IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No: 4107712/2020 Heard at Edinburgh on the 28th and 29th April 2021

Employment Judge J G d'Inverno

Miss D Noble	**Claimant** **In Person**
Jill Brown trading as Nice Stuff	**Respondent** **In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

(First) That the respondent shall pay to the claimant the sum of £36.30 (THIRTY SIX POUNDS AND THIRTY PENCE) being the balance outstanding of the redundancy payment to which she is entitled; and

(Second) That the respondent shall pay to the claimant the sum of £24.20 (TWENTY FOUR POUNDS AND TWENTY PENCE) being the balance of sums owed to the claimant by way of pay in lieu of notice under the arrangement entered into between the parties.

REASONS

1. This case called for Final Hearing at Edinburgh on 28th and 29th April 2021. Each of the parties appeared in person.

Agreed Facts

2. In the course of Case Management Discussion, conducted by the Tribunal prior to the commencement of the Hearing, parties confirmed and the Tribunal records the following matters of fact which were agreed between the parties for the purposes of the Hearing, and the following Issues requiring investigation and determination at Hearing.

Agreed Facts

(a) The claimant's dates of continuous employment linked by reason of regulated transfers of relevant undertakings were from the 1st of June 2010 to the 1st of November 2020.

(b) The Effective Date of Termination ("ETD") of the claimant's employment was the 1st of November 2020.

(c) As at the Effective Date of Termination the claimant had accrued 10 continuous years of employment.

(d) The claimant's date of birth is 18th of the 6th 1955 and, as at the Effective Date of Termination the claimant was 65 years of age.

(e) As at the EDT the claimant had statutory entitlement, in terms of section 86(1)(b) of the Employment Rights Act 1996, to receive 10 weeks' notice of dismissal which failing 10 weeks' net pay in lieu of notice.

(f) Let it be assumed the claimant was dismissed for reason of redundancy, as at the EDT, the claimant had a statutory entitlement to receive redundancy payment based upon 10 years x (1.5 weeks gross weekly wage).

(g) As at the Effective Date of Termination the claimant's gross and net weekly wages were the same.

(h) As at the EDT the claimant's gross and net monthly pay was £576 and her gross and net weekly pay was £133 (being £576 x 12 = £6,912 ÷ 52). (Although agreeing that calculation and value of net weekly wage at the outset of the Hearing the respondent departed from it in submission reverting to reliance upon her pre litigation calculation of weekly wage in the sum of £130.50/week. The value of the relevant weekly wage was, accordingly, a matter determined by the Tribunal.)

(i) Following her dismissal and prior to the date of Hearing the respondent had paid to the claimant and the claimant had received from the respondent a payment of £1,957.50 in the name of a redundancy payment and a sum of £1,305 pay in lieu of notice which payments the claimant received only in partial satisfaction of the sums which she claimed under each head maintaining her claim for an additional sum under each.

(j) Following the transfer of the claimant's employment to the respondent, in October of 2018, the weekly hours worked by the claimant reduced from 16 hours to 13.5 in January of 2019 and thereafter increased to 14.5 in June of 2019.

(k) Notwithstanding the above net reduction in hours to 754 hours per year the claimant continued to be paid by the respondent for the previously contracted

16 hours work (or more accurately) 768 hours per year as is reflected in her payslips.

(l) As at the Effective Date of Termination the claimant was paid for 64 hours per calendar month (768 hours per year).

(m) As at the Effective Date of Termination the claimant's hourly rate of pay, both gross and net, was £9/hour.

The Issues

3. In the course of Case Management Discussion parties identified and agreed and the Tribunal recorded the following as the Issues requiring investigation and determination by the Tribunal at the Final Hearing:-

Reason for Dismissal

3.1 **(First)** What was the reason, or if more than one the principal reason for the respondent's dismissal of the claimant, effective as at 1st November 2020, and in particular, as is asserted by the respondent, was the claimant dismissed for reason of redundancy which is a potentially fair reason.

3.2 **(Second)** Let it be assumed that the claimant was dismissed for reason of redundancy, as at the Effective Date of Termination was the dismissal by reason of voluntary redundancy, as is asserted by the respondent, or although having commenced as a potential voluntary redundancy was it a compulsory redundancy as is asserted by the claimant.

3.3 **(Third)** Let it be assumed the claimant was dismissed for reason of redundancy, in so dismissing the claimant did the respondent follow a fair procedure, or was the procedure which was followed by the respondent defective such as to

taint the dismissal with unfairness and thus, was the dismissal procedurally unfair in terms of section 98(4) of the Employment Rights Act 1996.

3.4 **(Fourth)** Let it be assumed that the dismissal was procedurally unfair, would the claimant have been in any event dismissed for reason of redundancy had a fair procedure been followed and if so when.

3.5 **(Fifth)** Let it be assumed that the claimant was unfairly dismissed to what remedy, if any, is the claimant entitled by way of basic award and or compensatory award.

3.6 **(Sixth)** Let it be assumed the claimant was dismissed for reason of redundancy, does the claimant's entitlement to a statutory redundancy payment and to statutory pay in lieu of notice fall to be calculated by reference to gross and net weekly wages, as at the effective date of termination, of £133 per week which the claimant, in her ET1 asserts reflects payment for 16 hours per week at £9/hour and which was further reflected on the face of the claimant's relevant wage slips, or alternatively, as is asserted by the respondent, in the form ET3, using a lower gross and net weekly wage based upon the claimant working 14.5 hours per week as at the EDT.

Breach of Contract and Wrongful Dismissal

3.7 **(Seventh)** Did the respondent breach the claimant's Contract of Employment by asking her, in January of 2019 to reduce the number of hours which she worked per week while continuing to be paid for the previously contracted 16 hours per week.

3.8 **(Eighth)** Was the claimant wrongfully dismissed by the respondent in which case, to what remedy if any is the claimant entitled.

3.9 **(Ninth)** Is the claimant entitled to damages (compensation for alleged personal stress and anxiety assertedly said to be caused by the respondent adopting an allegedly hostile and uncooperative tone in correspondence.

4. In relation to Issue **(Ninth)** above the Employment Judge drew to the attention of parties his view that the Issue, as recorded, focusing a claim for damages for personal injuries not arising out of discrimination, was a claim which the Tribunal lacked jurisdiction to consider and it would be a matter for the claimant upon consideration to either seek to insist upon the claim or not insist upon the claim. The claimant subsequently confirmed, in the course of the Hearing that she did not insist upon the claim which fell away.

Sources of Oral and Documentary Evidence

5. Each party lodged an individual bundle of documents, to some of which reference was made in the course of evidence and submission. While parties had been unable to agree a Joint Bundle there was nevertheless considerable duplication between the individual bundles and, the respondent's bundle being paginated and where a document to which the Tribunal was referred appeared in both bundles, it is referred to in this Note of Reasons by reference to the page number in the respondent's bundle.

6. The claimant and the respondent respectively gave evidence on affirmation on their own behalf, each thereafter answering questions in cross examination and questions put by the Tribunal.

Findings in Fact

7. On the documentary and oral evidence led the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the determination of the Issues.

8. In 2015 the respondent, who carries on the business as a sole trader under the trading name “Nice Stuff”, opened a gift shop in Broughton Street, Edinburgh where she worked with the assistance of two part time members of staff.

9. In October 2018 the respondent took over another trading business “Clementine Home and Gifts”.

10. The transfer of business between the entities was a qualifying transfer for the purposes of the then applicable Transfer of Undertakings, Protection of Employment Regulations.

11. The Contracts of Employment of three part-time staff, including that of the claimant who had been employed by the transferor since October of 2011, transferred to the transfereed respondent.

