Case Number: 1601358/ 2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms M Attwood**

Respondent: **Hanley Farm Shop Ltd**

Heard at: **Cardiff by video** **On: 29 and 30 June 2021**

Before: **Employment Judge R Harfield**
Members **Mrs L Bishop**
Ms A Fine

Representation:
Claimant: Ms Smith (lay representative)
Respondent: Mr Clarke (legal representative)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The claimant's complaint of indirect sex discrimination is not successful and is dismissed;
2. The claimant's unauthorised deduction from wages claim is not successful and is dismissed;
3. The respondent acted in breach of contract in not giving the claimant one week's notice of the termination of her employment. The claimant is awarded the gross sum of **£204.92**

REASONS

Introduction and the issues to be decided

1. The claimant presented a claim form on 12 June 2020 bringing complaints of unfair dismissal, notice pay and other payments she said she was owed. She identified that she had worked for the respondent as a café assistant between 20 September 2019 and 31 March 2020. At the vetting stage the claimant's unfair dismissal claim was rejected by Employment

Judge Harfield on the basis the claimant did not have 2 years' qualifying service, a decision which was maintained following a reconsideration application. The respondent presented a response form denying the claims. A case management hearing took place before Employment Judge Vernon on 30 September 2020 albeit the hearing was ineffective as proper notice of the hearing had not been given to the claimant's representative.

2. The matter came back before Employment Judge Brace on 28 October 2020. Employment Judge Brace made case management orders to get the case ready for this hearing. She also dealt with an amendment application made by the claimant with the assistant of the Citizen Advice Bureau. The amendment application is at [35-36] and says:

> "*Due to current pandemic, the Claimant was unable to attend work due to childcare being unavailable. The Claimant requested she be furloughed; however, this was refused due to work still being available. The Claimant was subsequently dismissed citing lateness as a reason. However, the Claimant avers that this was in fact due to being unable to attend work throughout lockdown."*

3. The application to amend was therefore to add an indirect sex discrimination claim brought on that basis. It was stated that the respondent's attendance policy put the claimant and puts women at a disadvantage due to childcare arrangements.

4. Employment Judge Brace allowed the amendment. She noted in her case management order that the complaint was one of indirect sex discrimination and that the claimant [32H]:

> "*claimed that she was unable to comply with the Respondent's attendance policy due to her childcare commitments in terms of her inability to attend work after the 23 March 2020 lockdown during the Covid-19 pandemic, and as a result she was dismissed."*

5. Employment Judge Brace identified the liability issues to be decided at this hearing as being (in part adopting the wording from the amendment application):

"Indirect discrimination (Equality Act 2010 section 19) – dismissal

1.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

1.1.1 An Attendance policy

1.2 Did the Respondent apply the PCP to the Claimant?

1.3 Did the Respondent apply the PCP to men or would it have done so?

1.4 Did the PCP put women at a particular disadvantage when compared with men, in that women have greater childcare responsibilities than men and are unable to comply with such attendance policies in not having childcare during the pandemic?

1.5 Did the PCP put the Claimant at that disadvantage?

1.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

1.6.1 [TBC]

1.7 The Tribunal will decide in particular:

1.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;

1.7.2 Could something less discriminatory have been done instead;

1.7.3 How should the needs of the Claimant and the Respondent be balanced?...

3. ***Wrongful dismissal/ Notice pay***

3.1 What was the Claimant's notice period?

3.2 Was the Claimant paid for that notice period?

3.3 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice or payment during notice?

4. Unauthorised deductions

4.1 Were the wages paid to the Claimant on [dates to be confirmed in the Schedule of Loss] less than the wages she should have been paid?

4.2 Was any deduction required or authorised by statute?

4.3 Was any deduction required or authorised by a written term of the contract?

4.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

4.5 Did the Claimant agree in writing to the deduction before it was made?

4.6 How much is the Claimant owed?"

6. In terms of the matters left in the list of issues to be confirmed by the parties, Mr Clarke told us that the respondent was not pursuing a justification defence in the indirect discrimination claim. The respondent's position is that any analysis of the indirect discrimination claim cannot reach that far because the decision to dismiss the claimant was made before lockdown and before the claimant raising lockdown related issues about childcare and furlough. The Claimant's schedule of loss is at [48 to 50]. It set out a claim for a loss of £697.45 in what it is said the claimant should have earned in a 26 week and 1 day period of employment as against what it is said the claimant actually earned. In her original claim form the claimant had said that on a couple of occasions she had been asked to leave her shift early as the business was quiet due to the virus and she had not been paid for her contracted hours. It was therefore understood that the claimant was saying she had been underpaid when sent home early. But her schedule of loss did not set out, as Employment Judge Brace had directed, the particular dates she said she had been underpaid. There is no specific evidence on dates and times within the bundle.

7. In the course of preparation for the proceedings the claimant had also identified she considered she should have been paid a month's notice and not a week's notice on the basis that she had completed her probationary period.

