Case No: 2302727/2020

EMPLOYMENT TRIBUNALS

Claimant: H Seco

Respondents: A Tovar (1)
R Estebanez-Lazaro (2)

Heard at London South Employment Tribunal via CVP

On 4 March 2021

Before: EJ L Burge

Representation
Claimant: In Person
Respondent: G Nicholls (Counsel)

RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1. The Claimant was automatically unfairly dismissed by the Respondent under s.100(1)(e) Employment Rights Act 1996 ("ERA");

2. There shall be a *Polkey* reduction to the compensatory award of 25%, nil pay for 4 weeks in November 2020 and 100% from 20 December 2020;

3. The Claimant's claim for unlawful deduction from wages fails;

4. The Claimant's claim for notice pay is well founded. The Claimant is entitled to two weeks' notice pay;

5. The Tribunal declares that the Respondents failed to provide itemised payslips pursuant to ss.8 and s.12(3) ERA 1996; and

6. If the parties cannot agree, the Tribunal will decide the remedy for unfair dismissal at a further hearing on 7 October 2021.

Preliminary matters

1. The Respondents had previously made an application for strike out of the

Claimant's claim of unfair dismissal on the basis that the Claimant did not have two years' service in accordance with s.108 of the ERA. The Tribunal wrote to the Claimant on 17 November 2020 giving a strike out warning on the basis that the Claimant did not appear to have two years' service. The Claimant wrote to the Tribunal stating, amongst other matters, that she considered she had been automatically unfairly dismissed under s.100 ERA. On 8 December 2020 Employment Judge Balogun wrote to the parties stating that having considered both parties' representations the application for strike out was refused.

2. The Respondent's opening note drew the Tribunal's attention to a further application for strike out on the basis that the s.100 and s.44 ERA claims were not present in the claim form. At the start of the hearing Ms Nicholls reiterated the Respondents' strike out application and said that the Claimant would have to make an application for her claim to be amended to include a claim of automatic unfair dismissal. The Tribunal decided that the Claimant did not have to make an application to amend - a potential claim under s.100(1)(e) arose from the facts contained in the claim form. The Claimant had ticked the box unfair dismissal (there was no "ordinary" or "automatic" distinction to be made) and it was implicit in her ET1 that the Claimant believed she had been dismissed because she was self-isolating during a period of national lockdown.

3. Even if the Tribunal was wrong about that, the Tribunal decided that the amendment would be permitted as a "re-labelling". Employment tribunals have a general discretion to grant leave to amend claims to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in *Selkent Bus Co Ltd v. Moore [1996] ICR 836 EAT* and *Cocking v. Sandhurst (Stationers) Ltd [1974] ICR 650 NIRC*. There is a distinction between:

    (i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.

    (ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim.

4. In essence, *Selkent* said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application" before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." This approach was approved by the Court of Appeal in *Ali v. Office of National Statistics [2005] IRLR 201*. The Presidential Guidance was also considered. Here the Claimant would suffer most injustice and hardship if the amendment was not allowed.

5. The parties agreed that the issues to be determined were:

    a. Was the Claimant automatically dismissed pursuant to s.100(1)(e) of the ERA;

    b. What pay should the Claimant have been paid?
        i. Did the Claimant suffer an unlawful deduction from her wages in respect of pay/furlough pay? And/or
        ii. Did the Respondent fail to pay the Claimant the notice pay required under her contract of employment?

    c. Did the Respondent fail to provide itemised pay statements pursuant to s.8 ERA?

6. At the start of the one day hearing the Tribunal spent time ensuring that the Claimant agreed that the claims above were those that she was pursuing and gave her time to make sure that there were no others. The Claimant confirmed that she was not pursuing any other claims, including a claim under s.44 ERA, and a claim for the right to time off for dependant care leave under s.57A ERA. However, in her written closing submissions provided 7 days after the hearing the Claimant stated that she was also pursuing a claim for holiday pay which she included in her "original claim but overlooked at the start of the hearing". She did not raise holiday pay as a live issue and in any event did not give evidence on it or ask the Respondents any questions on it in cross examination. The Tribunal concludes that holiday pay did not form part of the Claimant's claim.

7. The Claimant provided oral further particulars to her claim of automatically unfair dismissal under s.100(1)(e) ERA that in the circumstances of a covid pandemic and a national lockdown:
    a. She took the "appropriate steps" of self-isolating and adhering to national lockdown requirements;
    b. The Claimant also confirmed that the "circumstances of danger which the employee believed to be serious and imminent" were that as a live-out nanny she would need to travel to work and expose herself and others in the Respondents' home to the virus, one of whom was in a high risk category.

The hearing

8. Three bundles of documents were provided to the Tribunal. The Respondent's bundle ran to 128 pages. The Claimant's bundle ran to 83 pages – it largely contained the same documents, some in a more readable format but without the strike out correspondence and without the witness statements. The Claimant also provided a Supplementary File running to 94 pages. The Tribunal confirmed that it would only read the documents contained in the Supplementary File if they were referred to during the course of proceedings and that it would not in any event read section C which contained without prejudice correspondence.

9. Hannah Seco, the Claimant, gave evidence on her own behalf. Angel Tovar and Raquel Estebanez-Lazaro, the Respondents, gave evidence on their

own behalf.

Findings of Fact

10. The Claimant was employed from 5 November 2018 as a live-out nanny for the Respondents' two children, then aged 6 and 8. The Claimant worked an average of 25 hours per week for £320 net pay and her responsibilities included caring, cooking, feeding, bathing the children, keeping living room and children's room tidy after playtime, picking up the children from school and to/from after-school activities as required and occasional babysitting. The parties operated a system whereby the Claimant's hours were recorded in a schedule so as to maintain the 25 hour average. From 5 November 2018 – March 2020 the parties had a good working relationship. Clause 6 of the contract of employment provided for termination of the contract as follows:

"6.1 Termination of this agreement by the Nanny:

(a) During the probationary period the nanny will give not less than two weeks notice in writing

(b) After the probationary period, the Nanny will give no less than four week notice in writing

6.2 Termination of this agreement by the Employer:

(a) The Employer will give two week notice to the Nanny to terminate this agreement, unless:

(b) the Employer believe the children are not well attendance or save [sic]

(c)The Nanny is guilty of gross misconduct or serious and persistent breaches of the terms of this contract, or

(d) is convicted of any criminal offence involving dishonesty, violence, causing death or personal injury, or damaging property."

11. On 18 March 2020 the Claimant tried to call Ms Estebanez-Lazaro and explained in a message that her sister had coronavirus symptoms and that she would have to isolate also. She messaged again later with an update saying that one of her sister's colleagues had also come down with a fever and that "considering the circumstances I am fine with taking unpaid leave and am very sorry to you and your family that this is my situation..". The Claimant went on to describe the symptoms of coronavirus, sent her love and said that she would update them once she had a clearer picture but for now she would be in isolation as advised. Ms Estebanez-Lazaro asked whether the Claimant had been in contact with her sister while she was caring for the Respondent's children, but the Claimant confirmed that she had not been. Ms Estebanez-Lazaro messaged the next day, 19 March 2020, asking how things were and offering to bring the Claimant anything she needed.

12. The Claimant responded the following day, 20 March 2020, saying that she appreciated the offer, that she too was now unwell with a "temperature/feeling nauseous/coughing" and that:

"I can't look after my sister by myself so our mum is driving down to London and take us up to Scotland. We are going to be in isolation up there as my parents have all the supplies and we don't want to take the chance with older people in the block of where my parents place is and ordering communal supplies with them for the block. I don't mind taking self isolation unpaid too given the circumstances for everybody across the country re employment etc. I also really hope that all of you are okay and take the

correct measures to avoid contamination… "

13. In cross examination the Claimant said, and the Tribunal finds as a fact, that she could not get food deliveries to the flat at that time and the decision to isolate in Scotland was because her parents could look after them and they had access to all the supplies they needed. She was also concerned for the elderly residents in the block of flats, her own health, the Respondents' family including the Respondents' daughter who had asthma. The Tribunal believes the Claimant, she was a honest, credible witness.

14. Ms Estebanez-Lazaro replied saying that she was sorry the Claimant was not well, the whole purpose of isolation was to stay at home but she understood that the Claimant needed to be with her family. She continued "Please let me know if you leave London and when as we do not know how long this potential lockdown will last please let me know as I would appreciate having the house keys while you are away."

15. On 20 March 2020 the government announced the Coronavirus Job Retention Scheme ("CJRS"). The purpose of the scheme was to provide grants to employers to ensure that they could retain and continue to pay staff, despite the effects of the pandemic. It initially applied from 1 March 2020 to 30 May 2020. It was then extended to 30 June, and again to 31 October 2020. Under the initial CJRS, only employees who were employed on 19 March 2020 on a PAYE payroll notified to HMRC through an RTI submission on or before that date were eligible. Employees who were on a payroll on or before 28 February or 19 March but who stopped working after those dates could be re-employed and furloughed. The CJRS initially covered 80% of an employee's wages (up to £2,500 per month) as well as employer National Insurance and pension contributions. From 1 August, NICs and pension contributions were not covered. In September and October the CJRS only covered 70% and 60% of wages, respectively, and employers were required to top up to 80%.

16. The following day, on Saturday 21 March 2020, Ms Estebanez-Lazaro texted the Claimant checking how she was.

17. On Monday 23 March 2020 Mr Tovar emailed the Claimant:

"Hope you are well and safe. Raquel tells me that you are now in Scotland with your family. We are here in London ready for a bumpy ride.

Probably planning for a 2 week at home on Scotland but I have the feeling that you are going to be away for more than that, as this madness may not finish until May. School doesn't plan to be open before and the PM says it will take 12 weeks to turn the tide and send the virus packing (whatever that means).

Based on the above and because of the long absence expected, I need to stop making your weekly payments and also you tax contribution, otherwise the hour backlog will be too large to catch-up.

I have attached an hour log to last week for you to see what it is the current status.

Anyway, I hope I'm wrong, everything's solved fast and we can see you soon here.

Keep well and please keep us posted with any news"

18. The same day the Claimant replied to Mr Tovar saying that she really hoped that they were all doing well and not showing any symptoms. She said that if she had stayed in London with her sister they would not have been able to see their family, she had a feeling this would go on for longer than the 2 week isolation period as this reflected what had been happening elsewhere in Europe. In relation to her salary this was:

"totally understandable and I am happy to comply with this at the moment as it is a very unusual situation. I did see that in the package made by the chancellor, Rishi Sunak, that the government will pay 80% of employees wages, but this facility has not been set up and will be done in the coming weeks."

19. The Claimant then provided a link to an article that explained it in a little more detail and provided a summary of the CJRS, that the government would pay them 80% of the Claimant's wages so that they could pay her the 80%. Salary payments would be backdated to 1 March 2020. The Claimant said that she did understand that she was paid for 25 hours yet worked less so she would acknowledge this. She continued:

"At the moment, yes, we do not know how long this will go on for so I suppose we must stay in contact over the coming weeks to figure out the best option, but more importantly to make sure everybody is safe and healthy.

I also posted the keys as per Raquel's request yesterday so they should be with you soon, but I would recommend to pick up the mail with gloves and clean the key just in case..".

20. On 23 March 2020 the Claimant also replied to Ms Estebanez-Lazaro's message saying she had just replied to Mr Tovar's email and copied her in. She had posted the keys and that she would download an app if the children wanted to text her.

21. Later on 23 March 2020 the Prime Minister announced a national lockdown and instructed the British public that they must stay at home, except for certain "very limited purposes" – shopping for essential items (such as food and medicine); one form of outdoor exercise each day; for any medical need, or to provide care to a vulnerable person; and to travel to and from work where this is "absolutely necessary" and the work in question cannot be done from home. The Prime Minister said that knowing the disruption this would do to people's lives, to their businesses and to their jobs, the government had "produced a huge and unprecedented programme of support both for workers and for business".

22. On 26 March 2020 the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 350) (the "Lockdown Regulations") came

into effect, significantly extending the range of businesses that were required by law to close with immediate effect including all retail businesses not on an approved list. The regulations included significant restrictions on freedom of movement: "no person may leave the place where they are living without reasonable excuse".

23. The Claimant gave evidence that she could not travel while there was a national lockdown and that she was not allowed to work during that period due to the national lockdown rules. The Respondents gave evidence that she could have worked, although Ms Estebanez-Lazaro said that the rules kept changing, she discussed the matter with friends and some of their nannies were coming to work. The Tribunal finds as a fact that it was not clear whether or not the Claimant could work but in any event there was no discussion about it and no suggestions from either side of, for example, how the Claimant's workplace could be covid-safe.

24. On 11 April 2020 Mr Tovar emailed the Claimant saying that he had requested the payslip company to put the Claimant on the CJRS "until all the current situation finish. Not completely sure how this works but I'll let you know when I'll know more…"

25. Mr Tovar gave evidence to the Tribunal that he had subsequently looked into the CJRS and concluded that the Claimant was not eligible because she had stopped being paid at the end of March. He thought at the time that if he had enrolled the Claimant he would be committing fraud. He also gave evidence that he could have done things better, he was under the pressure of having to combine homeschooling with working.

26. Mr Tovar did not tell the Claimant that he had not enrolled her on to the CJRS. When asked in cross examination why he did not tell the Claimant, he gave evidence that he was in a stressful situation with everything including work, he had forgotten to communicate but that the Claimant should also have asked.

27. The Claimant gave evidence that thereafter she had grown increasingly anxious, as she was not able to obtain information about her furloughed status directly from the Department of Work and Pensions. On 3 June 2020 the Claimant emailed the Respondents:

    "Long time, no speak! Really hope you are all doing well and have been staying fit and healthy in lockdown. Missing [the children].

    I wanted to reach out regarding the furlough scheme. I have done some research and am yet to find the date which the government will disclose the furlough scheme monies for employees, to employers.

    I thought that perhaps you may have some more information, as an employer? With regard to dates, they initially said that they would expect furlough scheme payments to start on 1st June, but I have seen no indication of this since. If you could kindly shed some light on if they have updated you with further information, I would be most grateful."

28. Mr Tovar replied on 17 June 2020:

"…*I find quite astonishing that after three months without knowing from you, the only reason to contact us is to ask for Furlough payments.*
To be clear, your contract was terminated long ago as you haven't come back to work, even after the government advised to do so.
I previously asked the payslip company to do the paperwork and send it to you. I understand from your email that you have not received these, so please find attached the documents."

29. In cross examination Mr Tovar accepted that the termination was not mutual. Mr Tovar gave evidence to the Tribunal that he forgot to tell the Claimant that he could not put her on furlough, he was in a stressful situation with everything including work, he probably should have done but also she should have asked. To the best of his recollection he had asked the payslip company to draw up the P45 in May 2020. That P45 gave the date of termination as 31 March 2020.

30. On 17 June 2020 the Claimant wrote back to the Respondents that it was possible to still enrol her into the CJRS and provided further information on doing so via a leaflet from Nanny Tax and HMRC.

31. In response Ms Estebanez-Lazaro set out a chronology and ended the email with:

"Happy to have a call if you wish to discuss further but it is very sad to see how some people try to benefit from a scheme that is offered to those in real need and keen to continue with their jobs, which is obviously not your case considering the lack of contact (until the furlough chaser was sent a few days back)."

32. In evidence to the Tribunal Ms Estebanez-Lazaro said that she could have used different language in that email and that it was her emotions coming through.

33. The correspondence between the parties continued but the situation was not resolved. The Claimant again explained how the CJRS worked but the Respondents took no action.

34. The Claimant's unchallenged witness evidence described the effect that the Respondents' actions had on her. She said, and it is accepted by the Tribunal, that she had to seek medical attention, was prescribed sleeping tablets and enrolled in therapy as a result of distress, anxiety, panic attacks and insomnia.

The Law

(1) S.100(1)(e) Employment Rights Act 1996 – automatic unfair dismissal for a health and safety reason

35. S.100(1)(e) ERA protects employees who, in circumstances of danger that they reasonably believed to be serious and imminent, took (or proposed to take) appropriate steps to protect themselves or other persons from the danger.

36. Whether an employee has taken, or proposed to take, appropriate steps for the purposes of this subsection is to be judged by reference to all the circumstances, including his or her knowledge and the facilities and advice available to him or her at the time (S.100(2) ERA).

37. If, however, an employer shows that it was, or would have been, so negligent of the employee to take the steps that he or she took, or proposed to take, that a reasonable employer might have dismissed him or her, then the employee's dismissal will not be regarded as automatically unfair (s.100(3) ERA).

38. In the case of *Oudahar v Esporta Group Ltd [2011] ICR 1406*. Mr Oudahar was a chef who had refused his manager's instruction to mop an area of the kitchen as he claimed that wires protruding from the wall made mopping there dangerous. He was dismissed for failing to comply with a reasonable request after the employer accepted the maintenance manager's evidence that the area was safe. The Employment Appeal Tribunal allowed Mr Oudahar's appeal against the Tribunal's finding that he had not been dismissed for a reason falling within s.100 but for failing to follow a reasonable instruction. The EAT set out a two stage approach for applying s.100(1)(e):

> *24. "In our judgment employment tribunals should apply section 100(1)(e) in two stages.*
>
> *25. Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of **Balfour Kilpatrick** are relevant) did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.*
>
> *26. Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.*
>
> *27. In our judgment the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e).*
>
> *28. We reach this conclusion for the following reasons.*
>
> *29. Firstly, it seems to us to be the natural way to read section 100(1)(c)-(e). Each subsection is directed to some activity on the part of the employee: the bringing of matters to the attention of the employer (section 100(1)(c)), leaving or proposing to leave or refusing to return (section 100(1)(d)), or taking or proposing to take steps (section 100(1)(e)). In each case the statutory provision directs the Tribunal to consider the employee's state of mind when he engaged in the activity in question. In no case does it direct the Tribunal to consider whether the employer agreed with the employee.*
>
> *30. Secondly, it seems to us that this reading gives effect to the protection which Parliament must have intended to afford to an employee, having regard to the provisions of the Framework Directive which we have quoted. Section 100(1)(c)-*

(e) do not protect an employee unless he behaves honestly and reasonably in respect of matters concerned with health and safety. It serves the interests of health and safety that his employment should be protected so long as he acts honestly and reasonably in the specific circumstances covered by the statutory provisions. If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection.

*31. Thirdly, we think this conclusion derives some support from the judgment of the Appeal Tribunal in **Balfour Kilpatrick Ltd v Acheson** [2003] IRLR 683. In that case a group of employees took industrial action and refused to return to work, believing their working conditions to be hazardous to health and safety. The principal ground of the decision was that taking industrial action did not amount to "reasonable means" of raising a health and safety concern."*

39. In Balfour Kilpatrick Elias J said at para. 67:

"The fact that the employer was dismissing because of the failure to return to work and was indifferent to the reason why the men were not at work is immaterial. He knew what the employees were asserting the reason to be. Had we found that to have been a protected reason then we would have concluded that the dismissals were for that reason. We consider that the tribunal were right on this aspect of the case. Moreover, we consider it likely that an employer would be equally liable if he had the opportunity to find out the reason for the absence and chose not to take it. This ought, in our view, to be the position in order to give effective implementation of the Directive."

40. The EAT in *Oudahar* commented on this at paragraph 36:

"*Strictly speaking, in its reasons the Appeal Tribunal only addressed the employer who was indifferent to the reason for the employee's absence, or chose not to find out (although the submission seems to have been wider (see paragraph 50, which we have quoted). But we see no difference in principle between the employer who positively disagrees with the employee and the employer who is indifferent or does not bother to find out. In each case it seems to us that the statutory intention is that the employee should be protected if he falls within the scope of section 100(1)(c),(d) or (e).*
…"

41. In *Oudahar* the Respondent raised the possibility of an employer dismissing unfairly by virtue of s.100(1)(e) even though the employee never mentioned any danger at all:

We turn finally to Mr West's submission that it would be possible, at least in theory, for an employer to dismiss an employee unfairly by virtue of section 100(1)(e) even though the employee never mentioned any danger at all. We acknowledge that this is a theoretical possibility. In practice, however, the likelihood that this would occur is vanishingly small provided that an employer carries out a reasonable investigation before dismissing. It would be rare indeed for an employee who had really taken steps to avert imminent danger to withhold that from his employer during an investigation. The closely circumscribed conditions set out in section 100(1)(e) coupled with section 100(2) and (3) provide ample protection to the employer."

42. In *Masiak v City Restaurants (UK) Ltd 1999 IRLR 780, EAT*, the Employment Appeal Tribunal held that "other persons" can include members of the public and is not restricted to other employees or workers of the employer. In that case Mr Masiak said it was the potential health hazard to the public that lead him to walk out of his employment.

43. In *Harvest Press Ltd v McCaffrey [1999] IRLR 778*, the Employment Appeal Tribunal held that "the word danger is used without limitation in section 100(1)(d) and Parliament was likely to have intended those words to cover

any danger however originating".

Compensation

44. S.123(1) of the ERA provides that the compensatory award shall be 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal'. In written closing submissions Ms Nicholls reminded the Tribunal that the object of any compensatory award is not to punish the Respondent for any error.

45. Guidance for the assessment of loss following dismissal and the correct approach to *Polkey* reductions was given in *Software 2000 Limited v Andrews [2007] ICR 825*, EAT summarised as follows:

    a. in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

    b. in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee;

    c. there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. However, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

    d. a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary, that employment might have terminated sooner, is so scant that it can effectively be ignored.

46. S.207A Trade Union & Labour Relations (Consolidation) Act 1992 ("TULCRA") provides that where the ACAS Code of Practice applies and the employer or employee has unreasonably failed to comply with the Code the Employment Tribunal may, if it considers it just and equitable all in all the circumstances, increase or decrease the amount by no more than 25%.

47. In *Ikejiaku v British Institute of Technology Ltd EAT 0243/19* the EAT upheld the Employment Tribunal's conclusion that the disciplinary section of the ACAS Code did not apply to an automatic unfair dismissal for making a protected disclosure. However, the grievance part of the Code may apply where there had been a 'concern, problem or complaint' raised.

48. In *Audere Medical Services Ltd v Sanderson EAT 0409/12* the EAT held

that as a matter of principle there was no reason why a *Polkey* reduction or a reduction for contributory fault could not be made in automatically unfair dismissal cases, provided the circumstances warranted it.

49. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it reduces any compensatory award by such proportion as it considers just and equitable having regard to that finding, s123(6) ERA.

50. In *Nelson v BBC (No 2) [1980] ICR 110*, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

    (a) The relevant action must be culpable and blameworthy

    (b) It must actually have caused or contributed to the dismissal

    (c) It must be just and equitable to reduce the award by the proportion specified.

(2) Pay and notice pay

a. Unlawful deductions from Wages

51. Section 13(1) of the ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA.

52. The Statutory Sick Pay (General) (Coronavirus Amendment) (no 2) Regulations 2020, SI 2020/304 ("SSP Coronavirus Amendment Regs") were in force from 16 March 2020. The Regulations amended the Statutory Sick Pay (General) Regulations 1982, SI 1982/894, reg 2(1)(c) to the effect that those who self-isolate in accordance with relevant public health guidance are deemed to be incapable of work.

53. The Tribunal does not have jurisdiction to decide whether a claimant is entitled to a benefit such as statutory sick pay (*Taylor Gordon and Co Ltd (t/a Plan Personnel) v Timmons 2004 IRLR 180, EAT*).

b. Notice pay

54. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

55. The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account

of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.

(3) Pay slips

56. Under s.8 of the ERA, an employee has the right to be given by his/her employer, "at or before the time at which any payment of salary or wages is made to him, a written itemised pay statement". This statement should include particulars of any variable and fixed deductions, and the purposes for which they are made.

57. Under s.12(3) of the ERA, where an Employment Tribunal finds that an employer has failed to give an employee any pay statement, it shall make a declaration to that effect.

Conclusions and associated findings of fact

58. When her sister had symptoms of coronavirus (and the Claimant subsequently had symptoms), the Claimant had to isolate and was concerned about the safety of the Respondents' family (in particular that one of the children had asthma) and also her own and her sister's safety including that they could not obtain the supplies they needed to isolate in their flat in London. The Claimant and her sister were taken to Scotland by their mother so that they could isolate in the family home there.

59. The Claimant did not know that she was likely to have been entitled to statutory sick pay as a result of the SSP Coronavirus Amendment Regs. As an employer, this is the sort of thing that the Respondents should have taken steps to be aware of. However, the Claimant agreed with the Respondents that she would not be paid for her period of isolation. It is the Tribunal's conclusion that this constitutes a written agreement to which the worker has previously signified his or her agreement in writing (s.13(1)(b) ERA).

60. When Mr Tovar emailed the Claimant and suggested that the Respondents stop paying her as she would not be able to keep up with the hours of work due under the contract, the Claimant also agreed to it and so it is the Tribunal's conclusion that this also constitutes a written agreement to which the worker has previously signified his or her agreement in writing (s.13(1)(b) ERA).

61. The Tribunal finds that on Monday 23 March 2020 Mr Tovar thought that the Claimant would return to work once the covid-related situation was over ("I hope I'm wrong, everything's solved fast and we can see you soon here"). His actions, in not contacting the Claimant to ask her when she would be back, and his email on 11 April 2020 saying that he would ask the company to put her into the Furlough scheme "until all the current situation finish" also demonstrates that this was his understanding and certainly this was the impression that he had given to the Claimant. The Tribunal finds that Ms Estebanez-Lazaro also believed that the Claimant would return after the lockdown saying that they did not know how long the lockdown would last and she would appreciate having the house keys "while you are away".

62. Both Respondents gave evidence, that the Tribunal accepts, that they really

needed the Claimant to work during that period. It is astonishing that they did not ask her to come to work and simply assumed that she would not do so. The Claimant gave evidence that is accepted, by the Tribunal, that she did not think it was safe to work in a close contact role. Her email of 23 March 2020 stated "…*we must stay in contact over the coming weeks to figure out the best option, but more importantly to make sure everybody is safe and healthy."* The Respondents did not reply and question the "few weeks". The next the Claimant heard from the Respondents was on 11 April 2020 when Mr Tovar emailed her to say he had requested the payslip company to put the Claimant on the CJRS "until all the current situation finish. Not completely sure how this works but I'll let you know when I'll know more…". It is entirely reasonable that the Claimant thought that the Respondents held a similar view to her - that she would not work for a few weeks and that she was being furloughed. Neither Respondents had said anything that would indicate that this was the not the case and they had not asked her to return to work.

63. The Tribunal accepts the Claimant's evidence that she stayed in Scotland believing that her job was secure and that she would return once lockdown was lifted. The Tribunal accepts that the Claimant thought she was furloughed given the content of Mr Tovar's email on 11 April 2020. The Tribunal also accepts the Claimant's evidence that she inferred that the Respondents had the same approach to her that having a person in the house in such a close contact role would not be safe for any of them. There was a clear failure of communication from the Respondents. The Tribunal accepts the Respondents' oral evidence that they found lockdown extremely hard and that they would have been very keen for the Claimant to be working for them but the Respondents agreed in cross examination that they had not contacted the Claimant to enquire when she might return.

64. The Claimant repeatedly gave Mr Tovar information about the CJRS but he came to his own (incorrect) conclusions after conducting his own research that the Claimant could not be enrolled on the scheme. If Mr Tovar had thought that the contract had come to an end at the end of the March as he says he thought, he would have found out that the CJRS confirmed that employees who were on payroll on 28 February but who had since left that job for whatever reason could be re-employed by their old employer and placed on furlough. He clearly did not research the scheme properly, despite repeated information from the Claimant.

65. The CJRS is a mechanism through which employers can claim money from HMRC. It does not alter existing employment law rights and obligations. The rules of the CJRS as set out in Treasury Directions require employers to enter into a full furlough agreement or a flexible furlough agreement with their employees, setting out the main terms and conditions that will apply during any period of furlough. Agreements must be incorporated into the employee's employment contract. This did not happen with the Claimant and as such the Claimant cannot claim against her employer for money that should have been paid by the furlough scheme. It is for employers to decide whether to furlough an employee. Unfortunately for the Claimant there is no redress for her and others like her where an employer does not enroll an eligible employee on the scheme.

66. Employers will normally be liable under the employment contract to pay employees their full wages, even if they cannot provide any work. However, the Respondent and the Claimant had agreed, in writing, that the Claimant would cease to be paid while she was not working and so the Respondent did not unlawfully deduct her pay (s.13(1)(b) ERA).

67. The Respondents' pleaded case was that there was a mutual termination of contract. This is rejected by the Tribunal. The Tribunal finds that the Claimant's contract was terminated by Mr Tovar when he emailed on 17 June 2020 and stated "To be clear, your contract was terminated long ago as you haven't come back to work, even after the government advised to do so". The contract provided termination by the Respondents by giving two weeks' notice. No notice was given by Mr Tovar and so the Tribunal concludes that the Respondents are in breach of contract.

68. In accordance with *Oudahar,* the Tribunal first needs to consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? The Tribunal's conclusion is that there were circumstances of serious imminent danger – the Claimant reasonably believed that the coronavirus pandemic put the Claimant, the Respondents' family and her sister in serious and imminent danger. There was a national lockdown and the Claimant worked in close contact in the Respondents' home as a live-out nanny. The Claimant had to self-isolate in accordance with government rules. She also said, and it is accepted by the Tribunal, that she could not get supplies to her flat in London. The Claimant took steps to protect herself, the Respondents' family, her sister and others living in her block of flats by going to Scotland to isolate in her family home and adhering to the national lockdown.

69. Taking into account all the circumstances, including the Claimant's knowledge from the government announcements in relation to covid and the lack of anything to the contrary from the Respondent (to say, for example, that she could return to work with suggested ways to make the workplace covid-safe), these were appropriate steps. She continued to stay in Scotland for isolation because she had made a reasonable assumption that the Respondent shared her views that working in close contact in another family's home was not safe for her or for them, especially given that she may take the bus to work, she would have to get supplies, the Respondents would be in the household too and one of their children had asthma.

70. The Respondents did not suggest that it was so negligent for the Claimant to take the steps she took (s.100(3) ERA).

71. The second part of the equation is whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. The Respondents' case is that if the contract was not frustrated due to termination by mutual consent in March 2020, the Claimant was dismissed for going to Scotland. These are both rejected. In his email on 17 June 2020 Mr Tovar said he dismissed the Claimant because she had not "come back to work". The reason why the Claimant had not returned to work was principally because of the appropriate steps she had taken The

Claimant took steps to protect herself, the Respondents' family, her sister and others living in her block of flats by going to Scotland to isolate in her family home and adhering to the national lockdown.

72. The Respondents knew that the Claimant was isolating in Scotland because of the pandemic. They also had tacitly agreed in their emails that she would return after it was over. The fact that they did not carry out a reasonable investigation to find out why the Claimant continued to remain in lock-down in Scotland does not save them (*Balfour Kilpatrick* and *Oudahar*).

73. The dismissal is therefore automatically unfair for health and safety reasons in accordance with s100(1)(e) ERA.

Adjustments to compensation

74. In relation to whether or not a *Polkey* reduction to compensation should be applied, the Tribunal can assess how long the employee would have been employed but for the dismissal. This is a speculative exercise but necessary to ensure that the compensatory award is just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal.

75. The Claimant did not in fact move back to London after the second lockdown because she had no job to come back to. Given the effect on her health as described in paragraph 34 above, it was understandable that she remained in Scotland to be near her family. The Claimant was concerned about the close contact nature of the live-out nanny role with the Respondents from a health and safety perspective as she would be bringing additional risk into the house and to herself. In the context of the on-going and fluctuating covid risk throughout the remainder of 2020 combined with her family being in Scotland, the Tribunal assesses that it is only 75% likely that the Claimant would have returned to the job without substantial covid mitigations, which were unlikely to have been acceptable to the Respondents. It is therefore 25% likely that the Claimant's employment would have been terminated by either side for those reasons after the first national lockdown (prior to which she was on nil pay, as agreed). The Claimant would not have worked during the four week national lockdown in November 2020 and the Claimant would have resigned/Respondents terminated her contract when London moved into tier 4 on 20 December 2020. The Tribunal therefore concludes that it is just and equitable that the compensatory award is reduced by these amounts to reflect those likelihoods and that the period of loss ends on 20 December 2020.

76. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to automatically unfair dismissals. It could have applied in relation to a grievance raised by the Claimant but no such grievance was been identified by the Claimant.

77. The Claimant did not contribute to her dismissal. The correspondence confirmed that both parties were expecting her to return after lockdown and that she was to be placed on furlough. It was right that she isolated when her sister fell ill with symptoms of covid. The Claimant's behaviour was not culpable and blameworthy and therefore there should be no deduction for

contributory fault.

Employment Judge L Burge

Date 12 March 2021

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