EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case no 4110120/2021 (V)

Held by means of the Cloud Video Platform on 7 December 2021

10 **Employment Judge W A Meiklejohn**

Miss Faith Carnie	**Claimant** **Represented by:** **Ms R Elliot – Friend**
Genesis (J&T) Limited	**Respondent** **Represented by:** **Mr A Philp – Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that the claimant's claims in respect of unauthorised deduction from wages, notice pay and holiday pay do not succeed and are dismissed.

REASONS

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1. This case came before me for a final hearing, conducted remotely by means of the Cloud Video Platform, to determine both liability and remedy. The claimant was represented by Ms Elliot and the respondent by Mr Philp.

35 **Nature of claims**

2. In terms of her ET1 which was presented on 21 June 2021, the claimant brought the following claims –

- Redundancy payment
- Notice pay/breach of contract
- Holiday pay
- Arrears of pay
- Other payments

3. All of these claims were resisted by the respondent. During the hearing, some of these claims were withdrawn, namely –

   (a) Redundancy payment – the claimant accepted that she had received a redundancy payment on 29 January 2021.

   (b) Other payments – this was a claim for damages for harm and distress which the claimant accepted she could not pursue before the Tribunal.

   (c) Arrears of pay – this was withdrawn in part, in relation to underpayment during furlough in respect of which the claimant accepted that she had miscalculated.

Evidence

4. I heard evidence from the claimant. For the respondent I heard evidence from Mrs V Wilson, Director and Ms S Sowerby, Nursery Manager at Dalkeith. I had a joint bundle of documents extending to some 140 pages to which I refer below by page number.

Findings in fact

5. The respondent is a provider of early years childcare from a number of sites in Dalkeith and Paisley, operating under the name "Happy Days". The Dalkeith sites include the Happy Days Nursery at Hardengreen House, Eskbank ("Hardengreen"). When the claimant was first employed at Hardengreen, the respondent also operated a Pony Riding Centre from the site.

6. The claimant is a qualified riding instructor. She commenced employment with the respondent on 18 June 2017. This followed on from an offer letter dated 23 May 2017 (42) in which the claimant's role was described as Pony Centre Coordinator. This letter set out in a number of bullet points the *"Terms of your employment and job description"* which included –

   - *Hours of work will be 9.00am-5.00pm, 5 days per week. And a total of 1 hour in breaks per day.*

   - *Your hourly rate will be £8.20 – this information must be kept absolutely confidential between you and the directors and any question regarding your wages should be directed to Christina or Victoria.*

   - *Position: Pony Coordinator for riding center at our Hardengreen location*

7. The remaining bullet points focussed on the person specification for the role and the job description, including "*Main duties will cover all aspects of pony care".* The claimant's rate of pay increased to £8.50 per hour in April 2019 and £8.72 per hour in April 2020.

Terms and conditions

8. There was a conflict in the evidence as to whether the claimant had been issued with a statement of particulars of employment. Mrs Wilson said that one had been issued in the same form as the sample within the joint bundle (33-40). These were kept in employees' files but one could not be found in the claimant's file. The claimant initially said that she had not received this. She later accepted that she might have done so, but could not recall. I decided that, on the balance of probability, as it was the respondent's practice to issue such statements, the claimant had received a statement of particulars in the form of the sample in the joint bundle.

9. Within that statement there were provisions relating to holidays and notice. I was satisfied that these formed part of the claimant's terms and conditions of employment. The relevant provisions can be summarised as follows –

(a) Holidays – the holiday year was the calendar year. The holiday entitlement was 5.6 weeks. The statement indicated that employees were required to take one week's holiday at either Christmas or New Year. It also provided that, due to the nature of the business, public holidays were not recognised.

(b) Notice – the notice entitlement of an employee (such as the claimant) with more than three years' continuous service was one week for each complete year of service.

10. The statement included a section on hours of work. This was intended to be completed to show the contracted weekly hours and the number of days worked each week. As the form of statement was not specific to the claimant I had no information as to what might have been included in her case. However, and notwithstanding the terms of the offer letter, I was satisfied that the claimant's hours of work varied from week to week and she was paid for the hours actually worked rather than on the basis of a fixed 32 hours per week. This was supported by –

(a) the provision in the statement that "*Your hours of work will be arranged according to a rota covering Monday to Friday which the Nursery will notify you of an a weekly basis*" although I considered that this was more applicable to those members of the respondent's staff providing childcare;

(b) the claimant's payslips (117-134) which indicated that her hours of work (pre furlough) varied from month to month; and

(c) the claimant's acceptance during her evidence that her hours were variable.

11. There was a further conflict in the evidence as to the amount of holidays taken by the claimant at New Year 2020. The respondent's position was that the claimant had taken one week, being 6 days reflecting her normal working week at that time. The claimant's position was that she had taken only 2 days as she had required to attend at work to look after the ponies. The claimant's January 2020 payslip (123) did not assist as it did not detail holiday pay. I decided that, in the absence of any information as to what alternative arrangements had been made for care of the ponies, the claimant's evidence as to the amount of holiday she had taken was to be preferred.