8. At the start of the hearing the Tribunal therefore clarified with both parties that:

   (a) The unauthorised deduction from wages claim was about the occasions on which the claimant said she had been sent home early and not paid for her full shift;

   (b) The claimant was bringing a notice pay claim of either 1 week or 4 weeks;

   (c) The indirect discrimination claim was as set out in Judge Brace's case management order of 28 October 2020 and in particular the factual summary at paragraph 14 [32H] and the legal issues identified at subparagraph 1 of paragraph 46 [32J-32K].

9. Both parties agreed those were the issues before the Tribunal. We had before us a bundle of documents extending to 183 pages. References in this Judgment to references in the bundle are in brackets [ ]. We had written statements from and heard oral evidence from the claimant and Mr Lyndon Edwards and Ms Harriet Edwards for the respondent. We received

oral closing submissions. We have not set out the parties' closing submissions here but we took them into account.

Summary of the relevant legal principles

10. Section 39 of the Equality Act 2010 prohibits discrimination in employment. In particular section 39(2) says that:

"An employer (A) must not discriminate against an employee of A's (B) –

(a) As to B's terms of employment;
(b) In the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) By dismissing B;
(d) By subjecting B to any other detriment."

11. It was identified in the case management hearing before Employment Judge Brace that the discrimination claim was brought under 39(2)(c); i.e. that what was said to be discriminatory was the claimant's dismissal.

12. Sections 13 to 25 of the Equality Act define what is meant by discrimination and includes at section 19 indirect discrimination. It says:

" (1) A person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, person with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) It puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

13. The relevant protected characteristics include sex.

14. In terms of the burden of proof, section 136(2) of the Equality Act provides that:

"If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A)

contravenes the provision concerned, the court must hold that the contravention occurred."

15. Section 136(3) goes no to say that *"subsection (2) does not apply if A shows that A did not contravene the provisions."*

16. A claim for notice pay is a breach of contract claim (sometimes also referred to as wrongful dismissal). The Tribunal has jurisdiction to hear breach of contract claims under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (with some exceptions) where the claim arises or is outstanding on the termination of the employee's employment.

17. Section 13 of the Employment Rights Act 1996 states: -

"(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) The worker has previously signified in writing his agreement or consent to the make of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion"

18. The case law has established that for a sum to be "properly payable" to the claimant, the claimant had to have a legal (albeit not necessarily contractual) entitlement to the sum.

Findings of fact

19. We do not have to determine every factual dispute between the parties; only those necessary for us to decide the issues in the case. Where there is a dispute between the parties we applied the balance of probabilities. Central to the indirect sex discrimination complaint is a dispute as to when the decision was made to dismiss the claimant and the reason why that decision was made.

20. The claimant started working for the respondent on 16 September 2019. The respondent is a farm shop that also has a café. The claimant worked

predominantly in the café and she came to the respondent with previous café experience. It is a family run business. Mr Lyndon Edwards is a director. Ms Harriet Edwards is also a director and is Mr Edwards' daughter.

21. In November 2019 the claimant emailed Ms Edwards asking if she could reduce her hours to finish earlier, saying she felt she was missing out on time with her son when working until 4pm or 5pm. They met and agreed changes to the claimant's shifts [55-56]. The claimant worked on a two week rota. In week one she worked Monday 12- 5pm, and Wednesday 10-3:30pm, Thursday 9 - 4pm. In week two she worked Monday 12 – 5 pm, Wednesday 12 – 4pm, Thursday 9:30 – 4pm, Saturday 11 – 5pm and Sunday 10 – 3pm. The claimant's mother in law looked after the claimant's son on a Monday. On a Wednesday he was looked after by a childminder and by a different childminder on a Thursday. On a Saturday and Sunday the claimant's partner could look after their son.

22. In January 2020 concerns started to arise about the claimant being late for work. The time card at [77-78] shows the claimant clocking in late for work on Monday 6 January 2020, by 3 minutes. On Saturday 11 January it was 5 minutes, on Sunday 12 January it was 4 minutes and on Monday 13 January it was 4 minutes. Whether the claimant was late or not on the 22 January is not clear to us (neither party actually took us through the time card entries) as the arrival time is recorded at 9:37 but the claimant did not ordinarily start work until either 10 or 12 on a Wednesday. It appears she was then 7 minutes late on Saturday 25 January, 1 Minute late clocking in on Saturday 8 February and 7 minutes on Sunday 9 February 2020.

23. The claimant accepts she was sometimes late. She says sometimes she would be a couple of minutes late if her childminder was not back from taking other children to school or if she was behind sorting out her son. She says there was also one or two instances where she was either late or early because she got muddled up about her shift times. The issue with the childminder dropping other children to school was only a potential problem on a Wednesday. It seems looking at the timecard entries that the claimant's lateness in fact usually tended to be on a Monday or a weekend when she had family members looking after her son. It seems likely to the Tribunal that the cause of the claimant's lateness on the identified occasions was therefore more likely to be the claimant not leaving the house early enough to ensure that she got to work on time. It seems likely there was also an instance or maybe a couple of instances where the claimant got her start time wrong, although no one identified to us the particular occasions that happened.

