Case No: 3304135/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr P Dunn

Respondent: Multipest Ltd

Heard at: Watford **On:** 5 March 2021

Before: Employment Judge Shastri-Hurst

Appearances:
For the Claimant: In person
For the Respondent: Mr Collyer (solicitor)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing not objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 268 pages. The order and reasons for it are below.

RESERVED JUDGMENT

1. The Claimant's claim of wrongful dismissal/breach of contract is well-founded and is upheld.
2. The Claimant's claim of unauthorised deduction from wages is well-founded in part and is upheld in respect of:
    a. The Claimant's salary for March 2020;
    b. The Claimant's holiday pay;
    c. The Claimant's expenses.
3. The Claimant's claim of unauthorised deduction from wages regarding the furlough scheme is not well-founded and fails.
4. The Respondent is ordered to pay the following sums to the Claimant:
    a. Damages for wrongful dismissal under paragraph 1: £1648.92 (net)
    b. Sums for unauthorised deduction of wages under paragraph 2: £2,349.55 (gross)
5. The figures at paragraph 4b are gross sums. Any liability for tax on that sum will be the responsibility of the Claimant.

REASONS

1. The Claimant was employed by the Respondent as a technician from 13 November 2018 to 1 April 2020, when he was dismissed for gross misconduct.

2. The Claimant entered a period of ACAS Early Conciliation from 6 April 2020 to 15 April 2020, after which he presented his claim to the Tribunal, claiming various sums as unlawful deductions of wages and as breach of contract (notice pay).

3. The Respondent contests the various pay related claims, although some concessions have been made today, as I will set out further on in this judgment. In short, the Respondent accepts that deductions were made, but that they were authorised and/or excepted deductions under s13(1) and/or s14 of the **Employment Rights Act 1996** ("**ERA**"). Regarding the claim for notice pay, the Respondent argues that it was entitled to summarily dismiss the Claimant as he was in fundamental breach of his employment contract, and therefore no notice pay is payable.

4. The Claimant represented himself. Mr Collyer represented the Respondent. I am very grateful to both for the manner in which they prepared for and conducted the hearing today. To assist me in my decision-making, I had sight of a bundle of 268 pages, as well as witness statements from the Claimant and Ms Rawson, the Claimant's partner. I also had a statement from Mr Stephen George, the Respondent's Operations Manager, and son of Mr Brian Downard, the Director of the Respondent. I heard from both the Claimant and Mr George, who were cross-examined. Mr Collyer had indicated to the Claimant that he would accept Ms Rawson's statement as read and had no need for her to attend, although she was in attendance to support the Claimant.

ISSUES

5. At the commencement of the hearing, I explained to the Claimant and Mr Collyer that I had drawn up a list of issues that I considered to be the ones that I needed to consider. I discussed those issues with the parties, and they were content that I had encapsulated the issues accurately. I record that list below.

<u>Breach of contract – notice pay</u>

5.1. Was the Claimant guilty of gross misconduct, and therefore in fundamental breach of his employment contract, so as to allow the Respondent to consider itself released from contractual obligations? The Respondent alleges that the Claimant set up his own business, and conducted his own business using the Respondent's equipment and in the time in which the Claimant was engaged to do work for the Respondent.

5.2. If not, how much notice pay is the Claimant entitled to?

<u>Unauthorised deduction of wages – pay for March 2020</u>

5.3. It is agreed that the Claimant received zero pay for the month of March 2020.

5.4. The Claimant usually received £2083 (gross), £1648.92 (net) per month.

5.5. The Respondent accepts that this therefore constitutes a deduction. The issues are therefore as follows:

5.5.1. Was the deduction of the Claimant's March 2020 pay an authorised deduction under s13(1) ERA?

5.5.2. Was the deduction from wages an exempted deduction under s14(1)(a) ERA?

The Respondent had initially argued that £720 was lawfully deducted from the Claimant's March 2020 salary, as recoupment for 50% of the costs of a training course the Respondent had paid for the Claimant to attend. It has transpired that in fact the Claimant had already paid for 100% of the course, and therefore the Respondent accepts that the £720 should not have been deducted from the Claimant's final pay slip.

In any event, the Respondent argues that the Claimant received an overpayment in the months preceding March 2020, as he was paid for days when (despite being scheduled to work for the Respondent) he was not working for the Respondent but was working for himself.

