EMPLOYMENT TRIBUNALS

Claimant: Mr C Carranza

Respondent: ISS Mediclean Ltd

Heard at: London Central Employment Tribunal (By video)

On: **3 & 4 September 2020**

Before: Employment Judge Quill (sitting alone)

Appearances
For the Claimant: Mr R O'Keefe, trade union representative
For the Respondent: Ms E Grace, counsel

This was a remote hearing with the consent of the parties. The form of remote hearing was [V: video fully (all remote)]. A face to face hearing was not held because it was not practicable and no-one requested the same. The documents that I was referred to and the decisions made are described below.

RESERVED JUDGMENT

(1) The complaint of unfair dismissal contrary to section 99 of the Employment Rights Act 1996 is not well-founded and is dismissed.

(2) The complaint of unfair dismissal contrary to section 98 of the Employment Rights Act 1996 is not well-founded and is dismissed.

(3) The complaint of breach of contract is dismissed.

REASONS

Introduction

1. The Claimant is a former employee of the Respondent who brings claims of unfair dismissal and breach of contract.

2. I would like to apologise to both parties for the delay in sending out this judgment and reasons.

The Claims

3. Automatic Unfair Dismissal, contrary to sections 94 and 99 of the Employment Rights Act 1996

4. Unfair Dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996

5. Breach of Contract - Failure to give (or pay in lieu of) notice

6. Breach of Contract – Holiday Entitlement (Breach of Working Time Regulations is NOT part of this claim)

The Issues

Automatic Unfair Dismissal

7. Was the Claimant's mother a dependant within the meaning of Section 57A(3) of the Employment Rights Act 1996?

8. Did the Claimant take time off for some or all of the period 5 August to 9 August 2019 "to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted" [as per Section 57A(1)(a)]? In particular:

   8.1 Did the Claimant provide assistance to his mother (on a rota basis with other siblings) while she was in hospital by washing, cleaning, assisting with toilet, and then caring for her for several days following her discharge from hospital?

9. If so, was the time off "a reasonable amount of time off during the employee's working hours in order to take action which was necessary" for that reason.

10. Was the reason (or the principal reason) for the Claimant's dismissal that the Claimant had taken time off under section 57A?

Ordinary Unfair Dismissal

11. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was a reason relating to the Claimant's conduct.

12. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

13. If the Claimant was unfairly dismissed (i) should he be reinstated or re-engaged and (ii) in relation to compensation:

   13.1 what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and

reasonable procedure been followed and/or would have left the employment in time anyway?

13.2 would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

13.3 did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Breach of Contract – Notice Pay

14. To how much notice was the Claimant entitled, taking into account his contract and the statutory provisions?

15. Has the Respondent proved that the Claimant fundamentally breached the contract of employment such that it was entitled to terminate without notice?

Breach of Contract - Holiday Pay

16. Does the Claimant require permission to amend in order to advance the holiday pay claim on the basis asserted by Mr O'Keefe during the hearing (and in the schedule of loss sent to the Respondent after Day 1, and before Day 2, of this hearing)? If so, is permission granted?

17. Is the holiday pay claim a matter which cannot be raised in this claim as a result of the decisions made in case numbers 2202457/2018 and/or 2208202/2017?

18. Is the holiday pay claim an abuse of process (taking into account the rule in Henderson v Henderson, and the previous proceedings)?

19. Subject to the above:

19.1 What (if any) were the express terms of the contract in relation to holiday pay?

19.2 What (if any) were the implied terms of the contract in relation to holiday pay?

19.3 In relation to each of the years 2011 to 2017 inclusive, was the Claimant paid less than his contractual entitlement for holiday pay for that year?

19.4 If so, in each case, is the claim for underpayment in time or out of time?

19.5 Taking account of the above, to what is the Claimant entitled as damages?

The Hearing and the Evidence

20. There was an agreed bundle, submitted electronically in 3 parts, of around 150 pages. During the course of the hearing, around 30 additional pages were submitted with my agreement.

21. For the reasons which I gave at the time, I was satisfied that I should deal with a complaint alleging breach of contract, being termination without appropriate notice.

22. In relation to holiday pay, the Respondent's position was that (a) the claim as described in the claim form for these proceedings had already been settled (the settlement having been reached by an exchange of correspondence between

representatives) and (b) the arguments being advanced by Mr O'Keefe (set out in a Schedule of Loss sent to Ms Grace late in the evening of Day 1 of this hearing) should not be considered, as they were (i) not pleaded for this case, 2200015/2020 and (ii) could not be raised now in any event, taking into account the previous litigation between the parties. Because this particular dispute arose on the morning of Day 2, when we were part way through the final witness's (the Claimant) evidence, and because it required additional documents to be submitted to me (including the new schedule of loss and the judgments from case number 2202457/2018), I directed that any relevant questions of fact should be put to the Claimant, and I would make a decision on these procedural points after the hearing, having heard each sides more detailed submissions.

23. I had written statements from the Claimant and, on behalf of the Respondent, Mr Soares and Mr Hudson. Each of the witnesses attended the video hearing and were questioned by the other side and by me.

24. An interpreter provided assistance to the tribunal by translating between Spanish and English for the benefit of the Claimant. There were different interpreters on each day. On both days, both the Claimant and the interpreter were satisfied that they could understand each other, notwithstanding any differences between European Spanish and South American Spanish. Mr O'Keefe told me that he was also able to communicate directly with the Claimant when necessary.

25. Because of the new issues that had been raised on the morning of Day 2, I reserved my decision after the end of the evidence and submissions. It had become apparent during the Claimant's evidence (and Mr O'Keefe accepted this during my discussions with him during submissions) that the Claimant had not given full disclosure of his income from the end of employment to 31 December 2019. (Mr O'Keefe stated that he did not have full instructions on the matter, but it was possible that some of the income the Claimant had referred to during his evidence was not income which replaced that from the Respondent, but was from other work which he had been doing both before and after termination of employment with the Respondent.) I therefore stated that, as part of my deliberations, I might go on to determine remedy if appropriate and if I was satisfied that I had enough information to reach a decision, but that – if I found in the Claimant's favour but decided that I needed further information in relation to remedy – I might order a further hearing.

The findings of fact

26. In relation to case number 2202457/2018, there was a hearing before EJ Goodman (sitting alone, by consent) on 5 to 7 March 2019, in which the Claimant was represented by Mr O'Keefe and the Respondent was represented by counsel (not Ms Grace). A reserved judgment with reasons was dated 20 March 2019 and sent to parties on 25 March 2019. Neither party sought to persuade me that any of the findings of fact made by EJ Goodman were not binding on me.

    26.1 At paragraph 5, EJ Goodman noted that a previous claim (2208202/2017) had been made. She noted that that claim had been for underpayment of holiday pay (payment being made at a rate of 15 hours per week, although the Claimant usually worked in excess of that number of hours, and was paid

accordingly). The reason for that claim's withdrawal - at a hearing before EJ Baty on 23 April 2018 - was that the Respondent had paid the Claimant for the underpayment from May 2017 to December 2017.

26.2 At paragraphs 5 and 6, EJ Goodman noted that 2208202/2017 had not been dismissed on withdrawal, and that the Claimant had not wanted to claim only in relation to May 2017 to December 2017. On 19 April (so 4 days before withdrawing 2208202/2017), he had presented the new claim, 2202457/2018.

26.3 At paragraph 6, EJ Goodman notes that in September 2018 EJ Segal QC disallowed an attempt to claim for historic contractual holiday pay. The parties did not provide me with a copy of EJ Segal's decision.

26.4 At paragraph 11, EJ Goodman noted that on Day 2 of the hearing, the Claimant sought to introduce some new documents, saying that these had been found in the union office after Day 1 of the hearing. Permission was granted. She noted that – on their face – some of the documents suggested that the Claimant's contractual hours were 37.5 per week.

26.5 At paragraphs 12 to 22, there are findings of fact about when the Claimant started work, and his hours, and the documents issued to him. The documents referred to in paragraph 22 are (as far as I am aware) the same items that appear in the bundle for this hearing at 34A to 34Q inclusive.

26.6 At paragraph 32, it is noted that the Claimant had 6 weeks leave in 2015. His mother was unwell at the time and the Claimant visited her.

26.7 At paragraph 53, EJ Goodman concludes – based on the evidence and arguments that she had heard – that the Claimant's contracted hours were 15 per week. He did work longer hours than that fairly often, but the additional hours were not part of his contracted hours; he was paid for those extra hours when he worked them, but he was not guaranteed such hours.

26.8 At paragraph 55, it was noted that there had been a reduction in the average number of hours worked per week, but that did not amount to a dismissal, and the Claimant was still on the 15 hours per week contract that he had previously been on.

26.9 At paragraphs 72 and 73, EJ Goodman decided that the Claimant had an entitlement to 49 days unused holiday, and that he was to be allowed to take that leave in the future, and that the pay he should receive for it should be at the rates that he would have been paid had he actually taken it in the relevant years in which it accrued. She fixed a remedy hearing to calculate those pay rates, but, as per her later judgment dated 24 May 2019, that hearing was not needed because the parties reached an agreement instead.

