EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106953/2020 Hearing Held at Edinburgh on 2 and 3 June 2021

Employment Judge: M A Macleod

Mr Colin Hutton	Claimant In Person
Timberbush Tours Limited	Respondent Represented by Mr R Eadie Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of unlawful deduction from wages, in respect of annual leave, succeeds, and the Tribunal orders the respondent to pay to the claimant the sum of **Four Hundred and Fifteen Pounds and Forty Seven Pence (£415.47)**; and that the remaining claims made by the claimant all fail and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 2 November 2020 in which he complained that he was automatically unfairly dismissed by the respondent, and that he was unlawfully deprived of wages including holiday pay and arrears of pay.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A hearing was fixed to take place in person in the Employment Tribunal in Edinburgh on 2 and 3 June 2021. The claimant appeared on his own behalf, and Mr Eadie, solicitor, appeared for the respondent.

4. A joint bundle of documents was produced to the Tribunal and relied upon by both parties in the course of the hearing.

5. The respondent called as witnesses Steve Spalding, Chief Executive Officer, and Amy Miller, Head of Marketing/Business Development.

6. The claimant gave evidence on his own account, by way of witness statement in respect of his evidence in chief, and orally in response to questions in cross-examination and from the bench.

7. The Tribunal was able to find the following facts proved or admitted, based on the evidence led and information provided.

Findings in Fact

8. The claimant, whose date of birth is 9 April 1985, commenced employment with the respondent on 7 February 2019 as a Digital Marketing Executive.

9. The respondent is a coach tour operator providing day trips to tourists across Scotland, with a turnover of approximately £6,000,000.

10. The claimant was provided with a Statement of Particulars of Employment (44ff). His place of work was designed as Unit 4, Forth Industrial Estate, Sealcarr Street, Edinburgh. His starting pay was £21,000 per annum, and his hours of work were 10am until 6.30pm each day, Monday to Friday. His annual holiday entitlement was 5.6 weeks, and the holiday year ran from 1 December to 30 November each year.

11. The claimant was employed to work in Amy Miller's team. She was the Head of Marketing and Business Development, and was the claimant's line manager.

12. In January 2020, the respondent's Chief Executive Officer, Steve Spalding, heard from agents operating in China to develop business for the respondent that Covid-19 was spreading rapidly, and causing many cancellations and considerable disruption of travel. He raised with the respondent's Board in January 2020 his concern about the possible impact on their business in the event of the spread of the virus.

13. In March 2020, it became apparent that Covid-19 had spread to the United Kingdom, and that customers were contacting the business in order to cancel scheduled trips.

14. The respondent wrote to the claimant on 26 March 2020 (57), under the heading "Variation to your term and conditions", to update him on the new measures which they were taking in light of recent Government announcements. It was confirmed that the pandemic had had a significant impact upon their business, and that they had had to lay off some employees. They said that the options available to them were to continue with lay-offs, consider redundancies or place staff on to furlough leave. They confirmed that they believed that furlough leave was the best options for the business and for employees, and asked that he agreed to the decision.

15. They continued:

"this letter is to inform you that your position is considered apt for inclusion in this furlough from 1 April 2020 to 31 May 2020 at which point we will review the situation. Please note that the Company does reserve the right to recall you from your furlough leave with immediate effect prior to 31 May 2020 should circumstances change.

What this means for you?

We will take advantage of the job retention scheme announced by the government on the 20 March 2020 to ensure that we can retain as many roles as possible at this time. Under the job retention scheme, you will not undertake any work for the Company during the period 1 April to 31 May, but you will be paid 80% of your salary up to a maximum of £2500 per month…

We appreciate that this is a difficult situation and we are keen to do the right thing for all our employees. We believe that this temporary change to your contract and reduction of your salary is the best option available to us at this time.

Please can you confirm your acceptance in writing (via email) to Lisa Klasen at lisa@timberbushtours.com by the close of play on 27 March 2020…"

16. On 4 May 2020, the respondent wrote to the claimant to extend the current furlough arrangement until 30 June 2020 (62). The letter repeated the statement that he would not undertake any work for the respondent during that period of furlough, but that he would be paid 80% of his salary up to a maximum of £2,500 per month. The claimant emailed Ms Miller on 4 May to confirm acceptance of the terms of the letter (61).

17. In April 2020, the respondent understood that they were not permitted to ask a furloughed employee to carry out any work unless it did not directly generate income, in which case it would be acceptable for him to do it. As a result, the claimant was asked by Ms Miller if he would be willing to work on a new Private Hire brochure for the respondent while on furlough leave. The claimant researched the matter and found the rules to be clear and unambiguous in saying that he would not be allowed to volunteer for his employer. Mr Spalding and Ms Millar had an exchange of messages on 21 and 22 April (59) in which he said that although furloughed, the claimant could volunteer to work on a project as long as the work he was

doing was not directly generating income, and that this might keep him occupied as well as helping the respondent to be prepared. In reply, she stated that "he's not willing to work on the PH brochure whilst on furlough".

18. Ms Miller messaged the claimant on 21 April 2020 (60) to say that Mr Spalding was wondering if he wanted to do a project while furloughed. She said that *"I've said you won't do it without being paid and on furlough, but again it's up to you. Project would be PH brochure as we think PH will be the main focus when we return. Let me know whenever you like."*

19. The claimant replied the following morning to say *"Howdy. I'll pass on the brochure, thanks. I don't want it to jeopardise the furlough pay."* (60)

20. The claimant was of the view that to have carried out this work, which in his view was for profit and was work for which he would normally be paid, would have amounted to his acceding to a request to commit fraud. He did not express this view to the respondent, but simply declined and the matter went no further.

21. On 19 May 2020, the respondent wrote to the claimant (65) a letter which was sent to the claimant by email on that date (64). He acknowledged receipt of the letter but said nothing else in his response.

22. In the letter, it was stated that staff continued to accrue annual leave while on furlough, and that if staff built up a large accrual of annual leave and were seeking to take it all before the annual leave year ended, the respondent would struggle to accommodate this and remain staffed. Accordingly, they said, *"…and in line with the Working Time Regulations, I am giving you notice as of the date of this letter, that you are required to take 5 days' annual leave during the payroll week ending, 17 June 2020. You will remain on furlough leave at this time, taking annual leave simultaneously."*

23. On 20 May 2020, the claimant submitted a holiday request for 5 days in June through the CharlieHR online system operated by the respondent

for such requests. Ms Miller contacted the claimant to say that she would not be processing his request, but that Mr Spalding would be dealing with annual leave requests thereafter.

