CE

EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Harte**

Respondent: **(1) Mr Graham P Sharp**

(2) Sharp Leisure Consultancy and Bar Services Limited

Heard at: **East London Hearing Centre**

On: **4 March and (in chambers) 15 March 2022**

Before: **Employment Judge Goodrich**

Members: **M Legg**
M Rowe

Representation:

For the Claimant: **In person**

For the Respondent: **Mr S Hoyle (Litigation consultant)**

JUDGMENT

The unanimous judgement of the Employment Tribunal is that:

1 The Claimant was unfairly dismissed. The second Respondent is ordered to pay the Claimant compensation for unfair dismissal of £1308.00 for her basic award and £528.00 for her compensatory award. The recoupment provisions do not apply.

2 The Claimant's redundancy claim succeeds. No order of compensation is made for the reasons set out further below.

3 The Claimant's age discrimination claim fails and is dismissed.

4 The Claimant was dismissed in breach of contract in respect of notice and the Respondent is ordered to pay damages to the Claimant of £872.00. This is a net

sum but is based on the Claimant's gross pay because it is likely that on receipt the Claimant will have to pay tax on this amount as Post Employment Notice Pay.

REASONS

1. The background to this hearing is as follows.

2. The Claimant issued proceedings on 7 December 2020. Before doing so she had obtained an ACAS Early Conciliation Certificate, which was received by ACAS on 5 November 2020 and issued on 5 December 2020.

3. The Claimant, in box 8.1 of her claim form, ticked that she was bringing claims for unfair dismissal, age discrimination, notice pay and other payments. She provided details of her claim which were later summarised by Judge O'Brien at a Preliminary Hearing, to which we refer below.

4. The Respondent filed an ET3 response, defending the proceedings, the response being accepted by the Tribunal.

5. On 24 June 2021, Employment Judge O'Brien conducted a Preliminary Hearing on the case. He made a helpful summary of the issues in the case and made case management orders.

6. Although the case had been listed for two days to be heard by a Tribunal, only one day was available for a Tribunal to hear the case.

7. The Claimant has acted in person throughout these proceedings. The representative for the Respondent, Mr Hoyle from Croner, informed the Tribunal that Croner had only very recently been instructed. He also informed the Tribunal that neither he nor his client had a copy of the Preliminary Hearing document sent by the Tribunal to the parties after the Preliminary Hearing on 24 June 2021.

8. The Judge, therefore, provided a copy of the Preliminary Hearing document to Mr Hoyle; and a copy of it is attached to this judgment. The issues set down by Employment Judge O'Brien were agreed by the parties to be the issues that the Tribunal needed to decide. In his closing submissions, however, Mr Hoyle accepted that the Claimant had been dismissed by the Respondent on 31 October 2020.

9. One of the issues referred to by Employment Judge O'Brien was the correct name of the Claimant's employer. After reading the documents provided in the trial bundle, it was apparent that the correct name of the Claimant's employer was Sharp Leisure Consultancy & Bar Services Ltd. The correct name of the named Respondent was Mr Sharp; and the Tribunal determined that the name of the first Respondent should be Mr Graham Sharp, not Mr G Sharp t/a Armstrong's Restaurant.

10. Another of the issues referred to in the Preliminary Hearing document was as to the Claimant's length of service. In dispute was whether there was a "TUPE" transfer from the Claimant's previous employer to the first Respondent in these proceedings on 11 February 2019.

11. One of the documents provided in the bundle for the Tribunal was a letter from Licenced Insolvency Practitioners, David Rubin & Partners, dated 15 February 2019. In the course of this letter it was stated that the Director of Gadman Ltd t/a Armstrong's had instructed the firm to assist in placing the company into creditors voluntary liquidation and stating that, due to the company's financial difficulties: "*Your contract of employment has been terminated by reason of redundancy with effect from today*." The letter provided in the bundle of documents had blanked out the name of the recipient.

12. The Claimant, in response to questions from the Judge, informed the Tribunal that she had never received such a letter and had never claimed nor received any redundancy payment.