Furlough

12. In common with most of the respondent's other employees, the claimant was placed on furlough as from 23 March 2020 when the national lockdown came into effect. The respondent issued a standard letter dated 31 March 2020 (42.1-42.3) to all staff who were furloughed. This included the following –

"For employees with variable pay who have been employed for at least one year: Your Furlough Pay will be based on 80% of the higher of your earnings in the same month last year, or your average earnings in the 2019/20 tax year."

13. As mentioned above, the claimant initially asserted that she had been underpaid while on furlough. However, she accepted during the hearing that she had in fact received the correct amount of pay while on furlough and withdrew this part of her claim.

14. On 15 July 2020 those parts of the respondent's business which had closed during lockdown re-opened and staff who had been placed on furlough returned to work. The only exceptions were the claimant and a cook, who remained on furlough. Although on furlough, the claimant continued to look after the ponies at Hardengreen. She received £20.00 per week for doing so. I understood that this was to cover her travelling expenses.

15. While on furlough the claimant took 10 days annual leave during August 2020.

Meeting on 13 August 2020

16. The claimant attended a meeting on 13 August 2020 with Ms L Ghori, the Manager at Hardengreen, and Ms Sowerby. Ms Ghori kept a handwritten note of this meeting (42.4-42.6). The background to this, as described by Mrs Wilson, was that –

    (a) the respondent was unable to re-open the Pony Centre due to continuing restrictions;

    (b) one of the ponies had become ill and had to be put down;

    (c) the respondent was looking to dispose of the other two ponies;

    (d) the respondent needed everyone they could get to cope with the work in hand; and

(e) Mrs Wilson wanted Ms Ghori and Ms Sowerby to ask the claimant if she could do any other work.

17. There was a conflict in the evidence as to whether the claimant was told at this meeting that her furlough would end on 30 September 2020. Mrs Wilson's position was that the claimant was told to return to work on 1 October 2020; this had been the purpose of the meeting. Ms Sowerby's position was that the purpose of the meeting had been to tell the claimant about the riding school and her return to work, and a return date of 1 October 2020 had been discussed. The claimant's position was that Ms Ghori and Ms Sowerby "*may have mentioned"* coming back at the end of September 2020 but had not said that this was the end of her furlough.

18. Ms Ghori's handwritten note made no reference to the end of the claimant's furlough nor a return to work date of 1 October 2020. Notwithstanding this, I was satisfied that the claimant was told at this meeting that her furlough would end on 30 September 2020 and a return to work on 1 October 2020 was discussed. I regarded this as consistent with (i) the purpose of the meeting as described by Mrs Wilson, (ii) the evidence of Ms Sowerby and (iii) the claimant's evidence that coming back at the end of September 2020 might have been mentioned.

19. I did not understand the claimant to dispute that the matters recorded in the handwritten note were discussed on 13 August 2020. These included –

(a) The uncertainty as to whether the Pony Centre/riding school would re-open.

(b) Whether the claimant would consider a job at Hardengreen. The claimant indicated that she would be happy with an admin job, cleaning or cooking.

(c) The request by the claimant for something in writing about her hours and hourly rate, and her statement that she was getting £8.75 per hour

in her other job (at McDonalds) and would not work for less. When Ms Ghori expressed doubt about this, the claimant was recorded as saying that *"she doubts she would come then, it's pointless as she enjoys her job at McD's, and it's more money".*

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Messages between claimant and Mrs Wilson

20. On 4/5 September 2020 there was an exchange of WhatsApp messages between the claimant and Mrs Wilson (116). The relevant parts were as follows –

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VW "*Just to let you know….we are unable to sustain the riding school following Covid, as per your discussion with Lisa"*

FC "*As you are aware I have been with the company over 3 years meaning that I require 3 weeks notice to end my contract. Please advice (sic) when I will receive my final pay and holiday pay…."*

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VW *"Sorry Faith, are you handing in your notice?....Let me know what your intentions are."*

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FC "*I'm not handing my notice in, but as I was contracted as a riding instructor, and as we have no ponies I don't understand where my place wld be?"*

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VW "*We are delighted to continue your employment with the company within the nurseries, which you said you were happy to do – is this still the case?*

FC "*As I said nothing was confirmed during my meeting with Stacey and Lisa, not the closure of the riding school or continued employment within the nursery. I did say that if the latter was to be the case I wld need a new contract and to see what was proposed in writing."*

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VW "*Same contract, nothing's changed, you're employed by the same company and we have work for you…."*

21. Mrs Wilson sent a further WhatsApp message to the claimant on 17 September 2020 (87) –

5 "*Faith, I need to give you paid holidays this month as you won't be able to get them all this year otherwise. I'll let you know how many have been topped up from furlough for this month.*"

Claimant consults CAB

10 22. At some point during September 2020 the claimant consulted Dalkeith & District Citizens Advice Bureau. The CAB wrote to the respondent by letter dated September 2020 (43). The main points made in this letter were that the claimant worked exclusively on all aspects of pony care and the respondent's decision to cease working with ponies meant that her role was 15 redundant.

Correspondence/contact during October 2020

23. The claimant sent a message to Mrs Wilson on 1 October 2020 (47, also 87) asking what hours her holiday pay covered. It appeared that Mrs Wilson did 20 not respond to this.

24. Ms Sowerby confirmed that Ms Ghori had, in her presence, tried to call the claimant a couple of times in early October 2020 but got no answer. Mrs Wilson's evidence was that her managers did try to contact the claimant 25 but she would always say that she was waiting for advice. She said that she was aware of this from her weekly conversations with Ms Ghori.