24. On 22 June 2020, Mr Spalding wrote to the claimant again (72) in relation to "Holiday Accrual":

"Dear Colin,

…Further to my letter in May setting out our intention to deduct the equivalent of 5 days holiday accrual in June, I am now writing to advise of a further deduction for the period of accrual up to 31 July.

On this occasion, the deduction will be slightly less, equal to the value of 4 days.

Accordingly, and in line with the Working Time Regulations, I am giving you notice as of the date of this letter, that you are required to take 4 days' annual leave during the payroll week ending 29 July 2020. You will remain on furlough leave at this time, taking annual leave simultaneously.

Your holiday pay for this period will be calculated using the same method as the current furlough scheme, however holiday pay will be paid at 100% rather than 80%...

I am sorry that we are having to take these measures, but trust you will agree, we must take every possible step to give us the best chance of sustaining the business and recovery throughout this period of uncertainty…"

25. The claimant regarded this as being outwith his normal contractual process for booking annual leave. However, he replied to Ms Miller on that day (71) to say:

"I am confirming receipt of this letter.

I am on holiday for a week as of next week anyway, so I guess there's no need to change that.

Cheers!

Colin"

26. On 8 June 2020, the respondent wrote to the claimant (68) to advise that the job retention scheme would continue to apply to him. It was noted that there was an alteration to the basis upon which the scheme would operate:

"As outlined previously, we will take advantage of the job retention scheme announced by the government on the 20 March 2020, to ensure that we can retain as many roles as possible at this time. Previously under the job retention scheme, you were not able to undertake income generating work for the Company, however from 1 July, this will change.

Effective, 1 July 2020, the scheme will be more flexible allowing you to work for the company on a part time, flexible basis with the cost being shared between the company and HMRC. Should this be a viable option, we will be in touch to discuss in greater detail, however in the meantime you will be paid 80% of your salary up to a maximum of £2,500 per month. Again, we ask therefore that you accept the temporary reduction in income as we seek to ensure the continuity of the business."

27. The claimant emailed Ms Miller on 8 July 2020 to confirm that he accepted the new terms of the letter (67).

28. The claimant interpreted this as an indication that flexible furlough would be put in place for him if the respondent considered it to be a viable option, after discussing it with him.

29. On 13 July 2020, the respondent wrote to the claimant (76):

"COMMENCEMENT OF REDUNDANCY CONSULTATION

Further to my announcement this morning, I am writing to confirm the commencement of redundancy consultation will commence with the Driver Guide pool of staff, however your position is ***not affected*** *at this time.*

In the coming weeks and months, I am hopeful that we will gradually start to resume operations, albeit initially on a reduced scale.

I would like to take this opportunity to thank you for your continued commitment and dedication to the Company during this difficult time.

For now, we will begin a period of consultation with the affected staff. This is a difficult time for the company and most particularly for the staff who may be affected and whose jobs may be at risk, particularly in these extraordinarily challenging times. For this reason, we expect you to keep this memo (and any other information relevant to our proposals) confidential, out of respect to your colleagues and support for the company.

I am grateful for the patience, co-operation and professionalism shown during these unprecedented times."

30. The reason for the redundancy process was that Mr Spalding was of the view that the drop in business was so severe that there would be insufficient work for staff over the summer, and therefore he sought a 40% reduction in the driver pool. He also sought savings elsewhere in the business. He was cautiously optimistic that there may be opportunities for revenue in July 2020, but at a much lower level than he had hoped for.

31. The letter was sent to the claimant on 13 July after Mr Spalding and Ms Miller had had a discussion about the claimant's position. Initially, Mr Spalding had inclined to the view that the claimant should be included in the redundancy exercise, but felt that Ms Miller put "compelling arguments" for the claimant to remain. He had to make a judgement about whether or not the claimant's continued employment would be likely to assist with the recovery of the business, and concluded that, while it needed to be kept under constant review, the claimant should not be made redundant at that point.

32. Ms Miller had an exchange on 29 June with Mr Spalding by text message (75) in which she had argued that the business "get a lot for our money when it comes to Colin".

33. She spoke to the claimant by telephone on 14 July 2020. In that conversation she indicated that the claimant had been considered as part of the redundancy process, but that it had been decided not to proceed with him in this regard. She told the claimant that she had had to fight to persuade Mr Spalding to keep his job, and advised him that he would need to show his worth to the business over the coming weeks. Ms Miller was uncertain as to the claimant's reaction to this call.

34. Mr Spalding messaged Ms Miller on that day to ask how her call with the claimant had gone (77). She responded: *"Fine. It's either shoved a fire under his arse, or had the opposite effect and made him fear for his job."*

35. On 20 July 2020, the claimant sent a message to Ms Miller to draw her attention to a Facebook entry by DH, a coach driver employed by the respondent, in which he had posted a photograph of himself with a number of customers (78). He commented to Ms Miller (79) that *"his face mask wasn't over his nose"*. The claimant was also concerned that the customers in the background of the photograph did not appear to be observing social distancing rules. Ms Miller noted that one of the customers in the background was not wearing a mask at all. She advised the claimant that she had passed this on to Mr Spalding.

36. The claimant also drew the respondent's attention to a further Facebook entry by DH (100) in which he posted a photograph of himself, with no facemask on, accompanied by a group of customers who did not appear to be observing social distancing measures. He also showed a photograph of DH inside the coach (101) without a facemask. In his message to Ms Miller, on 3 August 2020, the claimant said (103):

"Hi.

It appears [name redacted] is not wearing a face mask or keeping to the social distancing rules… again.

I've come across two more Facebook posts (see attached images) of him not wearing a face mask on the coach and not keeping our customers safely apart.

This completely undermines the work everyone has done to get us to the point of touring safely again.

On a personal level, it makes our marketing efforts very difficult. We're preaching about our safety measures while he openly defies it. He should be more concerned about upholding the Timberbush brand, but instead he's diluting our message for personal gains.

I'm sure you can already predict the issues that can arise from this but – nearly all of his followers will be from previous Timberbush tours. If he keeps posting images of Timberbush tours not adhering to safety measures, this may prevent people re-booking with us because they don't feel comfortable about our business practices. Also people on his tour will post images and videos on social media of us not doing our job properly. More severely – we could get bad reviews and refund demands – and this could get exposed to the media.

So if someone could speak to him, that would be great.