13. Mr Hoyle, on behalf of the Respondent made an application for David Rubin & Partners to supply a copy of the letter which, they submitted, must have been provided to the Claimant.

14. The Tribunal asked the representative to contact the Insolvency Practitioners to seek to ascertain their response to any request or order for the document. Mr Hoyle, having done so, notified the Tribunal that David Rubin & Partners had been brought by BTG UK. He also said that he had spoken with a Mr Ellis from BTG UK, who told him that he would only provide any such document in response to a court order. Mr Hoyle submitted that such an order was vital for the justice in the case in ascertaining whether or not a TUPE transfer had taken place.

15. The Tribunal was not particularly satisfied with the late submission of such an application. We doubted the reasons given for why Mr Sharp had not received the Preliminary Hearing document– although Mr Sharp stated that the premises of Armstrong's Restaurant were closed during lockdown, the document was not sent out during a time of lockdown but when the restaurant was open. Even if Mr Sharp had not received the document, he was present at the preliminary hearing at which the issues were discussed, after which the reference to the TUPE issue was recorded in the Preliminary Hearing document.

16. Nevertheless, the Claimant's continuity of employment is an issue of importance in this case. If the Respondent's contentions are correct and there was no TUPE transfer on 16 February 2022, the Claimant would not have sufficient continuity of service to bring an unfair dismissal claim and make a claim for a redundancy payment. If she had the eight years continuity of service, because her employment had transferred on 16 February 2019 by virtue of the TUPE Regulations, not only would she be able to bring both such claims, if successful in her claim she would be entitled to greater amounts of notice pay and basic award as compensation for unfair dismissal. The Tribunal was satisfied, therefore, that the document was both relevant and necessary for the fair disposal of these proceedings. An order was made to the individual notified by Mr Hoyle as having conduct of the matter and who would have care of any letter to the Claimant that David Rubin & Partners may have written to her at the time Mr Sharp took over the running of Armstrong's Restaurant from Gadman Ltd.

17. In order not to have to reconvene the parties for a further Employment Tribunal hearing, Mr Hoyle agreed to put the Respondent's case on the document in cross-examination. The Claimant's case was, as stated above, that she had neither received

the letter, nor made a claim for a redundancy payment.

18. It was also agreed with the parties that, as Mr Hoyle stated that his cross-examination of the Claimant on matters relevant to remedy (if all or some of her claims were to be successful) would be short, the Tribunal would deal with all remedy issues (including the so-called "*Polkey*" issue) rather than having the need to convene another remedy hearing day, if the Claimant were to be successful in some or all of her claims. The Claimant notified the Tribunal that, if successful in her unfair dismissal claim, she sought compensation, not reinstatement or re-engagement with the Respondent.

19. In response to the Tribunal's order, Mr Ellis sent a copy of the letter ordered. This was in identical form to the letter provided in the bundle of documents for the Tribunal (at pages 72-78), except that the name of the recipient was not blanked out but was addressed to Eileen Harte, the Claimant, at her home address.

20. In the course of the Tribunal's deliberations on their judgment, the judge considered that a case that had not been referred to the Tribunal, nor notified to the parties, might be relevant to our judgment on the issue of whether "TUPE" applied to preserve the Claimant's continuity of employment in 2019, an issue in dispute between the parties. The case is question was *Secretary of State for Trade and Industry v Slater and others (2007) IRLR 928 EAT* (referred to later in this judgment).

21. The Tribunal, therefore, gave the parties an opportunity to make further submissions on this issue; and were told that, if they wished to do so, these submissions must be provided to the Tribunal by not later than 25 March 2022.

22. In reply, on behalf of the Respondent, Mr Hoyle stated that he needed more time to investigate the judgment to which he had referred, although he did not apply for an extension of time for this, nor say when he would provide any further submissions. He did, however, state that his client's evidence had been that the landlord paid him to run the business. He also stated that the assets of the business had been purchased by the landlord of the premises his client operated from- this, however, was not evidence that had been provided to the Tribunal at the hearing.

