EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110443/2019(V)

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Held via Cloud Video Platform on 26-30 April & 13 May 2021

Employment Judge M Sangster
Tribunal Member Dearle
10 **Tribunal Member Copland**

Mrs P Pirie	**Claimant** **Represented by** **Mr R Russell** 15 **Solicitor**
Blaze Manufacturing Solutions Limited	**Respondent** 20 **Represented by** **Mr E McFarlane** **Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:

- The respondent made an unauthorised deduction from the claimant's wages and is ordered to pay to the claimant the gross sum of £18.47; and

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- The remaining claims do not succeed and are dismissed.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing
35 was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimant presented complaints of unfair dismissal, as a result of asserting a statutory right, wrongful dismissal and unauthorised deductions from wages/breach of contract in relation to an agreement to uplift her salary by 10%. The respondent denied all claims.

5 3. The claimant gave evidence on her own behalf and led evidence from Douglas Welsh (**DW**), the respondent's former Finance Operations Manager.

4. The respondent led evidence from:

   a. Dr Evelyn Gilles, Questioned Document Examiner;

   b. Ms Claire Doherty, Senior Accounts Assistant for the respondent;

10 c. Mr Howard Johnson (**HJ**), the respondent's Managing Director and Company Secretary;

   d. Mr Russell Moir, IT Manager for the respondent; and

   e. Mrs Ann Johnson (**AJ**), one of the respondent's directors, currently holding the position of Commercial Director.

15 5. The parties agreed a joint bundle of documents extending to 286 pages, in advance of the hearing. Further documents were added, with consent, during the course of the hearing.

Issues to be Determined

6. A list of issues was lodged by the parties, in advance of the hearing. This
20 stated that the issues to be determined were as follows:

1. Unfair Dismissal – Section 104 of the 1996 Act

1.1 *Was the Claimant dismissed from the Respondent?*

1.2 *Was the Claimant dismissed for attempting to assert a statutory right?*

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1.3 *What was the alleged statutory right the Claimant believed had been infringed by the Respondent?*

2. Breach of Contract/Wages Claim

2.1 *Was there a contingent agreement between the Respondent and Claimant stating that within three months of her start date she would be entitled to a 10% increase in her salary from the 7th April 2019, in default of an agreement between the parties as to bonus terms within three months of the commencement of her employment?*

2.2 *Did the Claimant sign a Contract of Employment with a signature dated the 13th March 2019?*

2.3 *If yes to 2.2, did the Contract of Employment supersede the first agreement referred to at 2.1*

2.4 *If no to 2.2 and the answer to 2.1 is yes, is the Claimant due backdated wages for the period between 7th April 2019 and 28th April 2019?*

2.5 *If yes, how much wages are the Claimant due?*

2.6 *Regardless of whether any contract was signed or not, were the bonus terms agreed before 7th April 2019? If not, was the Claimant entitled to a 10% increase in her salary from the 7th April 2019?*

3. Wrongful Dismissal

3.1 *Was the Claimant paid her Notice Pay?*

3.2 *If so, how much was she paid?*

3.3 *If the agreement referred to in 2.1 did exist, should the Claimant have received her Notice Pay at a higher rate than was paid?*

4. Remedy

4.1 *If the Claimant is successful with her claim under Section 104 of the 1996 Act, how much compensation is due?'*

7. At the outset of the hearing, the Tribunal discussed this list of issues with the parties, to ascertain whether it was agreed and whether it accurately reflected

the issues to be determined by the Tribunal. The parties confirmed that it was initially prepared around 2 weeks prior to the hearing and agreed the day before the hearing commenced.

5 8. At that point, Mr McFarlane, for the respondent, referred to the case of ***Spaceman v ISS Mediclean Limited*** UKEAT/0142/18, stating that this was potentially fatal to the claimant's case given the use of the word 'attempting' in the list of issues.

10 9. Mr Russell for the claimant expressed surprise at this being raised at that point, but not previously, when the list of issues was being discussed between the parties. He highlighted that this point was not in the respondent's pleadings. He stated that the inclusion of the word 'attempting' in 1.2 of the list of issues was an error on his part and that the claimant's case was, and 15 always had been, that she was dismissed for asserting a statutory right. It was noted that this accorded with the terms of the claimant's ET1, where she stated, *'I believe my resignation was demanded because I exerted my statutory right not to have unlawful deductions made from my wages i.e. that I expected the contractually agreed salary increase to be applied and this was 20 withheld by the company.'*

10. Given the terms of the pleadings, and the fact that the claimant's representative indicated that the list of issues contained an error (so was, in effect, no longer agreed), the Tribunal confirmed that they would proceed on 25 the basis that the question of whether the claimant had merely attempted to assert a statutory right, or had actually done so, was a live issue for the Tribunal to determine.