12. Although not information provided by the transferor to the respondent at the time of the transfer, the claimant’s Contract of Employment had, prior to 2011 been the subject of an earlier TUPE transfer, the claimant having worked; for the first transferor from the 1st of June 2010 until the second transfer on the 7th of October 2011, thereafter with the first transferee until the date of the second transfer, 1st of October 2018, and thereafter, with the second transferee (the respondent) until the Effective Date of Termination of her Employment on the 1st of November 2020.

13. It was accepted by the respondent prior to the raising of proceedings and, was a matter of agreement between the parties for the purposes of the Hearing, that as at the Effective Date of Termination of her Employment the claimant had accrued 10 complete years of continuous service for the

purposes of calculating statutory entitlement to redundancy payment and notice.

14. Following the 1st October 2018 transfer, the respondent traded from both her original Broughton Street premises and the acquired Bruntsfield premises under the same trading name "Nice Stuff" with staff working, as required, across both outlets.

15. At the time of the transfer of her employment to the respondent the claimant's contracted for hours were 16 hours per week which equated to 768 hours per year.

16. Prior to and for an initial period after transfer of her employment to the respondent, the claimant worked more than 16 hours per week but was paid through the payroll for 16 hours and, in cash for any extra hours worked.

17. At the time of the transfer, the transferring employer told the respondent that that situation resulted from the claimant having advised her that she required to be seen to be paid for no more and no less than 16 hours per week in order that her entitlement to working tax credit would not be affected, and that accordingly the transferring employer had accommodated the claimant by arranging to pay her in cash for any additional time worked by her beyond 16 hours per week.

18. That was the position which the respondent inherited upon transfer of the claimant's employment.

19. The respondent was unhappy with that situation and entered into discussions with the claimant with a view to agreeing a reduction in her hours.

20. Via discussions between the parties and by email of offer sent by the respondent to the claimant at 1840 on the 9th of January 2019 and email of acceptance sent by the claimant to the respondent at 1132 on 10th of January 2019 copied and produced at page 42 of the respondent's bundle ("R-42"),

parties entered into an agreement to vary, by mutual consent, the claimant's weekly hours worked firstly by reducing them to 13.5 hours and shortly thereafter increasing them to 14.5 hours.

21. From that point forward until the Effective Date of Termination of her Employment the claimant effectively worked 14.5 hours per week which equates to 754 hours per year (14.5 x 52).

22. In the course of those discussions the claimant advised the respondent that it continued to be necessary that she be seen to be paid no more and no less than 16 hours per week, in order that her entitlement to working tax credit remain unaffected.

23. In those circumstances the parties further agreed that although in fact working only 14.5 hours per week the claimant would continue to be paid, in terms of her 12, monthly, salary payments, as if she had been working for 16 hours per week (or 768 hours per year (as opposed to 754 hours per year).

24. Doing so had the result of the claimant being paid at her hourly rate of £9 per hour for 14 hours in a 12 month period which she had not in fact worked.

25. The parties agreed that those 14 hours might be set off against any unused holidays for which the claimant was to be paid at the end of each holiday year.

26. At the time of her dismissal the claimant was being paid for 64 hours per month or 768 hours per year although she was working for only 62.8 hours per month or 754 hours per year, (the former being reflected in the claimant's payslips).

27. In the relevant period the claimant's PAYE issued and processed payslips show that the claimant was paid at the rate of £9 per hour for 64 hours in each calendar month resulting in a both gross and net wages payment of

£576 per calendar month which equates to a gross and net weekly wage of £132.92.

28. The claimant's gross weekly wage, for the purposes of calculating her entitlement to statutory redundancy payment was £132.92.

29. The claimant's net weekly wage for the purposes of calculating the value of 10 weeks' notice pay was £132.92. The claimant was an employee with normal working hours whose pay did not vary with the amount of work done.

30. Prior to the onset of the Covid pandemic, in March of 2020, the respondent employed 7 part-time members of staff, including the claimant, while also working part time in the business herself.

31. During the first Covid lockdown and forced closures of the outlets, the respondent arranged for all staff to be put on furlough and kept in regular contact with them.

32. Following the lifting of the first lockdown the respondent reopened both outlets to test the market and kept the situation under review.

33. Sales had been substantially reduced and the trading situation was exacerbated by further introduced parking restrictions which resulted in prospective customers being unable to park near to the outlets.

34. The claimant had asked that she be allowed to remain on furlough at that time rather than returning to work in the trading premises, as she was concerned about contracting Covid.

35. In time, it became clear to the respondent that it was no longer financially sustainable for her to run two outlets and she made the decision to shut the Broughton Street outlet and reduce staffing levels accordingly.

36. As at the date of taking the decision to close the Broughton Street premises, there existed within the respondent's business a genuine redundancy situation.

37. At that time the then current Government Furlough Scheme was due to end on the 30th of October 2020 and there was no clarity as to whether, and if so for how long, it might be renewed.

38. The respondent concluded that she required to take immediate steps to reduce staffing levels and costs if there was to be any realistic prospect of continuing to trade from the remaining outlet. She further considered that that end state should be achieved before the end of the Furlough Scheme, with a view to ensuring that affected staff might continue to have the benefit of the support provided from it.

39. The respondent concluded that unless the necessary reduction in staffing levels and costs could be achieved on a voluntary basis, with and amongst her existing staff, it would be necessary to make some staff compulsorily redundant.

40. The written statement of terms and conditions of members of staff, including those of the claimant, contained a clause in the following terms:-

> "**6. Hours of work and overtime**
>
> 6.1 Your normal working hours are 16 hours per week. This may change depending upon the needs of the business and will be reviewed as necessary."

41. Three of the then employed part-time staff did not qualify for redundancy payment and the respondent gave contractual notice to those individuals in August of 2020 but continued to pay them until the end of September 2020.

42. The respondent then turned her mind to considering the positions of the four qualifying staff, including the claimant.

43. She wished, in the first instance, to explore with those staff whether the possibility of avoiding a need for compulsory redundancy existed. She explored with each whether they would be prepared to work and be paid for reduced hours, or alternatively, whether they wished to volunteer to be made redundant. She did so in the hope that once each employee had confirmed their position, and in the light of their confirmed positions, and a combination of mutually agreed reduced hours and voluntary redundancy, the need to select individuals for compulsory redundancy might be avoided.

44. On 12th August 2020 the respondent commenced consultation with the four qualifying affected employees;

(a) advising them of the lockdown and continuing Covid pandemic upon the business,

(b) advising them that they were at threat of redundancy,

(c) advising them of the requirement, in order to keep the business even partially viable to reduce by at least three days staffing per week and, with a view to avoiding a requirement for compulsory redundancies,

(d) enquiring of them whether they would be interested in either mutually agreeing a reduction in their contractual hours or,

(e) in volunteering to be considered for redundancy,

45. The terms of that letter, as sent to the claimant, is copied and produced at R-46.

46. The letter sent to the other three qualifying employees was in identical terms with the exception of the detail regarding each individual's working hours and, what was at that stage only an estimate, of the individual employee's entitlement to a redundancy payment calculated upon the hours per week actually worked by the employee and upon the number of complete years of their continuous service, as confirmed in October of 2018 by the transferring employer to the respondent.

47. The terms of the correspondence of 12th August sent to the four affected qualifying employees advising that they were at risk of redundancy but tailored to reflect what the respondent understood to be the claimant's relevant details, was in the following terms:-

> *"From: Jill Brown …*
> *Subject: NICE STUFF*
> *Date: 12th August 2020 at 1409*
> *To: Denise Noble ….*
>
> *Hi Denise*
> *I hope you are okay and that you and Mr T are managing to get out a wee bit more.*
>
> *This is an email I don't want to have to send. Since we started trading again sales have been quite a bit below the usual levels in Bruntsfield and I am afraid Broughton Street has fallen off a cliff, so much so that I am only operating on a Friday and Saturday there.*
>
> *When we went into lockdown I never thought we'd be closed for so long or that the pandemic would be so devastating for businesses everywhere, as well as my own. My personal income has taken a massive hit as I am no longer doing any property work and the tenant in my flat has just given me notice that he's leaving in September so I'll have to get the flat freshened up sharpish and hope that I can find another tenant in the current economic environment.*

That all leads to me having to be realistic about staffing levels in the shops looking forward. I am currently doing 5 days a week compared with 2 before. To keep the businesses going, and to allow myself to take even a small wage to compensate for the loss of my other sources of income, I'll have to continue doing this for the foreseeable future which unfortunately means losing at least 3 days staffing a week.