24. There is a dispute between the parties as to whether the claimant was ever spoken to about lateness prior to the probationary meeting on 13

March 2020. The respondent says the claimant was spoken to by two shift supervisors. The claimant denies this. We did not hear evidence from the two shift supervisors. There are also no documentary records confirming that the claimant was spoken to.

25. Ms Edwards told us that the two shift supervisors had come to her separately expressing concerns about the claimant being late. She said this was mid to late January 2020. She said they expressed concerns about the claimant being late impacting on other staff. In particular, that if the claimant was late for a 12 o clock start it impacted on the lunch breaks for other members of staff. She says that she told the supervisors to speak to the claimant about it and make her aware, and they would go from there. Ms Edwards said that the shift supervisors later told her, together, that they had spoken to the claimant but that the claimant did not seem that worried about it. She said that she then talked about it with Mr Edwards and they agreed they would raise it with the claimant in her probationary review which then tended to do with staff at about the 5 month interval.

26. Mr Edwards told us that the two shift supervisors came to speak to him separately about the claimant being late for work, and said that when they had spoken to the claimant about it she did not seem to take it very seriously. He said this was about the end of January or early February 2020 and that the supervisors had said it put undue pressure on the rest of the team and was bad for staff morale if someone was seen coming to work late and others were at work in good time ready for the start of their shift. Mr Edwards said that the claimant's clocking in time was also the time she arrived on site and it would not mean that the claimant was ready for work such that in reality it would be another 5 minutes or so before he claimant would have been ready to actually start work. He said he would have discussed it with Ms Edwards and also Maria and that they decided that if the shift supervisors were not having any luck they would raise it with the claimant at the probation meeting.

27. Applying the balance of probabilities, the Tribunal considers it likely that someone did say something to the claimant informally about being late. The timecards show the claimant being late on 3 consecutive dates on 11, 12 and 13 January 2020 and the Tribunal considers that is likely to be noticed by an employer and be a point of concern. It is also something that is likely to be noticed and commented upon by other workers, as they would feel it unfair if they were turning up for work on time and could see a colleague persistently being late. The next weekend the claimant worked, it appears she was then late again on Saturday 25 January. Some of the claimant's exchanges with her mother, also do create a sense of the claimant not considering the issue of lateness as being particularly serious to her. For example, on 12 February 2020 the claimant told her mother at

9:20am, in response to a question from her mother, that she was supposed to be in work 9 – 3 "*But not sure where Clare is, I've rang her I think she's on school run so I'm late but [claimant's son] didn't wake til 8.15 anyway."* The claimant's reaction to the situation does not give a sense of being concerned about, or of taking responsibility for being late for work as opposed to just considering it a matter of fact from her perspective. This adds credence to the suggestion that the shift supervisors did not get the sense the claimant was taking being late seriously and that they had passed that back to Ms Edwards and Mr Edwards. The Tribunal also notes that the claimant later expressed concerns to her mother about being worried about the potentially being dismissed at the probationary meeting. She expressed worries about her lateness and commented that staff who did not have children would be at work 15 minutes early [136]. The Tribunal considers this supports the suggestion that the claimant was aware that the issue of lateness had cropped up previously and that there some awareness on her part that other staff were viewing the seriousness of timeliness in a different way to how she did.

28. At some point the claimant was given a statement of her terms and conditions of employment to sign [51 – 54]. It is dated 6 February 2020. However, according to the timecards the claimant was not in work on that day and in fact was last in work on 30 January 2020. The claimant said Ms Edwards gave her the contract to her to sign. It seems to the Tribunal it must therefore be likely that the contract was given to the claimant at the end of January 2020 and she then took it home, in order for her to then be able to sign it on 6 February.

29. The Tribunal considers it likely that the claimant's lateness coming to the respondent's attention was probably around the same time that the respondent realised that the claimant was due a probationary review meeting and that they decided it was something they wanted to discuss with her at that meeting. Whilst Ms Edwards denied it in evidence, the Tribunal also considers that this also probably triggered the respondent realising that they had not given the claimant her statement of particulars of employment and that they needed to do so (and potentially other staff members too who also had their outstanding). The particulars of employment contain within them a statement that the first 6 months of employment are on an a probationary basis [51].

30. The claimant was not in work on 19 February as her son was unwell [74]. On 20 February 2020 the claimant was herself then signed off work by her GP for a week. She messaged Ms Edwards to say that she had been having a bit of a hard time with her mental health over the last month or so and so the doctor had signed her off for a week [75]. On 27 February the claimant messaged to say her doctor was happy for her to return to work

from Monday and asked if they could have a chat about her hours of work as childcare was so expensive [71]. Ms Edwards said to speak to her and they would see what they could do to help.

31. The claimant was then in work for one day on 2 March 2020 before she went off again. That night the claimant's son was taken to hospital with croup and they did not leave hospital until 4 March. The claimant was in contact with Ms Edwards on 3 March to say what was happening and Ms Edwards had responded to say she hoped he was feeling better soon and that the claimant was ok too.