11. Mr McFarlane was expressly asked whether he wished the jurisdiction point 30 to be addressed as a preliminary point or in submissions. He indicated that it was appropriate for it to be dealt with in submissions only.

Matters Arising During the Hearing

12. Mrs Pirie's evidence was heard over the course of the first two days of the hearing. Prior to the commencement of proceedings on the third day of the hearing, the Tribunal received correspondence from the parties, as follows:

    a. An amended list of issues from the claimant, with a cover email stating that there was an error in the previous version lodged, which was identified at the outset of the hearing, and that the claimant's representative thought it would be helpful to update this.

    b. Correspondence from the respondent:

        i. objecting to what appeared to be an 'application' from the claimant to amend the list of issues, albeit not stated as such and that no application for a case management order was actually made; and

        ii. applying for strike out of the automatic unfair dismissal claim on the basis that it had no reasonable prospects of success.

13. At the commencement of proceedings on the third day of the hearing, the Tribunal heard detailed oral arguments from the parties in relation to the correspondence received.

14. The Tribunal adjourned to consider and discuss. Having done so, the Tribunal confirmed to the parties that the unanimous view of the Tribunal was that:

    a. When the list of issues was discussed, Mr McFarlane raised the issue of the ***Spaceman*** case, stating that this was potentially fatal to the claimant's case given the use of the word 'attempting' in the list of issues;

    b. Mr Russell indicated at that point that that was an error in the list of issues and that the claimant's case was that the right had actually been asserted;

c. The Tribunal referred the parties to the pleadings – specifically page 14 and noted that this appeared to suggest that the claim was in fact that she had asserted a statutory right (not just attempted to do so); and

d. Based on that, and the fact that the claimant's representative indicated that the list of issues contained an error (so was in effect no longer agreed), the Tribunal had confirmed that they would proceed on the basis that the question of whether the claimant had merely attempted to assert a statutory right, or had actually done so, was a live issue for the Tribunal to determine.

15. It was confirmed that the Tribunal was of the view that it was appropriate for the Tribunal to proceed in the manner it did as, while a list of issues may have been agreed between the parties in advance of the Hearing, it is incumbent upon the Tribunal hearing the case to consider, at the outset, whether the list accurately reflects the issues to be determined in the case. This is what the Tribunal did at the outset of the Hearing.

16. The Tribunal also noted that Mr McFarlane was expressly asked whether he wished the jurisdiction point to be addressed as a preliminary point or in submissions and that he indicated that it was appropriate for this to be dealt with in submissions only. The Tribunal noted that if, as stated by Mr McFarlane, the only live issue in relation to that particular claim was whether the claimant was dismissed for *attempting* to assert a statutory right, then the obvious course of action would have been for this to simply be dealt with as a preliminary matter – there would have been no need to proceed to hear evidence.

17. The Tribunal confirmed however, given that Mr McFarlane stated that he did not fully appreciate the impact of the discussion at the outset of the hearing, the Tribunal would permit the respondent to recall Mrs Pirie and put questions to her on these points. Given the stage we had reached in proceedings,

having only heard evidence from the claimant and no further witnesses, the Tribunal confirmed that they felt that this would negate any prejudice to the respondent. The Tribunal confirmed that they believed that this was the most appropriate way to address the situation, given the overriding objective.

5 18. Mr McFarlane requested that the Tribunal reconsider their decision. While not strictly necessary (as the decision was not a 'judgment'), the Tribunal agreed to hear further oral arguments from each party. Following an adjournment, the Tribunal confirmed that the application was refused, and the original decision would stand, for the reasons previously stated.

10 19. Mr McFarlane indicated that he no longer insisted on the application for strike out as a result.

20. Mr McFarlane also stated at that point that, having reflected on matters, he did not feel that he required Mrs Pirie to be recalled to address the issue of whether she had actually asserted a statutory right (rather than merely 15 attempting to do so), as these points had already been covered in the her evidence in chief and in cross examination.

Findings in Fact

21. The Tribunal found the following facts, relevant to the issues to be determined, 20 to be admitted or proven.

22. The respondent is a provider of fire safety protection, detection and loss prevention solutions working mainly within the energy sector. HJ and AJ are married, and their two sons also work in the business, along with around 25 members of staff.

