EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms R Garnett	**v**	**1. Rothalcourt Limited** **2. Martin Daniels**

Heard at: Watford (by CVP) **On:** 7 and 8 September 2020

Before: Employment Judge Milner-Moore
Members: Mr R Eyre
Ms E Jones

Appearances:

For the Claimant: In person
For the Respondents: Ms Y Montaz

CORRECTED LIABILITY JUDGMENT

1. Unfair dismissal: The claim of unfair dismissal succeeds **against the first Respondent.** The claimant was unfairly dismissed by the first Respondent contrary to section 98 of the Employment Rights Act 1996.

2. Redundancy: The claim for a statutory redundancy payment succeeds **against the first Respondent**.

3. Direct age discrimination contrary to section 13 of the Equality Act 2010: The claim of direct age discrimination **against the first and second Respondents** is not upheld and is dismissed. **The first and second Respondents** did not, in dismissing the claimant, discriminate against her on grounds of age.

4. Unlawful deduction from wages: The claim for unlawful deduction from wages succeeds - **the first Respondent** made a deduction from the claimant's wages in in failing to reimburse the claimant for eye test and prescription charges.

5. Breach of contract: The claim for breach of contract **against the first Respondent** succeeds - the claimant received less than her statutory notice entitlement on dismissal.

LIABILITY REASONS

1. This case was listed for a two-day hearing to consider issues of liability and remedy. The hearing took place via the Cloud Video Platform. I took steps

at the outset to ensure that all parties were able to participate via the platform. There were occasional interruptions to the hearing and some issues with the connection but we were able to resolve those difficulties.

Claim and issues

2. The claims being brought and the issues for determination were identified at a case management discussion before Employment Judge Tynan on 28 January 2020. There was, at that time, a dispute as to whether the claimant had sufficient length of service to bring claims of unfair dismissal, and for a statutory redundancy payment, the claimant having been employed by Northampton Laser Clinic (NLC) before working for the first Respondent. That dispute was resolved during the course of this hearing. The respondents accepted that NLC and the first Respondent were "associated employers" as defined at section 231 Employment Rights Act 1996. The respondents also accepted that there had been no interruption of continuous service when the claimant's employment moved from NLC to the first Respondent. It was accepted that the claimant had ceased work for NLC on 31 May 2017 and began work for the first respondent on 1 June 2017 and that her contract of employment with the first respondent erroneously stated her continuous service to have begun on 1 August 2017.

3. The liability issues which arose for determination as part of this hearing were as follows:

Unfair dismissal

3.1 *What was the principal reason for dismissal and was it a potentially fair one by reference to sections 98(1) and (2) of the Employment Rights Act 1996?* The respondent asserts that the reason for dismissal in this case was redundancy which is a potentially fair reason for dismissal.

3.2 *Was the dismissal fair within the meaning of section 98(4) of the Employment Rights Act ? Did the respondent act within the band of reasonable responses in deciding to dismiss and in the processes followed prior to dismissal?* A fair redundancy process would usually require: warning and consulting regarding redundancies, fair selection processes (including identifying the appropriate pool of employees from which to select and making that selection by reference to proper criteria) and considering whether redundancy could be avoided by offering suitable alternative employment.

3.3 Would it be appropriate to adjust compensation to reflect the likelihood that the claimant would still have been dismissed even had a fair process been followed?

Redundancy

3.4 It followed from the concession made as to length of service that the claimant did in fact qualify for a statutory redundancy payment in the event that redundancy was established as a principal reason for dismissal.

Direct age discrimination

3.5 *Was the claimant, in being dismissed, treated less favourably by the respondents because of her age or by reference to the protected characteristic of age generally?* Mr Daniels has been named as a respondent in respect of the age discrimination claim on the basis that he acted as the first repondent's agent in taking the decision to dismiss and so may be liable under the Equality Act, section 110. Under the Equality Act 2010 the burden of proof is on the claimant to show facts from which a tribunal could conclude that discrimination may have occurred. If the claimant succeeds in doing so, then the burden will shift to the respondent to show that there was a non-discriminatory reason for the treatment in question. The claimant compared herself with an older colleague who performed the same role and was not selected for redundancy. The claimant alleged that she was told that the older colleague would be retained because as a person over 60 she paid no National Insurance contributions.