<u>Unauthorised deduction of wages – holiday pay</u>

5.6. The Respondent now accepts that some holiday pay, accrued but untaken at the time of the Claimant's dismissal, is owed to the Claimant. This claim has therefore become an issue of mathematics alone.

5.7. It is agreed that the Claimant's holiday entitlement was 20 days plus 8 bank holidays, and that his annual leave year was 1 January to 31 December.

5.8. The Respondent asserts that the Claimant had taken 3 days off between 1 January 2020 and 1 April 2020. Although the Claimant was unable to confirm this due to faded memory, he did not dispute it.

5.9. The issues are therefore:

5.9.1. What annual leave had the Claimant accrued from 1 January 2020 to 1 April 2020?

The Respondent asserts that the Claimant had accrued 5 days, working on 20 days annual leave, and assuming that bank holidays were paid for.

5.9.2. What was the balance of holiday accrued but untaken as at the Claimant's date of dismissal?

The Respondent asserts that 2 days of holiday were accrued but untaken. This number is arrived at based on 5 days' accrued holiday and 3 days' holiday taken.

5.9.3. What is the rate of pay for the Claimant's holiday?

5.9.4. What holiday pay is the Claimant therefore entitled to?

Unlawful deduction of wages – furlough pay

5.10. Was the Claimant entitled to receive furlough pay from 24 March 2020 for a 12-week period, given that he alleges he was instructed, and informed the Respondent, that he should self-isolate for a minimum of 12 weeks? This includes the following issues:

5.10.1. Does the ET have jurisdiction to deal with this claim?

5.10.2. Was there an agreement in place between the parties in order to trigger the right to furlough pay?

5.10.3. Given that the Claimant was dismissed on 1 April 2020, does that negate any entitlement to furlough pay, if any entitlement did initially exist?

Unlawful deduction of wages – expenses

5.11. The Claimant claims £74.24 in expenses incurred and claimed during his employment. This was conceded by the Respondent today.

LEGAL FRAMEWORK

Unlawful deduction of wages

6. S27(1) **ERA** defines wages as:

> "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

7. The Claimant's claim relates to his salary, which falls squarely within this section, and is not an excluded payment under s27(2) **ERA**.

8. S13(1) **ERA** provides as follow:

> "An employer shall not make a deduction from wages of a worker employed by him unless –
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

9. S13(3) **ERA** provides as follows:

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

10. The question of what is properly payable generally requires the Tribunal to determine what payment the worker is entitled to receive by way of wages. This

is an issue to be decided in line with the approach of the civil courts in contractual actions – **Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT**.

11. In other words, the tribunal must decide, on ordinary contractual and common law principles, the total amount of wages that was properly payable to the worker at the relevant time.

12. S14 **ERA** provides as follows:

> "(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –
> (a) An overpayment of wages, or
> (b) An overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker."

13. A payment of wages to which a worker was entitled when made cannot retrospectively become an overpayment for the purposes of s14(1) **ERA** – **Key Recruitment UK Ltd v Lear EAT 0597/07**.

14. The EAT has given a fairly wide meaning to the phrase "overpayment in respect of expenses". In the case of **SIP Industrial Products Ltd v Swinn [1994] ICR 473**, the employer had withheld wages that were owing to an employee who had made a fraudulent claim for expenses. The ET found that this type of scenario was not intended to be covered by s14(1)(b) **ERA**. However, the EAT reversed that decision, holding that the reason for the overpayment was irrelevant; the provision is sufficiently broad, given the inclusion of the words "for any reason". The employee's claim was therefore dismissed on the basis that the deduction was an exempted one under s14(1)(b).

Breach of contract – notice pay

15. The issue as to whether there has been a breach of contract is an objective test: reasonableness or otherwise of the alleged breaching party is irrelevant.

16. The burden of proof for a claim for notice pay lies with the Respondent. It is for the Respondent to prove that the summary dismissal was justified because the employee acted in such a way as to fundamentally breach his contract of employment.

17. To amount to a repudiatory or fundamental breach of contract, the employee must display a deliberate intention to disregard the essential requirements of the contract – **Laws v London Chronicle (Indicator Newspapers) Ltd (1959) 1 WLR 698**.

18. The issue of repudiatory breach must be viewed objectively, and therefore actual intention of the employee is irrelevant – **Briscoe v Lubrizol Ltd [2002] IRLR 607**

19. In **Neary and anor v Dean of Westminster [1999] IRLR 288** (paragraph 22) it was held that, regarding a breach of the implied term of trust and confidence, the employee's behaviour:

"must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment".