26.10 At paragraphs 76 to 79, it was explained that the claims for underpayment of holiday for periods prior to May 2017 were out of time. At 77, EJ Goodman stated that, for that reason, she did not propose to address the Respondent's Henderson v Henderson argument that it was an abuse of process to seek to raise the claims in 2202457/2018 after 2208202/2017 had been withdrawn.

27. The Claimant was employed by the Respondent as a healthcare cleaner, and his period of continuous employment commenced in July 2011. The Respondent is a global company with a dedicated Human Resources department.

28. The Claimant is originally from Peru and his mother and one of his sisters live in Peru. The Claimant is one of 9 living siblings. As well as his sister in Peru, he has one sibling in the USA and 6 in Spain.

29. His mother and sister live in the Andes. To visit his mother and sister, the journey from London takes to 2 days to get there, and 2 days to get from there back to London. Therefore, each visit involves a total of 4 days travelling. A visit home also costs a significant amount of money in relation to the Claimant's wages and the cheapest journey that he can get is about £600 depending on the time of year and other factors. It can cost significantly more than that. The combination of the travel time and cost means that whenever the Claimant is visiting his mother and sister in Peru, he prefers to go for at least 3 weeks if possible.

30. I note paragraph 34 of EJ Goodman's reasons, and make the following additional findings of fact about absence in 2016:

    30.1 The Claimant was absent from 26 September 2016 to 4 November 2016 inclusive, using a combination of holiday, time off in lieu, rest days and unpaid absence. His request for extended absence was that he was "*travelling to Peru for delicate family circumstances*" and was made on 2 September 2016.

    30.2 He was later absent from 28 November 2016 to 16 December 2016 inclusive, using another combination of holiday and unpaid absence. His request for extended absence was that he was travelling "*to Peru to see my mother that has complicated heart problems*" and was made on 17 November 2016.

31. According to his leave records, the Claimant also had extended absences in November/December 2017, November/December 2018 and May/June 2019. The Respondent did not provide contemporaneous documents about the dates on which the requests for this leave were made or about whether the Claimant made any particular comments about why the leave request ought to be approved.

32. The Respondent's contractual holiday arrangements for a full-time worker were as follows:

    32.1 The leave year ran 1 January to 31 December.

    32.2 For the first 5 years of his employment, the entitlement was to 22 days per year. After 5 years' service, the entitlement was 25 days per year.

    32.3 In addition to that entitlement, an employee was also entitled payment for any public holidays on which s/he would otherwise have been rostered to work, and was not required to work. For any public holidays which s/he was obliged to work, there was an enhanced rate of pay but no time off in lieu.

    32.4 There was no contractual entitlement to carry leave over from one year to the next.

32.5 Requests for holiday had to be made on the Respondent's specific application form, and holiday could only be taken if such a request had been approved.

32.6 The Respondent reserved the right to refuse requests for operational reasons and to require employees to take their holiday to coincide with customer close downs.

32.7 The written contract asserted that "*approval of annual leave is at the absolute discretion of your Manager*".

32.8 It also stated that unauthorised absence may result in dismissal or other disciplinary action.

33. Apart from holiday entitlement, the contract states that "*reasonable time off will be granted to deal with unexpected family crisis and emergencies. This will be unpaid and you must keep your manager informed of the situation and the likely length of absence*". There was also a provision for unpaid leave to be granted in other exceptional circumstances at the discretion of the manager.

34. As well as the contract, the Respondent has an absence policy (pp 35 to 41 of bundle). It deals with absences for various reasons, including sickness. Amongst other things, it states:

34.1 Compassionate leave may be granted for unexpected family crises and emergencies, and the circumstances should be investigated prior to approval.

34.2 Leave without pay might be granted in some circumstances, including "if a dependent falls ill …" and "to make long term care arrangements for a dependant who is ill or injured", amongst other things. It states that an employee who abuses this system might be disciplined or dismissed.

34.3 It refers to "(AWOL) Absent without leave" and states that pay will be suspended and appropriate action taken.

35. The Respondent has a disciplinary policy (pp 42 to 51 of bundle). Amongst other things, it states that a hearing might take place in the employee's absence where the employee does not attend the hearing and "*has not made the Company aware of any legitimate reason or mitigating circumstances for non-attendance*".

36. This dispute relates to an absence in August/September 2019, which the Respondent says was unauthorised, and the Claimant say was to deal with a family emergency in Peru.

37. The Respondent has said that the date on which Claimant bought his plane tickets might be relevant, as that would potentially provide evidence of whether it was just a coincidence that his mother fell ill at that time, and that the Claimant had already pre-planned to go to Peru or whether, in fact, he only planned the journey after his sister contacted him about his mother's illness. The Respondent invites me to infer that the Claimant had purchased the ticket some considerable time prior to being contacted by his sister about his mother's admission to hospital. The Respondent points out that the Claimant has failed to disclose the ticket as has failed to disclose evidence about when the ticket was purchased either to the Respondent (prior to

dismissal or during the appeal stage) or to the Respondent and tribunal during the litigation.

37.1 For the purposes of the wrongful dismissal claim, my finding is that the ticket was purchased on 2 August 2019. I accept the Claimant's testimony that he could not buy the ticket on 1 August 2019, because he did not have enough money to do so. On 2 August 2019, he made arrangements to borrow the money and noted that flights on 2, 3, 4 August 2019 were too expensive. He therefore purchased, on 2 August 2019, a ticket for 5 August.

37.2 For the purposes of the unfair dismissal claim, I note that the Claimant did not disclose documentary evidence to the Respondent during the appeal and did not provide an explanation for not doing so, other than stating that he had sent some documents to his union representative.

38. Before submitting the form, the Claimant first approached Mr Soares. It is common ground that the Claimant told Mr Soares that he wanted an extended period of leave and he wanted to take it immediately. It is common ground that Mr Soares informed the Claimant that he should submit the request to the Claimant's line Mr Basma. Mr Soares was Mr Basma's line manager.

39. There is dispute between the parties about what else may or may not have been said. Because Mr Soares is the dismissing officer, I need to make some findings about what Mr Soares knew about the reasons for the Claimant's absence.

39.1 The conversation took place no earlier than 30 July 2019 and no later than 1 August 2019.

39.2 The Claimant's reasons for approaching Mr Soares were that Mr Soares was a senior employee who, the Claimant believed, could authorise the requested period of several weeks leave starting immediately. The Claimant wanted to inform Mr Soares about his mother's illness, and to persuade him to approve the absence because of that illness.

39.3 Mr Soares did not wish to have the discussion with the Claimant. Mr Soares paid no attention to what the Claimant wanted to say about the reasons for seeking to leave, other than to note that the Claimant was suggesting that there were good reasons for requesting extended leave at short notice.

39.4 Mr Soares wanted the correct procedure to be followed. The correct procedure, in his opinion, being (i) that the request should first be submitted to the line manager who could potentially approve it, and (ii) if rejected the employee can appeal to a more senior manager.

39.5 Mr Soares told the Claimant that if he wanted more than 2 weeks' leave to be approved by Mr Basma, there would have to be an accompanying letter to show that there were good reasons. Mr Soares did not state or imply that Mr Basma would grant the leave request if made. He simply said that Mr Basma could potentially approve it if the reasons in the letter persuaded him to do so.

39.6 Mr Soares was aware that he could approve leave for the Claimant (or another employee in the same job as the Claimant) after a line manager had rejected

the request, but he did not regard himself as the person to whom the Claimant should submit the initial request. Mr Basma is one of seven service managers reporting to Mr Soares.

40. On 30 July 2019 the Claimant's mother fell ill and was admitted to hospital. The Claimant was contacted by his sister by no later than 1 August 2019.

41. On 1 August 2019, the Claimant made an application, using the Respondent's request form, for annual leave to cover the period from 5 August 2019 to 9 September 2019. The Claimant submitted the leave request to Mr Basma but did not, at that time, inform Mr Basma about the reasons for the leave, other than what he, the Claimant wrote on the form. He submitted no additional information either orally or in a separate letter (unlike, for example, the 2 September 2016 request). On the form he wrote that the Respondent had owed him 49 days (a reference to EJ Goodman's ruling) and that he had had 24 days, and that the Respondent therefore owed him 25 days, which was the number of days requested on the form.

42. The leave request was rejected by Mr Basma on 2 August 2019. He rejected it by circling word "rejected" and by supplying the Claimant with a letter. The Claimant suggests that the Respondent never refused any leave requests; I do not accept that. The contract makes clear that leave requests might be refused and that requests must be on the pre-printed form. The Claimant, and any employee using the form, can see that the manager is going to delete as applicable one of the pre-printed words "approved" or "rejected" prior to signing it.

43. The letter stated that the reason for rejection was that a large number of employees already had booked leave in the period 5 August to 9 September 2019. I have no reason to doubt that there were employees who had already, prior to 2 August, been granted leave to be used within the month of August. The letter informed the Claimant that if he did not attend work during the period in question, that would potentially be a disciplinary issue, and might lead to dismissal. He was told that he could request leave in the window 15 September to 16 December 2019.

44. On receiving the rejection form and letter, the Claimant decided that Mr Basma was not in a position to approve the leave. He did not immediately have a detailed discussion with Mr Basma about why he, the Claimant, wanted the leave or about Mr Basma's reasons for saying "no".