25. The claimant's position was that there had been no such calls/messages. I did not find this to be credible. Matters had not been made as clear as they 30 could (and should) have been following the meeting on 13 August 2020. Any doubt as to (a) when the claimant's furlough ended and (b) the fact that she was expected back at work on 1 October 2020 could have been avoided if the respondent had done as the claimant requested and put it in writing. However, I was satisfied that the respondent's expectation was that the

claimant, having been told that her furlough would end on 30 September 2020, would return to work on 1 October 2020. When she did not do so, Ms Ghori attempted to contact her to ascertain her intentions.

5 26. On 30 October 2020 there was a further exchange of WhatsApp messages between the claimant and Mrs Wilson (87). The relevant parts were as follows –

FC "*Hi I haven't been paid this month but have received my payslip which*
10 *shows my pay and then loads of deductions*

VW "*Faith you never got back to Lisa about what was proposed and therefore not worked any hours, your furlough ended last month. All your holiday pay was put through last month. What we're (sic) you expecting?"*

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FC "*I haven't heard from Lisa at all. And furlough ends this month…."*

VW "*YOUR furlough ended last month….none of our employees are on furlough past September that's why we asked everyone who was on furlough*
20 *to see what they were doing for coming back to work. Some people came back, some handed in their notice, but we never heard from you?"*

FC "*I messaged u on the 1st of October and I messaged Lisa on the 31 of August. I've had no communication regarding my continued employment.*
25 *You have received a letter from citizens advice asking for u to respond to my enquiries within 14 days and I have heard nothing."*

VW "*Sorry, Faith, I don't know what you're talking about."*

30 27. There was a further exchange of messages about the respondent's email address for correspondence and on 5 November 2020 Mr Wilson confirmed that she had received the CAB letter (43). There was then a further exchange of messages resulting in a meeting between Mrs Wilson and the claimant being arranged for 10 November 2020.

Meeting between Mrs Wilson and claimant

28. Mrs Wilson and the claimant met on 10 November 2020. Mrs Wilson described what happened at this meeting in a letter she subsequently sent to the claimant on 26 January 2021 (76-78). This was in much the same terms as her evidence to me and I was satisfied that this was an accurate account of the conversation on 10 November 2020. In her letter Mrs Wilson referred to the date of the meeting as 6 November 2020 but I believed that was in error as (a) an email from the claimant to the CAB sent on 10 November 2020 (83) indicated that the meeting took place on that date and (b) the follow up letter from Mrs Wilson to the claimant sent on 13 November 2020 referred to their meeting "*earlier this week".*

29. In her letter of 26 January 2021 Mrs Wilson said the following about this meeting (so far as relevant) –

"*We met on 06/11/20 to try and resolve the matter. I said to you that we had work for you and wanted you back at work. I also confirmed again that we would be happy to accommodate any hours and days that suited you. You expressed that it would be difficult travelling from Dunbar and that your "worst nightmare" would be working with children. I expressed that there were lots of jobs you could do and read you the notes from a previous meeting with Lisa and Stacey whereby you said you would give working solely with the children "a go". I also said that I was surprised at what you were saying as it was in fact a nursery and her (sic) work involved mostly giving children riding lessons and leading children's parties…."*

Mrs Wilson writes to claimant

30. Mrs Wilson followed up on her meeting with the claimant on 10 November 2020 by writing to the claimant on 13 November 2020 (53). Her letter was in these terms –

"*I write to confirm that as per your meeting at the end of August with Lisa and subsequent meeting earlier this week, your employment has continued, your furlough having come to an end as at end September 2020.*

We will expect you to be at work on Tuesday 17th November at 8.00am. You will resume your 5.5 hours per day, 5 days per week (Mon-Fri) from: 8.00am until 1.45pm with a 15 minute unpaid break during this time. Please report to Lisa or Stacey.

As discussed, should you have difficulty with these hours, we will be happy to discuss an alternative shift…."

31. The claimant did not report for work on 17 November 2020. A note prepared by Ms Ghori on 20 November 2020 (54) recorded that the claimant had returned her call of that date. In that note Ms Ghori refers to the claimant saying that (a) Tuesday was her usual day off (17 November 2020 being a Tuesday), (b) Mrs Wilson's letter did not state a start time (which was patently incorrect), (c) she had been expecting a letter ending her employment and (d) she would not be coming into work the following week.

32. Mrs Wilson wrote to the claimant on 24 November 2020 (56) confirming that there was work for the claimant at Happy Days and her employment was continuing. Mrs Wilson also referred to the claimant not having contacted the respondent in line with company absence reporting procedures and mentioned the possibility of disciplinary action.

33. Mrs Wilson wrote to the claimant again on 2 December 2020 (57) referring to the claimant having failed to respond to telephone calls in the previous week.

She invited the claimant to a disciplinary hearing on 9 December 2020. When the claimant failed to attend or make contact, Mrs Wilson wrote to her once more on 14 December 2020 (58) inviting her to a disciplinary hearing on 17 December 2020.

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34. A disciplinary hearing took place on 17 December 2020, following which Mrs Wilson wrote to the claimant on 18 December 2020 (59) advising that she was not going to pursue disciplinary action but expected the claimant to engage in consultation regarding her employment. Mrs Wilson asked the claimant if her preferred option was to be made redundant.