23. At the time of completing the judgment, so far as the Tribunal is aware, no further submissions were provided on behalf of the Respondent.

24. The Tribunal also asked the Claimant to confirm (as we believed to be the case) that if the Claimant was unsuccessful in her claim for "furlough" pay, she wished to claim loss of earnings for the same period. So far as the Tribunal is aware the Claimant did not reply to the Tribunal's letter.

THE RELEVANT LAW

Length of service and "TUPE"

25. One way in which an employee may obtain the protection of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") Regulations 2006 is through a business transfer pursuant to the provisions of 3(1)(a).

26. Another way in which the TUPE protections come into place is through the service

provisions changes set out in Regulation 3(1)(b). These provide for three types of service provision change, sometimes known as "contracting out, or outsourcing"; "second generation contracting out"; and "contracting in, or insourcing".

27. The two types of transfer are not mutually exclusive, so that a transfer may qualify for TUPE protection both by way of the business transfer provisions and the service provision change provisions.

28. Whether either of these provisions apply has been the subject of extensive caselaw guidance where a number of factors have been suggested, with none of them usually being decisive. Factors such as whether or not the tangible assets of the business are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new company, the degree of similarity between the activities carried on before or after the transfer and the period, if any, in which they are suspended are the kinds of factors that need to be considered.

29. Regulation 3(6) provides that a relevant transfer may be effected by a series of one or more transactions; and may take place whether or not any property is transferred to the transferee by the transferor.

30. If TUPE does apply for the protection of the employees' employment, Regulation 4 gives continuity of employment for the transferring employees, with their contracts of employment continuing to apply; and Regulation 7 gives protection against dismissal.

31. Regulation 4 of The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") provides: '…a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor… which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the persons so employed and the transferee.'

32. Regulation 7(1) of the TUPE Regulations goes on to provide:

'(1) where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.'

33. However, in the circumstances set out in Regulation 8, Regulations 4 and 7 do not apply. Regulation 8 has the purpose of facilitating rescue of businesses that are becoming insolvent.

34. Regulation 8(1) provides:

'(1) if at the time of a relevant transfer, the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.'

35. Regulation 8(2) defines the meaning of relevant employee as meaning an employee of the transferor-

'(a) whose contract of employment transfers them to the transferee by virtue of the

operation of these Regulations; or

(b) whose employment with the transferor is terminated before the time of the relevant transfer in circumstances described in Regulation 7(1).'

36. Regulation 8(5) provides that Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.

37. Regulation 8(6) provides:

'(6) … 'relevant insolvency proceedings' means insolvency proceedings which have been opened in relation with the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.'

38. Regulation 8(7) provides as follows:

'(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is subject to bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.'

39. In the case of *Secretary of State for Trade and Industry v Slater and others* [2007] IRLR 928 EAT, the appeal tribunal considered whether Regulation 8(7) applied in circumstances where the appointment of a liquidator was imminent at the time that the relevant transfer occurred. The issue was whether the insolvency proceedings in question had commenced prior to the transfer. In the *Slater* case, a firm of accountants were appointed by the directors of the company to assist the transfer in preparing for the winding up. The following day, the firm of accountants gave notice of redundancy to all staff. The company was not, however, formally put into voluntary liquidation until the members meeting and creditors meeting took place some weeks later. The EAT held that the liquidation of the company, for the purposes of Regulation 8, did not occur until after the transfer had taken place some weeks earlier. Liability for the debts owed to the Claimants did not, therefore, lie with the Secretary of State.

Unfair dismissal

40. Section 108(1) Employment Rights Act 1996 ('ERA') provides that section 94 ERA (the right not to be unfairly dismissed) does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than 2 years ending with the effective date of termination. There are some exceptions to this, but these are not relevant to this case.