Unauthorised deduction from wages

3.6 *Has the claimant received less than the wages properly payable to her?* The claimant claims £70 reimbursement for the costs of an eye test and prescription which she says the respondent agreed to pay to her.

Breach of contract

3.7 The claimant says that she did not receive her full notice pay.

Documents and issues during the hearing

4. We received a bundle of documents from the claimant and some additional supplementary material from the respondent which was inserted as document 37 onwards. We also received witness statements from the claimant and from Mr Daniels and heard evidence from both.

5. I should record certain matters which were raised during the hearing. The respondent made an application to admit some late evidence: a timesheet and some witness evidence from the respondent's bookkeeper, Ms Boniface. This was intended to confirm the respondent's position that the claimant had worked on a casual basis from 26 June 2017 onwards before formally being employed on 1 August. I refused the application to admit evidence from Ms Boniface. There was no good explanation for the delay in producing this material. The respondent had been on notice of the claimant's case that she had been employed throughout June and July 2017 for a considerable time. No statement had been drafted for Ms Boniface and it was being proposed that we should adjourn for a short time to enable a witness statement to be prepared which would have caused delay. We considered that the claimant would have been prejudiced if late evidence were allowed as she would have little time to process or respond to that evidence. We recognised that there would be prejudice to the respondent in not having the benefit of that evidence but considered that the respondent was, in that respect, the author of its own misfortune in failing to take timely steps to prepare its case and to comply with the tribunal's directions regarding exchange of witness statements.

6. An issue also arose as to whether a document in the bundle was without prejudice. However, on reading the document and on discussing with Mr

Daniels and his representative, it was accepted by the respondents that it was not in fact a without prejudice document. It merely recorded notes prepared by Mr Daniels in response to the claimant's appeal letter.

7. At various points Mr Daniels and the respondent's representative expressed concerns that the claimant's face was shadowed due to the lighting arrangements in the room in which the claimant was sitting. None of the tribunal panel experienced the same difficulty in seeing the claimant's face and the claimant attempted to adjust the lighting to the best of her ability. This did not impact on our ability to assess the claimant's evidence or on the conduct of the hearing more generally.

8. Perhaps inevitably because this was a video hearing and it is more difficult to determine when people have finished speaking, there were occasional interruptions and cross talking by participants. Mr Daniels in particular, felt that on a couple of occasions he had been interrupted by the claimant. I reminded the parties of the importance of not speaking across one another and of leaving adequate time for a response. Mr Daniels was offered the opportunity to reiterate any evidence that he considered to have been interrupted.

9. Finally, I should record that Mr Daniels asked to address the panel in closing submissions, in addition to closing submissions being made by his representative. This was because he wished to explain his own and Mr Bennett's (the owner of NLC and Rothalcourt) professional backgrounds, in response to what he considered to be attacks on his integrity. We did not consider this to be appropriate as it did not appear to fall within the proper scope of closing submissions, amounting to essentially giving new evidence. We also considered that Mr Daniels was represented and that Ms Montaz could make any necessary submissions. We allowed time for Mr Daniels and Ms Montaz to confer before she began her closing submissions just to ensure that she had an opportunity to take proper instructions and to make any points that Mr Daniels wished to have made on his behalf.

The facts

10. We made the following factual findings.

11. On 1 July 2015 the claimant began employment with NLC Limited, a company of which a Mr Bennett was the owner. The business of NLC was the provision of laser hair removal services at premises owned by Mr Bennett. The claimant was working as a receptionist booking in clients laser hair removal and having some responsibility for administrative matters, such as the maintenance of the first respondent's website and blogging.