45. The Claimant, knowing that Mr Soares could approve the leave, attempted to find Mr Soares, but could not do so. Having been unable to find Mr Soares he asked Mr Basma where Mr Soares was and explained that this was because the Claimant wished to challenge the refusal of his leave. Mr Basma's advice was that the Claimant should speak to Mr Soares' manager, Mr Kogo Bamba, who had authority to approve the leave request. That is what the Claimant did.

46. Because it is necessary for me to make a decision about what information the Claimant gave to the employer, it is necessary for me to make some findings about the conversation. My findings are that:

46.1 The Claimant did inform Mr Bamba that the reason he wanted to be absent from work for 5 weeks (starting almost immediately) was go to Peru and the reason for wanting to go to Peru was that his mother was ill in hospital.

46.2 He also informed Mr Bamba that he had by now purchased the plane tickets and the travel date for the ticket was 5 August with a return in early September.

46.3 The Claimant suggested that Mr Bamba would be able to arrange cover for the Claimant's absence.

46.4 The Claimant also suggested to Mr Bamba that if annual leave was not approved then he, the Claimant would be absent from work.

46.5 The Claimant did not specifically ask if he could take unpaid leave (rather than use the 25 days of paid leave owing to him as a result of EJ Goodman's decision).

46.6 Mr Bamba informed the Claimant that his annual leave was not approved and that the reason for this was that the Respondent did not have sufficient staff to cover the absence. Mr Bamba did not make any suggestion that the leave would be approved if it was treated as unpaid leave rather than annual leave.

47. On 5 August 2019, Mr Basma informed Mr Soares that the Claimant was absent from work and had not contacted him. Mr Soares took HR advice and instructed Mr Basma to follow the Absence Policy.

48. On 22 August 2019, Mr Soares conducted a disciplinary hearing in relation to the Claimant's absence. Mr Soares had sent a letter dated 19 August 2019 inviting the Claimant to the hearing, stating that the allegation was misconduct, being absence without leave. The letter stated that the hearing might proceed in the Claimant's absence and that dismissal was a potential outcome.

49. At the hearing, the Claimant did not attend. Mr Soares noted that the letters had not been returned and that no contact from the Claimant had been received. Mr Soares was satisfied that:

49.1 On 6 August 2019, Mr Basma had sent a letter (twice: by first class post and also recorded delivery) to the Claimant's home address stating that the Claimant needed to contact the Respondent by later than 12 August 2019 to explain his absence (which was being treated as unauthorised) or else disciplinary action would follow.

49.2 Mr Basma had attempted to contact the Claimant by phoning the Claimant's mobile number, but without reply.

49.3 On 13 August 2019, Mr Basma had sent a letter (by the same two methods) stating that he should attend a disciplinary investigation meeting on 16 August.

50. Mr Soares decided that it was appropriate to proceed in the Claimant's absence. He took into account the documents available to him, including the 2 August 2019 rejection letter. He checked the Respondent's holiday absence records and formed the view that it was true that the Respondent did have many people on pre-

approved leave in August 2019. He took into account that – in his opinion – the area which the Claimant was responsible for cleaning was an area of a hospital which had to be cleaned thoroughly each day and that it was an area for which specific training was required. He decided that that impacted on the ability to get suitable cover at short notice. He also took into account that, in his opinion, the Claimant knew the appropriate procedures for requesting emergency leave and noted the Claimant's two such requests in 2016.

51. My finding is that Mr Soares had reason to believe that it was at least possible that the Claimant was abroad (as per his own evidence, he reviewed the Claimant's past holiday requests and noted that the Claimant had had some previous lengthy absences to go to Peru at short notice). He also had reason to believe that it was least possible that Mr Basma might have some additional relevant information about the Claimant's whereabouts. In particular, he was aware that the Claimant had approached him – Mr Soares – about the possibility of emergency leave and he – Mr Soares – had directed him to Mr Basma. Mr Soares also had oral information from Mr Basma and took that information into account (including about Mr Basma phoning the Claimant and about – according to Mr Basma – the Claimant's comments that he would take the leave even though it had been refused and would refer the matter to his lawyer.

52. Mr Soares was aware that, according to the rejected leave request, the Claimant would potentially be available to return to work around 5 September 2019.

53. Mr Soares states on 22 August, he was not aware of the Claimant's reasons for wanting to take the leave, and that the Claimant had not – as far as he knew – informed the Respondent that his mother had been admitted to hospital, or that that was the reason for the leave. Mr Soares denies knowing that on 2 August, the Claimant had said to Mr Bamba that he wanted the leave because his mother had been admitted to hospital. Although I accept that Mr Soares did not necessarily have a reason to approach Mr Bamba, it seems to me that if he – Mr Soares – did have reason to be curious that the Claimant had not approached him to ask him to approve the leave following Mr Basma's rejection and therefore had every reason to ask Mr Basma if Mr Basma knew why that had not happened. Mr Soares did not do that.

54. Mr Soares decided to dismiss the Claimant and sent a letter dated 23 August 2019 to inform the Claimant. The dismissal reason was that the Claimant was absent from work from 5 August 2019, after having been told that his leave request was refused. Mr Soares formed the opinion that the Claimant was deliberately absent without leave and that he had not contacted the Respondent to seek to explain matters. The letter stated that the termination date was 23 August 2019. The letter notified the Claimant that he could appeal by writing to Mr Bamba and said the time limit was "seven days from the receipt of this letter".

55. The Claimant had travelled to Peru on around 5 August 2019. He returned to his home address on 5 September 2019. That was when he read the letters dated 6 August, 13 August, 19 August and 23 August 2019. It was on 5 September 2019 that the Respondent's dismissal decision was communicated to him. He had returned to the UK with the intention of going back to work around 10 September 2019 (his proposed first day back, had his leave request been granted).

56. By email and attached letter dated 18 September 2019 sent by a union representative, the Claimant appealed against his dismissal. The appeal was thus 6 days outside the time limit fixed by the dismissal letter (received 5 September, making the time limit 12 September 2019). The Respondent agreed to process the appeal.

57. The appeal letter alleged that the dismissal was unfair contrary to section 94 ERA and section 104 ERA (assertion of a statutory right, namely the holiday pay claim to tribunal) and section 152 Trade Union and Labour Relations Act 1992 (penalising union membership). It also alleged a breach of section 146 of that act (detriment because of union membership) and that the Claimant (a) should have been paid for the holiday and (b) had been entitled to dismissal with notice. The letter also alleged breach of ACAS code and suggested that the Respondent (specifically Mr Bamba) had been subjecting him to bad treatment (including the refusal of the leave request) because of the previous tribunal claims. The letter disputed the Respondent's claim to have attempted to contact the Claimant by telephone and stated that the Respondent ought to have used email or WhatsApp to contact the Claimant, given that (according to the letter) the Respondent knew that the Claimant was abroad. The letter states that Mr Soares was told on 1 August 2019 that the situation was urgent and that the Claimant's 5 brothers were also travelling to Peru; it states that Mr Bamba was told on 2 August 2019 that the situation was urgent and that was why the Claimant had spent £1500 on a plane ticket, rather than the much cheaper price he was usually able to find. The letter does not allege (a) that Mr Basma was informed about the reason for the leave request or (b) that the Claimant needed to make arrangements for his mother's care (as opposed to seeing her urgently due to the grave nature of her medical condition). The letter states that the Claimant requested annual leave, and that he did not request unpaid leave, and suggests that the Respondent ought to have considered unpaid leave as an alternative, even if rejecting the holiday request.

58. In early November, Mr Bamba arranged for Kieron Hudson, Project Manager, to hear the appeal. Mr Hudson has been employed by the Respondent for several years and has previously handled several disciplinary hearings and appeals. Mr Hudson was not junior to Mr Bamba and had had no prior dealings with the Claimant and no prior involvement in the dismissal decision.

59. Prior to the appeal hearing, Mr Hudson studied the letter and identified some relevant issues that required a determination by him. He spoke to Mr Soares and to Mr Bamba. My finding about what he was told by each of them is:

    59.1 Mr Soares denied knowing, before the start of the Claimant's absence, that the Claimant was requesting the leave because his mother was in hospital. [As mentioned above, my finding is that Mr Soares did not pay any attention to the details of what the Claimant told him circa 1 August 2019, and simply told him to make a written request to Mr Basma.]

    59.2 Mr Bamba told Mr Hudson that the Claimant had spoken to him following Mr Basma's rejection of the leave request, and that the Claimant had told him that he wanted the leave because his mother was in hospital. [I note, for example, that at the appeal hearing, Mr Hudson states that "management" became aware of the "family issue" on 2 August, and my inference is that by

"management" he meant Mr Bamba. This is also my interpretation of row 4 of Mr Hudson's preparation document dated 11 November 2019. For avoidance of doubt, I do not interpret row 16 of that document as meaning that Mr Soares had also (as well as Mr Bamba) said that he heard about the Claimant's family circumstances on 2 August 2019.]

60. The appeal hearing took place on 18 November 2019. The Claimant was accompanied by the same union representative who had drafted the appeal document. Mr Hudson was accompanied by an HR adviser, and there was a note taker. No interpreter was requested or provided.