32. On Thursday 5 March Ms Edwards messaged the claimant at 9:37am to ask her if she was on her way into work. The claimant messaged her mother saying "Shitt Harriet thought I was going in today" and her mother gave her some advice on what to say. The claimant apologised explaining she had thought she had sent Ms Edwards a message the night before, but it did not send, to say that her son was still not well and she was on her way to the doctors to take him for a check up. Ms Edwards responded to say "*Hello, I cannot get cover this late notice I need to know much earlier than this Maisie. I already have another person off today and didnt arrange cover as I thought we would be ok. As well as someone off in the shop. Is there any way you can come in after."* The claimant apologised again but said that her son was not well enough to go to the childminders.

33. That same day the claimant was sent a letter inviting her to a probationary review meeting on 13 March 2020. The letter said:

> "*We have a number of concerns with your performance in your role and would like to discuss these with you. Consequently, you are required to attend a probationary review meeting on 13 March 2020… to discuss the issues, which I have itemised below.*
>
> - *Time keeping*
> - *Not showing up for work*
>
> *I would like to draw to your attention that we retain the discretion to take into account your length of service with us and forewarn you that your probationary period could be extended or your employment could be terminated following this review."*

34. Ms Edwards told us that the letter being sent the same day that the claimant did not attend work was just a coincidence. The Tribunal considers this is unlikely to be the case. The messages exchanged between the claimant and Ms Edwards on 5 March 2020 show Ms Edwards demonstrating a degree of frustration. That was understandable on her part. She was expecting the claimant in work and was already

short staffed. Likewise, what happened is understandable from the claimant's perspective.

35. The Tribunal considers it is likely that by the 5 March 2020 a variety of factors were accumulating. The claimant's lateness for work was an issue that they wanted to speak to the claimant about and the Tribunal accepts that the respondent would have been intending to hold a probationary review meeting with the claimant at around the 5 month mark in any event. They then did not do so as the claimant was absent on sick leave, before being in back for 1 day and then being absent again because her son went into hospital. The Tribunal accepts that the respondent by then did need to call the claimant in for a probationary meeting fairly promptly as the claimant would have worked there for 6 months by 16 March 2020. However, we do consider that the sending of the invite letter specifically on 5 March was not coincidental. We do consider that the timing of the letter was likely to have been influenced by the fact the claimant had not attended work on 5 March when they were expecting her in. However, we also accept that the respondent would have invited the claimant to a probationary meeting at around that time in any event, and prior to 16 March.

36. The Tribunal also considers it is likely that by the time of the probation meeting there were various things which were accumulating as a source of concern. There was the issue of the claimant's lateness for work and the sense that she was not taking that seriously. There was the claimant not attending work on 5 March and not forewarning the respondent that she would not be coming in so that they had time to arrange cover. It is likely that these things gave the respondent an increasing concern about unreliability on the claimant's part.

37. At the meeting on the 13 March Mr Edwards told the claimant that they had secret shoppers round and gave the claimant 2/5 on customer service and said that she was a little short with customers. The evidence from Mr Edwards and Ms Edwards about these secret shoppers was extremely vague. In her written witness statement Ms Edwards said that when dealing with the claimant's subsequent appeal she was "conducting further investigations checking the reports of the mystery shoppers." Yet there are no written reports from the mystery shoppers and Mr Edwards and Ms Edwards both stated there were none that could be produced. On the face of it saying that a mystery shopper had given someone 2/5 and saying that the mystery shopper reports were being checked at appeal stage tends to suggest that would have been recorded in writing somewhere. Mr Edwards and Ms Edwards also talked about "shoppers" and "reports" in the plural and yet said in oral evidence that in fact there was only 1 report about the claimant.

38. The evidence from Mr Edwards and Ms Edwards was unsatisfactory and at times coy. This left the Tribunal in considerable doubt as to whether there were in fact any formal secret shopper reports. Concerns were coming to light about the claimant and the claimant was absent from work for a considerable period in February and early March. The Tribunal considers it likely that the respondent was seeking feedback about the claimant from other individuals such as staff members and also regular customers that the Edwards family, operating a family community business, were likely to know fairly well. The Tribunal considers it more likely that it was this kind of informal feedback from regular customers that was described as "secret shoppers" as opposed to being a more formal arrangements that generated a written report. We accept that this kind of feedback and also the feedback from shift supervisors that the claimant's lateness and attitude to lateness were causing disharmony in the wider team, were also factors on the respondent's mind by the time of the probation meeting.

39. We therefore consider the growing sense of concern and dissatisfaction with the claimant was multifactorial in nature. We also consider that it was probably also contributed to by the claimant's level of absence. She had been looking after her son and then off sick for a week in February 2020. She was then only in work for one day before her son went to hospital. Even with good reason for her absence, we consider this was still likely to have been a source of frustration to the respondent, and a sense of one thing happening after another and worries about the claimant's general reliability. We consider it is also likely that there were contributing concerns relating to the claimant having got some of her shift times muddled up, turning up either late or early. Further, it is likely that there were concerns about the claimant's ability to provide occasional cover for other absent staff, such as other people's holidays.