12. In September 2015 Mr Daniels joined NLC Limited, working as a manager of NLC and of various other business interests of Mr Bennett's, acting as his agent and holding Mr Bennett's power of attorney.

13. During 2017, NLC was placed in voluntary liquidation. As a result, the claimant's employment by NLC terminated on 31 May 2017. The claimant, up to that point, had been performing reception and administrative functions. The claimant's evidence, which we accepted, was that she had continued

performing the same functions after 31 May 2017 working for the first respondent at the same premises.

14. It was originally suggested by the respondents that there had been an interruption in the claimant's continuous service during June and July 2017 both because the claimant had not been continuously employed and because there had been a change of employer from NLC to the first respondent. However, the respondents now accept that NLC and the the first respondent were associated companies and that the claimant had begun working for the first respondent immediately after her employment terminated with NLC and that she had worked during June and July before signing her employment contract with the first respondent on 1 August 2017.

15. Mr Daniels managed the first Respondent on Mr Bennett's behalf, working with Ms Boniface, who undertook bookkeeping. There were three reception staff: the claimant (working 15 hours a week with overtime of up to 4 hours a week), an employee of long standing called Jane (working 26 hours a week with an option of 3 hours overtime a week) and a third person, Simone (working 15 hours a week with overtime of up to 4 hours a week). Simone was Mr Daniel's partner and provided assistance to him with other business activities.The claimant was 44, at the relevant time, Jane was in her 60's and Simone was in her mid-40s. In addition, a number of laser practitioners worked for the first Respondent. These individuals had previously been directly employed by NLC but were retained by the first Respondent as self-employed practitioners.

16. The first Respondent had a redundancy policy which was produced to us in evidence and which can be found as document 11 on the claimant's list. It is relevant to record some of the terms of the redundancy policy. Paragraph 5 quotes:

> "Where there is a possibility that redundancies will be made the employer will consult with all affected employees individually. First the employer will look at steps that may e taken to avoid compulsory redundancy such as.
>
> (a) Whether agency staff self-employed contractors and consultants can be used less."
>
> …….
>
> "(e) possible short time working job sharing or other flexible working arrangements.
> …..
>
> (g) asking for applications to retire early or volunteer for redundancy."
>
> "7. When it is not possible to avoid making compulsory redundancies the employer will meet with all affected employees to advise of the reasons for this and the number of jobs at risk of redundancy.
>
> 8. The employer will consult and advise of the measures being looked at to avoid or reduce the number of redundancies and may ask employees for suggestions.
>
> 9. The employer will consult on the procedure that will be followed and the pools for redundancy if relevant and selection criteria that will be applied and will confirm this to the affected employees in writing.

….

11. Where selection of employees for redundancy is necessary the criteria used to select those employees who will potentially be made redundant will be objective transparent and fair and based on the skills required to meet the employer's existing anticipated business needs. Where there is more than one employee in the selection pool each potentially redundant employee will be scored against the criteria and those provisionally selected based on their score will be informed in writing of this.

…

13. Each provisionally redundant employee will be invited to a meeting to discuss their provision selection for redundancy where they will be individually consulted. No final decisions about redundancies or the exact employees to be made redundant will be made at this stage.

14. Employees are allowed to attend individual redundancy consultation meetings with a Trade Union representative or colleague and will have a reasonable time to prepare before the meeting. At the meeting each employee will individually discuss this cause if any. The proposal to select them for redundancy and the terms of the redundancy and employees will have the chance to make comments about their scores if any for the employer to consider. If there are other relevant available roles these may be discussed.

15. Where selection for redundancy is confirmed by the decision maker employees selected for redundancy will be invited to a further meeting… at this meeting it will be confirmed that the employee has been selected for redundancy and after this meeting the employee will be given notice of termination of employment and written confirmation of the payments they will receive. Employees will be given the opportunity to appeal against this decision and will be advised if how to do so when their redundancy is confirmed in writing.

16. If an employee chooses to appeal, they will be invited to an appeal hearing usually held by someone senior to the person who held the previous meetings."