61. Notes of the meeting are in the bundle. I also have a copy of Mr Hudson's pre-meeting preparation document and with his handwritten notes later made on that document, based information received during and after the meeting. Mr Hudson asked various questions and the Claimant answered some directly and his representative answered others on his behalf. Mr Hudson asked to be sent copies of documents showing when the ticket was booked and documents relating to the Claimant's mother's medical situation. The Claimant agreed to send them to his representative so that they could be forwarded to Mr Hudson. During the meeting, the Claimant accepted that he did not try to contact Mr Basma, Mr Soares or Mr Bamba during his absence, but asserted that he had contacted "head office" by email; it was also agreed that evidence of that would be provided to Mr Hudson after the meeting.

62. By 2 December, Mr Hudson had not received the requested items and so phoned the Claimant. The Claimant informed him that they had been sent to the union representative already, and so Mr Hudson emailed the representative to relay that and to request the documents. He asked the union representative to send them by email or else phone to discuss further. He received no response.

63. On 3 December 2019, Mr Hudson sent a letter rejecting the appeal. Amongst other things, the letter asserted:

    63.1 Mr Hudson believed, and thought it significant, that the Claimant's written request on 1 August 2019 had simply requested annual leave, and not referred to any "emergency".

    63.2 Mr Hudson thought it significant that the Claimant had sought paid time off, not unpaid leave under the relevant sections of the absence policy.

    63.3 Mr Hudson believed, and thought it significant, that the Claimant had previously made use of the policy to request extended leave due to family circumstances in Peru.

    63.4 Mr Hudson was satisfied that the Respondent had attempted to contact the Claimant by phone, and that there was no reason to use email or Whatsapp as well as (or instead of) phone and post.

    63.5 Mr Hudson was satisfied that there were numerous people on leave during August and that that was the reason for refusing the leave request. He rejected the suggestion that the refusal of leave, or any of the other treatment alleged by the Claimant, was because of the previous tribunal proceedings.

63.6 Mr Hudson did not think that Mr Bamba knew where the Claimant was during the unauthorised absence. Mr Hudson noted that Mr Soares was aware of the rejected leave request at the time of his decision to dismiss the Claimant (following the hearing which the Claimant did not attend).

63.7 Mr Hudson had requested evidence of booking of tickets, of the Claimant's mother's illness and of attempts to contact head office during the hearing, and had subsequently chased, and had not received them.

63.8 Mr Hudson was satisfied that the reason for Mr Soares' dismissal decision was unauthorised absence (and not any of the alternative reasons suggested by the Claimant).

63.9 Mr Hudson believed that dismissal was the appropriate sanction, and that the Claimant was not entitled to notice or pay in lieu of notice. He believed that the Claimant had committed "gross misconduct".

64. Mr Hudson had no reasonable grounds for implying, in the letter, that Mr Bamba and/or Mr Soares would have had no reason to suspect that the Claimant was likely to be absent from his home address (and in Peru) during August 2019. Subject to that, the contents of the letter represent his genuine opinions, formed in the period between receiving the appeal letter and 3 December 2019, and based on his investigations of the Claimant's allegations and of the circumstances which led to the dismissal decision.

65. After the appeal outcome was issued, on 19 and 20 December 2019, there was a brief exchange of emails between the representative and Mr Hudson in which the representative asked what documents Mr Hudson had requested at the appeal hearing. The documents were not submitted after that exchange, or while the tribunal hearing bundle was being prepared. On Day 1 of the hearing, the Claimant, via Mr O'Keefe, disclosed boarding passes for the outward and return flights and a medical report relating to the Claimant's mother. That report was in Spanish and a translation into English was provided. The report stated that the Claimant's mother was admitted to hospital as an emergency on 30 July due to problems with her pacemaker. While in hospital other issues had been identified, including infections acquired in hospital. She was discharged on 26 August 2019.

66. On 2 January 2020, the Claimant presented (within the time limit) a claim form to the employment tribunal. The particulars referred to the Claimant's mother's hospital admission (and to the Claimant's assertion that he had told the Respondent that he needed to take annual leave because of that). The particulars did not say that he had needed to provide care to his mother (or that he had told the Respondent that he needed to do so).

67. The Claimant's written statement also contained no assertions that he had needed (on a rota basis, with siblings) to provide assistance with washing and toilet while his mother was in hospital; that assertion was first made during the hearing.

The Law

Automatic Unfair Dismissal.

68. Section 57A of the Employment Rights Act 1996 ("ERA") states:

> 57A.— Time off for dependants.
>
> (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
> (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
> (b) to make arrangements for the provision of care for a dependant who is ill or injured,
> (c) in consequence of the death of a dependant,
> (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
> (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.
>
> (2) Subsection (1) does not apply unless the employee—
> (a) tells his employer the reason for his absence as soon as reasonably practicable, and
> (b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.
>
> (3) Subject to subsections (4) and (5), for the purposes of this section "dependant" means, in relation to an employee—
> (a) a spouse or civil partner,
> (b) a child,
> (c) a parent,
> (d) a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.
>
> (4) For the purposes of subsection (1)(a) or (b) "dependant" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee—
> (a) for assistance on an occasion when the person falls ill or is injured or assaulted, or
> (b) to make arrangements for the provision of care in the event of illness or injury.
>
> (5) For the purposes of subsection (1)(d) "dependant" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee to make arrangements for the provision of care.
>
> (6) A reference in this section to illness or injury includes a reference to mental illness or injury.

69. Section 99 ERA states in part:

> 99.— Leave for family reasons.
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances.
> …
> (3) A reason or set of circumstances prescribed under this section must relate to—
> … or
> (d) time off under section 57A;
> and it may also relate to redundancy or other factors.

70. In *Qua v John Ford Morrison Solicitors*, referring to section 57A, the EAT stated:

16.. The right to time off to "… provide assistance" etc. in subsection (1)(a) does not in our view enable employees to take time off in order themselves to provide care for a sick child, beyond the reasonable amount necessary to enable them to deal with the immediate crisis. ... Section 57A(1)(a) envisages some temporary assistance to be provided by the employee, on an occasion when it is necessary in the circumstances specified. Under subsection (1)(b) time off is to be permitted to enable an employee to make longer-term arrangements for the care of a dependant, for example by employing a temporary carer or making appropriate arrangements with friends or relatives….

17.. The right is a right to a "reasonable" amount of time off, in order to take action which is "necessary". In determining whether action was necessary, factors to be taken into account will include, for example, the nature of the incident which has occurred, the closeness of the relationship between the employee and the particular dependant and the extent to which anyone else was available to help out.

18.. We consider that, in determining what is a reasonable amount of time off work, an employer should always take account of the individual circumstances of the employee seeking to exercise the right. It may be that, in the vast majority of cases, no more than a few hours or, at most, one or possibly two days would be regarded as reasonable to deal with the particular problem which has arisen. Parliament chose not to limit the entitlement to a certain amount of time per year and/or per case, as they could have done pursuant to Clause 3.2 of the Directive. It is not possible to specify maximum periods of time which are reasonable in any particular circumstances. This will depend on the individual circumstances in each case and it will always be a question of fact for a tribunal as to what was reasonable in every situation.

19.. Where an employee has exercised the right on one or more previous occasions and has been permitted to take time off, for example, to deal with a dependant child's recurring illness, an employer can in our view take into account the number and length of previous absences, as well as the dates when they occurred, in order to determine whether the time taken off or sought to be taken off on a subsequent occasion is reasonable and necessary. An employee is entitled to be permitted to take a reasonable amount of time off to take action necessary to deal with a child who "falls ill" under subsection (1)(a) . … .

22.. Further, in determining what is a reasonable amount of time off work, we consider that the disruption or inconvenience caused to an employer's business by the employee's absence are irrelevant factors, which should not be taken into account. ... Secondly, there is nothing in the domestic provisions implementing the Directive which suggests that such matters should be taken into account in deciding what is a reasonable amount of time off work in any particular case. Finally, the right is, essentially, a right to time off to deal with the unexpected. What is reasonable time off in the particular situation which has arisen will depend on what has occurred and the individual employee's own circumstances. The operational needs of the employer cannot be relevant to a consideration of the amount of time an employee reasonably needs to deal with emergency circumstances of the kind specified. A dependant child could suddenly fall ill and necessitate action, which requires an employee's absence from work, at a time which the employer could show caused acute or even insurmountable operational problems. Taking into account the employer's needs as relevant to the overall reasonableness of the amount of time taken off would, in our view, frustrate the clear purpose of the legislation which is to ensure that employees are permitted time off to deal with such an event, whenever it occurs, without fear of reprisals, so long as they comply with the requirements of section 57A(2) .

71. The EAT noted that the essential question under section 99 ERA (and by reference to section 57A) is whether the reason for the dismissal (or the principal reason) was that the employee had taken time off under section 57A. To decide that question, tribunals must address the following:

> (1) Did the Claimant take time off or seek to take time off from work during his working hours? If so, on how many occasions and when
>
> (2) If so, on each of those occasions did the Claimant (a) as soon as reasonably practicable inform his employer of the reason for his absence; and (b) inform the employer how long he expected to be absent; (c) if not, were the circumstances such that he could not inform the employer of the reason until after he had returned to work?
>
> If on the facts the Tribunal find that the Claimant had not complied with the requirements of section 57A(2) , then the right to take time off work under subsection (1) does not apply. The absences would be unauthorised and the dismissal would not be automatically unfair. Ordinary unfair dismissal might arise for consideration however, if the employee has the requisite length of service.
>
> (3) If the Applicant had complied with these requirements then the following questions arise:
>
> (a) Did he take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paragraphs (a) to (e) of subsection (1) ?
>
> (b) If so, was the amount of time off taken or sought to be taken reasonable in the circumstances?
>
> (4) If the Claimant satisfied questions (3)(a) and (b), was the reason or principal reason for his dismissal that he had taken/sought to take that time off work?
>
> If the Tribunal answers that final question in the affirmative, then the Claimant is entitled to a finding of automatic unfair dismissal.