You are obviously still on the Furlough Scheme but looking ahead I'm afraid that I'm unable to offer you the same number of hours as you did pre lockdown. Your contract states that you will usually work 16 hours per week but that this can be more or less according to the needs of the business and of course this has been 14.5 hours by agreement for the past year or so. I anticipate that initially I might be able to offer you one shift per week but I have not yet determined the final rota and I am afraid that redundancies are inevitable, something I really hoped to avoid. If reduced hours are unworkable for you and/or you wish to volunteer to be considered for redundancy please let me know. I can work out what the payment would be but from my initial research I think it would amount to approximately £2,000.

I appreciate this is really disappointing news, it is a very difficult situation for everyone and I hope you understand that I have to make changes to staffing levels or risk losing the business altogether. If you'd like to come to the shop for a chat rather than emailing me then please feel free to do so, we could arrange this before opening or after closing.

Best wishes

Jill"

48. The process which the respondent had envisaged following was one in terms of which she anticipated:

(a) She would receive a response from the affected employees setting out their initial views, either by email or as she had offered in her letter at an informal meeting:- "*If you'd like to come to the shop for a chat rather than emailing then please feel free to do so …"*

(b) That in respect of any who had expressed interest in or confirmed that they wished to volunteer for redundancy she would then carry out a detailed calculation and provide them with the relevant financial information confirming the amount of the redundancy payment which they would receive.

(c) In the event that any of those affected had, alternatively or also confirmed that they were prepared to agree to work reduced hours to then,

(d) Consider whether by a combination of reducing hours for those who were prepared to work the same and or of accepting offers to take voluntary redundancy, the need for compulsory redundancies could be avoided and thus also the need to put all of the affected employees through a redundancy selection process.

(e) In the event that the responses from all employees when considered did not provide a basis upon which the need to make any compulsory redundancies could be avoided to then;

(f) Advise all the affected employees of the scoring criterion and the procedure that would be followed in a selection process

(g) To further consult with the affected employees in relation to the same and,

(h) To work through the selection process and identify those selected for compulsory redundancy.

49. In the respondent's estimate the time required to carry out such a compulsory redundancy selection process, if the need to do so was confirmed, would have been one week (7 days).

50. Of the four affected employees, three replied to the respondent by email advising that they were prepared to agree to work reduced hours. One of those three also stated that she would give consideration to voluntary redundancy and, having done so, in fact confirmed, in a subsequent email on 15th of August 2020 that she volunteered for redundancy which offer, to be made voluntarily redundant, the respondent acknowledged receipt of on the 19th of August and confirmed that she would revert to her once she had decided on a way forward after receiving responses from all.

51. The respondent subsequently wrote to accept that other employee's offer to be made voluntarily redundant to which she attached a letter;

    (a) detailing the amount of that employee's redundancy payment, the basis upon which that had been calculated,

    (b) providing an internet link to a government redundancy calculator, confirming the balance of untaken holiday leave entitlement as at what would be the Effective Date of Termination of the employee's employment, and,

    (c) the amount of any residual sum owed by the respondent to the employee in respect of untaken holiday leave entitlement and or the amount of any overpayment in respect of already taken leave entitlement.

52. The letter also confirmed the employee's statutory period of notice and, while also confirming that the employee had no contractual right to receive pay in lieu of notice and thus would normally require to work their notice period in order to be paid for it, also offering the employee the option of remaining on furlough during their notice period or alternatively returning to work.

53. The letter concluded with reiteration of the confirmation contained in the opening paragraph, that the employee's offer to volunteer for redundancy was accepted and requesting that the employee confirm whether they did or did not wish to return to work to serve her notice or alternatively wished to remain on furlough.

54. The claimant responded on 14th August 2020, by email, to the respondent's email of 12th August taking up the respondent's offer to have an initial informal meeting "to meet for a chat". The claimant inserted the heading "Voluntary Redundancy" at the beginning of her response. The response, which is copied and produced at page R-47, was in the following terms:-

> "*Hello Jill, thanks for your email. I know it must have been incredibly hard to write, but truth be known, I had been expecting it. I would like to meet for a chat, if that's okay, I can do any day before or after shop hours. I'll leave it up to you. I will have to bring "the boy" so meeting at the shop is probably the best route to take. Regards Denise."*

55. The parties subsequently agreed to meet at the shop premises on 18th August at 10.30 am.

56. The shop was scheduled to open at 11.30 but, given that the respondent considered it highly unlikely that any customer would come in at or before that time she left the door unlocked.

57. Although the respondent had informed herself as to the likely amount of the redundancy payment to which the claimant would be entitled in advance of the meeting she did not envisage that there would be a requirement to confirm the actual amount of any payment/payments (adjustment to holiday pay etc at the initial meeting).

58. Rather, she envisaged that the meeting would be an initial informal meeting at which she would have the opportunity of listening to the claimant's views in relation to the options which she had identified in her correspondence of 12th August and, in the event that the claimant were to express an interest in volunteering for redundancy, to then go away and carry out a detailed calculation of the sums which would be due to the claimant on termination of her employment by way of redundancy and thereafter writing to the claimant providing that financial information for her consideration.

59. If the claimant were to subsequently confirm that she was volunteering for redundancy, to then give consideration to that offer, in the context of the responses received from the other affected employees and, if appropriate, accept it at that point formally providing the claimant with relevant financial information.

60. The meeting between the parties lasted for approximately 45 minutes including a period in which the parties were engaged in purely social conversation.

(a) That period of social conversation followed after a relatively short period of initial discussion about the options and during which the claimant advised the respondent variously that her continuing in employment, but working reduced hours, was not an acceptable option as she needed to be paid not less than and not more than for 16 hours per week at her hourly rate in order to avoid impact upon her entitlement to working tax credit.

(b) When in response to that statement the respondent asked her "*So are you volunteering for redundancy*", the claimant responded by saying "*Yes*".

(c) It was at that point in the meeting, the claimant having confirmed that one of the available options, working reduced hours, was unacceptable and that she was volunteering for redundancy, that is wished to go

forward with the second option of being considered for voluntary redundancy, that the conversation between the parties turned to social matters.

61. After some 20 minutes or so of social discussion the claimant said to the respondent "*Well it's about time we stopped shooting the breeze and discussed my package*".

62. The respondent, for their part, had not anticipated doing so but rather writing to the claimant with the relevant financial information after she had carried out a detailed calculation but she agreed to discuss the financial aspect as the claimant wished to.

63. The claimant began by advising the respondent:-

(a) That she had been advised by the Citizens Advice Bureau that her redundancy payment should be calculated on the basis of 10 years continuous service because of her continuity of employment with the two previous transferring employers.

(b) The respondent stated that she had been working on a start date of the 9th of October 2011 because that was the information provided to her about the claimant by the transferring employer.

(c) The claimant responded by stating that she had spoken to the relevant previous employer who had confirmed that she had continuous employment from an earlier date.

(d) The respondent indicated that, for her part, she would require to confirm that position herself directly with the former? employer and once she had done so would revert.

(e) The claimant stated that she needed to know the figures to which the respondent replied,

(f) By stating that based upon the employee information which had been passed to her at the time of the transfer of the claimant's employment, she believed that the claimant's entitlement would be in the region of £2,000 but that she would confirm the same once she had clarified the issue of length of service.