Many thanks,

Colin"

37. Ms Miller replied to the claimant on that day (102) saying *"Thanks for the message. I've had a word with [redacted] and he will approach [redacted] about this. I appreciate he will have been doing this with the best of intentions, however the points you've raised are justified and important. Thanks for raising the alarm, and don't hesitate to do so again if you spot anything else."*

38. Mr Spalding was concerned about the public perception of the company from the Facebook posts, and said so in his exchanges with Ms Miller on that day (104) (*"I don't want Timberbush slaughtered on SM [social media] or in the press or enforcement from any authorities."*

39. Mr Spalding spoke to DH to address the matters raised – in his evidence to the Tribunal he said that DH had been "separately disciplined" – but that the claimant was not aware that action had been taken on the basis that it was a confidential issue between management and employee. In general, Mr Spalding's view was that DH was not repeatedly disobeying orders, but that he was learning new protocols, and that it was not his job to police the wearing of face masks by all customers, just to issue the guidance to be followed on the coach. Mr Spalding confirmed in evidence that on the first occasion, DH was issued with a verbal warning; and on the second occasion, without specifying what action was taken, it was "escalated". However, DH was not dismissed.

40. On 27 August 2020, Ms Miller and Mr Spalding had a private exchange of messages (114) in which they discussed increasing the claimant's hours, in order to have him put together videos and more interactive materials for the respondent's website. Mr Spalding said:

"It is a balancing act, bit of chicken and egg as well! Trying to eek (sic) open the spending tap, stimulate demand, generate revenues to pay for the resources, etc. I think we need to get off the fence a bit more with marketing and see what is out there. Only way to do that is, give it a go. I think we increase Colin to 50% for a month and see what benefits we get. You know how frustrated I am with his rule book approach to the current situation, especially when I see what others are doing to help us survive… so I hope this will encourage a different mentality before patience is exhausted. It will be an important month!"

41. Mr Spalding gave evidence to the effect that his reference to the claimant' rule book approach meant he was frustrated that the claimant would only be available at the restricted times when he was scheduled to work, and

outwith that he was incommunicado. Mr Spalding felt that there was a need for a better handover of work so that all those who required to know the updated position on particular matters would be informed of them. He believed that the claimant was, at that point, on flexible furlough, and that he was not therefore restricted to the agreed 8 hours per week, but could work longer by agreement with the respondent. Any additional hours would be remunerated at 100% for work actually done, and the remainder would be paid at 80% in line with the furlough provisions.

42. Mr Spalding considered that the business was on a "knife edge" in August 2020, and it was necessary for every employee to be well-utilised and to "make themselves valuable" to the business.

43. The respondent began to make arrangements towards the end of August to allow staff to return to the physical premises of the office, and to encourage staff to do so. Mr Spalding went to the office on 2 September 2020 to move desks around and clean the space so that staff could sit at a suitable distance (120). The respondent wanted the claimant to return to the office for 5 days a week (117).

44. On 3 September 2020, the claimant sent an email to Ms Miller under the heading "Current and future working conditions" (123):

"Although I would like to return to the office and see the team again, I'm quite anxious about using public transport to do so.

Unlike most of the core staff, I rely heavily on public transport to get to work and can use four buses in one day. I haven't been on a bus since March, and I'm very uncomfortable about having to use one now, especially as so many passengers are avoiding wearing face masks and ignoring social distancing. This will put me in an unnecessarily stressful situation on a daily basis and significantly increase my chances of catching, and spreading, the Coronavirus.

The official stance from the Scottish Government is that we should only use public transport if it essential and only return to an office if it is

essential. As we already have a robust system in place for working at home, I don't understand the sudden change in direction. Unless there's something I'm missing, it would be nice to have the reasoning behind this. Literally everyone I know who works in an office will not be returning to their offices until Christmas and beyond.

I completely understand there's a strong desire to get back together as a team, and there's the argument that things would run more smoothly if everything was happening from one location. Ultimately, though, I think peoples' physical and mental health should be the priority. I'm worried this will have a negative impact on me and others.

Moving forward in time – my other concern is childcare and logistics of returning to full-time hours. I'm assuming the game plan would be for me to return to full-time hours at the office by the end of October? It would be good to have some clarification on this ASAP, as returning to full-time will have a major impact on my wife's current work situation. It is highly unlikely my wife's employer will allow her to have flexible shifts (the joy of retail management). It may mean she'll unfortunately have to resign from her position to allow me to return to the office and for her to look after the children; a far from ideal situation.

I would love to work alongside everyone again, but I feel like I would be sacrificing a lot to do so. Please let me know your thoughts and if you have any possible alternative solutions.

Many thanks,

Colin"

45. Mr Spalding, when he saw this email, forwarded it to Gary Voy, one of the co-owners of the business, on 5 September 2020 (128), with the message: *"Mans an idiot."* In his evidence before the Tribunal, Mr Spalding described this as "not my finest hour", but indicated that the reason for the comment was that there were inconsistencies in the claimant's position set out in the email.

46. Ms Miller replied to this email on 4 September 2020 (122):

"Hi Colin,

Thanks for your email and I appreciate your patience in my response.

I understand your anxiety on returning to office. Many of the team are undergoing the same thoughts and feelings. With regard to public transport, I fully accept it is a challenging situation, and one you must feel comfortable with. There is guidance in place for those who do not own a car or have access to one, including adopting hand sanitisers, face coverings and social distancing. Walking as part of your journey rather than taking two buses can also be a mitigation.

To help put your mind at ease, our Reservations Team will not be in the office for the time being, and will continue to work from our shop at Castlehill until things pick up. This will reduce staff numbers in the office, ensuring enough space for social distancing. I'm not sure if you're aware, but we also have office rooms set up in Unit 3 that we can also use in the future to ensure sufficient distancing for staff.

The main thinking behind the return to office is to regain some of the missing elements lost when the team is not together. This is a critical time for Timberbush, when on a daily basis we are seeking creative ideas and solutions to the greatest challenge the business has faced – to put it plainly. Our ability to harness team input really is compromised when working remotely.

It's also becoming evidence that some members of the team are struggling with having to work from home, some physically, depending on their environment, and some emotionally due to isolation. I do understand and recognise your point on whether this is essential. The combination of these factors I would argue is essential to the health and wellbeing of the team, as well as the survival of the business, hence the decision being taken for a tentative approach.

I can assure you that we have taken many steps to ensure the office is a safe space and want to be supportive in achieving your safe return too.

If it would put your mind at east, I would be more than happy to meet up and show you around the office, have a coffee and a catch up?

Best wishes"

47. On 7 September 2020, Mr Spalding sent an email to staff at 8.20am, including the claimant, attaching Covid Protocols relating to the premises of the office (134), to give staff a "sense of what is in place", and asking them to adhere to play their part in maintaining a safe working environment.