40. There are minutes of the meeting on 13 March at [80-81]. The meeting was conducted by Mr Edwards and Ms Edwards took handwritten notes. She later converted those handwritten notes into an email that she sent to the respondent's HR advisor. In turn, she later turned that email into the typed minutes of the meeting. When generating those typed minutes she mistakenly included within them a sentence that had been sent to the HR advisor after the meeting. That sentence says:

> "*So now we need to know based on whats been spoken about do we need to send a letter or a basic phone call now that she hasn't passed her probationary period."*

41. The minutes were not sent to the claimant to approve at all and nobody was suggesting they were a verbatim account of everything that was said. However, all the witnesses seemed in general to suggest that they

captured the gist of some of the things said. Mr Edwards and Ms Edwards said in evidence that during the meeting the timecard entries were shown to the claimant as to the times she had been late. The claimant denies this. The Tribunal considers that, on balance, it is likely that there was some kind of print out available and present at the meeting, even if a copy was not given to the claimant. The notes record Mr Edwards saying "These lates for 4 – 11 minutes late…" tends to suggest that he was referring to a document, as does the fact he is referring to specific figures.

42. The minutes record the claimant saying she understood that when her son was ill and she was off work it put pressure on the respondent as a business. She also talked about being under financial pressure as she still had to paid the childminder if her son was not there, and that financially she did not have the option to stay at home with him all the time and had to work. It is not recorded in the minutes but the claimant said in evidence that she had said (and Mr Edwards agreed with this) that she was not sure how lateness could always be avoided as sometimes her childminder was late back from a school run and also because her son was young he picked up viruses from other children and became poorly which meant she could not then send him to the childminders.

43. The minutes record Mr Edwards agreeing that from the respondent's point of view "time off is a problem, on a busy day it causes lots of problems and extra strain on the other members of staff, but it doesn't sound like your situation is going to get any better, which is very concerning."

44. The minutes also record Mr Edwards saying "Flexibility is a problem due to childcare for [the claimant's son], but also when you are due in you late a lot which if were waiting for you to come to start lunches it has a knock on effect with the other girls breaks." Mr Edwards told us in evidence that the reference to flexibility was about the potential for the claimant to cover other shifts. Later on in the minutes the claimant says that she could not cover many shifts due to there being no space at the childminders and maybe she could try a nursery instead.

45. In relation to lateness, the minutes record the claimant saying she got her times mixed up in January and that is why she could have been late. When asked what she or the respondent could do to improve the problems the minutes say the claimant said:

> "*Its trial and error, a Monday is my best day to work because childcare is free. Wed & Thurs isn't because I need childcare on those days or having a day off between working days because then if he is will I don't have to take 2 days off. Im hoping he doesn't get ill with summer coming hes had a bad few months being ill and in*

hospital, and I don't know who else to speak to or what to do, if me or my partner could stay home we would but its not possible."

46. The claimant in her witness statement said that Mr Edwards did not offer any solutions to how things could be improved. Mr Edwards said in oral evidence that he had been looking to the claimant to come up with some proposals of what she or they could do going forward to resolve the issues. He said that he had been expecting or hoping that the claimant would come to the meeting and say what she could do to ensure that she would arrive at work on time and be a good, reliable member of the team.

47. Mr Edwards said in oral evidence he had felt disappointed with the claimant's responses at the meeting as she seemed to be saying her lateness was not her fault as the problem lay with the childminder. He said, in essence, that if the claimant was not going to accept ownership of the problem that he was left struggling to see how it was likely to be resolved and improved going forward. He said that given the claimant was also late at the weekends that the claimant may have had something to do with her own lateness as opposed to it being the childminder. He said that when he had dealt with similar meetings in the past, staff had come back and agreed the concerns and set out proposals as to what could be done to remedy it. He said, the overarching sense he got from the claimant was that she did not consider things to be her fault and there was nothing she could do about it. He said he was ultimately concerned everything would then remain the same going forward.

48. Mr Edwards said the claimant's incidences of lateness were sizeable and sporadic such that he did not see changing shifts or start times was likely to fix it without something coming from the claimant as to how she was going to achieve turning up on time. He said that in previous cases he had extended individual's probation periods with an action plan to work to but that when he reflected on it he did not see it as a viable option in the claimant's case. He said he remained worried the claimant would not remedy the lateness and he was worried about her attitude towards the issue given the claimant had said, when shown the timecard sheets, that she had not thought it was that bad. He said the claimant had not convinced him of her proactivity and responsibility for resolving the problem.

49. The Tribunal considers it likely that the claimant probably did leave Mr Edwards with a sense that she was not taking responsibility for some of the issues that had arisen, or that she not taking responsibility for proposing things to be done about it, or recognising the impact of events on the respondent, as opposed to her focus being on her own family situation, and finances. The claimant's child being ill and then not having childcare was clearly something difficult for the claimant to fix. Likewise

always being able to find childcare to cover extra shifts was likely to be difficult. But she does not appear to have said anything about trying to give the respondent better notification of when she could not be in. The Tribunal considers it is likely that the claimant's pattern of lateness was a key concern for the respondent, and it does not appear that the claimant took steps to reassure the respondent that she was going to address that. She spoke about having got her times mixed up and her problems sometimes with the childminder being late because the childminder was on the school run. But she did not talk about how she was going to fix those things or ensure on other days (such as the Mondays and weekends when she did have family provided childcare) how she was going to make sure she was at work on time. Instead, we accept it is likely that she gave the general impression that she did not think these things were her fault or were for her to find a way to sort. She talked instead about how it was trial and error and that Wednesdays and Thursdays were not good days for her to work as she needed childcare on those days, but ultimately those childcare arrangement responsibilities were her responsibilities not the respondent's.