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35. Mrs Wilson met with the claimant again on 28 December 2020. The outcome was that the claimant was potentially to be made redundant. Mrs Wilson wrote to the claimant on 28 December 2020 (60) to confirm this –

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"*The reasons for this are your original role no longer exists in it's full capacity as we no longer have the animals and you do not wish to remain employed in any other role within the nursery unless it involves animal care."*

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36. Mrs Wilson wrote to the claimant again on 12 January 2021 (61) to arrange a further meeting (to be held by telephone call due to continuing Covid restrictions) to progress the redundancy consultation towards dismissal.

Claimant is dismissed

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37. Following her telephone conversation with the claimant on 15 January 2021 Mrs Wilson emailed the claimant on that date (63) attaching a letter (64) in which she stated –

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"*It is with regret that we must confirm that your position with the Company will become redundant on 05/02/21.*

You will be required to work your 3 weeks notice period, commencing from 18/01/21, and your last working day with the Company will therefore be 05/02/21…."

5 38. Mrs Wilson's letter continued by stating the claimant's redundancy payment to be £816.00, and referred to her entitlement to holiday pay. There was then an exchange of emails between the claimant and Mrs Wilson on 16-21 January 2021 (65-68). With her message of 21 January 2021 (68) Mrs Wilson sent the claimant a revised version of her letter of 15 January 10 2021 (69), the only difference being the amount of the redundancy payment which was now stated to be £837.12. Mrs Wilson's covering email began as follows –

"*My apologies for the error in your previous letter – please disregard the letter 15 of 15.01.21. Please find your updated redundancy package letter attached."*

39. The claimant responded to Mrs Wilson by email on 21 January 2021 (70) indicating that she was able to work her notice from 1 to 21 February 2021, and requesting that her travel time should count towards her allocated hours. 20 The claimant also suggested that she be put back on furlough for her notice period.

40. Mrs Wilson replied on 23 January 2021 (71). She advised the claimant that her notice *"started on the date as per your letter".* She told the claimant that 25 the respondent could not claim furlough for employees during their notice period. The claimant replied on 25 January 2021 (72) indicating that she was prepared to undertake *"ad hoc"* duties during her notice and requesting flexibility around her attendance.

30 41. Mrs Wilson responded to the claimant by letter dated 26 January 2021 (76-78). In her letter Mrs Wilson set out the history of events from August 2020. Mrs Wilson's letter concluded –

"Louise has tried to contact you again today and you said that you want to change your notice period to start from 01/02/21 and your 32 hours per week to include your travel time. I am afraid that it is not possible to change your notice period and that we cannot include your travel time in your working hours but we are more than happy to accommodate a later starting time, condensed hours etc".

42. During cross-examination each of the points in Mrs Wilson's letter was put to the claimant. The claimant broadly agreed that Mrs Wilson's letter accurately recoded what had happened apart from disputing how often Ms Ghori had contacted her.

43. There was a further exchange of correspondence between the claimant and Mrs Wilson on 8 and 11 March 2021 (79-80). The claimant referred to payment in respect of (i) her three week notice period and (ii) salary from October 2020 until the date of her redundancy. She asserted that the letter of 21 January 2021 was served *"too late to comply with my statutory notice period"* and asked for payment in lieu of notice. She also asserted that she had been available for any suitable work (since the end of furlough) and should have been paid for those months. In her reply Mrs Wilson's told the claimant that "*Had you worked your notice, the hours worked would have been paid to you in February 2021".*

Holidays and holiday pay

44. According to her payslips, the claimant was paid a holiday pay top up (ie over and above her furlough pay) of £313.45 in September 2020 (132) and holiday pay of £95.88 in November 2020 (133). She was then paid holiday pay of £378.45 (calculated as 43.40 hours @ £8.72 per hour) in January 2021 (134). None of the claimant's other payslips for 2020 and 2021 made reference to holiday pay.

45. The claimant's statement of particulars of employment (33-40) contained provisions relating to annual holidays. These included –

"*Holidays are to be taken during the year in which they are earned. They may not be carried forward in part or in whole to the following year.*"

5 *"On termination of employment, you will be entitled to be paid for holiday accrued but not taken at the date of termination of employment."*

46. Mrs Wilson wrote to the claimant on 23 November 2020 (55) about her holiday pay. She told the claimant –

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"*Usual daily rate = 5.5 x £8.72 = £47.96 x 22 = £1055.12 Holiday Pay*

Already paid = Daily furlough rate of £29.35 x 22 = £645.79

15 *Difference between the two is £409.33. As a payment of £313.45 was made in September, I will pay the difference of £95.88 in November*

Please note that you will now have been paid for your holidays for the whole year, as requested. We have done so as a good will gesture as the full years
20 *allocation has not yet been accrued."*

47. This appears to have been the catalyst for a further letter from the CAB to the respondent dated November 2020 (49-50). This included the following –

25 "*Ms Carnie has also forwarded on an email from Victoria at Happy Days indicating that her annual leave entitlement was allocated against days when she was on furlough. Ms Carnie has no note of being contacted by the Nursery to inform her that these days had been allocated. Under the terms of the working time regulations employers must give notice of annual leave*
30 *being allocated and therefore the 22 days have not been allocated appropriately."*

Comments on evidence

48. It is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. I have focussed on those parts of the evidence which had the closest bearing on the issues I had to decide.