48. Ms Miller and the claimant had an exchange of messages at 11.47 and 11.50am that day (135):

"Amy Miller:

Appreciate it probably wasn't the response you're after. If you're concerned, by all means give Steve an email or a call and get his take on the reasoning as to why we're returning to the office. Offer is still there for a coffee and a show around if you'd like.

Colin Hutton:

Ok. For me to return to the office, I won't get on a bus. That's never going to happen. It's a big box of germs on wheels. So my only option is to walk 2 hours a day, even if it rains or snows. Which will become increasingly unpleasant as the weeks go by. I really don't have any major concerns with being in the office, I think the systems in place will make it work.

Amy Miller:

I understand where you're coming from, unfortunately I don't have an answer. I don't know if you would be able to car-share, or grab a bike to make the commute easier? You wouldn't need to get on the bus in rush

hour but as you've said, you'd rather not anyway. If you want to make a case, by all means send Steve an email directly. I'm a bit of a go-between at the moment and I'm sorry I can't be more help."

49. At 2.43pm on 7 September 2020, Mr Spalding emailed the claimant (136), attaching a letter "regarding our current circumstances which I had hoped would not be required." He proposed a call at 11am the following day, which the claimant accepted in reply. He did say that he understood that this was short notice but he did not want the claimant to be worrying over an extended period, but that if he needed more time to digest it he would try to accommodate that.

50. The letter which was attached and dated 7 September 2020 (137/8) stated:

"Dear Colin,

I was very pleased to see that August provided some demand for the return of tour activity, however we remained around 85% down on August 2019 revenues. Going forward into the winter low season, the outlook continues to be extremely challenging across the business.

Following my last update to you on 13 July 2020, a further review of workload and cost has been conducted due to the ongoing impact outlined. After considering all possible options, the business has concluded that there is a risk that it will be unable to continue to provide work for all remaining employees and that it may therefore have to make further redundancies. The business will be continuing to explore ways of avoiding compulsory redundancies and minimising the number of employees affected. Measures which may assist in avoiding compulsory redundancies include:-

- *Short-term working*
- *Restricting overtime*
- *Temporary Lay Off*

- *Recruitment freezes*
- *Offering alternative employment elsewhere within the Company*
- *Further support from Government*

If you have any suggestions on ways to avoid redundancies, please let me know.

If the business is not able to avoid the need for redundancies, it may have to make redundancies. At present we anticipate that, if compulsory redundancies become necessary, your role of Digital Marketing Executive is likely to be at risk.

If redundancies are necessary, the business will have to decide which individuals will be selected for redundancy. For your particular situation, you are likely to be in a pool of one as the only person doing the role.

Before any decision is made, the business will carry out a consultation exercise including ways of avoiding or reducing the number of redundancy dismissals and mitigating the consequences of any such dismissals.

As part of this process, I will arrange an individual telephone meeting with you to consult about the business's proposal in more detail and how this may affect you personally and will let you have details of that as soon as possible. If you have any questions in the meantime, please do not hesitate to contact me.

I would like to thank you for your continued support and understanding during this difficult period. The business very much regrets that it may have to make further redundancies and that you may be affected.

Yours sincerely,

Steve Spalding

Chief Executive Officer"

51. Later that afternoon, Ms Miller texted the claimant to say that "He [Mr Spalding] hasn't spoken to me about it at all. I'm too scrambled for this. WTH." (139). The claimant understood she meant that Mr Spalding had not consulted with Ms Miller about his intention to include the claimant as being at risk of redundancy.

52. On 8 September, Mr Spalding conducted a telephone conversation with the claimant in relation to possible redundancy. A note was produced (141) which appeared to be a form of script for Mr Spalding to use. The discussion concluded with the claimant being asked if he had any thoughts or suggestions, or questions on the process. During the discussion, the claimant suggested reducing his hours to part-time in October, and increasing the digital advertising spend. He asked Mr Spalding how many other people were affected by the redundancy process, but was unable to obtain a clear answer.

53. The claimant left the call understanding that Mr Spalding had agreed that he could have more time to think over possible solutions. Mr Spalding disputed this.

54. On 9 September 2020, at 12.19pm, the claimant received an email from Facebook (144) confirming that he was no longer an administrator on the Timberbush Tours Ltd Facebook page.

55. On the same day, at 12.41pm (some 22 minutes later, Mr Spalding emailed the claimant (148) attaching a letter detailing the discussion, his suggestions, the company's response to the suggestions and the outcome for his role.

56. The letter attached to that email (149-151) set out the background to the decision. It is useful to set out the full terms of that lengthy letter:

"Dear Colin,

I refer to my letter dated 7 September 2020 and our subsequent consultation call at 11.00am on 8 September 2020.

Thank you for agreeing to taking part in the call which allowed me to provide some further context to the current circumstances faced by Timberbush. While I appreciate it was not positive news, it was important that I was able to share that with you and have a proper conversation about it. It was also an important opportunity to consult with you for input about what was being proposed and your ideas about alternative suggestions to the role of Digital Marketing Executive being made redundant.

As I explained, business revenue was down over £4m since March 2020. In August we got to around 15 of the figures for August 2019 sales revenue, however September sales have unfortunately fallen off again. Regarding costs, I confirmed that support from the banks for payment holidays are coming to an end, no rent relief from landlords at any of our premises has been possible and the furlough scheme costs for employees who remain on furlough are increasing as employer contributions rise each month.

In summary, we face an extremely uncertain and difficult time for cash flow and future survival of the business with in creased operating costs, rigid fixed costs and limited revenues.

To your credit, you responded to this in a very honest and straightforward way by agreeing that it is an incredibly difficult situation and the industry has been badly damaged by the pandemic.

During our conversation, I asked you if you had any ideas or suggestions that may help avoid the need for further redundancies.

You responded suggesting that you could go part time when furlough ends at the end of October 2020.

As you know, I said that I would give this full consideration before making a decision. Having had a chance to review the idea, you need to be aware that it is not certain that we will continue to participate in the furlough scheme beyond September simply due to affordability. The

increasing employer contributions required make this very difficult for the business to manage. To date, our participation in the scheme has been decided month to month based on available cash flow, which as explained is under increasing pressure. Additional concerns about the likelihood of there being a sufficient workload to justify retaining the role of Digital Marketing Executive cannot be ignored and that remains the case, even if you were retained on a part time basis as you suggested. All of that reflects the harsh reality of the current level of market activity we are noting.

You suggested that there was the option of the business increasing spend of digital advertising through Google/Facebook ads as we had seen some tangible success when we used the free Google budget, resulting in a 5-fold increase.