41. Section 98(1) ERA provides that in determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason or principal reason for the dismissal and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

42. The burden of proof for establishing the reason for dismissal lies on the employer.

43. One of the reasons for dismissal set out in section 98(2) ERA is that the employee

was redundant.

44. A refusal by an employee to accept necessary changes to their hours or duties may constitute some other substantial reason falling within s.98(1) ERA.

45. Where the Tribunal has been satisfied that the reason for dismissal fell within section 98(1) and (2) ERA, it will consider section 98(4) ERA. This provides that the question of whether the dismissal is fair or unfair;

'(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

46. In considering section 98(4) ERA, the tribunal will usually consider both the fairness of the procedures used in dismissing the employee and the fairness of the sanction of dismissal. For both these tasks, the function of the Employment Tribunal is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal if fair: if the dismissal falls outside the band it is unfair. The burden of proof in considering s.98(4) is neutral.

47. Where a dismissal has been held to be unfair the Tribunal is required to find out from the employee whether they seek reinstatement or re-engagement with the employer, or compensation alone.

48. Where an employee seeks compensation alone for unfair dismissal, sections 118 to 126 set out how compensation is to be calculated and provisions for reductions of awards. Section 119 sets out the formula for calculation of the basic award, section 123 the provisions for calculation of the compensatory award. Section 123 provides that the compensatory award shall be such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to the employer. Guidance on the interpretation of section 123(1) was given in the case of *Polkey v AE Dayton Services Limited (1987) IRLR 503 HL.*

49. Where a dismissal has been decided to be unfair, a Tribunal may need to consider the guidance given in the case of *Polkey*. There it was held that if the Employment Tribunal thinks there is a doubt as to whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his or her employment.

50. Where an award of loss of wages for unfair dismissal includes loss of wages, an employee has a duty to mitigate his or her losses, although the burden of proof as to whether an employee has failed to do this lies on the employer. If an employee has failed to take reasonable steps to mitigate his or her losses, compensation may be reduced. A Tribunal will, however, need to consider what the employee's losses would have been if he or she had taken reasonable steps to mitigate his or her losses.

Notice pay

51. Section 86 ERA sets out minimum periods of notice an employer is required to give to an employee to terminate their contract of employment. A contract of employment may give longer, but not shorter periods of notice.

52. Where an employee's contract of employment has been terminated without notice, or insufficient notice, he or she may bring a claim in an Employment Tribunal for notice pay.

53. An employee has a duty to mitigate their losses during the period for which notice pay is claimed, with the burden of proof, as with unfair dismissal compensation, being on the employer to show that an employee has failed to mitigate their losses. Whether an employee has done enough to mitigate their losses is to be judged from his or her perspective.

Redundancy

54. Section 139(1) ERA provides that an employee who is dismissed, shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) 'the fact that his employer has ceased or intends to cease-

(i) to carry on business for the purposes for which the employee was employed by him or

(ii) to carry on that business in the place where the employee was so employed or

(b) the fact that the requirements of that business-

(i) for employees to carry out work of particular kind, or

(ii) for employees to carry out work for a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to diminish.

55. In *Safeway Stores Plc v Burrell* [1997] ICR 523 EAT guidance was given that a Tribunal must carry out a three-stage test namely:

55.1. Was the employee dismissed?

55.2. If so, had the requirement of the employer's business for employees to carry out work of a particular kind seized or diminished or where they expected to seize or diminish?

55.3. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

56. Section 163(2) ERA provides that there is a presumption that in any question as to

the right of an employee to a redundancy payment, or the amount of the payment, there shall be a presumption that the dismissal was by reason of redundancy.

57. In certain circumstances, there is no dismissal for the purposes of the redundancy legislation in cases where there has been a renewal of contract or re-engagement. Section 141 provides that any such offer may be in writing or not. If an offer of renewal of contract or re-engagement falls within section 141(1) ERA and (3) the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

58. There are two considerations in considering section 141 ERA. Firstly, there is the issue of whether the offer made was suitable. Suitability in this context is to be assessed objectively by the Tribunal.