20. Although the label of "gross misconduct" tends to be attached to an employee's behaviour, this label is a red herring. The issue remains whether, as a question of fact, the employee's behaviour equates to a repudiation of the entire employment contract. This means that a tribunal must be satisfied that there was an actual repudiation of the contract: unlike unfair dismissal claims, it is not enough for an employer to demonstrate it had a reasonable belief that the employee's actions amounted to gross misconduct.

FINDINGS OF FACT

21. The Claimant commenced employment with the Respondent on 13 November 2018 as a technician. He started on a gross annual salary of £20,000. He received a salary increase in September 2019 to £23,000, and another in December 2019 to £25,000.

22. The Claimant's contract of employment is at p26. I note the following terms of contract:

> **Pay arrangements**
>
> Company vehicle: you will be provided with a Company vehicle and will be required to comply with the company's vehicle rules. We will reimburse you for fuel used for business journeys only, on completion of a fuel expenses claim form.
>
> **Holiday entitlement**
>
> The holiday year runs from 1 January to 31 December. You are entitled to 20 days' holiday a year calculated at the rate of $1/12^{th}$ of the annual entitlement for each complete month of service remaining in the current holiday year.
> ...
>
> You are required to reserve up to five days of holiday to take during the Christmas/New Year period.
>
> In addition to your holiday entitlement you may take and be paid for the bank/public holidays each year.
>
> **Holiday pay**
>
> Payment for holidays will be at your normal basic rate under your terms and conditions of employment for your normal hours of work.
>
> On termination of employment holidays will be calculated in proportion to the full entitlement. If you have taken less than this entitlement the surplus holiday pay will be added to your final pay. If you have taken more than this entitlement the excess holiday pay will be deducted from your final salary.
>
> **Notice period**
>
> <u>Notice period to be given by the employer to the employee</u>
> ...
> From the satisfactory completion of your probationary period but less than 5 years – one month.

23. I also have in the bundle a copy of the Employee Handbook, which starts at p39. At p41, the Handbook states:

> "It is important for you to read the Handbook carefully as this, together with your Contract of Employment, sets out your main terms and conditions of employment."

24. Under Section 6, Company Procedures, subsection "Conduct Covered: Conduct at Work", the Handbook states as follows (p52):

> The Company expects all employees to behave in a normal and reasonable manner. The following list provides examples of the type of conduct that the company would expect:
>
> - ...
> - ...
> - ...
> - To devote all your time and attention, whilst at work, to the company and ensure that all its property including confidential information, records, equipment, information technology, etc., is kept safe and used correctly.
> - ...
> - Not to be involved with any company, client or agent who is in direct competition with the Company. You are expected to devote all your loyalty to the Company.

25. Under the subsection "Conduct Covered: Company vehicles" at p55, the Handbook provides:

> The use of Company vehicles requires express approval from Management and the private use of commercial vehicles requires further authorisation. ...
> ...
> Some company vehicles are fitted with a tracking device, which may be used to verify locations, mileage, driving time and speeds. Any data obtained from the system may be used as evidence at a disciplinary hearing should the company consider the information relevant.

26. The Respondent has the technology to maintain a tracking record on all its employees: an example of tracking records for the Claimant are at pp105-264. The Respondent does not regularly perform checks on its employees' tracking records. The system can be set to automatically flag up certain issues, such as if a vehicle subject to the tracker is speeding. However, issues such as personal use of a vehicle are not capable of being flagged. The Respondent would only check a particular employee's tracker if something caused it to do so.

27. The Claimant had a good record, no performance/conduct issues were raised with him during the course of his employment prior to March 2020.

<u>The Claimant's work and tracker report</u>

28. I have the tracker report for the Respondent's vehicle under the Claimant's use for July 2019 to January 2020. This was not explored in any great depth in evidence before me, although I note Mr George's evidence in his statement at paragraph 10, in which he states that the Claimant was working for himself on various dates between July 2019 and January 2020.

29. I have minimal evidence as to what the Claimant was doing on each of the dates set out in Mr George's statement at paragraph 10, let alone whether he was working under the name of Dunn & Dusted, which is said by the Respondent to be the name of the Claimant's own company set up in competition with the Respondent. In fact, Mr George was very candid in his

evidence, and agreed with the Claimant's premise that he (Mr George) had no proof of what the Claimant was doing when his vehicle was stopped. He also said "I am not here to say [the Claimant] didn't work on those days, just that [he] used the van".