49. One area where I had difficulty with the credibility of the claimant's evidence was in relation to whether the respondent, and Ms Ghori in particular, had made efforts to contact her after 1 October 2020. The claimant's denial that there had been calls made and messages left was simply not believable. There was a pattern of the claimant failing to respond to calls, messages and letters.

50. The evidence of Mrs Wilson and Ms Sowerby was given in a straightforward and credible manner. It was supported by the contemporaneous documents. I have quoted quite extensively from those documents because they provide a reliable record of what was said at the time.

Submissions

51. There was no time at the end of the evidence for oral submissions and so it was agreed that written submissions would be provided by Ms Elliot and Mr Philp. I am grateful to them for the evident care they have taken in preparing those submissions. As these are available within the case file I will comment on them fairly briefly.

For the claimant

52. In relation to the claimant not being paid between 1 October 2020 and 5 February 2021, Ms Elliot argued that the respondent had failed to follow up after the meeting on 13 August 2020 so as to provide more clarity on what was expected. The first time it had been confirmed in writing to the claimant that her furlough ended on 30 September 2020 was in Mrs Wilson's letter on

13 November 2020. Thereafter during November and December 2020 the respondent had taken the route of disciplinary action against the claimant before finally agreeing that her role was in fact redundant in January 2021.

53. In relation to notice pay, Ms Elliot referred to Mrs Wilson's letter of 15 January 2021 giving a termination date of 5 February 2021 and requiring the claimant to work her three weeks' notice. This was shortly followed by another similar letter, with the covering email telling the claimant to disregard the previous letter. The claimant had tried to offer a more suitable period to work her notice but Mrs Wilson's responses on 23 and 26 January 2021 confirmed that the claimant was already supposed to have started her notice.

54. In relation to holiday pay, Ms Elliot disputed that the claimant had taken a week's holiday in January 2020, referring to her evidence that the ponies still needed fed. She asked me to prefer the claimant's evidence that she had taken only one or two days off. She noted that the claimant's payslip for January 2020 made no reference to holiday pay. She also noted that the claimant's payslip for August 2020 disclosed only furlough pay despite the claimant having taken holidays during that month.

55. Ms Elliot submitted that the claimant's role effectively became redundant at some point between the meeting on 13 August 2013 and Mrs Wilson's confirmation that the riding school was not to continue on 4 September 2020. A new role and new hours were to be arranged but this did not happen. The claimant was willing to work but was not given a job or role to return to.

56. Ms Elliot argued that the claimant should be entitled to statutory notice pay as she was served short notice. This should be based on 32 hours per week.

57. Ms Elliot submitted that the claimant had been paid a total of £633.43 in holiday pay in 2020. This equated to 72.5 hours. A balance of holiday pay was still owed to her.

For the respondent

58. Mr Philp submitted that the claimant's position – that because she was still "*contracted*" to the respondent during the relevant period, she was entitled to be paid – was untenable and misconceived. She did no work for the respondent between 1 October 2020 and 5 February 2021. She did not report for work. Her alleged willingness to work was not supported by any evidence. Mr Philp referred to ***The British Library and others v Kaur and another UKEAT/0177/08*** where (at paragraph 10) the Employment Appeal Tribunal said that –

"….*the Claimants must establish a contractual or other legal right to full payment of wages before a finding of unauthorised deductions can be made. The basic principle is that the employee must be willing and able to work…."*

59. Turning to notice pay, Mr Philp focussed on Mrs Wilson's use of "*disregard"* in her email of 21 January 2021 when referring to her letter of 15 January 2021. This, he submitted, had been simply a poor choice of language. The claimant had not consented to withdrawal of the original letter. Instead, she had sought to vary both the notice period and the effective date of termination, which the respondent had declined to agree. Notice, once given, cannot be unilaterally withdrawn and can only be extended or shortened by consent – ***Harris & Russell v Slingsby [1973] ICR 454***.

60. Mr Philp argued that it was clear that the claimant had received written notice of termination of employment on 15 January 2021 and had been required by the respondent to work her notice, as they were entitled to do. Accepting that the claimant had been told to *"disregard"* the letter of 15 January 2021, Mr Philp pointed out that (a) the only difference between this letter and the one dated 21 January 2021 was the amount of the redundancy payment and (b) the email attaching the second letter was headed "*Updated redundancy letter".* If it had been intended as a replacement redundancy letter, it would have said so.

61. Both letters referred to the same notice period including the same dates and times. The original notice given to the claimant was clearly not varied. If that was accepted then, given that the claimant did not work any part of her notice period, the notice pay claim had to fail. If that was not accepted, then short notice was given, in breach of contract, and compensation was due. However, that should not be based on the claimant's artificial assessment of working 32 hours per week but rather on a calculation under section 224 of the Employment Rights Act 1996 ("ERA").

62. In relation to holiday pay, Mr Philp referred to the change in the calculation reference period (from 12 to 52 weeks) introduced by the Working Time (Coronavirus) (Amendment) Regulations 2020. He invited me to find that the claimant had a holiday entitlement for 2020 of 28 days of which she had used 16, leaving 12 days of accrued but untaken entitlement. He also invited me to find that the claimant had received a total of £633.43 in respect of her 2020 annual leave entitlement (it being a matter of agreement that, of the holiday pay of £378.45 paid in January 2021, some 17.7 hours related to holiday accrual in 2021). Mr Philp then provided some arithmetic to which I will return below.

Applicable law

63. The right not to suffer an unauthorised deduction from wages is found in section 13 ERA which, so far as relevant, provides as follows –

"(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 making of the deduction.

(2)….

(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 such an occasion…."

64. Pay in lieu of notice is not *"wages"* – ***Delaney v Staples [1992] ICR 483 HL***.

65. Section 89 ERA (**Employments without normal working hours**) provides, so far as relevant, as follows –

"*(1) If an employee does not have normal working hours under the contract of employment in force in the period of notice, the employer is liable to pay the employee for each week of the period of notice a sum not less than a week's pay.*

(2) The employer's liability under this section is conditional on the employee being ready and willing to do work of a reasonable nature and amount to earn a week's pay…."

66. The right to holiday pay is found in the Working Time Regulations 1998 ("WTR") as amended by the Working Time (Coronavirus) (Amendment) Regulations 2020. Regulation 16 WTR provides, so far as relevant, as follows –

"(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3)….

5 *(3) The provisions referred to in paragraph (2) shall apply –*

….(e) as if….references to twelve were references to –

….(b)….52….

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(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") and paragraph (1) does not confer a right under that contract.

15 *(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual*
20 *remuneration in respect of that period."*

Discussion

67. In broad terms the issues I had to decide related to –

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(a) Arrears of pay – the claimant contended that she was entitled to be paid from 1 October 2020 until her employment ended. The respondent denied this because the claimant did not work during that period.

30 (b) Notice pay – the claimant contended that she was entitled to pay in lieu of notice. The respondent denied this because the claimant was given notice, and failed to work during her notice period.

(c) Holiday pay – the claimant contended that she was entitled to holiday pay (additional to what she had actually received) for 2020. The respondent denied that the claimant was entitled to the amount she claimed.

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Claimant's terms and conditions of employment

68. Before dealing with these issues, I considered that I should look at the claimant's terms and conditions of employment. I focussed on (a) what type of work could the claimant be required to do and (b) what were her hours of

10 work.

69. In relation to the type of work the claimant could be required to do, I looked at the claimant's offer letter (42) and the statement of particulars of employment (33-40) which I found the claimant had been given.

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70. In relation to the offer letter, it would be fair to say that this covered nothing other than working with the ponies at the riding centre at Hardengreen. The only hint that more might be required was in the bullet point which stated "*Ability to work in a team and support others to complete tasks on a daily*

20 *basis".* In terms of what work the claimant actually undertook, there was no evidence that, prior to being placed on furlough, the claimant did anything other than work relating to the riding centre.

71. The statement of particulars of employment provided no assistance. It was a

25 template rather than the actual statement given to the claimant. As such, it did not specify the job title or the duties of the role.

72. It is however always open to an employer and employee to agree a variation to the terms of the contract of employment. In my view, that was what

30 happened during the meeting on 13 August 2020. Ms Ghori's note (at 42.5) recorded this exchange –

LG "*In the case of the riding school not being able to go ahead we would wonder if you would consider a job within the nursery."*

FC "*Faith said she would be happy with an admin job, cleaning or cooking.*"

73. If the claimant was in doubt as to what she would be expected to do upon her return to work, the position was to some extent clarified during her exchange of messages with Mrs Wilson on 4/5 September 2020 (116). The claimant was advised that the riding school would not be continuing and that the respondent had work for her. It would have been reasonable for the claimant to have assumed that this work would be of the kind she said she would be happy to do during the meeting on 13 August 2020. Accordingly, I found that the claimant had agreed a variation to her contract at that meeting so as to undertake the types of work with which she said she would be happy.

74. I then considered the claimant's terms and conditions relating to hours of work. If the claimant ever worked a 32 hour week at the times set out in her offer letter (42), that changed almost immediately upon her starting work. I believed that the key elements dictating the claimant's hours of work were (a) the needs of the ponies in terms of feeding and care, (b) the frequency and timing of riding lessons and (c) the frequency and timing of children's parties.

75. The claimant's hours of work varied more or less from the outset. She was, as her payslips confirmed, paid according to the hours she worked. There was no evidence that she challenged this at the time and I was satisfied that, from no later than July 2017, the contractual position became that her hours of work were variable and she was entitled to be paid for the hours she actually worked.

Arrears of pay

76. I considered that central to this issue was what the claimant had been told about the end of her period of furlough and whether there had been an expectation that she would report for work from and after 1 October 2020. The claimant's position was that the respondent had failed to follow up after the meeting on 13 August 2020 and had failed to provide clarity as to what

work the claimant was expected to do (as the riding school would not be operating).

77. I had a degree of sympathy with the claimant here. It would have been better if the respondent had written to the claimant after the meeting on 13 August 2020 and before her furlough ended to confirm matters. However, I was satisfied that –

(a) The claimant was told during the meeting on 13 August 2020 that her period of furlough was to end on 30 September 2020 and that a return to work on 1 October 2020 was discussed – see paragraph 18 above.

(b) There was discussion at this meeting about the uncertainty whether the riding school would re-open and about the type of work the claimant might do when she returned, with the claimant indicating that she would be happy to do admin, cleaning or cooking - see paragraphs 19 (a) and (b) above.

(c) The claimant's position at that time was that she was unwilling to work for less than the £8.75 per hour she was earning at McDonalds – see paragraph 19(c) above.

(d) The claimant was told that there was work for her to do – see paragraph 20 above and in particular Mrs Wilson's message to the claimant stating *"Same contract, nothing's changed, you're employed by the same company and we have work for you".*

(e) The respondent attempted to engage with the claimant about returning to work but she rebuffed their efforts. For example, having failed to attend for work on 17 November 2020, she told Ms Ghori when they spoke on 20 November 2020 that she had been expecting a letter ending her employment. It seemed to me that this was consistent with the assertion made by the CAB on the claimant's behalf in September 2020 that her role was redundant – see paragraph 22 above.

(f) The claimant did no work for the respondent from and after 1 October 2020.

5 78. What the EAT said in the ***British Library*** case (see paragraph 58 above) held good here. The onus was on the claimant to show that she had a right to payment. She had to be willing and able to work. I was not satisfied that the claimant had demonstrated this. I found that, on the balance of probability, the claimant preferred to work at McDonalds where she earned 10 more and did not have to travel to Dalkeith (having returned to live with her mother in Dunbar – see paragraph 29 above).

79. Accordingly, I decided that the claimant was not entitled to be paid for the period from and after 1 October 2020 and her claim for arrears of pay (ie 15 unauthorised deduction from wages) did not succeed.

Notice pay

80. It was not in dispute that as at January 2021 the claimant's notice entitlement 20 was three weeks. The respondent's letter of 15 January 2021 effectively gave that notice – the claimant was expected to work during the weeks commencing 18 January, 25 January and 1 February 2021 so that her employment would end on 5 February 2021. That was 21 days, ie 3 weeks, after 15 January 2021.

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81. The key issue here was the effect of the respondent's subsequent email and letter of 21 January 2021. Mrs Wilson's email told the claimant to "*disregard*" the letter of 15 January 2021. I agreed with Mr Philp that this was a poor choice of language. Did it refer to the amount of the redundancy payment 30 (being the only actual difference between the two letters) or did it mean that the second letter entirely superseded the first?

82. With a degree of reluctance I accepted Mr Philp's argument, based on ***Harris & Russell***, that the three weeks' notice given by the respondent to the

claimant in the letter of 15 January 2021 could not be unilaterally withdrawn and, absent consent by the claimant, had not been withdrawn. I say with reluctance because this was a legalistic argument and I would have preferred to take a common sense approach. It seemed to me that what the respondent was doing in issuing the second letter on 21 January 2021 was simply correcting the amount of the redundancy payment, in the claimant's favour. There was no intention to vary the notice period.

83. I decided that the respondent had given the claimant the three weeks' notice to which she was entitled. Section 89 ERA applied. The claimant's hours of work were variable, not fixed. She had not been ready and willing to do work during the notice period. Instead, she had sought to change the notice period. The result was that her claim for notice pay did not succeed.

Holiday pay

84. I approached this by asking the following questions –

(a) What was the relevant holiday year?

(b) What was the claimant's entitlement to paid holidays in the relevant holiday year?

(c) How much of that entitlement had she taken and what balance, if any, remained untaken?

(d) If the claimant had a balance of holidays accrued but untaken, was she entitled to carry these forward or were they lost at the end of the holiday year?

(e) If the claimant was entitled to carry forward any accrued but untaken holidays, what holiday pay was due to her on termination of employment?

(f) Had the claimant received the holiday pay to which she was entitled for the holidays taken by her in the relevant holiday year and/or on termination of employment?

5 85. Firstly, what was the relevant holiday year? The answer to this was found in the statement of particulars of employment. The holiday year was the calendar year. It was not in dispute that the respondent had paid the claimant for the holidays accrued but untaken in the holiday year commencing 1 January 2021. Accordingly, the focus was on the holiday year
10 from 1 January 2020 to 31 December 2020.

86. Next, what was the claimant's entitlement to paid holidays in 2020? It was a matter of agreement that this was 28 days.

15 87. How much of that entitlement had the claimant taken and what remained untaken? The respondent's position as at 23 November 2020 was that the claimant had used 6 days of her 28 days' entitlement (at New Year 2020) and was due a balance of 22 days' paid holiday for the year. That was apparent from Mrs Wilson's email of that date (55 – see paragraph 46 above) where
20 her calculations were based on 22 days.

88. However, that appeared to ignore the fact that the claimant had taken 10 days' holiday in August 2020. It was also at odds with the claimant's contention that she had taken only one or two days at New Year 2020. My
25 view of this was that –

(a) I preferred the claimant's evidence that she had taken only two days of holiday at New Year 2020, and not six days as contended by the respondent. The claimant's explanation that the ponies needed to be
30 looked after was plausible.

(b) I accepted the claimant's evidence that she had taken 10 days of holiday in August 2020. Given that she was on furlough at that time it was possible the respondent might not have been fully aware of this.

It followed that the claimant's accrued but untaken holidays for 2020 amounted to 12 days.

89. Next, was the claimant entitled to carry these forward or were they lost at the end of the holiday year? This took me back to the claimant's terms and conditions of employment. These provided (at page 36) as follows –

"Holidays are to be taken during the year in which they are earned. They may not be carried forward in part or in whole to the following year."

90. This was in line with what is stated in the WTR. Regulation 13(9) provides –

"*Leave to which a worker is entitled under this regulation may be taken in instalments, but –*

(a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated."

91. I noted that this applies only to the 4 weeks' annual leave provided for in regulation 13(1) WTR. However, in the case of the additional 1.6 weeks' annual leave provided for in regulation 13A WTR, this can only be carried forward if a relevant agreement so provides – regulation 13A(7) WTR. In this case there was no such provision.

92. The exceptions in paragraphs (10) and (11) of regulation 13 WTR were introduced by the Working Time (Coronavirus) (Amendment) Regulations 2020. Those paragraphs provide as follows –

"*(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this*

regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due."

93. Accordingly, I had to consider whether the claimant came within this exception - had it been not reasonably practicable for the claimant to use her 12 days of accrued but untaken leave in 2020? I decided this against the claimant, ie I found that it had been reasonably practicable for her to take holidays to use her accrued entitlement. I had no evidence of any impediment preventing the claimant from taking holidays in the period from September to December 2020. Specifically, I had no evidence that the effects of coronavirus had rendered it not reasonably practicable for the claimant to take holidays during that period.

94. I therefore decided that the claimant's 12 days of accrued but untaken holidays were lost as at 31 December 2020 when the holiday year ended without those holidays having been taken. This meant that my next question – see paragraph 84(e) above – became academic.

95. Finally, had the claimant received the holiday pay to which she was entitled for the holidays taken by her during 2020? Given that the claimant received no normal remuneration after 30 September 2020, I considered that the relevant period of 52 weeks ran from 1 October 2019 to 30 September 2020. Based on her payslips (120-133) for that period, the claimant's gross pay was as follows –

October 2019	£1047.20
November 2019	£ 798.15

December 2019	£1379.55
January 2020	£ 981.75
February 2020	£1240.15
March 2020	£ 981.75
April 2020	£ 860.67*
May 2020	£1137.48**
June 2020	£1100.79**
July 2020	£1137.48**
August 2020	£1137.48**
September 2020	£1100.79***

*This reflects recovery of an overpayment (per 126)

**This is based on furlough pay per the relevant payslips, grossed up to 100%

*** This is based on furlough pay, grossed up, but excluding holiday pay

96. These figures add up to gross pay for the 52 weeks ending 30 September 2020 of £13003.24 which equates to weekly gross pay of £250.06. Based on the 16 days (or 3.2 weeks) of holidays actually taken by the claimant, she should have been paid £800.19 in holiday pay.

97. I was satisfied that the claimant had actually been paid for her holidays as follows –

(a) In January 2020 she was paid for the full month per her payslip (123). This made no reference to holiday pay but neither did any of her payslips for 2019 (117-122). I formed the view that, on the balance of probability, the claimant's January 2020 pay included the two days taken as holiday.

(b) In August 2020 the claimant was paid £909.98 of furlough pay. This included the 2 weeks (10 working days) when she was on holiday. She was entitled to receive 100% of her pay for those days. The difference (by grossing up) was £1137.48 minus £909.98 actually paid, divided by 31 and multiplied by 14 – this equals £102.74.

(c) The additional payments made by the respondent to the claimant in respect of holiday pay were £313.45 in September 2020, £95.88 in October 2020 and £378.45 in January 2021 (of which £154.35 related to 2021 – 17.7 hours @ £8.72 per hour – leaving £224.10 in respect of 2020).

98. The additional payments made by the respondent were calculated on the basis of paying the claimant her full year's holiday pay entitlement. They were substantially more than the amount to which I found the claimant was entitled based on her actual holidays in 2020. Accordingly, I decided that the claimant's claim for holiday pay did not succeed.

99. For the sake of completeness, I also considered whether it could be said that the claimant had been prevented from taking the balance of her holiday entitlement in 2020. In support of this was the statement by Mrs Wilson when she messaged the claimant on 17 September 2020 (87) that *"I need to give you paid holidays this month as you won't be able to get them all this year otherwise."*

100. As mentioned above, this appeared to be the catalyst for the second letter from the CAB (49) which pointed out that an employer "*must give notice of annual leave being allocated and therefore the 22 days have not been*

allocated appropriately". This reference to "*22 days"* appeared to ignore the fact that the claimant had taken 10 days' holiday in August 2020. However, it did serve to confirm that the claimant was aware that she had accrued but untaken holidays.

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101. My view of this was that the claimant was not simply accepting that payment in lieu of 22 days of holidays in 2020 satisfied her holiday pay entitlement for that year. On the contrary she was, through the CAB, challenging what Mrs Watson was doing. In those circumstances I was not persuaded that 10 there was anything preventing the claimant from seeking to use the balance of her 2020 holiday entitlement had she chosen to do so.

Decision

15 102. For the reasons set out above, the claims brought by the claimant in respect of unauthorised deduction from wages, notice pay and holiday pay do not succeed and are dismissed.

20 Employment Judge: Sandy Meiklejohn
Date of Judgment: 11 January 2022
Entered in register: 14 January 2022
and copied to parties