72. In *Cortest Ltd v O'Toole* EAT 0470/07, the EAT agreed with the guidance in Qua and also stated:

> The purpose of the legislation is to cover emergencies and enable other care arrangements to be put into place. These cases are all fact sensitive but a period as long as one month or even longer for care by a parent would rarely, almost never, fall within s.57A and cannot on the facts before the Tribunal have done so here. If longer leave is required than a short period of unpaid parental leave is available but that was not so here because it is not available for emergency situations and a request has to be put in writing. We are satisfied that one month especially where there is no evidence that any other arrangements were sought, for example, neighbours or other relatives or any other kind cannot be reasonable on the facts as found by the Employment Tribunal

73. In *Uzowuru v London Borough of Tower Hamlets EAT 0869/04*, the EAT also followed the Qua guidance. It upheld the tribunal's decision that there had been no unfair dismissal contrary to either section 99 or 98, on the facts of the case. The employee had been given a month's leave so that he could provide care for his mother abroad. He was dismissed for unauthorised absence several months later, the dismissal hearing taking place in his absence in circumstances in which the employee (through his wife) had argued that his continuing absence was still necessary in order to care for his mother.

74. In in *Royal Bank of Scotland plc v Harrison 2009 ICR 116, EAT*, it was noted that the word "necessary" was an ordinary word, and it was for the tribunal to decide on the facts of each case whether the employee's actions had been "necessary" for whichever of the reasons stated in section 57A(1) is being relied on.

75. Consideration of whether the employee's actions were "necessary" is likely to include consideration of what other alternatives existed, and how long it would have taken to implement those alternatives. Sub-sections 57A(1)(a) and 57A(1)(b) refer to slightly different scenarios, and therefore what is "necessary" must be considered separately for each of those. 57A(1)(a) is more apt to deal with the immediate aftermath of the dependant falling ill, and 57A(1)(b) more apt to deal with the on-going consequences of the illness. In either case, if the dependant has been admitted to hospital, that raises a question – for determination by the tribunal on the facts of the individual case – as to whether further assistance by the employee was "necessary". See the discussion in *MacCulloch and Wallis Ltd v Moore EAT 51/02*, a case in which the employee had travelled abroad because her father was ill and had been admitted to hospital, and in which the employee had several adult siblings who were also to provide some assistance.

76. In order to meet the requirements of section 57A(2), it is not necessary that the employee use words which mirror the exact terminology of section 57A(1) provided the employee gives sufficient information to explain that the absence is necessary for one of the given reasons. An employee's failure to satisfy 57A(2) means that the time off does not benefit from the protection granted by 57A, and the time off (if unauthorised) can be treated by the employer in the same way that any unauthorised time off can be treated.

77. Provided the employee has complied with section 57A(2), the employee does not necessarily need to provide on-going updates to the employer about the situation. However, if an employee has notified the employer about a set of circumstances which do not meet the requirements of 57A(1), and there is then a change of circumstances such that 57A(1) is potentially satisfied, then section 57A(2) requires the employee to contact the employer to notify the employer about the new circumstances in order to benefit from the protection of the section.

78. Where (as here) an employee has more than 2 years' service, and claims automatic unfair dismissal, the burden of showing that the dismissal reason was not the automatically unfair reason is on the Respondent. However, the mere fact alone that the Respondent fails to persuade the tribunal that the true reason for the dismissal was the reason put forward by the Respondent does not mean that, by default, the claim for automatic unfair dismissal succeeds.

<u>Unfair Dismissal</u>

79. Section 98 of ERA 1996 says (in part)

> (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—
…
(b) relates to the conduct of the employee,
…

(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.

80. The Respondent bears the burden of proving, on a balance of probabilities, that the Claimant was dismissed for conduct. If the Respondent fails to persuade the tribunal that it had a genuine belief that the Claimant committed the conduct and that it genuinely dismissed him for that reason, then the dismissal will be unfair.

81. "Conduct" can refer to the actions of employee - whether done in the course of employment or not – that potentially affect the employer/employee relationship.

82. Provided the Respondent does persuade the tribunal that the Claimant was dismissed for conduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

83. In considering this general reasonableness, I must take into account the Respondent's size and administrative resources and I will decide whether the Respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal.

84. In doing so I have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303; Iceland Frozen Foods Ltd v Jones [1993] ICR 17; and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82.

85. In considering the question of reasonableness, I must analyse whether the Respondent had a reasonable basis to believe that the Claimant committed the misconduct in question. I should also consider whether or not the Respondent carried out a reasonable process prior to making its decisions.

86. In terms of the sanction of dismissal itself, I must consider whether or not this particular Respondent's decision to dismiss this particular Claimant fell within the band of reasonable responses in all the circumstances.

87. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. In A v B [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances which should be taken into account when considering the reasonableness of the procedure include the gravity of the disciplinary charges and the potential effect upon the employee if the charges are upheld.

88. It is not the role of this tribunal – when deciding the unfair dismissal claim - to assess the evidence and to decide whether the Claimant did or did not commit

misconduct, and/or whether the Claimant should or should not be dismissed. In other words, it is not my role to substitute my own decisions for the decisions made by the Respondent.

89. In some circumstances unfairness at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process: that will depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case.

90. If there is unfairness at the first stage, then that can potentially impact the overall fairness of the employer's decision to dismiss, even if the second stage is carried out to a high standard of fairness. See Taylor v OCS Group [2006] IRLR 614

Adjustments to award

91. S122(2) the Employment Rights Act 1996 states that where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

92. In relation to compensatory award, S123(6) states that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Polkey

93. If assessing compensation for unfair dismissal, it is necessary to consider what would potentially have happened (or might have happened) if the unfair dismissal had not occurred. It should not be assumed that, but for the unfair dismissal, the Claimant would have remained employed by the Respondent indefinitely. The Polkey doctrine will usually be concerned with facts and matters known to the employer at the time of dismissal, but it is not necessarily limited to such facts. The tribunal may have to take into account facts which the employer might have found out if it had acted fairly, and/or future events which may have occurred if the employer had acted fairly. Polkey requires an assessment of the chances of different scenarios unfolding rather than to make decisions, on the balance of probabilities as to what would/would not have happened.

Breach of Contract

94. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the employment tribunal jurisdiction to consider (some) complaints of breach of contract. Amongst other requirements and exclusions, the claim must be one which arises or is outstanding on the termination of employment.

95. In accordance with the ordinary principles for breach of contract claims, this jurisdiction allows the tribunal to interpret the relevant contractual provisions and – for example – assess what the employee's contractual entitlement was to pay, notice, holiday and pay in lieu of holiday or notice.

96. When a tribunal is considering a wrongful dismissal claim (ie a claim that the dismissal was breach of contract) that requires an entirely separate, and different, analysis than the consideration of whether the dismissal was fair or unfair.

97. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant may have grounds to succeed in a claim for wrongful dismissal.

98. The amount of notice to which an employee is entitled is determined by the contract, subject to the statutory minimum. It is an objective question for the Tribunal to consider whether the Respondent did, in fact, have good cause to dismiss the Claimant for committing a repudiatory breach of contract. Where there is a dispute about whether the Claimant did, in fact, commit certain acts (or make certain omissions) then the tribunal is required to make findings of fact about the Claimant's relevant conduct. In so doing, the tribunal is not limited to considering only the evidence which had been available to the Respondent when it made its decision to terminate. Any relevant evidence presented at the hearing can be taken into account.

99. To assess the seriousness of any breach which is found to have occurred, it is necessary for the Tribunal to consider all of the relevant circumstances including the nature of the employment contract, the nature of the term which was breached, the nature and degree of the breach, and also the nature of the Respondent's business and of the Claimant's position within that business. Having assessed the seriousness, the tribunal will decide if the breach was such that the Claimant had no entitlement to be given notice of dismissal (and no entitlement to a payment in lieu of notice).

100. To amount to conduct which entitles the employer to dismiss without notice, the conduct must be such that it "*must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment*" Neary v Dean of Westminster [1999] IRLR 288. So called "gross misconduct" may be established without proving dishonesty or wilful conduct and so called "gross negligence" that undermines trust and confidence may also suffice to justify summary dismissal. Whether it does so is a question of fact and judgment for the Tribunal, taking into account the damage that the acts/omissions caused to the employment relationship. Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22.

101. In defending itself against a claim that it is required to pay damages for failure to give notice when dismissing an employee, the employer is entitled to rely upon facts not known at the time. In other words, it is not only entitled to rely on the reasons that caused it to dismiss, but is entitled to rely on any other repudiatory breach that it later discovers.