17. The policy also goes on to say that there will be no discrimination by reference to any protected characteristic in making redundancy decisions.

18. On 25 February 2019, Mr Daniels wrote to the claimant to advise her of a potential redundancy situation stating:

> "We have reviewed the business viability including the current employment arrangements for reception staff. The opening hours are to be changed taking effect on 1 March 2009. This will entail reduction in staff form the current three to two reception staff. Unfortunately the business is too small to be able to offer employment in an alternative role and therefore it will be necessary to make one member of staff redundant. By this letter I am offering the opportunity of voluntary redundancy to all of the reception staff. In the event that no one volunteers the option of compulsory redundancy will be adopted."

19. The claimant was given until Wednesday 27 February 2019 to express an interest in voluntary redundancy.

20. At or around that time a revised rota was produced which showed the reduction that the respondent was proposing in reception hours. This showed that the receptionist rota would require two receptionists, between them working a total of 40 hours a week. The previous rota had required 51 receptionist hours per week.

21. Mr Daniels suggested that his letter of 25 February 2019 was erroneous in referring to three individuals because there were only two employed receptionists, the claimant and Jane. However, it is clear that there were three individuals working as receptionists: Simone, the claimant and Jane. It was difficult to follow Mr Daniels's evidence as to Simone's status and whether she was employed, or self-employed, and whether she was paid solely by him, or also paid by the first respondent. We have had no evidence to show exactly what her employment status was or who bore the costs of the provision of her services to the first respondent. We concluded that it was likely that she provided services to the first respondent and to other businesses in which Mr Daniels had an interest but was not employed by the first respondent. However, we did not consider it plausible that the costs of her services were borne entirely by Mr Daniels given that she spent a significant amount of time performing reception duties for the first respondent.

22. After the issue of the letter of 25 February 2019, the claimant and Mr Daniels had a number of discussions regarding the situation. The claimant has produced typed up notes which she says she prepared from handwritten notes that were made at the time. However, these handwritten notes have not been produced. The respondent disputes these notes and has described them as a fabrication. We make the following general findings regarding these typed notes. We accept that the claimant probably made some notes at or around the time of each of these discussions and that these notes were then subsequently typed by her. The notes were not a verbatim record of the discussions and are not comprehensive and may not reflect the entirety of those discussions. However, in so far as they record certain comments made by Mr Daniels, we considered that the notes were likely to be broadly correct. This was because they were consistent with what the claimant has said in subsequent documents, including in her letter of appeal.

23. The claimant has stated that, on 25 February 2019, she had a discussion with Mr Daniels in which he said, "I'm asking for volunteers at the moment but if no one offers I'll put names into a hat. Have a think about it and let me know". We considered it likely that he did make such a comment.

24. On 26 February 2019, the claimant wrote to Mr Daniels asserting that there were only two receptionists who were employees of the first Respondent. She then had a meeting with Mr Daniels on 27 February 2019 and her notes of that meeting appear as document 2 in the tribunal's bundle. During that meeting the claimant contended there were only two receptionists who were employed by the first Respondent and that the redundancy policy suggested that any agency, self-employed, and consultancy staff would be let go before compulsory redundancies were considered. On that basis she considered that Simone should be let go. The claimant proposed as an alternative to redundancy each of the three receptionists should work a slightly shorter week. Mr Daniels was defensive about being challenged in relation to Simone's position and made a comment that Jane had already been told to

start working to the new rota which would apply from Friday 1 March 2019.

25. The first respondent has produced a "selection criteria document" which is dated 27 February 2019, and which purports to record a discussion said to have taken place between Mr Bennett, Ms Boniface and Mr Daniels on that day. The document sets out a number of section criteria: customer care role function, accuracy, team player, loyalty, honestly, flexibility, length of service. It contains two columns with the initials RG and JH with scores for each individual against each criteria. Mr Daniel's evidence was that this document records a set of redundancy selection criteria and the scores attributed to the claimant and Janes.

26. The claimant disputes the veracity of this document and says that it was created after the event. We considered that there may have been some discussions between Mr Daniels, Mr Bennett and Ms Boniface on 27 and 28 February resulting in a decision to retain Jane and Simone. However, we did not consider it likely that the respondent had generated this set of redundancy selection criteria or formally subjected the candidates to a scoring process. We considered it likely that the document was drawn up some time after the event and our reasons for making that finding are as follows:

    34.1 The redundancy policy required the respondent to consult on proposed selection criteria, to apply them to the pool of potentially redundant employees and then to inform the employees if the outcome of the process was that they had been provisionally selected for redundancy. However, the document recording the selection criteria and the scores generated was not referenced in any of the discussions that took place with the claimant at the time.

    34.2 The respondent did not make any reference to the document or the operation of a selection process when responding to the claimant's appeal, although the failure to operate a fair selection process with proper selection criteria was a point that was squarely raised by the claimant in her appeal letter.

    34.3 The ET3 makes no reference to the first respondent having operated a selection process by reference to selection criteria.

    34.4 Mr Daniels' witness statement made no reference to this document, or to the operation of a selection process by reference to specified selection criteria. In seeking to explain the process that he went through in deciding who should be made redundant, Mr Daniels said little more than that it had been very difficult, and he had discussed it with Mr Bennett and Ms Boniface and they had assisted him reaching a decision. He did not suggest that there had been a set of selection criteria or explain how these criteria had been chosen or how each individual's scores had been arrived at.

35 On 28 February 2009 the claimant and Mr Daniels had a further discussion. The claimant asked whether she was being made redundant. Mr Daniels replied that he did not think that the claimant's proposal of splitting shifts was workable. He said that he was thinking of just puling names out of a hat

because he could not decide or that he might just close the entire business. He said that he wanted to speak to Mr Bennett later that day. He said that Simone needed to earn more money and stand on her own two feet. He concluded by saying, "You cost me the most as Jane Hilton doesn't pay National Insurance contributions. It's just not going to work, and I'll just put the names into a hat and pick one out."

36 We considered that at some point on 27 or 28 February 2019 Mr Daniels and Mr Bennett had a discussion and reached the decision that Jane would be retained on account of her long service and her friendship with the bookkeeper, Ms Boniface, and that Simone would be retained because she was Mr Daniels' partner. We did not consider it likely that Jane's age featured as a motivation in the decision to retain her and dismiss the claimant. Her age did not impact on the costs incurred by the first Respondent in retaining her as an employee. Although National Insurance contributions were not payable by Jane because she was over pension age, that made no difference to the employer's obligation to pay National Insurance contributions. So, we considered it likely that the comment recorded by the claimant was simply a thoughtless comment made off the cuff by Mr Daniels rather than representing part of the decision making.

37 That analysis on our part is consistent with the way that matters are put at paragraph 28 of the claimant's own witness statement where she says, "I knew without hesitation that I would be made redundant as the respondent's partner Simone was one of the other receptionists (who is self-employed)." Mr Daniels would not want to make her redundant as this would "reduce their household income and the other receptionist had been there a very long time virtually since the beginning of the company existed (NLC Limited) and was a very close friend of the bookkeeper".

38 On 28 February 2019 the claimant was given a letter by Mr Daniels making her redundant with immediate effect. Because the respondent was at that time under the impression that the claimant did not have sufficient length of service to qualify for a statutory redundancy payment, she did not receive one. The claimant asked for an explanation of why she had been made redundant in a subsequent discussion with Mr Daniels and was told that it was Mr Bennett's decision.

39 On 22 March 2019 the claimant appealed on the basis that the grounds for redundancy selection were unfair and the respondent asked that she provide a more detailed explanation of the unfairness.

40 On 27 March 2019 the claimant wrote providing further detail. In the letter she asserted that she had continuous employment from 2015 and she identified a number of respects in which the respondent had failed to follow its own polices and/or a fair redundancy process. In particular, she stated that there had been no reduction in the use of self-employed staff, that there had been a refusal to consider job sharing, that no selection criteria had been applied by the respondent, there had been no meeting to discuss selection criteria, that the process had been prejudged (as Jane had already been instructed to attend on the new shifts even before the claimant was notified of the redundancy decision) and she asserted that the process was discriminatory on grounds of age because of the comment referenced above.

41 On 29 March 2019, the respondent sent a reply disputing the claimant's assertions and asking her to state simply what she wanted. The respondent did not operate an appeal process and made no attempt to convene an appeal hearing.

42 In February 2020 the respondent wrote to the claimant seeking reimbursement for £3,540 in respect of laser treatments that the claimant had undergone during the period of her employment with the respondents NLC and Rothalcourt. The claimant replied to say that she had been advised when she began work that this was a perk of her employment and that her understanding was that she could have such treatment free of cost. She stated that others had also received such treatments free of cost. This was permitted on the basis that it would enable her to explain to potential customers what it was like to undergo laser hair removal and so on.

43 The respondent separately seeks recovery of these sums in the County Court and we make no findings about whether or not it has any entitlement to that money. The relevance of this now is that the respondent relies on this to say that, had the claimant not been dismissed for redundancy, she would inevitably have been fairly dismissed for gross misconduct when this came to light. It is necessary for us to consider whether there is evidence to suggest that the respondent could fairly have dismissed the claimant for gross misconduct in respect of this matter.

44 We accepted the claimant's evidence that she genuinely believed free laser treatment to be a perk of her employment for the following reasons. We consider it implausible the claimant would have been undergoing unauthorised treatment for so long, and it is apparent from the documents that she underwent a number of sessions, without this coming to the attention of anyone with managerial authority. We consider it likely that there was an accepted practice that members of staff could have laser treatment for free. Mr Daniels has asserted that the claimant concealed her treatments, that others did not undergo such treatment and that the treatments were not a perk of employment. He stated that he had conducted a detailed investigation into this matter. However, no documents relating to that detailed investigation have been produced. For example, one might expect to have seen the treatment sheets, notes of investigative interviews with other staff members and evidence from the bookkeeper to explain how these matters came to light and had been concealed previously. No such evidence was produced.

45 The unauthorised deduction from wages complaint relates to the first respondent's failure to reimburse the claimant for the costs of an eye test and prescription glasses in the sum of £70. We accept the claimant's evidence that she was told by Ms Boniface that she would be reimbursed for these charges. We have had no evidence from the respondent to suggest that this was not said to her. The respondent disputes that the claimant was a DSE user and so entitled to be reimbursed for these costs. Irrespective of whether or not that is the case, it is clear that there was an agreement on the part of the first respondent that the claimant should be reimbursed for this charge.

The law

Unfair dismissal – section 98 Employment Rights Act 1996

46 It is for the employer to show the reason (or if more than one, the principal reason for dismissal) and that it is either a reason falling within section 98(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. Redundancy is a potentially fair reason for dismissal. If the employer shows a potentially fair reason for dismissal the tribunal is required to consider, in accordance with section 98(4) whether the dismissal is fair.

> "98(4) The determination of the question whether the dismissal is fair or unfair having regard to the reasons 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."

The Tribunal is required to consider whether the decision to dismiss and the process followed prior to dismissal fell within the range of reasonable responses open to a reasonable employer. It is not the role of the tribunal to substitute itself for the employer and to consider what it would have done had it been the decision maker.

Section 123(1) of the Employment Rights Act 1996

Where an individual is found to be have been unfairly dismissed then the compensatory award is to be set at

> "*such amount as it considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal so far as that loss is attributed to action taken by the employer."*

47 Consequently, a Tribunal may reduce the compensation to be awarded on the grounds that to do so is just and equitable where a Tribunal considers that, had a fair process been followed, it is likely that an employee would have been fairly dismissed (Polkey v Dayton Services Limited [1987] IRLR 503). In considering a "Polkey" reduction it is necessary to have regard to all the evidence and try to assess what the chances are that the individual would have remained employed had a fair process taken place and/or for how long their employment would have continued. This may involve a degree of speculation. However, there may be cases where there is such a degree of uncertainty that no sensible prediction can be made.

Redundancy

48 The definition of redundancy appears at section 139 of the Employment Rights Act:

> "A redundancy situation will arise where dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or is expected to cease or diminish."

Age discrimination – section 13 of the Equality Act 2010

> "A person discriminates against another if because of the protected characteristic (A) treats (B) less favorably than A treats or would treat others."

49 The burden of proof provisions are set out at section 136 of the Equality Act 2010. In summary, if a claimant proves facts from which a Tribunal could find that there has been an unlawful act, the burden passes to the respondent to show, on the balance of probability, that they did not act unlawfully. If the respondent cannot put forward a satisfactory explanation for the acts complained of the Tribunal must find that discrimination occurred.

50 Section 110 of the Equality Act deals with the liability of agents for actions taken on behalf of the principle, where the action in question is a contravention of the Equality Act by the principle.

Unlawful deduction from wages

51 Section 13 of the Employment Rights Act 1996 sets out the statutory right not to suffer unauthorised deductions:

> A deduction is made when the wages payable on any occasion are less than the total amount properly payable.

Wages are defined in section 27 of the Employment Rights Act 1996 and include

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

Notice Pay

52 Section 86 of the Employment Rights Act 1996 sets out the entitlement to notice pay, of one week for each complete year of service (for individuals with two or more years' service).

Submissions

53 The parties made closing submissions. These are not separately recorded but have been addressed, in so far as necessary, in the conclusions section.

Conclusions

Unfair dismissal – reason for dismissal

54 We found that the principal reason for dismissal in this case was redundancy. The first respondent had a diminished requirement for employees to perform receptionist work. It is clear from the rota produced by the respondent that the requirement for receptionist hours had reduced from 51 to 40, that the respondent's assessment was that the number of staff required for reception

work could be reduced from three to two. The respondent has therefore shown a potentially fair reason for dismissal and has established that there was a redundancy situation.

Fairness

55 Section 98(4) of the Employment Rights Act sets out the relevant statutory test and the case of Williams v Compair Maxim sets out the types of measures that an employer would usually be expected to adopt before fairly dismissing for redundancy. We have concluded that the process followed by the respondent fell outside the range of reasonable responses open to a reasonable employer in a number of respects.

55.1 Firs, the respondent failed to follow its own redundancy policy. The redundancy policy suggested as a means of averting compulsory redundancy that the respondent first consider dispensing with the services of agency staff or consultants or self-employed persons. Although the precise employment status of Simone is unclear, it appears to be accepted by both parties she was not an employee of the first respondent. It is clear that she was providing services to the respondent as a receptionist. The first respondent should have considered dealing with the redundancy situation by dispensing with her services altogether or reducing its use of such services.

55.2 The entire redundancy process took place very quickly. It began on or around 25 February and was concluded by 28 February. There was very little time for any meaningful consultation with the claimant or time for the claimant to reflect on information that she was being provided with by the first respondent.

55.3 The first respondent did not give any real consideration to other measures that could have averted redundancy. The claimant had suggested that consideration should be given to the possibility of reducing all of the receptionist's hours to avert the need for a redundancy. There is no evidence that the first respondent gave any serious consideration to this and no evidence that the respondent discussed this with the other receptionists.

55.4 The first respondent failed to consult the claimant regarding selection criteria (in breach of its policy).

55.5 We have found that the respondent did not apply any objective selection criteria at the time of its redundancy decision nor did it consult with the claimant as to the basis on which she was being selected.

55.6 The respondent accepts that the claimant was not provided with the selection criteria and that her scores were not provided to her at any point before she was made redundant.

55.7 Nor did the respondent offer an appeal in respect of the decision to dismiss despite the claimant making it clear that she wished to appeal and despite her setting out clear grounds for an appeal.