25 23. Prior to commencing employment with the respondent, the claimant worked with Scottish Enterprise and was the respondent's account manager. In October 2018, following discussions with HJ and AJ, the claimant agreed to join the respondent as commercial director. The claimant and AJ agreed the terms upon which the claimant would be employed, including that her salary 30 would be £80,000. In an email exchange on 12 and 13 October 2018, between

the claimant and AJ, it was also agreed that the parties would discuss and agree the terms of the bonus scheme, but if this was not agreed within three months of the claimant's start date, her salary would increase by 10%.

24. The claimant's employment with the respondent commenced on 7 January 2019. HJ and AJ were on holiday at the time. On the commencement of her employment, the claimant was presented with a job description and contract of employment which had been prepared by the respondent's HR Administrator. These did not reflect the terms which had been agreed between the claimant and AJ. The claimant accordingly did not sign the documents. Instead, she added a number of comments to an electronic version of the document, showing the changes which she required. This was sent to AJ on 21 January 2019. On 5 February 2019, AJ indicated that she agreed with each and every point and that she would ask the HR Administrator to update the documents. She also stated that she was mindful that a fair bonus scheme required to be agreed ahead of the agreed deadline. The agreed deadline was 6 April 2019, three months after the commencement of the claimant's employment.

25. At the start of 2019, the respondent was in severe financial difficulty. This principally arose as a result of a dispute regarding one of their contracts, which created significant cash flow issues. They were operating with an overdraft of around £350k. It was possible that the company would become insolvent. AJ & HJ were not taking a salary from the business at that time. On/around 13 February 2019 the majority of the respondent's staff moved to short time working, working 2½ days per week. The claimant continued to work on a full-time basis.

26. During February and March 2019, the claimant, HJ and AJ continued to discuss the terms of a potential bonus scheme, but did not reach agreement.

27. HJ went on a business trip to Australia from 3-20 March 2019.

28. AJ and the claimant were due to attend an award ceremony together on the evening of 14 March 2019. The respondent had been nominated for 'Best SME in Oil & Gas' and AJ had been nominated for 'Above and Beyond' in

relation to the contribution she had made to the wider industry and community. Prior to the event however, the claimant indicated to AJ that she no longer wished to attend. The claimant stated to AJ that AJ was obsessed with winning awards, and that the respondent was not worthy of winning awards, given the circumstances. The claimant stated that she felt that it was inappropriate to attend or accept any awards, given the precarious financial position of the respondent. At that point, the respondent was unable to pay suppliers, redundancies were being made and most staff were still working reduced hours. AJ felt that it was important to attend the ceremony still. She felt that awards were important for business development, particularly when trying to break into new markets as recognised awards provide credibility. AJ accordingly arranged for someone else from the business to attend the awards ceremony with her. Both the respondent and AJ won the awards they were nominated for.

29. On the day of the awards, the claimant, AJ and DW had a meeting. During the meeting the claimant indicated to AJ that the company was in such a mess because of the bad decisions AJ had made in the past.

30. AJ was shocked and upset by the comments the claimant made about her and the respondent, when indicating that she would not attend the award ceremony and during the meeting on the day of the ceremony. She felt these comments displayed distain for her and the respondent. AJ had, until that point, greatly respected the claimant. She felt that her relationship with the claimant broke down at that point. Notwithstanding this, AJ wanted the claimant to continue in her role, as she felt that she was doing a good job and the respondent needed her skills to help them get back on track.

31. The claimant was on holiday from 15-26 March 2019. She returned to the office on 27 March 2019. She met with HJ and AJ that day. During the meeting AJ attempted to clear the air with the claimant, by explaining to her that she felt that what the claimant had said to her about attending the award ceremony and during the meeting on 14 March 2019 was demeaning. The claimant stated that AJ was only upset because she had spoiled her night by not attending. AJ was shocked by that reaction and stated that she felt that the

claimant's behaviour was cruel. The claimant stated that she was not cruel, just forceful. AJ stated that she couldn't work like that and that *'this isn't working'*. HJ then called a halt to the meeting. AJ avoided interacting with the claimant, where possible, thereafter by spending increasing amounts of time out of the office, engaged in business development activities.

32. On 28 March 2019, HJ sent an email to the claimant, following on from the meeting the previous day. Within the email he set out the terms of a proposed bonus scheme, stating *'We are at a decision point, I've outlined the bonus scheme which is integral to the package and this I'd like you to consider this holistically. I feel it only reasonable that you need some time to consider this overnight.'* The bonus scheme covered a three-year period and set out that the claimant would be paid 12% of annual salary based on the achievement of specified targets related to EBITDA and revenue for the next three financial years, as well as the possibility of an extra bonus of 3% against projected EBITDA increases within the respective year. Where targets were achieved, payments were to be made following the financial year end.