As I said in replying to you, I agree this is something we should be doing at the right time, but for a variety of business reasons we believe that the right time is not just now. While we are actually commanding the largest share of the tour market at the moment, our low numbers are a clear indication of just how small the market is currently and how challenging the situation is. Unfortunately, there is far too much capacity for the demand.

You asked during our call who else could potentially be made redundant?

As I explained, we had initially suspended all recruitment and the use of freelance staff across the whole business. As we came to the end of July 2020, we were forced to go through a redundancy exercise with the driving team which saw a total of 12 staff leave the business. Through natural reduction due to leavers, we have thus far avoided the need for compulsory redundancy with other office staff and the transport team, however this remains under review given the serious situation we face as detailed above.

At the end of our call, it was agreed that you had no further proposals to put forward at this time.

Unfortunately, despite the discussions with you and our extensive efforts behind the scenes, we have been unable to identify any viable alternatives to declaring your role redundant, and we have not been able to identify any suitable alternative employment for you.

With regret, I therefore confirm that the company has made the decision to declare your role redundant and to dismiss you by reason of redundancy as a result.

You are entitled to 1 month's notice, effective from today, 9 September 2020. Your employment shall terminate on 9 October 2020. You will remain on furlough during your notice period up to that date with no requirement to work flexi furlough. During your notice period you will be paid at 100% salary, rather than the 80% which has been paid during furlough leave.

Following termination of your employment you will receive payments as outlined in the attached redundancy schedule.

I would be grateful if you could arrange with Amy Miller to return all company property (including any documents) and collect any belongings by no later than 30 September 2020.

During your notice period, you are entitled to a reasonable amount of paid time off to seek alternative employment or arrange training and given that you are going to be on furlough leave with no expectation of having to work, that is effectively unrestricted. If you do need any specific time off, please let me know as soon as possible so I can make sure we can arrange that if there is any need for work to be done on a flexible basis. If you do find alternative employment and wish to leave before the above termination date, please contact me and we can discuss the practicalities of that.

In writing to you in these terms, I would like to stress that the organisation very much regrets that it has become necessary to make redundancies and that you have been affected as a result.

I would like to thank you for your hard work for the organisation during your time with us and wish you the safest of health and all the best for your future career.

Yours sincerely,

Steve Spalding

Chief Executive Officer"

57. The claimant was very unhappy at receiving this letter. He considered that Mr Spalding had misled him about giving him time to consider more ideas to suggest to save his job, that he did not offer a reference nor gave him the right to appeal against the decision. He did not receive a telephone or video call from Mr Spalding nor Ms Miller about the decision to make him redundant. He checked the metadata of the creation of the letter of redundancy, and discovered that it was created on 8 September 2020, meaning, in his view, that there was no meaningful attempt to save his job.

58. The claimant wrote to Mr Spalding by email on 14 September 2020 (157) attaching a letter of grievance (158):

"Dear Steve,

I am deeply unhappy about how my redundancy was handled.

This was an ***Automatic Unfair Dismissal*** *based on:*

- *Expressing concerns about Heath and Safety, specifically the threat of imminent danger to myself and my colleagues*
- *Refusing to work whilst fraudulently receiving furlough pay.*

I am seeking a resolution through a Settlement Agreement.

If escalated to an Employment Tribunal, ***Automatic Unfair Dismissal compensation is uncapped.***

However, typical compensation for Unfair Dismissal is one years gross salary.

During these unprecedented times, it could take me at least 6 months to find a similar role with a similar salary.

To be reasonable, I am only asking for 6 months full pay.

I would appreciate acknowledgement of this letter, and how you would like to proceed, within 5 business days of receiving it.

Regards

Colin Hutton"

59. Mr Spalding replied on 15 September 2020 (159-161). He assured the claimant that the decision to make him redundant was not taken lightly, and sought to explain that there were "sound business reasons" for the role being at risk of redundancy. He maintained that due to the lack of marketplace activity and the issue of affordability the respondent required to take action on a daily basis to ensure that it could survive.

60. He explained that business had fallen away, which was a "huge disappointment", rather than improving, and that action had to be taken quickly.

61. Mr Spalding went on:

"Your suggestion that the decision to make you redundant was a result of you expressing concerns about health and safety from returning to the office is untrue and offensive. The discussions you were having with Amy Miller on this was separate to any regarding your role but was one that was being conducted across the team.

Looking at all the facts, I do not recognise anything that could possibly be construed as placing your health and safety in 'imminent danger'. Quite the opposite is more accurate. We have shared our Covid Secure Protocols for employees and visitors and been as open and transparent

as possible to give confidence to our team. The premises and operational activities have been assessed for risk with a raft of mitigation measures employed. Beyond that, I am aware that Amy Miller had written to you offering a visit to give you assurance about what is in place and the protection that will provide.

Your letter also had a comment regarding furlough pay and refusing to work. It is important that I take this opportunity to remind you that participation in the furlough scheme for Timberbush was entirely voluntary and has provided you with a salary throughout the pandemic. Speaking to other business owners, I am well aware that many of them declared redundancies some time ago. At Timberbush, we took a different approach and have been doing everything we can to avoid having to lose staff and have held off for as long as possible to give the best chance of things improving and jobs being saved…

Against that background, I can again offer my assurance that the decision to make the role redundant was based solely on available work and affordability alone and no other factors were taken into account.

To the best of my knowledge, you have never been asked to do any work for Timberbush whilst on furlough in contravention of the CJRS rules. I am aware there were some early discussions via Amy Miller in April 2020 when the rules were still being digested about options for staff to volunteer to do small projects to keep creative thinking alive during lockdown. Your role of Digital Marketing Executive is a creative role; hence this idea being suggested to you at that early stage.

This was never mandated nor was it intended to be considered in that way. The suggestion would have been on a non-revenue generating voluntary basis and more to do with employer/employee engagement and ongoing mental health. As I mentioned to you during our call, several staff have struggled with mental wellbeing during lockdown, feeling isolated, etc and had this ever taken place, it might have assisted some of your colleagues to deal with those kinds of issues. I believe this further

confirms our commitment to ensuring the health, safety and wellbeing of our employees, in this case supporting their mental health.

My understanding of what happened is that you felt doing it could jeopardise your entitlement to furlough pay and indicated to Amy Miller that you would rather not do it. With the benefit of hindsight, it seems clear that there was a misunderstanding here as the whole idea was not pursued to be completed. Even if it had been followed through, it is important to stress to you by way of assurance of what was discussed that it was not intended that any of it would have been issued as a work instruction…"

62. Mr Spalding continued by asserting that the claimant's dismissal was fair, and confirming the amount of money which he would be due on termination of his employment.

63. The claimant replied on 15 September 2020 by email (163) attaching a letter (164).

64. He reiterated that his dismissal was automatically unfair due to having expressed concerns about health and safety, specifically the threat of imminent danger to himself and his colleagues, and refusing to work while fraudulently receiving furlough pay. He reminded the respondent that if they were unwilling to negotiate with him by 18 September, he would escalate the matter to ACAS and then to an Employment Tribunal.

65. Following his dismissal, the claimant attended his General Medical Practitioner on 4 December 2020, and reported that he was suffering ongoing and anxiety which he felt was progressing into low mood (202). He was prescribed Mirtazapine, an anti-depressant, which has been adjusted over time. In time, he sought a private review by a psychiatrist, who diagnosed him as suffering from Attention Deficit Hyperactivity Disorder (ADHD).

66. The claimant applied for a significant number of jobs (set out on a spreadsheet at 220-222), and was interviewed on 7 occasions without

success. On 15 April 2021 he was offered the position of Inbound Marketing Manager for Wyoming, a digital design agency (223). The start date for his employment was 3 May 2021. No evidence is available to the Tribunal as to the salary which he is receiving in this position, which is permanent.

67. The claimant claimed and received Universal Credit during his period of unemployment (208ff).

Submissions

68. Mr Eadie presented a submission on behalf of the respondent, which is summarised briefly here.

69. He said that the starting point was that the claimant was dismissed on the grounds of redundancy, and observed that he lacks two years' service upon which to base an ordinary unfair dismissal claim.

70. Mr Eadie then addressed the claimant's different heads of claim.

71. Firstly, the claimant claims automatically unfair dismissal, based on section 44(1) and section 100(1) of the Employment Rights Act 1996.

72. With regard to the claimant's assertion that he was in circumstances of serious and imminent danger, he has completely failed to lead any evidence which would allow the Tribunal to reach that conclusion. He was worried about travelling by bus, but Mr Eadie submitted that Lothian Buses is not providing serious and imminent danger for passengers, and there is no evidence to this effect. In any event, some 6 weeks earlier, he was asking to go on a coach tour and spend 12 hours with strangers, which cannot be reconciled with his later position.

73. He did not raise the concerns now said to amount to automatically unfair dismissal during the redundancy process, which is uncharacteristic. In addition, he raised with Ms Miller on 3 September that he had a concern with childcare, something which requires to be considered in determining his thinking at the time. He was not so concerned about the office but

about travelling by bus. In any event, he and Ms Miller discussed alternative methods of transport. His preference ultimately was to stay at home and not attend at the office.

74. The respondent has explained the incredibly challenging trading conditions during lockdown, which were unique. Mr Spalding was very clear in his evidence that the claimant was dismissed on cost grounds alone. A couple of other staff were also dismissed during the same review. He could have been dismissed in July but Ms Miller's intervention persuaded Mr Spalding to withdraw his name from consideration.

75. By the date of his redundancy dismissal, matters had not improved. Unless the Tribunal decides that the respondent's case is entirely made up, the only reasonable conclusion is that the claimant's position was redundant. The respondent's evidence was that it was not personal – he was a valued employee about whose skillset they were very positive, to the point of giving him a pay rise.

76. Secondly, Mr Eadie addressed the claimant's claim of unlawful deductions from wages. The respondent's position is that during the first period of furlough, the claimant was entitled to be paid, and was paid, 80% of his salary; and that during flexible furlough, he was entitled to be paid, and was paid, 100% of his salary on those days he actually worked, and 80% for the remainder.

77. Thirdly, Mr Eadie sought to deal with the claimant's claims of unlawful deductions from wages relating to holiday pay.

78. He was allocated 5 days' annual leave in June, and did not work those days. He was paid for those days and was able to benefit from the leave period.

79. He was allocated 4 days in July but Mr Eadie accepted that he had in fact worked in those 4 days. Given that, he accepted that the claimant should be paid for 4 days in July 2020, and apologised to the claimant for that failure to pay him.

80. At the point of the claimant's dismissal he was due a pro rata amount of 24 days out of his annual leave entitlement. He had taken all but 7.5 days of his annual entitlement. He was paid 6 days' pay in lieu of annual leave on termination of his employment. He was also paid an extra day in respect of notice, which should be deducted, leaving one half day as unpaid to the claimant, which Mr Eadie accepted should be awarded to him.

81. Fourthly, the claimant complained that the respondent failed to follow a fair redundancy process. Mr Eadie submitted that the respondent followed a fair procedure, based on professional advice given at the time. It was a "brief" process, determined on the basis that the claimant was in a pool of 1, and had a call with Mr Spalding during which he was unable to say anything which changed the position. It would not have been appropriate to have included Ms Miller, the claimant's manager, in the pool with him.

82. Even if the process had taken longer, it would still have resulted in the same outcome, given the trading situation and the fact that he was in a pool of 1. His dismissal was inevitable. There is no evidence that had the process taken longer the outcome would have been different.

83. Mr Eadie submitted that the respondent did not commit furlough fraud. It was discussed with the claimant as an option to give him something to do that he could, if he chose, do some voluntary work on a marketing brochure which would be required in the event of a return to full business. He refused and that was the end of the discussion. There was no breach of the CJRS rules arising from that.

84. He raised no particular issue with the claimant's Schedule of Loss. He disputed that there should be any ACAS uplift. In the event that the claimant succeeds, the injury to feelings award should be in the lower Vento band.

85. The claimant made a submission on his own behalf, and again this is summarised below.

86. Firstly, he submitted that he was automatically unfairly dismissed under section 100(1)(e) and 44(1)(c) of the Employment Rights Act 1996.

87. He referred to **Rodgers v Leeds Laser Cutting Ltd 1803829/2020**, an Employment Tribunal decision in which the claimant failed, but where the Tribunal set out the appropriate test to be followed.

88. The claimant's submission was that he was dismissed shortly after he raised concerns where he believed there was a serious and imminent danger to himself, in order to take appropriate steps to protect himself and others.

89. The respondent did not regard the concerns as valid and did not act appropriately in response. He raised concerns about coach drivers failing to take appropriate actions to ensure that health and safety was being observed on board the respondent's coaches. If they had taken the matter seriously the respondent would have dismissed the driver.

90. He submitted that on 27 August Mr Spalding, who ultimately took the decision to dismiss him, spoke to Ms Miller about his frustrations with the claimant and his "rulebook" approach. He told Ms Miller that there would be consequences for the claimant if he did not improve his performance (114). He was angered by the claimant's grievance and dismissive of his concerns.

91. Three hours after the claimant told him that he could not return to the office, the respondent sent him a letter confirming that he was at risk of redundancy. There was no coincidence, he argued. He failed to provide details of the redundancy process because there was no-one else involved, he said. He was not considered for redundancy until he raised health and safety concerns. The redundancy procedure was sudden and aggressive.

92. A reasonable employer would not dismiss a claimant during a grievance process.

93. The claimant pointed to the email in which Mr Spalding described him to the owners of the business as an idiot. He submitted that this related to his health and safety concerns. Scottish Government guidelines said that people should continue to work from home unless it was essential for them to attend their workplace, and transport and childcare were factors to be taken into account. The respondent was ignoring Government guidance.

94. The claimant feared that there was a serious and imminent danger to his health if he were to travel to the workplace by public transport, to do work which he could do at home. The respondent did not carry out a Risk Assessment as required by the Government guidance.

95. They did not update their Risk Assessment nor consult with staff when the claimant raised his health and safety concerns, again as required by Government guidance. They did not consider public transport to represent a risk.

96. The claimant's exposure to Covid is great due to having two daughters in school and a wife who works in retail. The risks could have been avoided if the respondent had complied with Government guidance. No proper alternatives were considered.

97. The claimant's concerns were valid but were just dismissed.

98. Secondly, the claimant raised the issue of unpaid wages. The respondent did not secure the claimant's agreement to flexible furlough, but merely said that it may be an option. He agreed that he would be paid 100% for working full time.

99. With regard to holiday pay, the claimant identified three areas of dispute.

100. Firstly, he was deprived of 5 days' annual leave in June 2020 to which he was entitled, and he did not have the benefit of rest and leisure time, as he was forced to sacrifice leisurely time off. There was a need to consider whether the restrictions in place allowed the claimant to relax, which is the purpose of annual leave.

101. He was therefore, he submitted, entitled to reclaim the 5 days he lost in June 2020.

102. Secondly, he noted that the respondent had conceded the 4 days in July 2020.

103. Thirdly, he maintained that out of the 24.1 days' annual leave which he had accrued, he had used up 16.5 days, which left him with 7.6 days. He is therefore entitled to 2 full days' annual leave.

104. He argued that he was entitled to injury to feelings in the lower middle band of the Vento scale. He relies upon the stress, anxiety and depression from which he continues to suffer.

The Relevant Law

105. Section 100 of the Employment Rights Act 1996 (ERA) provides:

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

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."

106. Section 44(1)(e) of ERA provides:

"An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –

…

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

Discussion and Decision

107. The issues before the Tribunal in this case appear to me to be as follows:

1. Was the claimant automatically unfairly dismissed under section 100(1)(e) of ERA?

2. Did the respondent unlawfully deprive the claimant of wages during furlough?

3. Did the respondent unlawfully deprive the claimant of wages in respect of annual leave either during or on termination of his employment?

108. Examining the claim form, and the further and better particulars submitted by the claimant, the fourth claim appears to have been abandoned. That claim was that the redundancy process followed was unfair. It was not clear what statutory provision was being relied upon in this claim, but the Tribunal inferred that the basis of the claim was that the dismissal on the grounds of redundancy was unfair under section 94 of ERA. At the conclusion of the paragraph in the ET1 in which this was set out, it was asserted that redundancy was not the real reason for dismissal. The claimant lacked the necessary minimum qualifying service of two years under section 108 of ERA within which to bring an unfair dismissal claim, and in any event, that assertion that redundancy was not the real reason for dismissal is in fact the foundation of his claim under section 100(1)(e).

109. Accordingly, the Tribunal must address each of the issues in turn.

1. Was the claimant automatically unfairly dismissed under section 100(1)(e) of ERA?

110. Although the claimant advanced his automatic unfair dismissal claim under both section 44 and section 100 of ERA, only section 100 provides the basis for a claim relating to dismissal. Section 44, as is apparent from its terms, relates to detriments being visited upon an employee in these circumstances, but it appears to me that the claimant's only claim under this heading is that the consequence of which he complains is dismissal. Since section 100 provides the basis for such a claim, dismissal is not a detriment and therefore the claim is only under section 100.

111. The claimant's argument, therefore, is that the reason for his dismissal was not the reason stated by the respondent, namely redundancy, but that he took or proposed to take appropriate steps to protect himself and others from danger, in circumstances where the danger was serious and imminent.

112. In determining this matter, section 100(2) provides that *"whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time."*

113. The steps which the claimant took, in this case, were, firstly, to notify the respondent that he was not prepared to return to the office due to the risks inherent in travelling by public transport (and in particular by bus) to the office, and secondly, to advise the respondent that one coach driver in particular had failed on a number of occasions to comply with guidance on the wearing of face masks and maintaining social distancing when travelling with customers, thus placing others at risk.

114. The claimant maintained that the risk which he faced by being required to travel to work by public transport was serious and imminent.

115. In my judgment, the claimant has not proved that the danger he faced was both serious and imminent. He was not, on any occasion when he discussed this matter, about to face that danger. He was only to face any risk of public transport if he were to board a bus to return to the office,

and in raising the matter with the respondent, he was entering into discussions with his employer about the matter.

116. It is not, in my judgment, obvious that travelling to work on a bus in the circumstances he faced represented a serious danger, nor that it was reasonable for him to hold such a belief. As the respondent observed, Lothian Transport only restarted its services on the basis that certain safety provisions were observed by passengers, and in particular that social distancing was maintained and masks worn at all times; and in addition, the claimant had, some 6 weeks before, proposed that he be permitted to join a tour, on a coach operated by the respondent, with a group of strangers who, while being required to observe social distancing and face mask-wearing, would be in close proximity to him over an extended period of time in a confined space. They questioned whether it was reasonable for the claimant to hold the belief that travelling on public transport was more dangerous that accompanying one of their own tours, and concluded, rightly in my judgment, that it was not reasonable for him to have done so.

117. In addition, the respondent did not require the claimant to face such a danger. Public transport was only one of the methods whereby he could attend the office, and they considered with him whether he could walk to work, as he had in the past, or cycle.

118. It is plain that the claimant did not have a difficulty with being in the respondent's office, conceding that the arrangements put in place were sufficient and reasonable. He wanted to stress, however, that he was not prepared to return to the office while he faced danger in travelling to and from work.

119. I found the claimant's position on this to be somewhat confusing. It is clear that both his daughters are in regular attendance at school, and that his wife works in retail. Since all three persons with whom he shares his home are in regular contact with people in circumstances which must

involve some degree of risk, it is difficult to understand why the claimant was so reluctant to travel in the company of others.

120. However, even more important was the fact that the claimant's misgivings about public transport were not supported by any evidence at all. It is not clear why he was so unhappy about that prospect, other than that he said that he had read in the press that some passengers were not observing the safety guidelines. In these circumstances, that assertion does not amount to evidence which supports his belief as being reasonable at that time.

121. It is not clear why he maintained that the danger was imminent to him. He was not required to take public transport to work (though clearly it may have been the most convenient form of transport for him), and the respondent had shown a willingness at least to discuss matters with him.

122. Accordingly, it is my judgment that the claimant's claim cannot succeed because he has not demonstrated that he was dismissed because he proposed that he would take appropriate action to address circumstances in which he faced danger which was serious or imminent.

123. However, on the evidence, it is clear that the reason for the claimant's dismissal was that he was redundant; that is, that the need for the work of the kind which he was providing had ceased or diminished in the workplace. The evidence given by Mr Spalding, in particular, which the Tribunal accepted as truthful, was stark and indeed dramatic in demonstrating the very significant fall in business, and thus income, which a tour bus company suffered in lockdown when travel was not permitted to the areas which they served. The respondent's evidence about the impact of Covid-10 on their business was not challenged by the claimant, and it is plain, in my judgment, that they reached a point where they could not sustain the claimant's employment while business was so poor.

124. It is true that the respondent's actions and words were, on occasion, unhelpful. Calling the claimant an idiot for expressing concerns about

public transport suggested frustration in a time of stress, by the Chief Executive, but was reprehensible and it is clear that he only apologised to the claimant when it emerged subsequently that he had sent that email. However, given my findings that the claimant did not meet the terms of section 100(1)(e), and given the other evidence from the respondent, I do not conclude that they were motivated to find a reason to dismiss the claimant because he was making these concerns plain.

125. The claimant also relied upon the timing and speed of the respondent's decision to dismiss him, and the unfairness of the process. In my judgment, while the process was expedited very quickly, it is clear, based on Mr Spalding's evidence, that the business was in urgent need of savings, and that, as Mr Eadie submitted, even if a longer process had been followed, there was unlikely to be any difference in the outcome.

126. I do not conclude from the fact that the respondent dismissed the claimant quickly after telling him that he was at risk that this means that he was dismissed because he raised health and safety concerns. They concluded that having a second marketing executive in circumstances where their business had fallen rapidly was not something they could continue to sustain. That they placed him in a pool of 1 is entirely understandable. He was the junior member of staff in a two person department, and as a result it was not unreasonable that they should decide not to include his manager within the pool.

127. Again, however, this is not a claim of unfair dismissal under section 94, and accordingly the fairness of the process is not of itself relevant, unless it demonstrates that the reason for dismissal was not in fact redundancy but the claimant's raising of health and safety concerns. In my judgment, for the reasons given above, the claimant has failed to prove that that was the reason for dismissal, and I am not prepared to reject the evidence of the respondent in making clear that the reason for his dismissal was in fact redundancy.

128. The claimant also suggested that the reason for his dismissal was that the respondent had unlawfully suggested that he breach the terms of the furlough scheme by working while on furlough, prior to the introduction of flexible furlough.

129. In my judgment, there is no basis for this suggestion. The claimant was not required or instructed to carry out work, but was offered the opportunity to engage in some business in order to keep him occupied, if he would find that helpful. He rejected the offer, anxious that this would breach the terms of the scheme, but in my judgment, since he was given the choice to reject that offer, and no adverse consequences flowed from either his rejection or his subsequent assertion that to accept it would have amounted to a fraud on the furlough scheme, there is no basis for suggestion that there was any connection between that matter and his subsequent dismissal.

2. Did the respondent unlawfully deprive the claimant of wages during furlough?

130. The claimant argued that when flexible furlough was introduced, he should have had his pay restored to 100% throughout his employment, rather than remaining on 80% except in relation to hours actually worked.

131. The evidence on this is not clear, but again, the claimant's position is self-contradictory. On the one hand, he said that the respondent did not in fact put him on flexible furlough, but suggested that they were considering the matter; and on the other, he maintained that he was on flexible furlough after that point, and should have been paid at his full contractual rate.

132. In my judgment, the claimant has failed to prove that there was any contractual or legal basis upon which he was entitled to be paid at 100% during furlough except in relation to hours actually worked during flexible furlough.

133. This claim must therefore fail.

4. Did the respondent unlawfully deprive the claimant of wages in respect of annual leave either during or on termination of his employment?

134. There are three components to this claim: the June annual leave, the July annual leave, and the payment in respect of annual leave in lieu on termination of his employment.

135. With regard to the June claim, it appears to me that the claimant's complaint is that he was required to take annual leave when he did not want to. He said that he was unable to relax, which is the purpose of annual leave. However, he took the leave, was paid for it, and has not included this period of leave as a period which was unpaid on termination of employment. As a result, it is entirely unclear what his complaint actually amounts to. The reality is that what employees do with their time off is a matter for them, and it is not the responsibility of employers to ensure that they relax during their time off. It is the responsibility of employers to ensure that there are sufficient days during the course of the working year when an employee does not require to attend work so as to ensure that they are not compelled, to the detriment of their health, to work without a break throughout that extended period of time.

136. Accordingly, it is not possible to discern the basis for this complaint.

137. With regard to the July claim, it is clear that the respondent admits that the claimant worked during the four days when he should have been on leave, and as a result, he should now receive payment in respect of those four days.

138. With regard to the payment made in lieu on termination, there is a disagreement as to the amount which the claimant should receive.

139. The respondent says that the claimant was left with 1.5 days of leave entitlement which were unpaid on termination, but that because he was paid an additional day's pay in his notice payment, that should be deducted from the sum awarded to him.

140. I am unable to sustain this submission. If the respondent overpaid the claimant in respect of notice, that is a matter between them and must be dealt with either by the respondent presenting an Employer's Contract Claim to the Tribunal (which they have not done, and indeed in the absence of a breach of contract claim, which they could not have done); or by recovering the overpayment by taking action against the claimant. They are not, however, permitted to argue that there should be a day's pay offset against the outstanding holiday pay due to the claimant which they have admitted would otherwise be payable. There is no relationship between the two payments.

141. The claimant maintains that he is due two days' pay, but it is not evident to me how he reaches that conclusion, and accordingly I am prepared to award the claimant the sum of **£415.47**, which amounts to 5.5 days' annual leave at the net rate of £75.54 per day.

Employment Judge: Murdo Macleod
Date of Judgment: 05 August 2021
Entered in register: 10 August 2021
and copied to parties