56 We recognize that this is a small employer, with limited resources, but nonetheless it seems to us a basic minimum of reasonable conduct on the part of an employer that it should comply with its own policy. The respondent's policy on redundancy was a clear one and had it been followed, in a reasonable manner then it is likely that any decision to dismiss would have been fair.

Polkey reduction

57 The first respondent invites the tribunal to find that it was likely that the claimant would have been dismissed fairly for gross misconduct in relation to her unauthorised receipt of free laser treatments. However, we have found that the claimant genuinely believed this to be a perk of her employment. The first respondent has failed to produce any evidence that she behaved dishonestly either in failing to seek permission, or in concealing these matters from the respondent. We do not therefore consider it likely that the respondent would have been in a position to fairly dismiss the claimant for gross misconduct.

58 It was also put to us that a fair redundancy process would merely have delayed the inevitable and that, had any procedural failings been corrected, the outcome would inevitably have been the same and the claimant would merely have been dismissed for a redundancy a few weeks later. We did not accept that argument and concluded that, had there been a fair process, it is unlikely that the claimant would have been made redundant at all.

59 The only evidence that we have about what the respondent was endeavoring to achieve through its processes is the new rota which showed a reduction in reception hours of 10 hours per week. A reduction in that order could have been achieved by reducing, or dispensing with, the services of Simone, who was not a permanent employee of the first respondent and who was working approximately 15 hours a week. We therefore considered that it was not appropriate to make any reduction in compensation on Polkey grounds.

Redundancy

60 It follows from the first respondent's concession in relation to continuous service that the claimant was entitled to a statutory redundancy payment.

Age discrimination

61 The claimant argues that she was less favourably treated on grounds of age by being dismissed. She argues that this was an act of direct age discrimination because her older comparator was not dismissed and because of the comments made by Mr Daniels as to the allegedly lower National Insurance costs of her comparator. We did not consider that this was sufficient to establish a prima facie case that the decision to dismiss was motivated by age discrimination. The National Insurance position made no sense as a motivation to retain Jane rather than the claimant because the costs to the respondent of an older employee are not in fact lower. Whilst an employee over pension age does not pay National Insurance contributions the employer's liability to make National Insurance contributions in respect of the employee is the same. However, even if we are incorrect in this and the burden is to be considered to have shifted, we consider that the evidence as a whole shows that the motive for the retention of Jane and Simone was in fact their close personal connections rather than age. In Jane's case she had a friendship to the bookkeeper and had long service with the first respondent. In Simone's case she had a close personal connection to Mr Daniels. Simon was a similar age to the claimant.

Unlawful deduction from wages

62 We uphold the claim for £70 in relation to prescription and eye test charges. We have found that there was an agreement by Ms Boniface that such an amount would be reimbursed if the claimant underwent an eye test. We find that this was an emolument in connection with her employment.

Breach of contract

63 It follows from the respondent's concession in relation to length of service that the claimant has been underpaid notice pay and we will consider as part of the remedy portion of this hearing how much she has been underpaid by.

Postscript

64 Reasons for the liability decision were provided orally during the hearing and no request for reasons was made at that time. The remedy decision was reserved and a combined decision issued after the hearing recording the liability judgment and setting out the reserved remedy judgment and reasons. Subsequently, the claimant made a request for written reasons in respect of the liability judgment and as a result these written reasons were prepared. The respondent also requested that the liability judgment make clear that the claims for unfair dismissal, redundancy, breach of contract and deduction from wages succeeded against the first respondent only and that the discrimination claims failed and were dismissed against both respondents. This has been clarified in the written reasons (under rule 69 of the Tribunal's Procedure Rules 2013 which allows for the correction of clerical mistakes and accidental slips).

65 The respondent has also requested reconsideration of the remedy judgment and the request for reconsideration has been granted in one respect. A corrected remedy judgment and reasons has been issued following reconsideration.

Employment Judge Milner-Moore

Date: 21 June 2021

Judgment sent to the parties on

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For the Tribunal office