Amendment

102. A tribunal has discretion to allow a Claimant or Respondent to amend their claim or response. This is a discretion to be exercised judicially. The key principle is that in exercising the discretion, tribunals must have regard to all the circumstances, and must balance any injustice or hardship which would result from

granting the amendment against any injustice or hardship which would result from a refusal to make it. In *Selkent Bus Co Ltd v Moore 1996 ICR 836,* the EAT set out some particular matters which must always be analysed (nature of the proposed amendment, time limits, timing and manner of the application to amend) when weighing up the decision, but that is not an exhaustive list, and all the relevant circumstances must be considered.

Abuse of process, issue estoppel and res judicata

103. The decision about whether or not there is abuse of process, contrary to the principle laid down in *Henderson v Henderson* is an issue that is to be determined, on the evidence, having regard to the complainant's reason for not pursuing the claim earlier (following the test laid down by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 and the guidance provided by Langstaff J in *James v Public Health Wales NHS Trust* (UKEAT/0170/14).

104. I must undertake broad merits-based approach in coming to my decision. I do not merely have to consider whether the issues could have been raised in the earlier case. I have to consider if *could and should have* been pursued these matters in the first proceedings. Even if I do decide that the complaint "could and should" have been pursued previously, I also have to consider if there are any special circumstances such that the Claimant should be allowed to raise the matters in these new proceedings.

105. It is for the Respondent to persuade me that there is an abuse of process. It is not up to the Claimant to prove that there was not. The Respondent is not entitled to an assumption that any matter which could have been pursued previously should have been pursued previously.

106. In *Nayif v High Commission of Brunei Darussalam 2015 ICR 517, CA*, the decision of the Court of Appeal – on the facts of that case – was that a tribunal's rejection of a race discrimination claim as out of time did not prevent the Claimant from bringing a negligence claim based on the same facts in the High Court. The tribunal had dismissed the claim on the basis that it had been brought out of time (meaning that the tribunal therefore did not have jurisdiction over the race discrimination claim). A claim for negligence is not within the tribunal's statutory jurisdiction. On the facts, because the tribunal had dismissed the claim without hearing evidence on the substantive issues, no issue estoppel arose. The court indicated that the result may well have been different if the tribunal had heard such evidence, even if the eventual decision had been to rule that (because of time limit) there was no jurisdiction.

Analysis and conclusions

Holiday Pay Claim – Pleading & Concession Issues

107. The Claimant does not require permission to amend the claim in order to argue that (i) he had a contractual right to be paid holiday pay at a particular rate and (ii) that rate was established by reference to the hours which he usually worked in practice rather than (if lower) the hours which he was contractually obliged to work

and (iii) he was paid less for his holiday than his contract (therefore) required and (iv) this was a claim that was outstanding on termination of employment.

108. The reason that I say that no amendment is required is that the claim that I have just described in the preceding paragraph is the set of factual allegations and arguments that are contained within paragraphs 18 to 22 of the particulars of claim.

109. In a schedule of loss sent to the Respondent on or around 13 August 2020, it was stated, by the Claimant's representatives on the Claimant's behalf, that:

    109.1 the holiday pay claim related solely to (a) outstanding entitlement as per the liability judgment in case number 2202457/2018 (and the parties' subsequent agreement in 2019, before the planned remedy hearing, pursuant to that liability judgment) and (b) further unused holiday entitlement that accrued in 2019; and

    109.2 the amounts due for those items had now been paid in full; and

    109.3 The holiday pay claim was "settled" and the outstanding sum claimed for holiday pay was "£0".

110. I note that the schedule of loss was contained in the agreed bundle (at pages 128 to 130) prepared for the hearing, and submitted to me at the outset of the hearing. There was no suggestion made by Mr O'Keefe on Day 1 of the hearing that the Claimant was seeking to retract the comments made in the Schedule of Loss. (Though it is fair to say that when Ms Grace stated on Day 1 that the holiday pay claim was settled, Mr O'Keefe did not agree with that assertion).

111. Furthermore, and additionally, on 1 September 2020, the Claimant's representatives sent an email to the Respondent's representative before, exchange of witness statements, stating:

> *"… the holiday pay claim was settled by the payment … in lieu of accrued holiday when the Claimant was dismissed, so we'll not be pursuing that aspect of the claim."*

112. That email was sent in response to the Respondent's representative's email which asked for details of the amount sought for holiday pay and added "*It would be good to get this part settled before the hearing*." The same email pointed out that the author would need to seek instructions before finalising witness statements if the holiday pay claim could not be settled before exchange of statements.

113. This exchange of emails was not part of the agreed bundle submitted to me on Day 1, but was included in the documents submitted by the parties on Day 2.

114. Mr O'Keefe's explanation for the schedule of loss is that this document was incompetently prepared by the Claimant's representatives and that the Claimant should not be disadvantaged by the alleged error. Similarly, he says that the comment in the email ought not to have been made, and that the person who sent it did not understand the basis of the Claimant's holiday pay claim. He also argues that no binding agreement can have been reached on this point because there was no consideration given by the Respondent.

115. Given that this was a contract claim, it could be settled without compliance with the statutory formalities required for settlement agreements [in, for examples, Regulation 35 of the Working Time Regulations or section 203 of the Employment Rights Act 1996]. See Lunt v Merseyside TEC Ltd [1999] I.C.R. 17.

116. I do not agree with Mr O'Keefe's assertion that there was no consideration given for the promise made, in the 1 September email, that the Claimant was not pursuing the breach of contract claim in relation to holiday pay. The consideration given was that (a) the Respondent exchanged statements which did not put forward a defence to the holiday pay claim and (b) the Respondent did not take any action, on receipt of the Claimant's statement, which also did not include any evidence about the holiday pay claim.

117. In any event, regardless of consideration, in my opinion the Claimant, through his authorised representative, made a clear concession that the holiday pay claim was settled by (a) expressly saying that in the schedule of loss and (b) expressly saying that in the email of 1 September 2020 and (c) including the schedule of loss in the agreed bundle submitted to me for the on Day 1. The fact that the concession was made is also borne out by the fact that the Claimant's statement did not attempt to deal with the issue.

118. I do not think that the circumstances are such that the Claimant should be allowed to withdraw this concession, for the following reasons:

    118.1 I note that in *Centrica Storage Ltd and anor v Tennison EAT 0336/08,* the EAT suggested that an application to withdraw a concession should be approached in the same way as application to amend the claim form or response, and thus the proper approach was to apply the principles governing that discretion, as set out in *Selkent*, etc.

    118.2 I also note that in in *Nowicka-Price v Chief Constable of Gwent Constabulary EAT 0268/09* the EAT suggested that an appropriate approach was to consider how withdrawal of concessions was dealt with in litigation to which the Civil Procedure Rules apply and that tribunals might wish to consider both Part 14, and its accompanying Practice Direction, and the guidance in *Braybrook v Basildon and Thurrock University NHS Trust [2004] EWHC 3352 (QB), [2004] 10 WLUK 187*.

    118.3 In this case:

        118.3.1 No new facts came to light after the schedule of loss and email of 1 September 2020. Mr O'Keefe simply asserts that they should be treated as errors based on information the Claimant already had.

        118.3.2 No actions of the Respondent caused the Claimant to make what is now said to be an error. The Respondent simply asked the Claimant to quantify and clarify the claim, and offered to try to settle it.

        118.3.3 The prejudice to the Respondent if the concession is withdrawn is that this hearing proceeded on the basis that it believed that the holiday claim was settled. Its statements did not deal with the issue and the

Claimant's change of stance was not revealed until after the Respondent's witnesses had concluded their oral evidence.

118.3.4 The prejudice to the Claimant if the concession cannot be withdrawn is that he would not be able to pursue a claim that was mentioned in the particulars of claim. This prejudice has to be weighed against the facts that he did not subsequently quantify the claim by way of a schedule of loss, and did not give evidence about it.

118.3.5 The fact that the attempt to withdraw the concession was made on Day 2 (following an email sent to the Respondent's counsel very late on the evening of Day 1, which she did not see until the morning of Day 2) is very relevant. The timing denied the Respondent any adequate opportunity to adduce evidence, and also denied the Respondent the opportunity to suggest that the hearing should be postponed (something which may have had costs consequences).

118.3.6 The lack of prospects of success for the claim – if the concession is withdrawn – is a factor against allowing the withdrawal.

118.3.7 Weighing these factors, it is not in the interests of justice to allow the Claimant to withdraw his concession and thereby pursue a complaint that – in years 2011 to 2017 inclusive – he took holiday and was paid less than his contractual entitlement to holiday pay for the periods of leave which he took.

<u>Holiday Pay claim - Merits</u>

119. Because of the Claimant's binding concession, the holiday pay claim is no longer a live issue. Had I decided that the concession could be withdrawn, the holiday pay claim would have failed on the merits in any event.

120. A determination was made by EJ Goodman that the Claimant was contracted to work 15 hours per week (3 hours per day, 5 days per week) and that the Claimant was paid at a rate of 3 hours per day for each day of holiday taken. For the years covered by her judgment:

120.1 The Claimant had not been allowed to take his full entitlement, and she made certain findings about the number of days that he therefore should be allowed to take in future, and about how to calculate his pay – in the future – when he used those particular days.

120.2 The Claimant had used some of his entitlement. As mentioned, he had been paid at 3 hours per day and this was (it can be inferred) an underpayment compared to his statutory entitlement. However, he was time barred from obtaining a remedy for that underpayment. The time bar applied regardless of whether the claim was framed as relying on Regulation 30 of the Working Time Regulations or on section 23 of the Employment Rights Act 1996.