(g) The claimant did not provide any explanation as to why she said that, nor did she relate it to her nervousness about contracting Covid, which was the explanation which she provided in her oral evidence before the Tribunal.

(h) The respondent took umbrage at the claimant's statement, interpreting it as, in the absence of any contrary explanation, as the claimant communicating that she had no concerns for the respondent's predicament and or that of fellow employees.

(i) The respondent considered that that contrasted sharply with the initial responses which she had received from the other three affected employees which had all been both understanding and supportive.

(j) She felt uncomfortable with continuing the meeting and began to wish that she had not agreed to get into a detailed discussion about amounts of money despite the claimant's insistence that she do so.

(k) At 11 o'clock, the scheduled opening time for the premises, the respondent had opened the shop door but the conversation between her and the claimant had continued in the absence of any customers. A customer however entered the shop shortly after parties exchange of remarks regarding the claimant

working her notice and both realising that it would be inappropriate to continue the discussion in the presence of a customer, the respondent brought the meeting to a close by stating that she would confirm the position regarding the claimant's length of service and would write to her with detailed figures.

(l) The claimant, for her part, stated that she was thinking about looking for another job, a remark which further impacted on the respondent in circumstances where the claimant said that her heart would not be in working her notice period with the respondent, the same against the background that, prior to the meeting of 18th August, she believed that she and the claimant had enjoyed a good working relationship and that she, the respondent, had treated the claimant along with all of her other employees generously.

64. Following the meeting of 18th August 2020 the respondent wrote to the claimant providing her with the relevant information in relation to her redundancy payment including detail of calculation. She confirmed that the figures given notice of in her letter, which is copied and produced at R-49 based upon the claimant's actual weekly hours worked of 14.5 hours and assumed 9 years of continuous service.

65. The terms of the letter of 20th August 2020 were prompted by and reflected the claimant's confirmation at the meeting of 18th August that she was volunteering for redundancy.

(a) The opening sentence was in the following terms "*I refer to our meeting on Tuesday morning during which you confirmed your decision to volunteer for redundancy.*"

(b) The letter also dealt with the claimant's notice; confirming her entitlement to one week's notice for each year of continuous

service, confirming that the claimant had no entitlement to receive pay in lieu of notice but, given the claimant's stated reluctance to return to work, went on to confirm that the respondent was willing to consider allowing the claimant to remain on furlough during the period of her notice as an alternative to her working her notice period, should she wish to receive pay during her notice period but not wish to return to work it.

(c) On the last page of the letter (R-51) the respondent set out the three options in relation to the claimant's notice period, any one of which she was prepared to support.

(d) The letter of 20th August 2020 concluded with the statement:-

> "*I hereby confirm that I accept your decision to volunteer for redundancy and would be grateful if you could confirm your agreement and acceptance of one of the above proposals"* [those relating to the notice period]. "*(If you respond to this letter after 24 August 2020 that date remains your "date of Redundancy Notice")*

66. On 23rd August the claimant responded to the respondent's email of 20th August. A copy of the claimant's email is at R-53.

(a) In the email the claimant confirmed her reluctance to return to "*the shop environment just now to work any notice period.*"

(b) She proposed that the parties meet further in a couple of weeks' time "*so that I can consider my position and whether taking the voluntary redundancy is actually the right thing for me to do.*"

(c) The respondent replied to that email on the same date (R-53) stating, in the third paragraph, "*we met on the morning of Tuesday 18th August as*

agreed, during which you confirmed your decision to volunteer for redundancy. I did offer you the option, as I did in my email of 12th August, that staff could work reduced hours in the immediate future until we saw how trade levels progressed but you said this is unacceptable to you as you need to work 16 hours per week in order to be entitled to working tax credit.

I wrote to you on Thursday 20th August, by email and post, accepting your offer of voluntary redundancy. I confirmed a 'notice of redundancy date' of 24th August and set out the options open to you" [in relation to notice period] "*, with the relevant notice/redundancy figures. ….. we met last Tuesday and I do not consider it helpful or warranted to meet again. ….*

In conclusion you are being made redundant with a notice date of 24th August. As it would appear you are not returning to work this week to serve your … notice period I can only assume you are accepting "option 3" in my letter of 20th August. Please confirm that this is the case and I will make the necessary arrangements for payment.

67. By further email dated 24th August 2020 (R-56) the claimant further replied referring to her earlier proposal that the parties meet again in two weeks' time but going on to say "*Luckily I have actually been able to speak to someone this morning so I can tell you my questions below.*

(a) *My main concerns/questions are threefold:- …."* The claimant thereafter identified three matters;

(i) firstly, that, in her assertion she had worked for a previous employer in the undertaking before transferring to the employer from whom she had transferred to the respondent and that accordingly she had accrued 10 years of continuous service and that her payment should be calculated using that multiplier;

(ii) secondly, the first two relating to the calculation and amount of her redundancy payment being that her payment should be based upon her originally contracted for hours of 16 hours per week on the grounds that there had not been a formal variation of the contract following the TUPE transfer in terms of which her pre transfer hours were protected.

(iii) The third point, dealt with by the claimant in numbered paragraph 3 of her email related to the issue of her, on the one hand not wishing to work her notice period but on the other hand to be paid for it despite not having entitlement to pay in lieu of notice.

(b) Numbered paragraph 3 of the claimant's email of 24th August 2020 timed at 18:35 commences with an acknowledgment by the claimant that she had volunteered for redundancy and is in the following terms:-

> "*3 When I volunteered for redundancy, I anticipated that I would be able to remain on furlough for the remainder of my notice period. It would be difficult for me to return to the shop knowing that I would be leaving soon but also, as expressed in my email, I have been taking extreme care throughout the last few months to protect my health and would have genuine worries about being back in a shop environment for lengthy periods of time. If, as indicated in your email, you are happy for me to remain on furlough (therefore giving me some time to explore my option with regard to benefits or alternative employment (then this is less worrying for me. ….. I do not accept my redundancy notice starting today, (24th) as I think it's important and reasonable to be clear on my correct entitlements as per my points above. …."*

68. By further email of the same date timed at 22:07 the respondent replied to the claimant's email in which she sought to address the three concerns identified

by the claimant. That email, which is copied and produced at R-55 commences with the statement "*I wish to start by confirming that you are being made redundant with your notice period commencing today, 24th as outlined in my letter of 20th August".* The penultimate paragraph is in the following terms *"In conclusion I reiterate the fact that you are now redundant with a notice period of today; your redundancy is not optional and there is no provision for you to reject the notice date. It is not negotiable. That decision is mine as your employer".*

69. While correspondence continued to pass between the claimant and the respondent following the 25th of August it focused entirely on:-

(a) the calculation of the claimant's redundancy payment the parties being at odds as to whether the claimant's actual hours worked of 14.5 hours per week should be used as the basis for calculating a week's pay or 16 hours per week being the claimant's pre TUPE and pre variation contracted for hours, and,

(b) in relation to the number of years of continuous service accrued by the claimant.

(c) The subsequent correspondence discloses no dispute between the parties as to whether the claimant had in fact volunteered for and offered to accept voluntary redundancy at the meeting of 18th August, which offer was accepted by the respondent in her letter of 20th August 2020.

(d) Nor does the correspondence disclose any dispute between the parties, in the context of the claimant's and A N Other employees offer to be made voluntarily redundant and the respondent's acceptance of those offers, as to whether there was any requirement for a redundancy selection process to be instituted.

70. In the context of two of the five qualifying employees having volunteered for redundancy (of whom one was the claimant) and the other three accepting a reduction in their working hours, the potential requirement, identified at the outset of the consultation process, for compulsory redundancies to be made was avoided and no requirement arose to select one employee for compulsory redundancy as opposed to another.