30. I have not seen evidence of the locations that the Claimant was supposed to be at on the dates listed in Mr George's statement, and therefore cannot do a comparison exercise to see whether he was where he should have been for his work with the Respondent. Neither can I then explore, if the Claimant was not working for the Respondent, what he was in fact doing at specific times and on specific dates.

31. In relation to the dates in Mr George's statement at paragraph 10, the Claimant told me that he would (for example) ask Joanna Dodd in the Respondent's office, or his line manager Mitchell Edwards, if he could stop off to get a prescription. He also said that on days when he had to attend a medical appointment, he would inform Mr Edwards or Ms Dodd, and Ms Dodd would then plan his work schedule around that appointment for that day. Mr George accepted that it was Ms Dodd who planned employees' routes.

32. Mr George stated that he could not imagine that he would not have heard about this arrangement from Mr Edwards or Ms Dodd. It had never been reported to him by Ms Dodd that the Claimant had to go to any medical appointments which required an altered work timetable.

33. On balance, I accept that the Claimant would speak to Mr Edwards frequently as his direct line manager, and that it was more likely than not that he would speak to Mr Edwards or Ms Dodds about his medical appointments, rather than Mr George or his father. This is the type of day-to-day matter that one would expect to be dealt with between direct report and line manager, for as long as it did not create a problem for either side. I consider that the reason why Mr George and his father never heard about these day-to-day arrangements was that no problems ever arose with it at a direct line manager level, and so they needed never to be troubled by it.

34. I find therefore that there would be times when the Claimant had a re-routed plan for his day in order to accommodate a medical appointment, but that this was done with permission of his line manager.

35. In terms of the specific dates that Mr George raises in his statement, I cannot be satisfied on the evidence I have seen and heard that the Claimant was working for himself during those dates as Dunn & Dusted.

<u>Events in March 2020</u>

36. On 20 March 2020, Mr George found out information from a customer that led him to suspect that the Claimant was conducting his own pest control business, "Dunn and Dusted", on the Respondent's time. Mr George was shown social media entries that appear in the bundle at pp101-104.

37. I note that there are other documents that the Respondent now relies upon to demonstrate that the Claimant had been conducting his own business, namely an insurance certificate and a treatment report – pp100 and 99 respectively. The Respondent came into possession of these documents in May/June 2020.

38. Having received this information, Mr George spent the weekend of 21/22 March 2020 investigating the Claimant's tracker record. This led him to believe that there were significant disparities between what the Claimant should have been doing and what in fact he had been doing during his work hours.

39. Armed with this information, Mr George spoke to his father, Mr Downard, and both considered that this evidence proved that the Claimant had acted in fundamental breach of his contract.

40. There is a dispute in fact between the parties as to whether, on 20 March 2020, Mr Downard invited the Claimant to a meeting on 23 March 2020. I consider that I do not need to resolve this dispute of fact. This is because Mr George accepts that any such invitation was simply for the Claimant to come in for a "chat": Mr George accepts that it was not made clear to the Claimant that this was intended to be an investigation meeting into his (the Claimant's) conduct, or indeed what that conduct was at that stage.

41. At 0729hrs on Monday 23 March 2020, the Claimant attempted to send Mr Downard an email stating that he had been ill over the weekend and that, in light of his existing ill-health, thought it necessary to self-isolate. I remind myself that Monday 23 March 2020 was the day of the Prime Minister's address to the nation regarding the national lockdown caused by the Covid-19 pandemic.

42. I say that the Claimant "attempted" to send this email, as it bounced back – see p71/72. He resent the email at 0731hrs and, at p73, I see that the email is recorded as "delivered after 0 seconds". I therefore find that the email did make it to Mr Downard's inbox: whether he read it or not is another matter.

43. Whether the Claimant was invited to a meeting on 23 March or not, it is agreed between the parties that no meeting took place on that day.

44. On Wednesday 25 March, Mr Downard telephoned the Claimant to inform him that he was standing outside his house with a colleague, Oscar Laube, and needed to have a conversation. I note at this stage that neither Mr Laube nor Mr Downard have attended to give evidence. Mr George is not able to speak to this discussion first hand, given he was not there. I accept that his evidence is honestly based on what he was told took place in that conversation by his father, however it is an inescapable fact that this is hearsay evidence. The only person who attended to give evidence about the conversation that happened at the Claimant's home on 25 March 2020 was the Claimant himself. I found the Claimant to be credible and consistent in his evidence, I therefore accept the Claimant's account of this interaction, set out below.