121. Therefore, the attempted claim before me does not relate to the first of these, that having been fully resolved by EJ Goodman's liability decision and the parties' subsequent remedy agreement. The attempted claim before me relates solely to

the second, and effectively relies on an argument that the Claimant's contractual entitlement to holiday pay was the same as his statutory entitlement.

122. The argument was that if the Claimant worked, de facto, a regular number of hours that was in excess of 3 per day then there was a contractual entitlement to be paid holiday pay which took into account the pay that he typically received when not on holiday. Mr O'Keefe's schedule (which was produced after Day 1 and not put to any of the Respondent's witnesses, and is not supported by anything in the Claimant's statement) argues that the Claimant always worked 10.5 hours per day (or, at least, that was always the average number) for the whole period 2011 to 2017. That is not a finding made by EJ Goodman; on the contrary, she found that his hours fluctuated (see paragraph 51 of her reasons, for example).

123. However, the greater problem for the Claimant is that his contract does not expressly state that his holiday pay would be calculated based on hours worked on average during any reference period. Mr O'Keefe relies on the argument that, for bank holidays, there is a statement that the employee will receive a "normal day's pay" if they are not required to work. He argues that that should be extended to apply to holiday as well, and also that a "normal day's pay" means – in this contract – something other than the contracted hours for that day. In other words, in the case of the Claimant, while his contracted hours were (as determined by EJ Goodman) 3 hours per day, his "normal day's pay" would be, according to Mr O'Keefe, 10.5 x his hourly rate.

124. However, that is not how the Respondent calculated pay for holidays. The Respondent's interpretation of the contract was that a day's holiday pay for the Claimant would be at the rate of 3 hours. Over the years, as noted by EJ Goodman, the Claimant had objected, and asked for a higher rate of holiday pay, but the Respondent had not adjusted his rate of holiday pay.

125. The contract contained no express clause that holiday pay was at a rate in excess of 15 hours per week (his contractual hours, as determined by EJ Goodman). At most, there was some ambiguity (as the result of no express clause). The Respondent consistently paid only at the rate of 3 hours per day (15 per week). During 2012, 2013, 2014, 2015 and 2016, the Claimant neither resigned and claimed constructive dismissal, nor brought a claim in the civil courts alleging breach of contract. By his conduct, the Claimant accepted that his contractual entitlement to holiday pay was to 3 hours per day. His statutory entitlement was (it seems) likely to have been significantly higher than that, but any complaints in relation to his statutory entitlement were dealt with by case numbers 2202457/2018 after 2208202/2017, and the legislation does not operate by implying terms into the contract of employment (but rather leaves the contract of employment unamended, and allows the Claimant to rely on whichever is more beneficial).

126. In other words, having been paid at a rate of 3 hours per day for each day's holiday, the Claimant received all that his contract entitled him to receive for holiday pay.

<u>Holiday Pay Claim – Abuse of Process</u>

127. Since I have decided that there was a concession that the holiday pay claim was resolved and I have also decided that it would have failed on the merits in any

event, there is nothing to be gained by commenting further on whether it might have been an abuse of process to seek to raise this claim in these proceedings. I merely observe that neither party sought to provide me with either the pleadings from the earlier claims, or the terms of the withdrawal of the first claim, or the order of EJ Segal QC declining a proposed amendment to add breach of contract complaints to the earlier proceedings. In the circumstances, there can be no criticism of the Respondent or its representatives for that omission.

Automatic Unfair Dismissal

128. I will seek to address the questions mentioned in *Qua*.

128.1 (1) *Did the Claimant take time off or seek to take time off from work during his working hours? If so, on how many occasions and when?*

Yes. On 1 August 2019, the Claimant made a written request to Mr Basma (which followed an earlier conversation with Mr Soares) to be absent starting on 5 August 2019, returning to work on 10 September 2019. This was said to amount to 25 consecutive days of annual leave.

He repeated the request (to Mr Bamba) on 2 August 2019.

He was then absent commencing 5 August 2019 and did not resume work because he was dismissed. But for his dismissal, his absence would have ceased on or shortly after 10 September 2019.

I do not consider absences (or requests for absence) on any earlier occasion to be relevant to his question.

128.2 (2) *If so, on each of those occasions did the Claimant (a) as soon as reasonably practicable inform his employer of the reason for his absence; and (b) inform the employer how long he expected to be absent; (c) if not, were the circumstances such that he could not inform the employer of the reason until after he had returned to work?*

The Claimant has failed to provide evidence of when he booked his flight, but I have accepted his account that he did so on 2 August 2019. He flew (as shown by the boarding passes) on 5 August 2019, the first day of his absence from work. He sought to inform Mr Soares orally of the reasons for his proposed absence, and Mr Soares believes that the conversation took place in July. Since I accept that the Claimant only spoke to Mr Soares after his sister informed him of their mother's hospital admission, that would mean the conversation took place on either 30 or 31 July 2019. In any event, it took place no later than 1 August 2019, because it took place before the Claimant made his written request. The Claimant wanted to have a discussion with Mr Soares about the reasons; the Claimant did not act unreasonably when he did as instructed by Mr Soares and made the written request to Mr Basma. The Claimant did not act unreasonably by failing to put his reasons in writing when he submitted the holiday request form to Mr Basma. The Claimant informed Mr Bamba of the reasons for his request on 2 August 2019.

Therefore, my answers are: (a) yes; (b) yes; (c) not applicable.

This is subject to the qualification that to the extent that the Claimant's mother's condition worsened while in hospital, and/or that there was any other change of circumstances which might required action from the Claimant falling within section 57A(1), there was no further information from the Claimant to his employer after 2 August 2019.

128.3 (3) *If the Applicant had complied with these requirements then the following questions arise*:

128.3.1 (a) *Did he take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paragraphs (a) to (e) of subsection (1)*?

No.

The Claimant's mother was a dependant within the definition in section 57A(3)(c).

The Claimant's mother was admitted to hospital on 30 July 2019, and that is the occasion on which she fell ill within s57A(1)(a). (I do not ignore that she must have had a previously diagnosed cardiac condition given that she already had a pacemaker or that the Claimant had previously taken leave to visit Peru on the grounds of his mother's health.)

The Claimant's presence in Peru (or, more accurately, absence from work) was not necessary to provide assistance with her admission to hospital. It seems that by the time that the Claimant knew his mother was ill, she had already been admitted to hospital. Furthermore, on his own account (as per appeal letter), by the time he requested the absence, he already knew that (a) his sister in Peru had already arranged his mother's hospital admission and (b) his brothers were already travelling to Peru. The Claimant himself did not commence his journey until 5 August; given the two day travelling time, would not have arrived until after his mother had been in hospital for about one week.

For these reasons, the Claimant's absence was not to take action that was necessary as per section 57(1)(a).

His absence was not necessary as per section 57(1)(b) either. This section justifies an absence for the purpose of arranging care. Even if it could ever justify an absence for the employee to actually provide that care personally, then that argument would – at the very least – require the employee to show that it was necessary that he provide the care personally. The Claimant has failed to do so; his mother was in hospital and there were also other siblings available. Indeed, according to the Claimant's own evidence, the other siblings (as well as him) did provide the personal care which he says was required while she was in hospital.

In addition, the employee did not tell the employer (on 2 August 2019, or at all) that he was intending to be absent so as to provide care (washing, toilet, etc) to his mother while she was in hospital. While section 57A(2) does not require precise words to be used, there is a difference between wanting to visit a parent who is gravely ill and actually providing care to the parent (or arranging for care to be provided). The Claimant communicated the former reason to the Respondent, not the latter.

128.3.2 (b) *If so, was the amount of time off taken or sought to be taken reasonable in the circumstances*?

The question does not have to be answered, given the requirements of section 57(1)(a) are not met. By the time that the Claimant arrived in Peru, arrangements had already been made for his mother's care, and there was no necessity for him to be present (or absent from work) to make further arrangements.

The Claimant's mother was discharged from hospital on 26 August 2019. (This was after the dismissal letter had been sent, but before the Claimant read it.) Thus, to the extent that the Claimant's explanation of his absence was to provide care for her while she was in hospital, his absence from work after that date would not have been necessary. The Claimant did not persuade me that he needed to be present in Peru (or absent from work) in order to make arrangements for his mother's care on leaving hospital; furthermore, he did not contact the employer to say that he needed to be absent for such a reason.

128.4 (4) *If the Claimant satisfied questions (3)(a) and (b), was the reason or principal reason for his dismissal that he had taken/sought to take that time off work?*

He does not satisfy either 3(a) or 3(b).

The reason for his dismissal was that he was absent from work in circumstances which the Respondent determined were unauthorised (see below).

129. For these reasons, the complaint of automatic unfair dismissal fails.

130. The effects of the absence on the employer's business (if any) would not have been relevant when considering this complaint.

<u>Ordinary Unfair Dismissal</u>

131. Mr Soares decided to dismiss the Claimant because the Claimant had not reported for work from 5 August 2019, in circumstances in which – in Mr Soares's genuine opinion – the Claimant knew that this absence was unauthorised. This was a reason related to the Claimant's conduct, and thus potentially fair as falling within section 98(2) ERA.