71. Following discussion with the transferring employer and notwithstanding the fact that the same was not reflected in the employee information statutorily provided by the transferring employer to the respondent at the time of the transfer, the respondent was prepared to accept, and confirmed to the claimant that she was prepared to accept, that the claimant, as at what would be the Effective Date of Termination of her Employment, had accrued 10 complete years of continuous service. She further confirmed to the claimant that she was content to use the multiplier of 10 both in respect of the calculation of the claimant's redundancy payment and the calculation of the claimant's statutory notice period. She confirmed that position to the claimant by email dated 29th of August 2020 copied and produced at R-61.

72. The respondent subsequently made payment to the claimant and the claimant received from the respondent a payment of £1,957.50 in the name of redundancy payment and of £1,305 100% topped up furlough payment for her 10 week notice period.

73. While, as at the point of the payments being made and received parties were in agreement as to the use of the 10 years continuous service multiplier and the entitlement to 10 weeks' notice, the claimant continued to dispute the amounts of the payments made under each heading, on the grounds that she believed that they did not reflect the hours that she was paid for as opposed to those which she actually worked.

74. By email dated 2nd September 2020 copied and produced at R-64 the claimant wrote to the respondent advising that upon conclusion of her notice period and, the Effective Date of Termination of her Employment, she would

engage the early conciliation procedure with ACAS in respect of that one disputed matter.

75. The claimant commenced early conciliation on the 4th of November 2020.

76. In the course of early conciliation the claimant focused with the respondent, via the conciliator, the continuing dispute about the basis upon which the amount of the claimant's redundancy payment and the 100% topped up furlough pay received during the notice period, were calculated. That dispute was one which effectively concerned the value of the claimant's weekly wage to be applied in both calculations. The respondent, for her part, maintaining her position that the same should be based upon the actual hours worked by the claimant (14.5 hours per week), the claimant, for her part, asserting that it should reflect her pre transfer contracted for and pre post transfer consensually varied hours namely 16 hours per week. No other matters were focused by the claimant, via the nominated conciliator, with the respondent during the early conciliation process.

77. The early conciliation period ended on the 23rd of November 2020 on which date ACAS issued the Early Conciliation Certificate.

78. On 8th December 2020 the claimant raised proceedings in the Employment Tribunal giving notice, in terms of her initiating Application ET1, of complaints, not only relating to the calculation and amount of her redundancy payment and payment during her notice period and in terms of which she sought to recover the difference between parties respective calculations but also giving notice of complaints of:-

- Unfair Dismissal
- Breach of Contract
- Wrongful Dismissal
- Compensation (damages) for personal injury arising from personal stress and anxiety allegedly caused by the respondent's uncooperative and hostile tone in correspondence.

79. The claimant asked "*what about my notice?*";

(a) The respondent stated that that would likewise be affected by whatever was confirmed as the claimant's length of service but that under the claimant's Contract of Employment she was not entitled to receive pay in lieu of notice so that if she wanted to be paid for her notice she should expect to work it.

(b) The claimant responded by stating that while she acknowledged that "technically" she was required to work her notice, her "*heart would not be in it.*"

(c) She did not want to work her notice. She would rather be paid for it.

(d) She was looking for other employment.

Submissions

80. The oral submissions made by parties at the conclusion of the evidential Hearing are set out below and, where it was used by them, in the first person.

Submissions for the Claimant

81. The claimant submitted as follows.

(a) I accept that the email exchange that passed between us [the parties] resulted in an agreement to change the hours worked under my Contract but I did not receive any written confirmation of that change in the form of an amended Contract.

(b) I do not believe that a fair redundancy selection process was followed.

(c) I believe that the equivalent emails that were sent to the other qualifying employees should have been put in the bundle to prove that all were being treated the same.

(d) She [the respondent] repeatedly refused my requests for a further meeting. Voluntary redundancy was accepted in good faith that the correct financial information would be provided.

(e) The meeting of 18th of August 2020 did not meet the requirements for a genuine and meaningful consultation.

(f) I believe that she (the respondent) was in a hurry to finalise matters before furlough ended.

(g) I believe that there was no due process, no genuine and meaningful consultation nor a fair and transparent selection process which I believe are always required in redundancy.

(h) ACAS makes no distinction between voluntary and compulsory redundancy. Both should involve a meaningful and transparent selection process.

(i) Some misunderstanding arose regarding the pay in lieu of notice issue. Mrs Brown interpreted my response (telling her that she was technically correct that I required to work my notice but that my heart would not be in it and my request that I be paid in lieu of notice, as me not wanting to work.

(j) The truth is at any other time I would have been happy to work this notice period but I was extremely nervous about contracting Covid. I

was being extremely cautious. Returning to work would have been the cause of increased anxiety for me.

(k) I understood that my Contract did not give me the right to be paid in lieu of notice but hoped that furlough would allow me to be paid during my notice (while not working).

(l) This would enhance any final payment to allow me to manage financially during the subsequent weeks.

(m) As I have already mentioned I believe there was no genuine and meaningful consultation or selection process followed before making me redundant.

(n) The actual process followed was so flawed as to result in my dismissal being unfair.

Submissions for the Respondent

82. The respondent submitted as follows:-

(a) The principle of redundancy was never disputed just the financial package that she (the claimant) would receive and that that was the thrust of all the subsequent communications which followed the 18th of August 2020 meeting at which she (the claimant) volunteered for redundancy.

(b) During the meeting, she confirmed that my offer of continuing employment, but on reduced hours, was unacceptable.

(c) She told me at the meeting what the value of her redundancy payment should be and that it should be based on 10 years continuing service.

(d) She moved the meeting on from an initial chat (as proposed in my email of 12th August page 46 of the respondent's bundle (R7)), to pressing me for figures.

(e) With the other 3 staff I was able to consider their responses to my email in the context of the whole staff and then revert to them with figures.

(f) It was not just Miss Noble's position with which I was dealing, I had to consider also the position of the other three qualifying staff while also taking into account the needs of the business.

(g) In the event, Miss Noble and one other (member of qualifying staff) volunteered for redundancy which (for my part) I was prepared to provide.

(h) Therefore there was no need to carry out a selection process. However, if neither or only one would have volunteered, then the requirement for compulsory redundancies would have arisen and a fair selection process would have followed.

(i) I submit that at the end of that process Miss Noble would have been selected for redundancy principally because the only other alternative option of working reduced hours was not acceptable to her and, if reduced hours were unacceptable then redundancy was the only other option.

(j) There was no possibility of me being able to continue to employ Miss Noble and the other three qualifying staff on the same hours which they had previously worked. I had already had to close one of the outlets.

(k) Miss Noble was not unfairly dismissed. She was dismissed for reason of redundancy by reason of her having volunteered for redundancy.

(l) On reflection, the situation was highly stressful. I was unprepared for her formalising the meeting. In retrospect I should have stopped the meeting at that point and said that I would investigate the question of years of service and then revert with figures and at that point if necessary reconvene. But the claimant pressed me to continue and we did.

(m) What was the principal reason for the claimant's dismissal? She was dismissed for reason of redundancy. There was genuine redundancy existing. I had already closed one venue and was working myself for 4/5 days per week in the business and therefore, only needed to cover 2/3 days per week.

(n) Redundancy is a (potentially) fair reason.

(o) Was it voluntary or compulsory? My position is that the claimant confirmed that she was volunteering for redundancy at the meeting of 18th of August and I accepted that in my email of 24th of August when I confirmed that she would be made redundant.

(p) Had the claimant not volunteered a requirement for compulsory redundancies would have arisen and, following a selection process I believe that the claimant, would have been made redundant.

(q) I believe that I acted reasonably in all the circumstances which were particularly stressful and which I was worried about surviving. With hindsight, I should have stopped the meeting when she formalised it and reconvened later. The meeting

however became unpleasant because of the claimant's reaction to my confirming that she didn't have a right to pay in lieu of notice and that she would have to work her notice if she wanted to be paid for it.