50. The Tribunal also finds that the respondent decided on 13 March 2020 or shortly thereafter, that they did not feel the claimant had passed her probation. In particular, the wording sent through to their HR advisor after the meeting for advice shows a decision having been made that the claimant had not passed her probationary period and that they were looking for advice as to how to carry that through; in particular whether they need to send a letter or could just phone the claimant.

51. We consider that the reasons for the decision to dismiss remained multifactorial and somewhat interlinked. Firstly, a key issue was the claimant's pattern of lateness for work and the sense this was likely to remain unresolved as the claimant did not seem to be taking responsibility for it. Secondly, concerns about unreliability in relation to both lateness and the claimant not at times giving sufficient notification that she would not be able to attend work, or not being in control of her shift times and then getting muddled up. She did not leave them with a sense of trust and confidence that she would be coming into work when she was due in. Thirdly, it is likely the respondent held some performance concerns. We do not consider this was a particularly critical issue but we consider it likely that the feedback from some customers and colleagues was that the claimant was not always the most engaging of staff members with customers. It therefore did not drive a sense of providing a reason to want to keep the claimant on as opposed to of itself being a key reason to dismiss. Fourthly, there was the sense that Mr Edwards had obtained from the shift supervisors that the claimant's lateness was causing disharmony in the working team. Fifthly, we consider the claimant's inability sometimes to provide shift cover remained a factor albeit again a smaller one as if the

claimant were viewed unreliable it is unlikely the respondent would have seen her as a good source of providing reliable cover in any event. Finally, the claimant's absence record for her own ill health and that of her child was also likely to have remained a factor.

52. The claimant was told at the end of the meeting that the respondent would be speaking with HR and would get back to her with a decision by the end of that day. That did not in fact happen as they were unable to obtain timely HR advice.

53. On Monday 16 March 2020, having heard nothing, the claimant messaged Ms Edwards saying she had not heard and asking if Mr Edwards was sending a letter or calling her [61]. As she did not get a response and she was due in work, the claimant went into work and worked her shift.

54. On 17 March 2020 the claimant messaged Ms Edwards saying they had not managed to speak the day before and asking whether she could drop a Thursday working or shorten her hours, and it may be easier as they had less customers [61]. Ms Edwards later responded to say that HR were on isolation and working through emails from home and asked if they could let the claimant know on Monday. The claimant said that it was fine, that she needed to get things sorted out, but Monday was fine [70]. The claimant was therefore then expecting the outcome on Monday 23 March 2020.

55. The claimant did not attend work on Wednesday 18 March, Thursday 19 March or Saturday and Sunday the 21 and 22 March. This was the run up to the formal lockdown later announced on the evening of 23 March 2020 and it was a time of great uncertainty and strain in society. On 20 March cafes were ordered to close. The claimant's text messages with her mother show her anxiety condition, which she already had, was getting worse. Neither the claimant nor Ms Edwards seem to recall them having a discussion about the claimant not coming into work and Ms Edwards was away for some of that period. It seems likely that if the claimant did have a discussion with anyone about not going into work it was with the respective shift supervisors. Ms Edwards said, and we accept, that at the time she did not know the claimant had not been coming into work.

56. On 22 March the claimant messaged Ms Edwards asking if anything was happening going forward with work as cafes had been told to shut and she said she would need to let her landlady know [70]. Ms Edwards replied to say "There is still work in the shop so business as usual." The claimant replied to say "I have no childcare at the moment as both my childminders have shut so not sure what I can do going forward as I'm not a key worker. We can talk tomorrow that's no problem."

57. The claimant did not attend work on 23 March 2020. There was some interaction between her and Ms Edwards that day. Neither the claimant nor Ms Edwards were clear as to whether they actually spoke by telephone or ultimately just by message, although the text messages at [63] do show that they were trying to call each other. The claimant then sent Ms Edwards a link to some guidance about furlough and the Coronavirus Job Retention Scheme which she said she had been sent by a friend and that it was also about being off work and looking after a dependent. The claimant also messaged her mother saying both her and her partner would be considered key workers if it was said that she was working in the farm shop [154]. The previous indication from Ms Edwards that the claimant would receive notification of the decision regarding her probation, did not happen that day. It was explained to us in evidence that at the time the respondent was facing both uncertainty as to what was going to happen next in terms of the pandemic and were incredibly busy, as it was the era of panic buying with lines of customers trailing out the door. We were told of the long hours being worked trying to keep up with stock, service customers, and try to keep customers and staff safe. It was on the evening of 23 March 2020 that the prime minister put the country into formal lockdown. We accept, it is likely there was a delay in communicating the decision to the claimant due to the demands of the pandemic response. It was also likely that dealing with the claimant's individual position in terms of employment was not a key priority for the respondent at that particular point in time.