59. In contrast, the second question, whether the employee unreasonably refused the offer, is assessed subjectively from the employers' point of view at the time of the refusal.

Direct age discrimination

60. When considering direct discrimination, a tribunal will consider section 30 Equality Act 2010 ('EQA') in conjunction with section 39.

61. A Tribunal will consider either a direct or a hypothetical comparator. In either case there should be no material difference between the relevant circumstances of the comparator.

62. It has been recognised for it is difficult for employees to bring evidence of unlawful discrimination and the burden of proof should be considered in accordance with section 136 EQA. Section 136(2) provides that if there are facts which the courts could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

63. In the case of *Igen Limited v Wong* [2005] IRLR 258 CA guidance was given as to the interpretation of the burden of proof provisions. Guidance was given that a staged approach should be taken.

64. The first stage is to consider whether the Claimant had proved facts from which the Tribunal could reasonably conclude that the burden of proof has shifted for the Respondent to prove that they did not treat the Claimant less favourably on the prohibited ground.

65. Many cases have subsequently given guidance on what is sufficient to cause the burden of proof to change.

66. If the burden of proof has moved to the Respondent, it is then for the Respondent to prove that it did not commit, or as the case maybe, as not to be treated as having committed, the unlawful act of discrimination.

67. In order to discharge the burden on the Respondent, it is necessary for them to prove on the balance of probabilities, that the treatment was in so sense whatsoever on the prohibited ground.

68. Tribunals have also been encouraged to address the question of why the Respondent behaved as they did, rather than aridly setting out all the stages of the guidance given in the *Igen v Wong* case. They have been encouraged to focus on the question- was the treatment on the prohibited ground or not?

69. In the case of an age discrimination complaint, direct age discrimination can be justified. If the Respondent shows the treatment of the employee treatment concerned is a proportionate means of achieving a legitimate aim, no unlawful discrimination would have taken place.

The evidence

70. On behalf of the Claimant, the Tribunal heard evidence from the Claimant herself.

71. On behalf of the Respondent, the Tribunal heard evidence from Mr Sharp, the first Respondent and a director of the second Respondent who employed the Claimant.

72. In addition, the Tribunal received a witness statement on behalf of the Respondent (unsigned), from the manager of the Armstrong's restaurant and bar where the Claimant worked, although she did not attend the Tribunal.

73. In addition, the Tribunal considered the documents to which it was referred in the bundle of documents supplied to the Tribunal; together, as referred to earlier above, we received copies of the letter ordered by the Tribunal.

Findings of fact

74. The Tribunal sets out below the findings of fact we consider relevant and necessary to decide the issues we are required to decide. We do not seek to set out every detail given to us, nor to make findings of fact upon any detail on which the parties were not agreed. We have however, considered all the evidence provided to us and we have borne it all in mind.

75. The Claimant, Mrs Eileen Harte, started working for Armstrong's restaurant in Clacton on Sea on 30 July 2012.

76. At the time that the Claimant started working at the restaurant, her employer was described in her contract of employment as "Moorville Limited trading as Armstrong's". The Claimant's job title was described as "bar/restaurant assistant."

77. Subsequently, the business was transferred to "Gadman Limited trading as Armstrong's". The date of this change was not made clear to the Tribunal although Mr Sharp, in the Respondent's ET3 response, stated that it occurred about 6 months before he took over the business**.** Mr Hoyle, on the Respondent behalf, accepted that the transfer between Moorville and Gadman was a 'TUPE' transfer.

78. The Claimant described her day-to-day job as follows. She worked part-time, three mornings a week, finishing at 11.30am. She started work before the restaurant opened which, until the Claimant was placed on furlough under the government job retention scheme (to which we refer later) the restaurant opened at 10am. Before the restaurant opened, she would get the restaurant in shape for opening. This might include tasks such

as hoovering, mopping the floors, setting out the coffees to be ready for service, checking the toilets and cleaning them if the cleaners were not at work, putting chairs unto the terrace and tables, making sure no rubbish or glasses were on the terrace. Once the restaurant opened at 10am, she would serve the customers with food and drinks such as food and coffee and cakes.