33. At that time, whilst HJ felt the claimant was adding value in relation to the work she was undertaking, and he wanted her to stay in the business, the relationship issues between the claimant and AJ were causing him concern. He started to wonder whether the claimant would/could remain working with the respondent. He raised in his email the issues which arose during the meeting the previous day, stating '*to be frank the hostility between the parties this is something I am not prepared to tolerate at any level. There needs to be much more open discussion and individual respect, however this is not insurmountable and in that vein I feel we can continue working together to deliver the planned strategy…We stress Blaze wants this to work, but it can only come from a position of individual mutual respect, trust and an asserted effort from all parties.*' He confirmed that the claimant reported to him, but that his delegated authority, if he was indisposed, was to AJ as the other founding partner and that *'if this is not something that you are comfortable with this also needs to be part of your decision process.'* He suggested that they meet the following afternoon to discuss.

34. The claimant and HJ met on 29 March 2019. The terms of the bonus scheme were not agreed during that meeting. In advance of the meeting, as the claimant had still not received an updated contract incorporating the changes she required, and which AJ had agreed to on 5 February 2019, she updated the contract to include these. She handed the updated contract to HJ at the meeting. The contract had sticky post it notes placed on it to explain the changes which the claimant had made. The first note stated *'Howard. Not all changes & discussions were reflected in the docs you sent through. I've amended as indicated – if you are happy then we can go with these.'* HJ was content to agree to all the changes proposed by the claimant. In the section entitled 'Pay', the contract stated *'A bonus scheme will be agreed before the end of the first three month period of employment. In the absence of an agreed bonus scheme your salary will increase by 10%.'*

35. On 1 April 2019, the claimant sent an email to HJ offering to reduce to 4 days a week, with a 20% pay cut, for the month of April 2019, *'to contribute to the business' cashflow easing measures'.* The respondent accepted this offer and the claimant's working hours and salary were reduced by 20% for the month of April 2019.

36. On 8 April 2019, the claimant sent an email to HJ stating that she accepted the bonus structure set out in HJ's email of 28 March 2019. She asked for her employment contract to be updated to reflect this.

37. On 17 April 2019, the claimant sent an email to HJ at 18:50 stating *'As per the agreement 13 October 2018 relating to my bonus – the lack of implementation within the agreed 3 months of my joining the business now requires for a 10% increase in my salary. I'll copy you on my email to [DW] to that effect.'*

38. HJ responded at 20:08 stating *'I disagreed we have reached agreement as per recent emails. Let's discuss.'* HJ was angry and upset that the claimant appeared to be asserting an entitlement to both the pay rise and the bonus structure. His understanding was that she would get one or other – the bonus structure or, if no agreement was reached in relation to that, a pay rise of 10%. The agreement to increase the claimant's salary was to provide protection to

her if no bonus scheme was agreed. It was never the respondent's intention that she would receive both. Given that the terms of the bonus structure had been agreed (albeit two days later than the deadline), he did not expect the claimant to insist upon the pay rise. This was particularly the case given the precarious financial position of the company at that time. The claimant was well aware of the company's cashflow difficulties and was working reduced hours and receiving reduced pay as a result. HJ could not see how the claimant could insist on both the salary uplift and the bonus in the circumstances. He was very frustrated at the approach the claimant was taking.

39. The following morning HJ went to the claimant's office, to discuss matters. He was angry. He said that the claimant was not going to be paid the 10% uplift, as bonus terms had been agreed. The claimant highlighted this was not done in time. He stated that the claimant could not get both the pay rise of 10% and the bonus scheme and that this was never the intention. The claimant indicated that she felt should get both, given that the terms of the bonus scheme were not agreed within the three-month period. HJ became very angry at that point, stating that she could not have both and needed to choose one or other. The claimant maintained that she was entitled to both, stating this was what was agreed. HJ started to leave the claimant's office but paused and, taking into account the claimant's approach to this issue and the relationship difficulties between the claimant and AJ, stated to the claimant *'In fact, I'll expect your resignation on my desk'*.

40. The claimant left the office following that exchange and worked from home for the rest of the day. She did not work the following day and had no contact with AJ or HJ the following week, as they were on holiday.

41. The claimant was paid on 26 April 2019. Her payment for April did not include the 10% uplift. Instead, she was paid £5,333.33 gross, which 80% of her normal salary, reflecting her reduced working hours in April 2019.