58. On 25 March 2020 a letter was written giving notice of the termination of the claimant's employment, and saying that she was required to work her notice period from 25 March 2020 to 31 March 2020 [82]. The letter says that the claimant had not reached the standards required and "I gave full consideration to the responses you gave at the meeting but have reached the conclusion that you have failed to demonstrate your suitability for the role. The reasons for this decision are your continual lateness (11 occasions to date during your probation period) and your performance in the role of Café Assistant." The claimant was given the right of appeal, to be set out in writing within 5 working days.

59. The letter was not sent or given to the claimant that day and she was therefore unaware of it at that time. On 26 March 2020 the claimant messaged Ms Edwards asking if she needed to fill in anything in relation to pay etc [64]. This was a reference to potential furlough. Ms Edwards responded to say "No there is currently nothing available as employers we spent all day yesterday speaking to accounts about this. We will let you know when we know more xx. There is a job here for you, we are rushed off our feet at the moment and as a keyworker childcare should be available. X" The claimant responded to say it was really hard as her childminder was shut due to the virus and the few people she had spoken

to regarding nurseries and keyworkers "they are told not to take any new children on a the risks to high its really difficult atm for child care xx."

60. The claimant says that Ms Edwards' message shows (in particular, that "there is a job here for you") that at that point in time there had been no decision to dismiss her, and that the decision was made after she communicated her childcare difficulties and asked to be furloughed.

61. We consider that Ms Edwards' message was extremely poorly worded and certainly the claimant cannot be criticised for the conclusion she reached. However, we were satisfied, and find as a matter of fact, that it was just that: a poorly worded message. We were satisfied that the decision to dismiss the claimant had already been made, on or shortly after 13 March 2020 but that there was a continuing delay in communicating that to the claimant. What Ms Edwards was in effect trying to say (whilst not mentioning the claimant's dismissal as presumably she was aware that the letter had not at that time been delivered to the claimant) was that for the time the claimant remained an employee there was work there for her in the shop to do and that they did not consider furlough to be an option for the claimant. They also had the view that there should be childcare available to the claimant by some means. The claimant's mother was encouraging her to offer to go in and work in the shop at weekends, but it does not seem likely that the claimant communicated that availability to the respondents as she was seeking furlough.

62. We heard oral evidence from Mr Edwards and Ms Edwards about their interactions with their accountants. We were told that the advice they had been given was that the business either entered the furlough scheme and furloughed all staff or that everyone stayed out of it. This does not seem to have been advice that was necessarily technically correct, albeit the furlough scheme was in its infancy at that point in time. We do, however, accept that is likely to be what the respondent was told, hence Ms Edwards' expression "No there is currently nothing available as employers we spent all day yesterday speaking to accounts about this." As Mr Edwards also said in evidence, at the time there was a 3 week minimum furlough period, and the claimant would not, given the decision to dismiss her, have been in employment for that qualifying period in any event to allow furlough to happen. It also seems unlikely that Mr Edwards or Ms Edwards would have pressed the accountants on the issue of furlough to the claimant given they knew they would be dismissing her with a week's notice period.

63. On the afternoon of 27 March 2020 the dismissal letter was hand delivered to the claimant's home. She sent a copy on to her mother [163]. The claimant lodged an appeal [83-84]. One of the grounds of appeal was

that “I believe the decision to end my employment wasn’t because of my lateness but due to the fact that I couldn’t work because of the corona virus and as I have a dependent, no childcare and I’m not a key worker, my partner is.”

64. The claimant was invited to an appeal meeting on 10 April 2020 [179]. The claimant said she could not attend a face to face meeting and asked for a written response [66]. A written appeal response was sent in the names of Ms Edwards and Maria Edwards on 10 April 2020 [86-87]. The letter said that the main reason for concern had been the claimant’s time keeping and enclosed a sheet with her clocking in times on it. It said that they had run through the times and the sheet in the probation meeting. The appeal response letter also said that timekeeping had been mentioned to the claimant on two occasions by the shift leaders.

Discussion and conclusions

Indirect sex discrimination

65. As set out above, the permitted amendment to the claimant’s claim was to allow a complaint of a discriminatory dismissal, said to be on the basis that the claimant was dismissed due to being unable to attend work (due to childcare unavailability) throughout lockdown. In particular, it is alleged that in dismissing the claimant the respondent applied to the claimant a discriminatory provision, criterion or practice. That provision, criterion or practice was identified in Employment Judge Brace’s case management order as being an attendance policy. In other words, the permitted pleaded complaint is that the respondent had an allegedly discriminatory policy requirement it applied to the claimant of requiring her to attend work in the lockdown, and when she could not, she was then dismissed.