132. Mr Soares did take into account that (a) Mr Basma had tried unsuccessfully to contact the Claimant by phone and (b) the Claimant had not contacted the Respondent to explain his absence. I do not agree with Mr O'Keefe's submission that Mr Soares' finding that the Claimant had failed to contact the Respondent about his absence on or after 5 August 2019 was a separate and freestanding reason for the dismissal. It was simply part of the main reason (ie that the Claimant had not attended work in circumstances which were – in Mr Soares' opinion – a breach of his contract of employment.)

133. Mr Soares did have reasonable grounds to believe that the Claimant had not attended work (and there is no dispute that he was absent). He also had a copy of Mr Basma's 2 August 2019 letter, and the leave rejection form, and so had

reasonable grounds to be satisfied both (a) that the absence was not authorised and (b) that the Claimant knew it was not authorised (and, again, there is no dispute that the Claimant knew on 2 August 2019 what Mr Basma had decided).

134. I do not think that Mr Soares had reasonable grounds to believe that the letters of 6 August and 13 August 2019 from Mr Basma had come to the Claimant's attention. Likewise, I do not think that Mr Soares had reasonable grounds to believe that the letter inviting the Claimant to the disciplinary hearing on 22 August 2019 had come to the Claimant's attention. In each case, Mr Soares knew that it was probable that the Claimant was abroad.

135. I do think that Mr Soares had reasonable grounds to believe that the Claimant could have contacted his employer – had he wanted to – in order to say expressly that he had travelled to Peru (or to provide any other reason for absence) and to specify how his employer could contact him during his absence.

136. I do not consider that dismissal of an employee for failing to report to work, having been told that their leave request was refused, is outside the band of reasonable responses. A reasonable employer would be entitled to take into account the effects of the absence on the business, and the lack of readily available cover, and the fact that (especially in August) it is important that employees do attend work as per the rota. I do not think that the majority of reasonable employers would dismiss an employee who wanted to visit a gravely ill parent in another country; however, this not the test which I am obliged to apply.

137. The procedure which Mr Soares adopted up to and including 23 August 2019 was one which no reasonable employer would have adopted.

    137.1 No reasonable employer would think that it was reasonable, in all the circumstances, to proceed with the hearing in the claimant's absence on 22 August 2019. Even if it was reasonable, on 19 August 2019, to propose a hearing date of 22 August, when the Claimant failed to attend on 22 August, Mr Soares concluded that the likely reason was that the Claimant was probably out of the country. In those circumstances, a reasonable employer would have deferred the hearing until on or after 10 September 2019, in order to give the Claimant an opportunity to comment on the case against him, whether to try to deny misconduct, or else to put forward an argument as to why the sanction should be something other than dismissal.

    137.2 Ms Grace suggests that it cannot be a requirement of reasonableness that employers must wait indefinitely for an AWOL to employee to return, prior to taking a decision about whether or not to dismiss. I agree with that, but the Claimant's holiday request form stated that he would be back by 10 September 2019. As per the Respondent's absence policy, it was not obliged to pay the Claimant for the period from 5 August 2019 onwards. No reasonable employer would have decided that it was reasonable to insist on the decision being made on 22 or 23 August 2019, rather than write to the employee to say that the disciplinary hearing had been postponed to a new date on or shortly after 10 September 2019.

137.3 Another alternative to postponing the hearing might have been to attempt to hold it by remote means on 22 August 2019. However, Mr Soares did not seek to do that either. In isolation, it was not unreasonable to send letters by post only (not email or WhatsApp) and had the hearing been postponed until after 10 September (and there was still no contact from the Claimant) then it might not have been unreasonable to have proceeded in his absence based on the posted letters only. However, if – contrary to my decision – the Respondent did have some reasonable explanation for not postponing, then Mr Soares ought to have attempted to make electronic contact with the Claimant at the start time for the hearing and given him that opportunity to participate (and/or request postponement).

137.4 There was no evidence that Mr Soares sought to find out if there were any mitigating circumstances. He did know from his conversation with the Claimant around 1 August 2019 that the Claimant was suggesting there was a good reason for being absent, even though Mr Soares waved the Claimant away without giving him a chance to fully explain. He ought to have questioned Mr Basma thoroughly and/or given the Claimant a chance to explain himself, as to why the Claimant thought it was so important to be absent.

137.5 An employer as large as the Respondent, and with a dedicated HR department, has the resources to wait slightly longer than 18 days to give an employee (of 8 years' service) the opportunity to attend a disciplinary hearing that might lead to dismissal for alleged unauthorised absence.

138. However, the Respondent's procedure did not come to an end with the decision made by Mr Soares. Mr Hudson conducted a thorough investigation into the circumstances, including meeting the Claimant and the Claimant's union representative. Prior to the meeting, Mr Hudson analysed the appeal letter with great care and investigated the points raised thoroughly. Mr Hudson did not feel obliged to uphold the decision made by Mr Soares and was willing to approach the matter with a fresh mind. He decided in advance of meeting Mr Soares and Mr Bamba what questions he wished to have answered by them, and he did the same in advance of his meeting with the Claimant. During the meeting, he gave the Claimant and his representative the opportunity to put forward any arguments that they wanted to make. The Claimant had the opportunity to make any arguments that he would have presented at a disciplinary hearing had one been scheduled for after his return to the UK, and Mr Hudson gave those arguments the same consideration that they would have been given at a fair disciplinary hearing.

139. New evidence was presented to Mr Hudson at the hearing and he took that into account. (He had previously been unaware of Mr Basma's 2 August 2019 letter). Mr Hudson gave the Claimant and his representative a reasonable opportunity to provide additional evidence after the hearing, but, despite his reminder on 2 December 2019, the requested evidence was not provided.

140. Mr Hudson decided:

140.1 That it was appropriate that the Claimant be dismissed because the Claimant had failed to attend work in circumstances in which the Claimant knew that the

absence was unauthorised. This was a reason related to the Claimant's conduct.

140.2 The Claimant had not taken the opportunity offered to him to show that there was mitigation or reasonable excuse by (a) providing evidence of his mother's illness and (b) the dates of travel plans being made.

141. Mr Hudson had reasonable grounds to form these beliefs

142. He reached them after a fair and reasonable process. There might be some aspects of the evidence to which a different person might have given different weight (eg the significance, or otherwise of the Claimant's previous absences), but Mr Hudson took a reasonable approach to his analysis of the available evidence, and to the decisions he was required to make.

143. Had Mr Hudson decided that termination of employment was not appropriate, he would have reinstated the Claimant. It was not outside the band of reasonable responses for Mr Hudson to decide that termination of employment was appropriate. It is not my role to substitute my decision for his.

144. Therefore, taken as a whole the procedure adopted by the Respondent was a fair one. The defects caused by dismissing the Claimant in his absence were cured by the conduct of a fair and thorough appeal process, prior to the making of a fair and reasonable decision that termination of employment (rather than reinstatement) was the appropriate outcome.

145. The claim of unfair dismissal fails.

<u>Breach of Contract – Notice Pay</u>

146. The Claimant failed to attend work having made a deliberate decision that he would not do so. Prior to making his decision, he had already seen Mr Basma's letter of 2 August 2019 which informed him that failing to attend work would potentially be a disciplinary issue, and that the decision might be to dismiss.

147. The Claimant also had received a contract which specified that the granting or refusal of holiday requests was at management's discretion. He had been involved in litigation in relation to that contract, and to holiday arrangements in particular.

148. There is no suggestion that the Claimant misunderstood anything that was written in the 2 August letter, or what was said by Mr Bamba when the Claimant asked the Respondent to reverse the decision conveyed by the 2 August letter.

149. The Claimant did not think the Respondent had good reasons for the refusal and, in particular, he believed that the Respondent should be able to find cover in his absence; however, the Claimant was in no doubt that by failing to attend work he was doing the opposite of what his employer had unequivocally stated was his contractual obligation.

150. The Claimant relies on the term in his contract that says: "*Reasonable time off will be granted to deal with unexpected family crises and emergencies. This will be unpaid and you must keep your manager informed of the situation and likely length*

of absence." The Absence Policy also discusses such leave. However, this clause does not give an employee a right to be absent unless the Respondent has approved the absence. The Claimant sought an absence until 10 September, and that was refused. He travelled out of the UK on 5 August and returned around 5 September; in other words, he could not have been back at work (much) before the 10 September date. The period of absence was one which the employer had already said "no" to. Furthermore, while, under the statutory provisions, the effects of the absence on the Respondent's business would be irrelevant, the policy makes clear that the Respondent will take into account the effects on the business generally, and the needs for fairness and consistency in particular. Furthermore, the Claimant did not "keep" his manager informed. He did not contact the employer after the start of the absence until September 2019.

151. Even though the Claimant regarded his absence as one which would be temporary, followed by a resumption of his duties, and even though he regarded the circumstances as exceptional, his actions demonstrated that he did not regard himself as bound to perform his duties in accordance with the employer's instructions. His refusal was demonstrated in a serious and fundamental way (ie not turn up to perform his contractual obligations). In these circumstances, he repudiated the contract, and the employer accepted his repudiation by terminating the contract because of it.

152. The Claimant's claim for breach of contract fails.

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Employment Judge Quill

Date: 04.01.2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12/1/21.

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FOR EMPLOYMENT TRIBUNALS