42. On Monday 29 April 2019 there was a board meeting. In advance of the meeting, the claimant prepared a letter of resignation. She did so as a result

of HJ stating to her on 18 April 2019 that he expected this. She assumed that her resignation would be requested again at the meeting. She took the unsigned letter to the board meeting.

43. HJ, AJ and the claimant attended the board meeting, along with the chairman. DW also attended for the first part of the meeting. The meeting progressed in the normal manner until 'any other business', when the claimant raised that she did not yet have a finalised employment contract and that she had not received the 10% uplift on her salary which was due to her. In response to the claimant's assertion that she did not have a signed contract, AJ went to HJ's office and collected the claimant's contract of employment. AJ returned to the meeting and presented a contract which appeared to have been signed by the claimant on 13 March 2019 and by HJ on 29 March 2019. The contract was in the same terms as the contract the claimant had passed to HJ on 29 March 2019. The claimant's immediate response was that she had not signed the contract. HJ's position was that the signed contract was passed to him by the claimant during their meeting on 29 March 2019, with post it notes on it and that he had then signed the contract later that day. The claimant asked if her resignation was still required, as requested by HJ on 18 April 2019. She was told by HJ and AJ that her continued employment was untenable. The claimant then retrieved the resignation letter from her bag, signed it and handed it to HJ, who indicated that he accepted the claimant's resignation.

44. The following day the claimant emailed HJ. She stated again that she had not signed the contract of employment. She stated that her pay in lieu of notice required to be calculated by reference to the uplifted salary of £88,000. She concluded by stating *'In my opinion Blaze still has an opportunity to recover from its financial instability however the greatest risk to the business is [AJ]. At every turn I found she opposes and sabotages change, she has an astonishing lack of people and leadership skills leading to the bullying culture your staff have brought to your attention in the ODR exercise and her self-absorbed and narcissistic personality assumes a far superior professional ability than in reality. To stand any real chance of success in recovery I suggest [AJ] should not be allowed any executive role or to have any*

influence, other than that of any shareholder, on the operations or people of the business.'

45. On 1 May 2019, the claimant sent an email to each of the board members. The sole focus of the email was the contract of employment. She stated that she had not signed this and that the signing of the document constituted a criminal act, namely fraud. She stated *'This action has placed me in an untenable position requiring me to tender my resignation as an employee of the company.'*

46. On 3 May 2019, the claimant sent a lengthy email to HJ. Within that email she stated that *'The events leading to my resignation are that at the Board meeting on 29th April I raised as 'Any Other Business' my concern at (1) my lack of contract of employment document, (2) my lack of 10% salary increase resulting from (3) the company's failure to finalise my bonus arrangements and (4) I asked if the Board still required my resignation as demanded by you, [HJ], on 18th April 2019.'*

47. On 10 May 2019, HJ wrote to the claimant. He stated that she would paid in lieu of the remainder of her notice period. He stated *'the company recognises that in view of the terms of the bonus scheme agreed between us and the focus of this on both the company's future performance and your contribution to this, it would be impossible to quantify what bonus, if any, would have been earned during the notice period. Accordingly, as a gesture of goodwill and as a way of mitigating these difficulties in calculating any bonus that may have been due, the company will instead apply 10% uplift to your salary for each month of the notice period. Payment of this uplift is entirely at the company's discretion and should not be taken to imply that the company believes it has any liability to make this payment. The company's position is that this uplift was due only for the period in which no bonus scheme was agreed.'*

48. The claimant's employment terminated on 10 May 2019. On 31 May 2019, she received the following payments

    a. Salary up to 10 May 2019, totalling £2,707.69 gross. This was calculated on the basis of the claimant's salary being £88,000.

b. Pay in lieu of notice for the period from 11 May to 28 July 2019 totalling £18,953.84 gross. This was calculated on the basis of the claimant's salary being £88,000; and

c. A salary adjustment totalling £61.53 gross, in respect of the month of April 2019.

49. Each of these payments were subject to deductions for income tax and national insurance contributions. None of the payments made to the claimant on 31 May 2019 were treated as an 'ex gratia' payment for tax purposes.

50. On 2 October 2019, a cheque was sent to the claimant by the respondent for the sum of £125.40. This was stated to be a net payment to cover the claimant's contractual entitlement to a salary of £88,000 for the period from 8-30 April 2019. The claimant responded on 13 November 2019, stating that she did not accept that the sum dismissed the respondent's liability to her, or her full salary shortfall. She stated that she did not intend to cash the cheque. She did not do so.

Submissions

51. Each party lodged a written submission, which was supplemented by an oral submission.

Claimant's submission

52. It was submitted that the claimant and DW were credible and that their evidence should be preferred to that of the respondent's witnesses.

53. The claimant invited the Tribunal to make certain findings in fact and summarised the applicable law.

54. The claimant submitted that the crucial issues were:

a. whether there was, as at 7 April 2019, a contractual entitlement to a 10% uplift in salary because bonus terms had not been agreed; and

b. whether the Claimant was unfairly dismissed as a result of asserting a relevant statutory right.

55. It was agreed in October 2018 that the claimant would be entitled to an uplift in her salary of 10%, if the terms of a bonus were not agreed between the parties by 6 April 2019. As this was not done, the claimant became entitled to the uplift from 7 April 2019 onwards. It was submitted that whether or not the contract was signed was not a material factor in the case, given that the terms of the contract, in relation to this particular element, were agreed in October 2018.

56. The respondent paid the claimant's notice period from 10 May 2019 at a rate of £88,000 but this was not in respect of the 10% uplift the claimant asserts should have applied from 7 April 2019 in relation to the failure to agree the bonus scheme within the deadline. From the 10 May 2019 the claimant received a 10% uplift in respect of any bonus may have been due. Therefore, the claimant was underpaid (and wrongfully dismissed) in respect of her contractual notice period. The shortfall being the 10% uplift on her salary for failure to agree the bonus scheme which should have been applied for her notice period and not confused by the ex-gratia 10% applied by the respondent relating to a bonus agreed but that had not yet been realised.

57. The claimant was dismissed (albeit constructively) as a result of asserting her statutory right not to suffer unlawful deductions from her wages. This was done on 17, 18 & 29 April 2019. Her resignation was demanded as a result of her asserting her statutory right not to suffer unlawful deductions from her wages on these dates.

Respondent's submission

58. The respondent submitted that no dismissal was admitted, and the claimant had less than two years' service at the effective date of termination. It was therefore for the claimant to prove that she was dismissed, and that it was because of the automatically unfair reason pleaded. The form of the dismissal claimed was a constructive automatically unfair dismissal.

59. The relevant legal provisions were referred to as well as the case of ***Spaceman v ISS Mediclean Limited*** UKEAT/0142/18, paras 27-29. It was submitted as a result, that any allegation of a breach of a statutory right before the payment of April 2019's salary (and thus the meeting on 18 April 2019) cannot as a matter of law found a claim for unfair dismissal.

60. In any event, the respondent submitted that the reason(s) the claimant resigned were not due to her asserting a statutory right not to have unauthorised deductions made from her wages, but due to other factors, as evidence by the correspondence sent immediately following her resignation. Her email of 1 May 2019 referred to her resignation being due to the fraudulent signing of the employment contract. This demonstrates that the claimant did not resign in circumstances covered by s104 ERA, but for another reason, so her claim must fail.

61. The evidence demonstrated that the claimant signed the contract of employment. There is no claim for unlawful deduction from wages on a PILON (***Delaney v Staples*** [1991] 2 QB 147) – a PILON is not 'wages'. The effective date of termination was 10 May 2019. There is no evidence from which the Tribunal could calculate bonus and a claim for an unascertainable sum cannot be made as an unlawful deduction from wages claim.

Relevant Law

62. S104 ERA states as follows:

(1) 'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

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(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

10 *(4) The following are relevant statutory rights for the purposes of this section—*

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an **[***employment tribunal***]***,'*

15 63. In the case of ***Spaceman v ISS Mediclean Limited*** UKEAT/0142/18, at paras 27-29, the EAT stated as follows:

'27. In my judgment the starting point must be the language of section 104 itself. Read naturally, section 104(1)(b) requires an allegation by the 20 *employee that there has been an infringement of a statutory right. An allegation that there may be a breach in the future is not sufficient. The thrust of the allegation must be, "you have infringed my right," not merely "you will infringe my right."*

25 *28. It is true that section 104(1)(b) read naturally in this way does not provide as much protection as it could. The same can be said of section 104(1)(a). Here the employer's reason must be that the employee has brought proceedings against the employer of a particular kind. I cannot see any normal canon of construction whereby it would suffice if the reason were that the* 30 *employee proposed to bring such proceedings.*

29. In these respects, section 104 is more narrowly drafted than other members of the same family of provisions. The drafting techniques in the family are not always precisely the same and I do not need to go through the 35 *provisions individually. However, in contradistinction to section 104(1)(a) other provisions are often drafted so that the employer's reason may relate to proposed proceedings as well as actual proceedings or proposed action as well as actual action; see for example section 104A to 104E. In practice these provisions will sometimes give protection where section 104 does not since* 40 *they apply to cases of proposed action as well as actual action.'*

64. S13 ERA provides "that an employer shall not make a deduction from a worker's wages unless:

a. The deduction is required or authorised by statute or a provision in the worker's contract; or

b. The worker has given their prior written consent to the deduction."

5 65. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church [2000] IRLR 27***).

10 66. Wrongful dismissal is a claim for breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more).

Discussion & Decision

Unfair Dismissal – Section 104 ERA

67. The claimant's position was that she was constructively dismissed as a result
15 of asserting a relevant statutory right. The relevant statutory right being contained in s13 ERA, which is the right not to suffer unauthorised deductions from wages.

68. The Tribunal found that HJ had demanded the claimant's resignation on 18 April 2019 and that this was what, ultimately, led to the claimant resigning.
20 She took an unsigned letter of resignation to the board meeting on 29 April 2019, as a result of the request made on 18 April 2019. She signed this having asked if her resignation was still required, as had been requested on 18 April 2019, and being told that it was.

69. The Tribunal considered whether the claimant had asserted a statutory right
25 prior to the demand for her resignation. The Tribunal found that the terms of the claimant's email of 17 April 2019 did not amount to the assertion of the statutory right not to suffer unauthorised deductions from wages. The claimant was not asserting that a deduction had been made from her wages in her email. She stated *'As per the agreement 13 October 2018 relating to my*
30 *bonus – the lack of implementation within the agreed 3 months of my joining the business now requires for a 10% increase in my salary. I'll copy you on*

my email to [DW] to that effect.' It was clear from the terms of her email that she was going to instruct DW to increase her salary. There could have been various responses from HJ to the claimant's email, ranging from him stating that this was no problem or that it had already been instructed, to what actually happened, which was that he disputed that she should receive both the uplift and the bonus. The claimant did not, within the email, assert that there had been an unauthorised deduction from her wages. She did not assert that the total amount of wages paid to her on any occasion were less than the total amount properly payable to her at that time, or that there had been any deduction from the wages which ought to have been paid to her on any particular date. In fact, her wages were not due to be paid until 26 April 2019, some 9 days later.

70. Section 104(1)(b) requires an allegation by the employee that there **has been** an infringement of a statutory right. An allegation that there may be a breach in the future is not sufficient. As confirmed in the ***Spaceman*** case, the thrust of the allegation must be, "you have infringed my right," not merely "you will infringe my right." The claimant's email did not amount to an assertion that there had been an infringement of a statutory right. Indeed, it did even amount to an assertion that there may be a breach of a statutory right in the future. Rather, she was simply asserting that she had a contractual entitlement to a 10% uplift on her salary, with the expectation that she would receive this.

71. The Tribunal found that the reason HJ demanded the claimant's resignation was that, within her email dated 17 April 2019 and during the discussion she had with HJ the following day, the claimant sought to enforce an entitlement to both the agreed bonus scheme and a pay rise. HJ's position was that she was entitled to one or other – the bonus structure or, if no agreement was reached in relation to that, a pay rise of 10%. His position was that she was not entitled to both. His position was that it was never the parties' intention that she would receive both. The fall back of the 10% bonus was to provide the claimant with some protection if parties were unable to reach an agreement on the terms of the bonus scheme. He was annoyed and frustrated at the claimant asserting that she was entitled to both, particularly given the

precarious financial position of the company at that time, which the claimant was well aware of. The fact that the claimant maintained this position, given the background circumstances (including the financial position of the company and relationship issues between the claimant and AJ) made her continued employment untenable in HJ's opinion. There was an irretrievable breakdown in the relationship as a result. It was for this reason that HJ and AJ maintained at the board meeting on 29 April 2019 that her resignation was still required. It was not due to the fact that she asserted at the meeting on 29 April 2019, among other issues, that she had not been paid the sums she was contractually entitled to on 26 April 2019. The decision had been taken prior to this.

72. Given that the termination of the claimant's employment was not due to the fact that she alleged that the respondent had infringed a relevant statutory right, the claimant's claim of unfair dismissal contrary to s104 ERA does not succeed.

Unauthorised Deductions from Wages & Wrongful Dismissal

73. Whilst a great deal of evidence was heard in relation to whether the contract of employment was actually signed by the claimant (including from a Questioned Document Examiner), the Tribunal concluded that whether it was signed or not was not relevant to its findings, given the agreement reached in October 2018 and the fact that the contract, whether signed or not, included the same provision.