66. We have not, however, found as a matter of fact that the claimant was dismissed for that reason. As set out above, we have made a finding of fact that the decision to dismiss the claimant was made on or shortly after the 13 March 2020 but that there was a delay in communicating that decision until the letter was written on 25 March 2020 and then hand delivered on 27 March 2020. That decision was made for mixed reasons, as set out above. It was not, however, made because the claimant was unable to attend work during lockdown. This is because the decision to dismiss was made before lockdown and before the claimant’s pandemic related childcare problems materialised.

67. It follows that the claimant’s complaint about a discriminatory dismissal is not made out and is unsuccessful because the factual premise behind the claim, as pleaded, is not made out on the findings of fact we have made. Under section 39(2) of the Equality Act it has not been established that the

respondent discriminated against the claimant by dismissing her. In the short period between the claimant losing her childcare for pandemic related reasons and her dismissal coming into effect, the respondent did apply an attendance requirement to the claimant. However, the claimant's claimed inability to comply with that was not the reason for her dismissal. The decision to dismiss had already been made.

68. The claim was not advanced on any other alternative detriment basis. It is purely a dismissal complaint. As a result, the indirect sex discrimination does not succeed and is dismissed. We would add, however, that it was entirely understandable why the claimant believed what she did about the reason for her dismissal. The fault for that lay with the respondent's poor communication in not communicating the decision promptly to the claimant, and in the unclear messages sent to the claimant by Ms Edwards.

Unauthorised deduction from wages

69. Contrary to the order of Employment Judge Brace, the claimant did not set out in her Schedule of Loss (or indeed elsewhere) the dates on which she said she was paid less in wages that she should have been. There was therefore no evidence before us as to the particular dates the claimant said she was sent home early, what she was told or agreed on those particular dates, what hours she was due to work on each date, what time she went home, the amount she was paid, and the amount she says she should have been paid for each occasion. The complaint therefore cannot succeed as there simply was insufficient evidence before us to establish and evaluate as a Tribunal the basics of each individual complaint.

70. We did, however, also consider whether we could make a more general finding as to whether, on the unknown occasions when the claimant went home early because work was quiet due to the pandemic, the contractual agreement was that the claimant was entitled to still be paid a full day's pay.

71. We were not satisfied evidentially that the contractual agreement was that the claimant was entitled to a full day's pay. The option given to the claimant (and colleagues) was to go home early or stay. There has to inherently be a difference between the two options; as otherwise everyone would just opt to go home. We were not satisfied as a matter of fact that the claimant genuinely thought or understood that if she went home early she would still be entitled to a full day's pay. We considered it more likely that she did understand, and therefore agreed by taking the option, that if she went home early she would only be paid for the hours that she worked. There is support for our conclusion (albeit accepting it was said in a different context) in the text message the claimant sent her mother on

11 March 2020 at [131] where she talked about being worried about her son and said "I might just say I have to pick him up At 3" (i.e. meaning she was contemplating telling the respondent that she had to leave work early to pick him up). The claimant ultimately did not do so that day, but the message tends to support a finding that if she went home early the claimant would not expect to be paid.

72. The complaint of unauthorised deduction from wages is therefore not upheld and is dismissed.

Notice pay

73. By the conclusion of the proceedings the respondent accepted that the claimant was entitled to a week's notice pay and that the value of a gross week's pay would be £204.92.

74. The claimant, however, seeks a notice payment of the equivalent of 4 weeks' pay on the basis that she says she passed her probation and that was therefore her contractual entitlement. The relevant clause of the claimant's contract of employment says:

"*If we terminate your employment we will give you the following notice:*

- *Under on month's service – No notice required*
- *One month up to successful completion of your probationary period – one week*
- *Upon completion of your probationary period but less than give years' service – one month…"*

75. The claimant's argument is that she reached 6 months' employment on 16 March 2020 and that by the time she was dismissed she had completed her probationary period and therefore the third bullet point applied to her.

76. In the Tribunal's judgement, however, the clause of the contract has to read as a whole. The bullet point in question follows on immediately from the one before which refers to a notice period of one month up to *successful* completion of the probationary period. We consider that the natural reading and construction of the cause is that the entitlement to a one month's notice period is following successful completion of the probationary period. We further consider that the natural meaning of "successful completion" is that there has been some form of active decision on the respondent's part, based on performance, to decide that their probationary standards have been met. We do not consider that its natural meaning would be that an employee successfully completes their probation through the simple effluxion of time. This fits with the section of the contract which sets the probationary period where it says : "This period

of time is to allow us to assess your performance and for you to decide if you wish to continue your employment with us." The claimant also clearly knew the respondent had serious concerns about whether she would pass her probation and that she was waiting for their decision about this. There was nothing said to her, even within Ms Edwards' clumsy messages, that sensibly suggested she was being told that she had successfully passed her probationary period.

77. The Tribunal therefore does not find the claimant was contractually entitled to a 4 week notice period. We therefore award the claimant the agreed gross sum of £204.92 for her week's notice pay. The claimant will be responsible for any tax and employee national insurance contributions due on that gross sum.

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Employment Judge R Harfield
Dated: 17 September 2021

JUDGMENT SENT TO THE PARTIES ON 20 September 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche