EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Gale**

Respondent: **Asks Ltd**

Heard at: **By video** **On: 6 August 2021**

Before: **Employment Judge R Harfield**

Representation:
Claimant: In person
Respondent: Mr Evans (director)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

- The respondent breached the claimant's contract of employment;

- The respondent failed to pay the claimant holiday pay;

- The claimant is awarded:
- £145.00. notice pay;
- £634.30 holiday pay;
- Less £416.50 overpayment;
- Totals £362.80;
- Plus 10% uplift = £399.08

- The claimant is responsible for any tax or employee national insurance contributions due.

REASONS

Introduction and the issues to be decided

1. The respondent is an estate agent operating out of various locations in West Wales. At the time in question, they employed about 26 individuals. The claimant worked for the respondent as a sales negotiator from 4 February 2020 to 14 August 2020. She presented a claim form on 11 November 2020, bringing a claim for unpaid notice pay and holiday pay. The respondent denies the claim.

2. It is not in dispute that the claimant was entitled to 1 week's notice of the termination of her employment. What is in dispute is (a) what she is entitled to be paid for this (b) what holiday pay the claimant was owed on termination and (c) whether the respondent can deem the claimant to have taken holiday in her notice period to offset the amount payable to the claimant. In turn these issues are linked to a fundamental point of dispute about what were the claimant's agreed contractual hours of work. The claimant initially worked 29 hours a week. The respondent says that at the time of the claimant's dismissal her contract had been varied by agreement so that she was contracted to work two days a week. The respondent says that the claimant's notice pay and holiday pay must factor in this reduction in hours. The claimant says that whilst a reduction to two days a week was discussed as a possibility the actual change was never agreed, verbally or in writing.

3. Both parties agree that there was an earlier overpayment to the claimant of £416.15 which needs to be deducted from the final amount payable to the claimant.

4. I heard oral evidence from and had written witness statements from the claimant and for the respondent: Mr Evans and Ms Richards. I also had a questionnaire document headed "returning to work", a printout of some whats app messages, a printout of an internal HR system showing the claimant having a whole year holiday entitlement of 17.5 days, a letter dated 7 August 2020, a series of emails between the claimant and Mr Evans, some pay slips, a Schedule of Loss, and an audio file containing the conference call between the parties of 6 August 2020. I took a break I the hearing to listen to the audio file. After hearing oral witness evidence, I took verbal closing comments from the parties. There was insufficient time to deliver an oral judgment which I therefore reserved to be delivered in writing.

Findings of fact

5. The claimant initially worked four days a week/29 hour a week working three full days and until 3pm on the fourth day. The claimant said at the time of recruitment that she had childcare arrangements in place to allow her to work the hours.

6. In early March 2020 the claimant approached Ms Richards asking if there was a possibility of her reducing her hours for a period as she was finding it difficult to balance working four days a week and her childcare commitments. Ms Richards said she would need to discuss it with Mr Evans.

7. About a week later the claimant met with Mr Evans and Ms Richards together. The claimant proposed working two days a week until her youngest child was in full time school. Mr Evans and Ms Richards said in evidence (initially at least) that it was agreed then and there that the claimant could drop to two days a week and that the change would take effect from 1 April 2020, to help them through the busy March period. The claimant says there was no definite agreement or arrangement in place and that Mr Evans and Mr Richards said they would get back to her.

8. The claimant says that about two days later Ms Richards called her into her office to say that they would look at the claimant reducing her hours to two days but that the business was currently so busy they would like her to continue with her current four days a week until at least the end of March. The claimant says Ms Richards said they would look at it again and discuss the possibility of the claimant working fewer hours once the end of March had passed. The claimant says she agreed to this as she was hopeful that if she was flexible for a while she would get the two days she was asking for. Ms Richards said in evidence she could not recall this third discussion taking place with the claimant, although she also said she was not saying it definitely did not happen.

9. Later in his oral evidence Mr Evans said that the claimant reducing to two days a week was agreed at the meeting but the actual arrangements of when it would start from was left to Ms Richards as she was responsible for managing the staffing in the offices. He said he was not involved in that bit of the discussion with the claimant, but that he did agree to the change from four days to two days.

10. On 17 March 2020 the claimant had to self-isolate and was on statutory sick pay. The offices then closed on 24 March 2020. The claimant was then placed on furlough with the respondent reclaiming furlough payments from the Treasury from 1 April 2020. The claimant's furlough pay was paid by the respondent at 100% from 24 March to 1 April and then 80% of the

claimant's pay based on working 4 days a week/29 hours a week thereafter.

11. No written confirmation was sent to the claimant confirming the change in her hours. The respondent says that this was an oversight due to the claimant isolating and then being on furlough combined with the demands of the pandemic at the time and ill health within Mr Evans' family but that their position remains the contractual variation was orally agreed between the parties and took effect from 1 April 2020.