74. The Tribunal found that there was a contingent agreement between the respondent and claimant that she would be entitled to a 10% increase in her salary from 7 April 2019, if no agreement was reached between the parties as to bonus terms by that date. This agreement was reached on 13 October 2018 when AJ confirmed in an email to the claimant that this was agreed. The terms of the contact of employment subsequently discussed between the parties also included a term stating this.

75. As there was no agreement in relation to the terms of the bonus scheme by 6 April 2019, the claimant was contractually entitled to a 10% pay rise from 7 April 2019.

76. The claimant was paid £5,333.33 for April 2019. This was calculated by reference to her annual salary of £80,000, less 20%, as per her agreement to work reduced hours for that month. Whilst that was her entitlement for the period from 1-6 April 2019, her contractual entitlement from 7-30 April 2019 was to a salary of £88,000, less 20%. The Tribunal calculated the additional sum due to the claimant for April 2019 as follows: 7-30 April 2019 – 3.4 weeks at £123.08 (£8,000/52x0.8) = £418.46 gross. That sum was properly payable to the claimant in April 2019, but was not paid to her.

77. In accordance with the terms of the email from HJ to the claimant dated 10 May 2019, the claimant's salary was uplifted by 10% for each month of her notice period. It was stated to be a 'gesture of goodwill' at that time, but it was not, ultimately, paid as an ex-gratia payment (which would have been paid free of tax and national insurance contributions). Instead, it was paid to the claimant on 31 May 2019 as 'salary' and 'PILON', with both being treated as payments under the contract.

78. The claimant received the sum of £2,707.69 gross as 'salary' on 31 May 2019. This was payment for the period from 1-10 May, when the claimant was working her notice period. This was a period of 1.6 weeks and was correctly paid, by reference to a gross salary of £88,000 (88,000/52x1.6=2,707.69). The claimant accordingly received the sums she was contractually entitled in relation to this period. No unauthorised deduction was made from her wages. The terms of the contract were not breached, so no damages are due for breach of contract/wrongful dismissal.

79. The claimant was placed on garden leave on 10 May 2019, for the remainder of her notice period. 11 weeks remained (11 May to 28 July 2019). She was entitled to £18,615.38 gross for the remainder of her notice period (88,000/52x11=18,615.38). In addition to her salary for 1-10 May 2019, on 31 May 2019 she was paid £18,953.84 gross, as pay in lieu of notice. The

claimant was accordingly paid the sums she was contractually entitled to for this period. The terms of the contract were not breached, so no damages are due for breach of contract/wrongful dismissal.

80. Given these findings, the claimant's claim for wrongful dismissal does not succeed and is dismissed.

81. The claimant was overpaid by £338.46 gross in respect of her payment in lieu of notice.

82. On 31 May 2019, the claimant was also paid a salary adjustment of £61.53 gross. This was a payment in respect of 7 & 8 April 2019: the days on which no agreement was in place in relation to the bonus.

83. A cheque, representing a net payment of £125.40 was sent to the claimant by the respondent on 2 October 2019. On 2 October 2019 the respondent sent the claimant a cheque for £125.40. They stated that this represented the net sum due to the claimant for the shortfall for the month of April 2019. Details of the gross figure, or how the sum was calculated were not provided. The claimant refused to accept that sum, stating that it did not address the full salary shortfall, as stated in her claim form and that she would not cash the cheque. She did not do so.

84. S25(3) ERA provides that *'an employer shall not…be ordered by a tribunal to pay or repay to a worker any amount in respect of a deduction…in so far as it appears to the tribunal that [the employer] has already paid or repaid any such amount to the worker.'*

85. Taking into account the terms of s25(3) ERA, the Tribunal concluded that the salary adjustment and overpayment, paid to the claimant on 31 May 2019, should be taken into account when making an order in relation to the sum to be paid by the respondent to the claimant, in relation to the claimant's claim

that sums were unlawfully deducted from her salary in April 2019. Together these payments amounted to £399.99.

86. Given these findings, the Tribunal concluded the respondent did make an unauthorised deduction from the claimant's wages in April 2019, contrary to s15 ERA. The respondent is ordered to pay to the claimant the gross of £18.47 in respect of this.

87. For the avoidance of doubt, the Tribunal concluded that the claimant had no contractual entitlement to any sums under the agreed bonus scheme at the time her employment terminated, as none of the specified targets had been met at the point the claimant's employment terminated.

Employment Judge	**Judge Sangster**
Date of Judgment	**31st of May 2021**
Date sent to parties	**1st of June 2021**