79. Armstrong's restaurant was opened through out the day and in the evening.

80. In the Respondent's ET3 response, it was stated that there were 20 employees. In charge of the business was Mr Sharp, the first Respondent in these proceedings. Next in charge was a restaurant manager, Emma Williams. She was described by the Claimant as being in her early 40s. There were about 4 or 5 who worked in the kitchen, namely chefs, line chefs and pot washers. The remaining staff served in the restaurant and bar and they had cleaning staff.

81. Ms Williams was aged in her early 40s and the remaining employees were in their 20s and 30s. The Claimant being aged 69 at the date of the termination of her employment was, thus, by a considerable margin, the oldest of the employees.

82. By February 2019 Gadman Limited got into financial difficulties.

83. In dispute is whether or not the Claimant received a letter from David Rubin and Partners**,** insolvency practitioners, dated 15 February 2019. On the balance of probabilities, the Tribunal find that the Claimant did receive the letter from David Rubin and partners. We so find because the Claimant when cross-examined, professed no memory of or understanding on a 48hr working week opt-out that she had signed; and it appears to us that, as the Claimant's employment was not interrupted and the restaurant continued as before, she may not have understood the significance of the letter and have forgotten about it.

84. The relevant passages of the letter to the Claimant (and the other employees of the Respondent made in similar terms) are as follows:

84.1. The letter had the heading "**GADMAN LIMITED T/A ARMSTRONG'S ("THE COMPANY")"** and was addressed to the Claimant at her home address.

84.2. The author of the letter (Paul Cooper, a partner in David Rubin and Partners) advised that the director had instructed them to assist in placing the company into creditors voluntary liquidation. A general meeting of members and a virtual meeting of creditors to place the company into CVL was to be convened on 1 March 2019.

84.3. He then stated that, due to the company's financial difficulties, her contract of employment has been terminated by means of redundancy with effect from today.

84.4. He gave details of the Claimant's statutory entitlement (although as referred to above, the Claimant made no such claims).

84.5. He informed the Claimant that her claim could not be processed until the resolutions to place the company into CVL has been passed at the meetings on

(1 March 2019). He advised that she would be able to submit details of her claim online in advance to ensure that it was progressed as soon as possible. He gave details of what she might be able to claim form the redundancy payment service.

85. The Claimant in her evidence stated there was no change in the operation of Armstrong's restaurant as a result of the business transferring to the second Respondent. The employees, the equipment in the restaurant and furniture, the type of service provided all remained as they had before. Mr Sharp, in answer to a question from the judge, agreed that this was correct. Mr Sharp explained that he took over the running of Armstrong's under a contract in which he charged a fee for his service and paid for the staff from that fee; that he charged Pavilion Bowl (the landlord of the building) a fee for his services and paid his staff from that fee. He stated that he took over the running of the business, Armstrong's restaurant, on 16 February 2019.

86. The Claimant was provided with a new contract of employment by the second Respondent, although it was never signed or returned by her. This stated that her employment with the company commenced on 16 February 2019 and that no employment with the previous employer counted towards her period of continuous employment.

87. The circumstances in which the running of Armstrong's restaurant passed from Gadman Limited to the second Respondent were not made clear to the Tribunal. We were not informed whether Gadman Limited had been performing the business of running the restaurant on the same basis as the second Respondent took over the business on 16 February 2019, under a service contract with the landlord of the building where the restaurant was situated; or whether the landlord of the premises bought the business from David Rubin and Partners and entered into a service contract with the second Respondent to run the restaurant. The former appears to the Tribunal to be the more probable, and we find to be the case, as the letting of the contract to the second Respondent took place before any resolutions made by the members and creditors meetings scheduled to take place on 1 March 2019. If, however, Gadman Limited had operated Armstrong's restaurant on their own account, paying rent to the landlord of the premises rather than running the service under a contract with the landlord, this would not affect the outcome of our decision on whether the Claimant's employment contract was preserved because of the provisions of "TUPE", for reasons set out in the Tribunal's conclusions below.