12. The claimant's furlough pay was based on 80% of 29 working hours a week. Mr Evans said he left it to his accountant to sort out the mechanics of furlough pay in an incredibly busy and uncertain period and that it was probably a mistake. Although he also said the level of furlough pay may not have been a mistake if the furlough pay was to be based on the previous two months' pay.

13. On 30 April 2020 the claimant sent the respondent an email in which she said "I appreciate very much the flexibility you both agreed to offer me before this situation arose, in regard to reducing the number of days a week I was going to work in the short term. I'm aware the landscape has changed considerably since you agreed to me dropping down to work fewer days and am open to discussing how you feel I could be best of service of the coming months and future."

14. On 10 June 2020 the claimant also completed a "returning to work questionnaire" sent to staff on furlough in which she wrote, in response to a question about being considered for part time work: "Yes – as previously discussed prior to lockdown I would be happy with this. We had proposed that I would be doing 2 days a week rather than my 4 days. If it works for the company, I would still be very happy with this 2 days per week for the next year or so."

15. On 29 July 2020 Ms Richards sent the claimant a message asking if she was able to work 2 to 3 days the following week. The claimant replied to ask what days she would be needed and said she could work 8 – 10th when her husband was available to look after the children. There were more messages clarifying dates and Ms Richards then asked the claimant to work on the Saturday and the following Monday. The claimant asked what that would mean furlough wise and whether she would only be paid for ad hoc days she was required to work. Ms Richards said it was flexible furlough and "the days you work will be paid as per previous agreement." Ms Richards also said she needed two regular days a week from the claimant moving forward. The claimant said she could work the Saturday and Monday in question, but she could not commit to two regular days a week going forward as her husband did not have a set weekly shift pattern

and that it was particularly difficult in the school holidays. She said she could let the respondent know the days she was available, according to her husband's shift pattern, in advance.

16. On 4 August 2020 the claimant asked what was meant by flexible furlough and said "Its not been made clear what "not enough work" is. Is it 4 days a week as in my current contract? 2 days a week, as previously discussed? 1 day a week? Less?"

17. A conference call was then arranged between the parties on 6 August 2020. During the call the claimant, in passing, referred to having previously discussed a potential drop to work fewer days a week, whereas Mr Evans talked about two days a week being agreed prior to lockdown. The conference call, however, was not about what the contractual position was, it was about the claimant explaining what her current childcare situation was and a discussion about how a return to work could fit around the claimant's husband's shifts. During the call Mr Evans asked the claimant to lay her cards on the table and say whether she still really wanted the job. The claimant said lockdown had shifted her priorities somewhat. She said if she was needed two days a week she was happy to come back and help but that if that was of no use to the respondent it would not be the end of the world for her employment to end. She said she would not in the immediate future be able to return to working four days a week, until her youngest child was in school full time. Mr Evans and Ms Richards said they would have a discussion and get back to the claimant.

18. Following the call Mr Evans decided it was best to terminate the claimant's employment. Ms Richards telephoned the claimant and told her. At this point in time, it was anticipated it would be an amicable parting.

19. On 8 August 2020 the claimant received a letter dated 7 August 2020 saying it may be best for all concerned to terminate the claimant's employment. The letter said the claimant was entitled to 1 week's notice, which in her case was 2 days, which she would not be required to work because it was said that any holiday entitlement the claimant may be entitled to would be set against the required notice. The letter said the claimant was entitled to 7.5 days holiday for the period and based on an average of 5.75 hours at £10 an hour amounted to £431.25. The claimant was also told she had been overpaid in February and March 2020 by £416.50 such that there was only £14.75 owing to her.

20. On 9 August 2020 the claimant sent an email questioning the calculation. She said no notice had been served by the respondent requiring her to take her holiday during her notice period. She said she considered she was entitled to 8.75 days accrued holiday and disputed that an average

day was 5.75 hours long saying that 29 hours a week was 7.25 hours a day. She also said her contract remained at 29 hours a week and her notice pay should be calculated on that basis.

21. Mr Evans responded on 16 August 2020 to say it had been discussed and agreed that the claimant's contract would be altered to two days a week from 16 March onwards and that the claimant had worked that day and then gone sick. He said that without the claimant's sick leave and if covid had not happened then the claimant would have been working two days a week. He said the claimant's holiday entitlement had been calculated based on the claimant reducing to two days a week from 16 March onwards. He said the claimant had been given sufficient notice of the requirement to take her holiday pay during her notice period as she was only contracted for two days.

22. The claimant replied to agree there had been an overpayment of pay of £416.50 in February/March but denied that firm agreement had been reached as to the change in her contractual hours and asserted that she was still owed notice pay and holiday pay. She said she hoped matters could be cleared up without having to raise a formal grievance.