(r) Regarding the breach of contract claim, I note that Miss Noble has conceded that her working hours were varied by mutual agreement which was recorded in the emails of 9th and 10th of January 2019 which appear at page 42 in the respondent's bundle and she is no longer insisting on her complaint of breach of contract.

(s) The 14 hours per year of overpayment which she received through payroll in consequence of the agreement was to be offset by a reduction in paid annual leave.

(t) The claimant actually worked 14.5 hours per week and not 16 and it was on that basis that I calculated her weekly wage for the purposes of both redundancy payment and her topped up furlough pay during the notice period; that is 14.5 (hours x 9 (pounds per hour) = £130.50 per week. The claimant, however, asserts that the weekly wage should be calculated on the basis of 16 hours per week, that is 16 (hours) x 9 (pounds per hour) = £144. Those were the positions adopted by each of us before yesterday and the case management carried out at the beginning of the Hearing. As confirmed then I agree that the claimant's monthly gross and net pay was £576 per calendar month as at the date of her dismissal and that her weekly pay for the purposes of calculating redundancy payment and pay in lieu of notice (or equivalent furlough topped up pay during the notice period, should be calculated by multiplying 576 (pounds per month) x 12 (months) and ÷ by 52 (weeks in a year). That results in the figure of £132.92 brought out in the calculation which was carried out during case management and I confirm

that I agree that the claimant's entitlement to redundancy payment and pay during notice period, should be calculated using a weekly wage of £132.92 value.

83. The respondent continued;

(a) This situation has been stressful for both parties and at the time the matter went to ACAS and they communicated with me, I was only aware of a dispute regarding the financial package that is whether it should be based on 14.5 hours worked per hour rather than 16 hours. At no time did she (the claimant) make a complaint pre Tribunal, that she had been unfairly dismissed.

(b) I was pleased that I was not put in a position where I had to make compulsory redundancies because I received two confirmed offers to accept voluntary redundancy one by the claimant and one by one other of the qualifying employees. Had one or other of them not volunteered however, I say that the claimant would have been selected for redundancy because she had made clear that she could not accept the only alternative which was to work for reduced hours. In those circumstances she would have been made compulsorily redundant and would have received the exact same payments as she did receive on the basis of her voluntary redundancy.

(c) The whole issue of unfair dismissal was only raised in the Employment Tribunal and in the ET1 form. No such complaint was communicated to me by ACAS during early conciliation, only a dispute about the value of the package.

(d) I say in the circumstances that I acted fairly. She (Ms Noble) wanted voluntary redundancy but she then appeared to change

her mind but only after I had accepted her offer to be made voluntarily redundant.

(e) Also, her position was that she did not want to work her notice period but was seeking alternative employment.

(f) These were inconsistencies in her position.

(g) She wanted all of the monies due to her to be paid by the 31st of August. In telling me that that was what she wanted she was effectively telling me that she was seeking her redundancy payment by that date. She had no right to payment in lieu of notice and had already made clear that she did not want to work her notice period so when she said that she wanted all payment by 31st August she could only have been referring to her redundancy payment.

(h) Having stated that she was anxious about contracting Covid she then did a U-turn, on the 29th of August and offered to work her notice. I had agreed to make payment to her by the 31st August of her redundancy payment but not pay in lieu of notice to which she had no entitlement.

(i) The dispute between us commenced at the meeting of 18th August. I was taken aback at the claimant's attitude to working her notice when she told me that while she accepted that technically she had no right to pay in lieu of notice and that she was obliged to work her notice, "*her heart would not be in it*". When I said to her (sarcastically) "*Well that's good for me*", she shrugged her shoulders and sneered at me.

(j) If the requirement to make compulsory redundancies had been confirmed then there would have been a selection process carried out. I believe that it would have taken no more than a

week including receiving input from the affected and qualifying employees and at the end of it, the claimant would have been amongst those selected for redundancy for the reasons amongst others, of her stating that the only other alternative, of working reduced hours, was unacceptable to her.

(k) In those circumstances, the claimant would have received notice of compulsory redundancy on the 25th of August as opposed to the preceding day the 24th of August. I had sent my initial email to all of the qualifying employees on the 12th of August and received substantive responses from the others on the 12th and 15th of August. The claimant had responded on the 14th of August suggesting that we meet as proposed by me in my email of 12th August.

(l) Regarding one other matter I believe that it would be valid to assert that a further sum should have been deducted from the claimant's final pay in respect of the recovery of an overpayment of paid annual leave entitlement as is set out in Appendix 3 "Monies received by Miss Noble" Form ET3 on page 33 of the respondent's bundle.

(m) The claimant's pro rata annual leave entitlement was 81.2 hours which converts to 1.56 hours per week against which the claimant received an overpayment which could/should have been made deducted back from her final pay. I accept that that deduction was not made. I accept that there has been no evidence before about this matter given in the course of the Hearing.

84. The claimant confirmed that she did not wish to exercise any limited right of reply.

Applicable Law

Claim for Damages for Personal Injury

85. The Employment Tribunal is not a court of common law with a universal jurisdiction. The Employment Tribunal is a statutory court and has jurisdiction to consider only those matters in respect of which Parliament has given it jurisdiction. The Employment Tribunal's jurisdiction to make awards of damages for personal injury including, hurt to feelings, is restricted to circumstances where that injury occurs in the context of the statutory delict of discrimination.

86. The Employment Tribunal does not have jurisdiction to consider the claimant's claim for damages for personal injury said to result from stress caused by the respondent's uncooperative attitude in the conduct of negotiations.

Breach of Contract Wrongful Dismissal

87. The claimant conceded in the course of the Hearing that the reduction in her working hours had been put in place by way of consensual variation of the terms and conditions under which her Contract of Employment was transferred (subject to the TUPE Regulations 2006) to the respondent. The claim for breach of contract and wrongful dismissal accordingly falls away.

Redundancy Payment

88. The occurrence of redundancy is defined within and regulated by the terms of section 139 of the Employment Rights Act 1996 which is in the following terms:-

> "***Redundancy***
>
> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local authority with respect to the schools maintained by it, and the activities carried on by the governing bodies of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

(7) In subsection (3) "local authority" has the meaning given by section 579(1) of the Education Act 1996."

89. The right of employees to receive payment from their employer of a statutory redundancy payment is prescribed in section 135 of the Employment Rights Act 1996 which is in the following terms:-

"***135 The right.***

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).”

The Amount of a Redundancy Payment

90. The formula for calculating the amount of redundancy payment to which an individual employee is entitled is set out in section 162 of the Employment Rights Act 1996 which is in the following terms:-

“***162 Amount of a redundancy payment.***

(1) The amount of a redundancy payment shall be calculated by—

(a) determining the period, ending with the relevant date, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for each year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

(4) F1

(5) F1

F1 S. 162(4)(5)(8) repealed (1.10.2006) by The Employment Equality (Age) Regulations 2006 (S.I. 2006/1031), regs. 1(1), 49(1), Sch. 8 para. 32(2) (with regs. 44-46, Sch. 8 para. 33)

(6) [F2Subsections (1) to (3)] apply for the purposes of any provision of this Part by virtue of which an [F3employment tribunal] may determine that an employer is liable to pay to an employee—

(a) the whole of the redundancy payment to which the employee would have had a right apart from some other provision, or

(b) such part of the redundancy payment to which the employee would have had a right apart from some other provision as the tribunal thinks fit,

as if any reference to the amount of a redundancy payment were to the amount of the redundancy payment to which the employee would have been entitled apart from that other provision.

(7) F4

(8) F4"

F2 Words in s. 162(6) substituted (1.10.2006) by The Employment Equality (Age) Regulations 2006 (S.I. 2006/1031), regs. 1(1), 49(1), Sch. 8 para. 32(3) (with regs. 44-46, Sch. 8 para. 33)

F3 Words in s. 162(6) substituted (1.8.1998) by 1998 c. 8, s. 1(2)(a) (with s. 16(2)); S.I. 1998/1658, art. 2(1), Sch. 1

F4 S. 162(7) repealed (15.12.1999) by 1999 c. 26, ss. 9, 44, Sch. 4 Pt. III para. 30, Sch. 9(2); S.I. 1999/2830, art. 2(2)(3), Sch. 1 Pt. II, Sch. 2 Pt. II (with Sch. 3 paras. 10, 11)

91. In terms of section 162(2) the appropriate amount of redundancy payment will be a sum equivalent to:-

(a) 1½ weeks' pay for each year of continuous employment in which the employee was not below the age of 41;

(b) 1 week's pay for each year of continuous employment (not within sub-paragraph (a) in which she was not below the age of 22, and

(c) Half a week's pay for each year of continuous employment not within either paragraphs (a) or (b) above.

A Week's Pay

92. The figure used will be the employee's week's pay as at the "calculation date". It is the gross amount (**Secretary of State for Employment v John Woodrow and Sons (Builders) Limited** [1983] IRLR 11). The sum is then

capped, if greater, at the statutory maximum which is increased in line with the Retail Prices Index on the 6th of April each year.

The Calculation Date

93. If an employee was dismissed without notice or less than their statutory minimum entitlement to notice under section 86 of the ERA 1996, the calculation date is the date on which their contract would have ended had statutory notice been given (section 226(5)(b) of the ERA 1996).

94. In all other cases the calculation date is the date on which working backwards from the relevant date, the employer would have to have given notice in order to comply with the employee's minimum statutory notice entitlement (*section 226(5)(c) and (6), ERA 1996*).

95. The method of working out a week's pay as at the calculation date is set out in sections 221-229 of the ERA 1996 which summarised provides:-

- That workers with normal working hours whose pay does not vary with the amount of work done are entitled to the "amount which is payable … if the [worker] works throughout his normal working hours in a week" (section 221(2), ERA 1996). In general, this means basic salary without any additional bonuses or other payments

- The worker has normal working hours but their pay varies according to the amount of work done (as with piece work) or the time of work (such as where the worker's pay is dependent on shift patterns that vary from week to week) their week's pay is based on their average pay during those normal working hours over the previous 12 weeks, including any "commission or similar payment which varies in amount" (sections 221(3) and (4) and 222, ERA 1996)

- If there are no normal working hours, a week's pay is simply calculated as an average of all the sums earned in the previous

12 weeks in respect of which remuneration was payable [section 224, ERA 1996]. This would include any overtime payments and commission.

Voluntary Redundancy

96. Before the consultation process in respect of compulsory redundancy begins an employer, following good practice may consider asking for volunteers for redundancy. There is no obligation on the employer to consider offering voluntary redundancies, but it is sensible to do so in order to minimise the effect on morale of compulsory redundancy, to keep control of the process (and to ensure that the employer does not lose key staff). While the employer is expected to consider all requests for voluntary redundancy it is not obliged to accept all applications for voluntary redundancy. Voluntary redundancies are alternatives to compulsory redundancy but where offers to volunteer for redundancy are made, accepted and implemented they still amount to redundancies and, in accepting such an invitation and volunteering for redundancy employees are volunteering to be dismissed by the employer by reason of redundancy.

Unfair Dismissal

97. The statutory right not to be unfairly dismissed is regulated by the terms of the Employment Rights Act 1996 section 98. ("ERA"):-

(a) Section 98 of the ERA is in the following terms:-

"**98 General.**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[F1(ba) is retirement of the employee,**]**

F1(c) is that the employee was redundant, or

(c) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

[F2(2A) Subsections (1) and (2) are subject to sections 98ZA to 98ZF.**]**

F2(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

[F3(3A) In any case where the employer has fulfilled the requirements of subsection (1) by showing that the reason (or the principal reason) for the dismissal is retirement of the employee, the question whether the dismissal is fair or unfair shall be determined in accordance with section 98ZG.**]**

F3(4) **[F4** In any other case where**]** **F4** the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

F5(5). . . . . .

(6) **[F6**Subsection (4)**] [F7**is**] F7** subject to—

(a) sections **[F8**98A**] F8** to 107 of this Act, and

(b) sections 152, 153 **[F9**, 238 and 238A**] F9** of the **M1** Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."

(b) The ACAS Code of Conduct for Disciplinary and Grievance Procedures expressly excludes redundancies. Notwithstanding, as in any dismissal, an employer requires to act reasonably in all the circumstances if the dismissal, for reason of redundancy which is a potentially fair reason, is to be regarded as fair in terms of section 98(4) of the Employment Rights Act 1996.

Discussion and Disposal

98. Upon the Findings in Fact made and on consideration of parties submissions the Tribunal disposes of the Issues as follows:-

The Reason for Dismissal

The Tribunal was satisfied on the evidence, of the respondent which the Tribunal accepted as both credible and reliable and which was not seriously challenged in cross examination, together with that of

the claimant that a genuine redundancy situation existed within the respondent's business and that the claimant was dismissed for reason of redundancy, which is a potentially fair reason.

Was the claimant dismissed by reason of voluntary or of compulsory redundancy

99. The Tribunal has found in fact that although the respondent did not expect her to do so at an initial meeting on 18th August 2020, the claimant confirmed in the course of that meeting that she volunteered to be dismissed for reason of redundancy and that the respondent subsequently accepted that offer and agreed to dismiss the claimant by reason of voluntary redundancy, in her email of 24th August 2020. Although the claimant, subsequent to the respondent's acceptance, implied in initial correspondence that she had not actually volunteered, she confirmed in subsequent correspondence that she had done so. The Tribunal was accordingly satisfied, on the evidence and has found in fact, that as at the Effective Date of Termination of her Employment, the claimant was dismissed for reason of voluntary redundancy.

In dismissing the claimant did the respondent follow a fair procedure or alternatively, in the circumstances pertaining, was the procedure followed flawed such as to taint the dismissal with unfairness.

100. The claimant relied upon the following matters in support of the contention that the respondent had failed to follow a fair procedure in dismissing her for reason of redundancy;-

(a) The respondent did not follow the ACAS Code of Conduct for Disciplinary and Grievance on Disciplinary Grievance

(b) The respondent did not operate a transparent and fair selection process in deciding which employees to dismiss by reason of redundancy

(c) The respondent was not in a position at the meeting of 20th August 2020 to provide her with detailed financial information (the amount of the redundancy payment which she would receive and the basis of its calculation) at the meeting of 20th August;

(d) The period of time between the initial meeting of 20th August and the date of the respondent's confirmation that the claimant would be made redundant was too short; and

(e) That the respondent had declined the claimant's requests for further face to face meetings after her acceptance of the claimant's offer to be dismissed by reason of redundancy adopting, in the alternative, to carry on communication by email.

101. The ACAS Code of Conduct upon which the claimant seeks to rely, expressly excludes its applicability to redundancies.

102. In exploring with affected and qualifying employees prior to confirming a requirement for compulsory redundancies, alternatives to compulsory redundancies, the respondent received three offers to work reduced hours and two offers, of which the claimant's was one, to be dismissed by reason of redundancy. The combination of those offers and the respondent's acceptance of them avoided completely the need to make any compulsory redundancies. The respondent was in a position to and did accept both the claimant's and the other volunteering employee's offers to be dismissed by reason of redundancy and thus, no requirement to select either of them by competitive selection process arose.

103. In light of the manner in which the respondent perceived the claimant's otherwise unexplained statement that her heart would not be in working her notice coupled with the request that she nevertheless be paid for that period, as an expression of disinterest in the difficulties with which the respondent and fellow employees were having to contend, and, in light of what appeared to be the claimant's initial assertion that she had not volunteered for redundancy at the meeting but only expressed an interest in the possibility of doing so, the respondent determined that it would be preferable, including for reasons of providing an accurate record, if such further discussions, about the only issues focused by the claimant namely the number of years of continuous service with which she was to be credited and the value of a week's pay to be used for the purposes of calculating her redundancy payment, should proceed by way of email correspondence rather than by face to face meeting. The Tribunal was satisfied that it was not unreasonable in those circumstances for the respondent to decline to meet further with the claimant on a face to face basis while continuing to engage with her fully by way of email; particularly in the context of the Covid pandemic and of the claimant's subsequently and in the course of that correspondence expressed concerns about contracting Covid were she to return to the workplace in order to work her notice.

104. There was no legal requirement upon the respondent to meet face to face as opposed to engaging with the claimant by way of email.

105. While the respondent had not anticipated that the claimant would volunteer for redundancy at the initial meeting of 18th August, the claimant having done so, as the Tribunal has found in fact she did, and the respondent having received responses from all of the other affected employees an acceptance of which by her would avoid the need for any compulsory redundancies, and being in a position to provide both the claimant and the other volunteering employee with a confirmation of the amount of their redundancy payment and the basis upon which it was calculated (albeit that a dispute continued for a period as to the applicable number of years of continuous service and a

dispute emerged and continued in respect of the calculation of a week's pay) the Tribunal considered that the respondent did not act unreasonably, in the circumstances, in moving to accept the offers of voluntary redundancy when she did with a view to ensuring that the relevant periods of notice could run during what was then anticipated to be the remaining period of the operation of the Furlough Scheme, in order to maximise the financial benefit to employees.

106. Separately, in circumstances where the claimant had offered to be dismissed for reason of redundancy it was open to the respondent to accept that offer unless previously withdrawn and she did not act unreasonably in doing so when she did, the acceptance by her of both offers being necessary to avoid the requirement to make compulsory redundancies.

107. At the time of accepting the claimant's offer to be made voluntarily redundant and in so dismissing the claimant for reason of redundancy the respondent acted reasonably in all the circumstances of the case and in terms of section 98(4) of the Employment Rights Act 1996, in treating the claimant's offer to be dismissed for reason of redundancy as a sufficient reason for so dismissing her and, in light of the size of the respondent's undertaking and the equity of the case in all the circumstances pertaining, the claimant's dismissal for reason of redundancy, which is a potentially fair reason, falls to be regarded as fair in terms of section 98(4) of the Employment Rights Act 1996.

108. The Tribunal was satisfied, in all the circumstances of the case that the procedure followed by the respondent in accepting the claimant's offer to be dismissed for reason of redundancy and in so dismissing the claimant was not defective such as to taint the dismissal with unfairness.

109. As the Tribunal has held the dismissal to be fair in terms of section 98(4) of the ERA, the requirement to consider whether the claimant would have been dismissed in any event for reason of redundancy had a fair procedure been followed, falls away.

110. The residual issue remaining between the parties related to the value of a week's pay to be utilised for the purposes of calculating respectively the claimant's redundancy payment and the amount of the payment to be made to her by agreement with the respondent in respect of the period of her notice during which she remained on furlough and, by agreement with the respondent, to be a sum equivalent to 100% of her weekly wage in that period.

111. The applicable statutory provisions direct the use of an employee's relevant gross weekly wage for the purposes of calculating entitlement to a statutory redundancy payment and, net weekly wage for the purposes of calculating pay in lieu of notice. In the case of the claimant, because of the number of hours worked by her, there is no difference between the value of the gross and the net weekly wage.

112. Where the wage actually paid to the claimant on a weekly basis is clear, on the face of her payslips and is established, there is no requirement for the Tribunal to look behind the payslips. Indeed, the circumstances in which it will be appropriate for it to do so will be relatively few and may, for example, arise because of particular circumstances including, for example, an allegation that one or other or both of the parties were operating a scheme designed to defraud Her Majesty's Revenue and Customs of appropriate PAYE or National Insurance contributions.

113. In the instant case it was not in dispute and the Tribunal has separately found in fact that as at the Effective Date of Termination the claimant was paid for 768 hours per year at an hourly rate of £9 per hour. The value of the claimant's gross and net weekly wage for the purposes respectively of calculating her entitlement to statutory redundancy payment and, by concessionary agreement with the respondent a sum equivalent to the pay which she would have received during her notice period had she worked it is accordingly calculated by 768 (hours) ÷ 52 (weeks) x 9 (pounds per hour) which equals £132.92 per week.

114. Utilising the gross weekly wage of £132.92 the claimant's entitlement to a statutory redundancy payment is a function of 1½ week's pay for each year of continuous employment in which the employee was not below the age of 41. In the case of the claimant that is 1.5 x 132.92 x 10 which equals £1,993.80.

115. In respect of the payment which parties were agreed would be made to the claimant in an amount equivalent to the pay which she would have earned had she worked her notice the statutory entitlement is one week's pay for each year of continuous service, in the case of the claimant that is 132.92 x 10 which is equivalent to £1,329.20.

116. Against those entitlements it is a matter of agreement between the parties that the respondent has already paid to the claimant and the claimant has accepted in partial satisfaction, a sum of £1,957.50 in the name of a redundancy payment. It is further a matter of agreement between the parties that the respondent has already paid to the claimant and the claimant has already received in partial satisfaction, the sum of £1,305 in the name of the agreed notice equivalent payment.

117. In respect of entitlement to statutory redundancy payment the respondent is accordingly owing to the claimant and shall pay to the claimant the sum of £36.30 (THIRTY SIX POUNDS AND THIRTY PENCE) and, in respect of "notice pay" the sum of £24.20 (TWENTY FOUR POUNDS AND TWENTY PENCE), and the Tribunal has accordingly entered Judgment in favour of the claimant in those respective amounts.

118. In the course of her submissions the respondent's representative made reference to the fact that in reciprocal agreement to the respondent agreeing to pay the claimant at her hourly rate of £9 for 768 hours per year in circumstances where the claimant was in fact only working 754 hours per year, the parties had agreed that the 14 hours per year, in respect of which payment was made to the claimant but for which she did not work, would be adjusted against the claimant's paid annual leave entitlement and or any payment made in lieu of untaken entitlement. On that basis she submitted that it might be appropriate to adjust downwards the value of the gross and

net weekly wages for the purposes of calculating entitlement to redundancy payment and "notice pay".

119. Leaving aside the fact that the evidence actually led before the Tribunal was likely to have been insufficient to support the making of Findings in Fact in that regard, the Tribunal was not otherwise persuaded by that submission. While, let it be assumed that evidence, sufficient to support Findings in Fact that firstly established that agreement and secondly the value of any "delta" in relation to it outstanding as at the Effective Date of Termination and leaving aside the legitimacy of any such arrangement entered into for the purposes of representing to HMRC and to the relevant Benefits Authority that the claimant was being paid at one rate when in fact she was being paid at a lower rate, or again the extent to which it is open to parties to contract out of statutory entitlement to paid annual leave, and while it may be the case that the claimant undertook by way of reciprocation, to take a reduced amount of paid annual leave and if it be the case that an overpayment in that regard had been made to the claimant it might potentially have been deducted, in terms of section 14 of the Employment Rights Act 1996, from the claimant's final wage, as opposed to from her redundancy payment, no such deduction was made; and it is not open to the respondent to seek to reduce the claimant's redundancy payment in retrospect in that regard by way of compensation or "set off". No such issue was before the Tribunal for determination.

Employment Judge: Joseph d'Inverno
Date of Judgment: 02 June 2021
Entered in register: 02 June 2021
and copied to parties

I confirm that this is my Judgment in the case of Noble v Jill Brown trading as Nice Stuff and that I have signed the Order by electronic signature.