45. The Claimant told me that, when Mr Downard telephoned him, he (Mr Downard) stated that he wanted all of the Respondent's property that the Claimant held. Other than that, the Claimant told me there was little conversation. This was after all a conversation that occurred on the Claimant's driveway, with the parties at a distance of several meters due to the pandemic. Mr Downard went on to wave some documents at him that appeared to be the social media print outs at pp101-104, and say "you know what this is about" or "you know what you have been doing".

46. Due to the Claimant being unwell, he wished to curtail the conversation. He therefore gathered the Respondent's property that he had, including the Respondent's van keys that he had been using, and handed it all to Mr Downard.

47. It is the Respondent's case that, during this conversation, the Claimant accepted that he had been carrying out his own business of Dunn and Dusted. The Claimant denies this. Once again, I do not doubt that Mr George was doing his best to assist the tribunal and was honest in his evidence that this is what his father told him had been said. However, I repeat that Mr George was not part of the conversation between his father and the Claimant, and therefore can only possibly give me a second-hand account. That is not his fault, that is simply the situation the Respondent finds itself in by choosing not to call Mr Downard to give evidence; I have heard no explanation as to why Mr Downard has not provided evidence to the tribunal. I therefore find that, on balance, the Claimant made no such comment about carrying out his own business.

48. Although the Respondent states that the Claimant was informed on 25 March 2020 that he was dismissed, I note that the written communication of that dismissal came on 1 April 2020, in response to the Claimant's request to be paid at p75.

49. I have seen various emails between the Claimant and Mr Downard dated 1 April 2020. The first is from the Claimant at 1052hrs. It references "I fully understand you felt the need to collect your van and martials [*sic - materials*] on Wednesday 25 March 2020 however I was self-isolating...". The email goes on to discuss the issue of furlough: the Claimant stating that he was to self-isolate until 15 June 2020, which would be his return to work date. Given that this is the first written communication between Mr Downard and the Claimant since the conversation on 25 March, I find it more likely than not that any suggestion that the Claimant was dismissed on that date was not clear and unequivocal. It simply makes no sense for the Claimant to have written about a return to work and so on (with no reference at all to a dismissal), if he had been told he had been dismissed on 25 March 2020.

50. The unequivocal indication of dismissal in Mr Downard's email of 1 April 2020 at 1357hrs, a revised version of which is sent at 1502hrs, states:

> You will shortly receive a letter informing you of your dismissal for gross misconduct.
>
> You have broken your contract by starting your own business using Multipest's van, stock, fuel and time.
>
> Please don't contact me anymore as this is a matter for the HMRC and police if necessary.
>
> It should be pointed out that at no time did you declare you were self-isolating.

51. The Claimant responded at 1852hrs, stating:

> Thank you for your email informing me of my dismissal, I am still outstanding my pay for the month ending 03/20. Also please check your email: Mon, Mar 23, 2020 at 7.31AM. Titled: FWD: Health.
>
> As you are aware I am entitled to my pay.

52. I therefore find that the Claimant's contract was terminated on 1 April 2020, being the effective date of termination (as is set out in the ET3).

53. The Claimant received further confirmation of his dismissal by letter dated 1 April 2020, although he only received it on 4 April. This letter, at p79, sets out that the Respondent had dismissed the Claimant without notice pay due to his act of "gross misconduct and gross breach of trust", namely running his own business since at least August 2019. The letter offered the Claimant the right to appeal.

54. On 5 April 2020, the Claimant submitted an expenses claim with supporting evidence totalling £74.24, at pp81-86.

55. The Claimant entered into the ACAS Early Conciliation process on 6 April 2020.

56. The Claimant replied by letter of 8 April 2020, at p87, in which he stated "I do not wish to contest your unproven and unsubstantiated allegations".

57. This is the first reference the Claimant made to any allegations. By this time, he had received the detail in the Respondent's 1 April letter. I therefore do not accept that the Claimant's reference to allegations in the 8 April 2020 letter supports the Respondent's assertion that the Claimant must have understood the allegations clearly on 25 March 2020.