23. Mr Evans replied on 28 August to say that Ms Richards "has confirmed that what was agreed at the meeting with the 3 of us at your request was to go down to 2 days per week, she also confirmed this was to start from the 1st April and not the 16th March as I had previously thought." He said he had listened back to the conference call and that the claimant had clearly acknowledged it was her request and understanding she would be going down to two days a week. Mr Evans said they were positive that the claimant's contract was amended verbally in March to be effective from 1st April and it was clear that she could not have worked the 4 days from April if the office had been operating normally. Mr Evans set out recalculation of holidays saying they were now calculated at £580.00. He reserved the right to reclaim any overpayment of furlough. He said £163.50 was owed to the claimant once the overpayment of wages was offset.

24. The claimant replied again to dispute that a verbal agreement had been reached to drop down to two days a week. She also continued to dispute the holiday pay calculation or that the respondent could offset the claimant's holiday pay against her notice period.

25. The claimant received the sum of £211.13 which represented a week of furlough pay that was outstanding. Having received no other response, on 14 September 2020 the claimant emailed Mr Evans again providing a link to the Working Time Regulations (in relation to the notice periods that apply if an employer is directing an employee to take annual leave) and saying she considered the failure to pay holiday pay and notice pay was

an unauthorised deduction from wages. The claimant said, "As I have raised this issue with you, the managing director of the company, I understand that if a satisfactory conclusion is not reached I will be forced to pursue the matter through Acas." She did not receive any further response.

26. At the heart of this case is a fundamental factual dispute as to what was agreed in relation to variation of the claimant's contract. There are no contemporaneous documents such as minutes or notes of meetings or discussions. I must decide the point on the evidence before me and applying the balance of probabilities.

27. Both of the respondent's witnesses initially said the decision was made at the three-way meeting that the claimant could reduce her hours to work two days a week with a 1 April 2020 start date. Mr Evans told me that he was the kind of person that makes such decisions there and then. Ms Richards told me she could not remember any follow meeting up just between her and the claimant. However, Mr Evans later said that he did not get involved in the detail of the start date and that he had left that to Ms Richards. That tends to suggest, to me, that there was a follow up meeting between the claimant and Ms Richards. Bearing in mind the lack of clarity in the respondent's witnesses as to the exact sequence of events, ultimately I prefer the account of the claimant. I therefore make a finding of fact that the claimant was not given a decision at the initial three-way meeting but was told that Mr Evans and Ms Richards would get back to her. I find that Mr Evans and Ms Richards then had a discussion in which Mr Evans said he would agree to the claimant reducing her hours in the future when they had sufficient cover in place for their work demands and that he would leave the detail to Ms Richards. I find that Ms Richards then had a follow up meeting with the claimant in which the claimant was told that the respondent would look at changing the claimant down to two days a week in the future, that they were so busy that they needed the claimant to work four days a week in March, and a change to working hours would be looked at again after March and when the demands of the market allowed. Of course at that point in time no one involved knew what was about to happen in terms of the pandemic, lockdown and furlough.

28. I also consider it likely that Ms Richards, and in turn Mr Evans, did as time went on genuinely, albeit mistakenly, believe that the arrangements reached were more definitive than they in fact were. I suspect that again this was in large part due to the business and pressure of dealing with lockdown. The claimant's and the respondent's subjective different perspectives on what, after the event, they thought had been agreed was then reflected in the exchanges they had.

The legal principles

Breach of Contract

29. 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.

Unauthorised deduction from wages

30. 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) In one or more terms of the contact (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion."

(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"

31. 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.

32. Section 27(1) defines "wages" and says, "*In this Part "wages", in relation to a worker, means any sum payable to the worker in connection with his employment, including – (a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."*

Working Time Regulations 1998

33. Regulation 13 of the Working Time Regulations sets out the entitlement to the statutory minimum amount of four weeks annual leave (supplemented by an additional 1.6 weeks leave in regulation 13A). Regulation 13(9)(b) states that annual leave 'may not be replaced by a payment in lieu expect where the worker's employment is terminated'. Regulation 16 provides for payment in respect of annual leave at the rate of a week's pay in respect of each week of leave. The relevant enforcement provision is at Regulation 30 which includes that a worker may present a claim where the employer has failed to pay the whole or any part of holiday pay due. It is therefore possible to bring a claim for accrued but untaken holiday pay outstanding on the termination of employment either directly under the Working Time Regulations or as an unauthorised deduction from wages claim.

34. The employer has the power under the Working Time Regulations to give notice requiring a worker to take statutory holiday on specified dates (regulation 15(2)). The written notice must be at least twice the length of the period of leave that the worker is being ordered to take (regulation 15(4)(a)). I do not have a copy of the claimant's original written contract of employment, but Mr Evans confirmed that the respondent was not seeking to argue they had a separate contractual right to insist that the claimant take holiday during her notice period.