88. The Claimant's job title differed slightly from her contract with Moorville Limited in that her job title was described as "Team Member Bar & Restaurant" and as reporting to the Management Team, rather than The Bar Supervisor. So far as the Tribunal was made aware no job description was provided to her.

89. The contract of employment described the Claimant's normal hours of work as being "**20/40** hours per week worked in accordance with the rota in force from time to time as set and displayed by the Company."

90. The period of notice the employer was required to give the Claimant were the same as the minimum periods of notice set out in section 86 ERA.

91. The Claimant's contract of employment that had been issued to her by Moorville Limited had different provisions as regards the Claimant's hours of work. These were described as follows:

"In order to meet flexibly the needs of the business your hours of work are variable each week without any pre-set minimum or maximum and will be in accordance with the rota in force from week to week and displayed by the Company."

92. The Claimant's contract of employment with Moorville also gave the Claimant the same rights to notice pay as those set out in section 86 ERA.

93. From 16 October 2019 until lockdown arrangements were instigated by the UK government, the Claimant's employment under the second Respondent continued as it had with Gadman Limited.

94. In March 2020, as required under the lockdown arrangements, Armstrong's restaurant closed. The employees, including the Claimant, were all placed on furlough and paid their wages under the Government job retention scheme. Mr Sharp also required all employees, including the Claimant, to attend a course on food handling to obtain a Level 2 Health and Hygiene qualification and to download the certificate and keep it on their telephone in case any government inspector should ask them for that.

95. On 4 July 2020, the restaurant reopened although with reduced hours. Mr Sharp invited about 4 or 5 of the employees back to work, the Claimant not being one of them. His explanation for this was that he had sufficient volunteers to do this and the tasks included heavy lifting and bending down, which he considered unsuitable for the Claimant because of her asthma condition.

96. Mr Sharp did not tell the Claimant of the restaurant reopening. The employees who came back to work at that point were aged 25-30.

97. The Claimant continued to remain on furlough until the termination of her employment on 31 October 2020.

98. On July 2020, the Claimant and Mr Sharp had a discussion in the course of which the Claimant asked why she had not been told about the restaurant being prepared to be ready to reopen.

99. In dispute is whether Mr Sharp told her that this was because 'all the youngsters had volunteered'.

100. This dispute of fact is one of four disputes referred to in paragraph 11 of the Preliminary Hearing conducted by Employment Judge O'Brien and this is a suitable point for dealing with them.

101. The first dispute is as to whether the Claimant was asked by the Respondent to attend staff meetings. The Claimant stated that she was not and the Respondent that she was. The Tribunal does not consider this issue to be of particular significance in determining the age discrimination claim. Not all the staff meetings were held at times that the staff were at work and the Claimant, working part-time was present less often at work than full time employees. Notices were put up on a staff notice board, although this was in a part of the building that the Claimant did not generally visit.

102. Also, in dispute is whether on 18 March 2020, the Respondent asked the Claimant

'how old are you?' In the Preliminary Hearing document, it was recorded that Mr Sharp stated he might have asked this, although he disputed it in his witness statement. When pressed on the point by one of the lay members, Mr Sharp accepted that he might have said this. The Tribunal finds that Mr Sharp did say this and found the Claimant's evidence to this effect to be the more convincing. She stated this to be the case when drafting her ET3 claim form when matters were relatively fresh in her mind.

103. Mr Sharp asked the Claimant to a meeting on 21 September, although he became stuck in traffic and was late in arriving, by which time that the Claimant had gone home.

104. On 28 September, Mr Sharp and the Claimant had a meeting.

105. The Claimant complains that at that meeting, Mr Sharp told her that he had not given her a new uniform because he did not want to give 'an elderly lady a kid's uniform', a remark that Mr Sharp denies having made.