58. The Claimant did not therefore take up the offer of an appeal that was open to him. He told me that this was because the correct process had not been followed: as he had not been presented with any evidence, there was nothing on which he could appeal. I do not agree with this: he was given the opportunity to appeal: whatever else was failing in the Respondent's procedure (and I note any such failures are not relevant to these claims), it did provide the Claimant with that right to appeal.

59. On 15 April 2020, the Claimant was issued with the ACAS Early Conciliation certificate, following which he presented his claim to the Tribunal.

CONCLUSIONS

60. I will use the list of issues as a framework for my conclusions.

Wrongful dismissal

61. The first issue is for me to determine whether the Claimant was in fundamental breach of his contract so as to entitle the Respondent to consider itself released from its contractual obligation to pay the Claimant's notice pay.

62. I remind myself that whether there has been such a breach is a question of fact, and not a question of reasonableness of the Respondent. The alleged breach for which the Claimant was dismissed was "you are currently running your own business and have been since at least August 2019" – p79.

63. It is important to note that the Claimant was not dismissed for personal use of the Respondent's vehicle generally.

64. Looking at the evidence I have regarding the alleged fundamental breach, I

have the following:

64.1. P99: a treatment report signed off by the Claimant as Dunn & Dusted, on a Dunn & Dusted template, from 5 June 2019;
64.2. P100: a certificate of insurance from 20 September 2019, with the company name of "Peter Dunn" for "pest and vermin control services". There is no mention of Dunn and Dusted as a company name or entity on this;
64.3. P101: posts from social media, including posts from the Claimant under the name of Dunn & Dusted. The two dates on these posts are 7, 19 March 2020. I note that there are references on p104 to "22w" which I understand to mean that the posts on that page were posted 22 weeks prior to the screen shot. However, I am not clear when p104 was printed from social media: I therefore make no finding as to the date on which the posts on p104 were posted.

65. In terms of Dunn & Dusted, the Claimant told me that he undertook work for which he did not charge. For example, he is part of a hunt, and would volunteer to do work for them, but would not charge, as they would never pay for such services. As such, he was not taking work away from the Respondent.

66. Regarding the treatment report at p99, the Claimant told me that this was a sample he gave to the hunt, as he thought that the pest controller's report that the hunt had received from a different company was inadequate. In any event, I note that there is no evidence to suggest that Dunn & Dusted charged for the work detailed in the treatment report.

67. As set out above, the insurance certificate at p100 is not for Dunn & Dusted, but for the Claimant himself. The Claimant explained he paid for the insurance himself, and held that insurance so that he could do odd jobs for the hunt and friends.

68. In relation to the posts on social media, the Claimant explained that his ex-partner had posted the Dunn & Dusted details, not him. He told me that he did do work for friends at the weekend, one of those friends being Mr Edwards (a different Mr Edwards to his line manager) who appears in the posts.

69. I remind myself that the Respondent bears the burden of proof to demonstrate that the Claimant was guilty of a fundamental breach of contract.

70. Given that I have to deal with the objective issue as to whether there has been a fundamental breach of contract, rather than the reasonableness of the Respondent's beliefs, I am not satisfied that the evidence I have demonstrates a breach that is so fundamental so as to reach the threshold required here. There is no evidence before me that Dunn & Dusted has ever traded, or that it is a registered company. I am not satisfied, on balance, that the evidence I have before me demonstrates that the Claimant had set up a business under which he was trading for money/profit.

71. I therefore conclude that the Respondent was not entitled to treat itself as released from its contractual obligations. Therefore, the Claimant's claim for wrongful dismissal is upheld and he is entitled to be paid his notice pay.

What notice pay is the Claimant entitled to?

72. The Claimant's contract provides that he is entitled to one month's notice pay. That therefore is the measure of the damages to be paid for this breach of contract, which is the net monthly figure of £1648.92.

Unlawful deduction of wages – pay for March 2020

73. The issue here is whether the Respondent, by not paying the Claimant for March, made any unauthorised deductions. The Respondent originally denied this on two grounds:

    73.1. The Respondent could legitimately recoup £720 from the Claimant under a training payment agreement, pursuant to s13(1) **ERA**. The Respondent now accepts that this is not the case, and that the £720 should not have been deducted.

    73.2. The Respondent could legitimately withhold March's salary in any event, given that it had discovered that the Claimant had not actually been working or carrying out work for the Respondent on the days set out in paragraph 10 of Mr George' statement. The Respondent relies on s14(1)(a) **ERA**, by claiming that the Claimant had received an overpayment of wages made (for any reason) by the Respondent.

74. On this second point, I have already made findings regarding the information gleaned from the Claimant's tracker report above. As I have set out above, I cannot be satisfied that the Claimant was not working for the Respondent on the days mentioned in Mr George's statement. On that basis, I cannot be satisfied that the Claimant has been overpaid for those specific days.

75. Accordingly, the Respondent has not been able to satisfy me that this is a case which falls within the exception set out in s14(1)(a) **ERA**. Thus, the Claimant's claim for unlawful deduction of wages regarding the Claimant's March salary succeeds, and the Respondent will pay to the Claimant £2083 gross for March 2020.

Unlawful deduction of wages – holiday pay

76. As set out under the issues above, it is admitted by the Respondent that the Claimant is owed holiday pay: it is just a question of maths.

77. The Claimant's entitlement to holiday under his contract is 20 days, plus the 8 bank holidays. In 2020, the only bank holiday that occurred between 1 January and 1 April, when the Claimant was dismissed, was New Year's Day. The remaining bank holiday days would need to be taken as and when they arose during the year. Therefore, the holiday entitlement that is relevant to this claim is the 20 days' leave that can be taken at any time of the year.

78. The number of days between 1 January and 1 April 2020 is 92. Therefore, the Claimant's accrued holiday, pro-rated for that 92 day period is 20 x (92/365) = 5 days.

79. The Respondent informed me that the Claimant had taken three days' holiday in the leave year from 1 January to 1 April 2020: this was not disputed by the Claimant. Therefore, the Claimant is entitled to (5 – 3 =) 2 days of accrued but

untaken holiday for that 92 day period. I therefore agree with the Respondent's calculations up to this point.

80. 2 days is 0.4 weeks. The Claimant's weekly salary is (£25,000/52 =) £480.77 gross. Therefore, the Claimant is entitled to be paid (0.4 x £480.77 =) £192.31 gross for his accrued but untaken holiday leave.

Unlawful deduction of wages – furlough pay

81. The Respondent runs the argument that the tribunal does not have jurisdiction to deal with entitlement to furlough schemes. I will consider this argument first under this claim.

82. The Coronavirus Job Retention Scheme ("CJRS"), at the time I am dealing with in March to June 2020, allowed employers to claim back 80% of wages of any employees who had been furloughed as a result of the pandemic. The legislative framework for the CJRS is found in s76 of the **Coronavirus Act 2020**, which came into force on 25 March 2020.

83. Regarding the operation of the CJRS from March to June 2020, it was a prerequisite that the employee's furlough was subject of an agreement between the employer and employee, of which the employer had a written record. This iteration of the scheme closed on 30 June 2020, and therefore is the relevant iteration for me to consider in this case.

84. Although the mechanism and amount of pay may be an issue for HMRC, and possibly fall outside the tribunal's jurisdiction, a finding as to whether the CJRS even applies to this factual scenario I find to be within my jurisdiction, as this is a question of fact, on which I have heard evidence and can make findings.

85. The relevant issue for me is therefore whether there was an agreement between the parties, a written copy of which the Respondent has kept for its records. The Claimant admitted that there was no such agreement, and that it was a choice for the Respondent as to whether it furloughed its staff or not. I have heard no evidence that there was an agreement, and have seen nothing to that effect in writing.

86. I therefore conclude that there was no agreement to furlough the Claimant, and as such the CJRS scheme did not bite in this case.

87. Regarding the Claimant's argument that he had been instructed by the NHS to self-isolate, I have seen the letter to that effect at p87 dated 23 April 2020. This letter therefore post-dates the Claimant's dismissal, and I agree with and accept the Respondent's submission that, even if the Claimant had been placed on the furlough scheme on 24 March, this does not prevent the Respondent dismissing the Claimant on 1 April 2020. Therefore, even if a furlough agreement had been in place, this would have come to an end at the point of the Claimant's dismissal in any event. The furlough scheme, and s76 of the **Coronavirus Act 2020**, does not act as a shield against dismissal.

88. I therefore dismiss this aspect of the Claimant's unlawful deduction of wages claim.

Unlawful deduction of wages – expenses of £74.24

89. This claim was conceded by the Respondent and therefore the Claimant succeeds in this claim to the value of £74.24.

Employment Judge Shastri-Hurst

Date: 26 March 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

21 April 2021

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FOR THE TRIBUNAL OFFICE