Discussion and Conclusions

35. The respondent gave the claimant a week's notice of the termination of her employment. The respondent also gave the claimant notice it was bringing furlough to an end. I have found above that the anticipated variation to the claimant's contract never actually took effect. The respondent was therefore contractually obliged to offer the claimant four days paid work/29 hours work in the week's notice period. The respondent did not do so as they decided to unilaterally deem the claimant as being on holiday in that period. The respondent accepts, however, that it did not have the contractual right to unilaterally deem the claimant to be on holiday. The respondent had the potential statutory right to direct the claimant to take annual leave under the Working Time Regulations. However, to require the claimant to take four days holiday required them

giving eight days' notice and the respondent therefore did not validly do so.

36. It follows that in unilaterally deeming the claimant to be on holiday in the notice period the respondent was acting in breach of contract. The failure to provide the claimant with four days paid work/29 hours work was also in breach of contract.

37. Damages for breach of contract are intended to compensate for the losses caused by the breach of contract. In my judgement I do not consider it likely that if offered 29 hours work in the notice period the claimant would have been in a position, due to childcare difficulties, to work all those hours. Agreement had previously been reached that the claimant would work two days that week and I consider it likely that those were the hours the claimant would have worked in the notice period if given the opportunity to do so. The losses sustained by the claimant due to the breach of contract are therefore the loss of income the claimant would have earned over those two days it is likely she would have worked if given the opportunity to do so. The claimant says an average working day was 7.25 hours at £10 an hour. The gross sum payable to the claimant is therefore £145.00.

38. Mr Evans accepted that if I found the claimant remained on a 29 hour a week contract and if the respondent was not entitled to offset holiday pay as against notice entitlement, he did not dispute the claimant's holiday pay calculation. The claimant seeks the sum of £634.30. I therefore award that amount in respect of a failure to pay holiday pay on termination of the claimant's employment which amounted to an unauthorised deduction from wages and/or breach of the Working Time Regulations 1998.

Offset

39. Both parties accept that the sum of £416.50 is to be deducted in respect of the February/March overpayment.

Acas Uplift

40. The Claimant seeks an uplift for an alleged failure to follow the Acas Code of Practice governing grievances. She says the respondent did not deal with her grievance correspondence of 28 August 2020 or 14 September 2020 and that she was not offered the right of appeal.

41. Under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, where it appears to the employment tribunal that the claim concerns a matter to which a relevant code of practice applies and the employer has failed to comply with that code and the failure was

unreasonable the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award by up to 25%.

42. The claimant's claims for unpaid holiday pay, unauthorised deduction from wages and breach of contract are claims in respect of which there can potentially be an uplift under Schedule A2. The Acas Code of Practice on Grievance and Disciplinary Procedures defines grievances as "concerns, problems or complaints employees raise with their employers." The claimant had raised what she saw as an underpayment of notice pay, holiday pay and an inappropriate offsetting of one against the other as a concern or a complaint with her employer.

43. The basic steps that the Acas Code of Practice says should be taken in respect of a grievance include holding a meeting with the employee to discuss the grievance, informing the employee of the right of appeal, and offering an impartial appeal where possible with a manager not previously involved in the case.

44. The claimant was not invited to a meeting to discuss her concerns. However, the respondent did engage in a series of correspondence with the claimant about the issues she was raising, and agreement could not be reached. I am doubtful that Mr Evans holding a meeting with the claimant would have made much of a difference to their exchanges or the decision he expressed, and I do not consider that trying to resolve the kind of dispute in question by way of correspondence was unreasonable. The claimant's latter two pieces of correspondence were not responded to. I consider it is likely that was due to it being a very busy time and also that Mr Evans probably thought there was little more to add/ no scope to further resolve the matter. In that regard I do consider that it would have been reasonable for the respondent to offer the claimant the right of appeal to a manager who had not been involved in the part time working arrangements or the dispute about payments. Whilst the respondent is a small business, Mr Evans confirmed in evidence that there was another director in the Narberth office who had not been involved and there were also other managers within the business. It would have been possible to deal with the appeal remotely. Mr Evans was extremely close to the matters the claimant was complaining about and to have a fresh pair of eyes considering the dispute at appeal stage would have been sensible.

45. Considering the nature of the complaint, the size of the respondent including that it did not have its own HR officer/advisor, and that there had been some effort to correspond with the claimant over the issues, I award an uplift to the claimant of 10%. I consider this to be just and equitable.

Summary

46. The award to the claimant is therefore:

£145.00 notice pay
£634.30 holiday pay
Less £416.50 overpayment
Totals £362.80
Plus 10% uplift = **£399.08**

Employment Judge R Harfield
Dated:12 October 2021

JUDGMENT SENT TO THE PARTIES ON 12 October 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS MR N Roche