106. On balance of probabilities, we find that Mr Sharp did make that remark. The Claimant made the allegation in a contemporaneous document, namely her letter to Mr Sharp dated 19 October 2020 (to which we will refer later below). In Mr Sharp's reply to that letter, he did not deny making the remark, but gave an explanation for why she was wearing the uniform she wore, rather than the newer uniform issued to the other staff. His explanation was 'if I had thought for one minute that you would of wanted to wear what I can only describe as a sailor's t-shirt, then I would have no problem with issuing you with one but as you only worked until 11.30 serving mainly the older generation, I find the black Armstrongs dress shirt much more suitable and thought it would have been inappropriate to wear one'. In the content of that explanation, it appears to the Tribunal that he may well have made the remark in question, that it is more probable than not that he did.

107. The dispute apart as to what Mr Sharp said to the Claimant about her uniform, there is a reasonable degree of agreement between the parties as to what took place at the meetings on 28 September 2020 and subsequent meeting on 12 October 2020. There was a certain amount of confusion and contradiction in the evidence both given by the Claimant and Mr Sharp on both these and other matters. The Tribunal considers that the respective witnesses were doing their best to give accurate evidence and at times were confused or mistaken, not seeking to mislead. At the meeting on 28 September 2020, Mr Sharp explained to the Claimant that her old job was not available as the restaurant was opening at 11am, instead of 10am and there was no point in her coming back for half an hour.

108. There is possibly some degree of dispute between the Claimant's evidence that Mr Sharp told her that once things got back to normal, she would start her own job and usual hours (her evidence); or that Mr Sharp told her that so long as he was still in business her job would still be there (Mr Sharp's evidence). Be that as it may, the Claimant's understanding was that she would be offered her previous job and times of work once they became available.

109. Meanwhile, Mr Sharp offered three possible alternatives to the job the Claimant was doing. These were as follows:

109.1. One job was cleaning toilets Friday, Saturday, Sunday and Monday from 8 until 10.30 at an hourly rate of £9 per hour.

109.2. The second job was described as “Bar Staff” serving food and drinks to tables on a five-day week, changing rota, with hours of work being from 11am-3pm at £9 per hour.

109.3. The third job was pot washing in the kitchen, two days a week with days to be confirmed at £8.72 per hour. The first two jobs would have been at the Claimant’s current rate of pay, with the third of them being at a slightly lower rate.

110. The Claimant was asked by Mr Sharp to think about the jobs offered to her.

111. Although Mr Sharp’s evidence about whether there was a meeting on 12 October 2020 appeared to be confused, the contemporaneous document suggests, and we find, that another meeting took place between Mr Sharp and the Claimant on 12 October 2020.

112. In the course of the meeting on 12 October, the Claimant informed Mr Sharp that the jobs and hours to be worked were not suitable for her.

113. Mr Sharp suggested to the Claimant that she discuss the offers with ACAS and the Claimant did so.

114. The Claimant duly contacted ACAS and following that meeting, wrote to Mr Sharp, by letter dated 19 October 2020.

115. In the course of her letter, the Claimant included the following points:

115.1. That ACAS had advised her that she was entitled to 12 weeks redundancy, 8 weeks wages, holiday and that she was claiming age discrimination.

115.2. At her meeting with Mr Sharp, he had told her that her job was no longer available and that she would not be able to cope behind the bar and that this was a case for redundancy.

115.3. She made allegations to which we have referred above (such as that she had been told that he did not want to given elderly ladies a kids’ new uniform; that she was not consulted when new uniforms were discussed nor asked to attend staff meetings, had not been asked whether she could return to work in early July; and had been told that she could not cope).

116. Additionally, the Claimant complained that when lockdown had first started, Mr Shard had asked her ‘how old are you?’ in the telephone conversation on 18 March.

117. As recorded in paragraph 11.3 of the Preliminary Hearing, Mr Sharp accepted that he might have asked the Claimant how old she was in that conversation. The Tribunal finds that such remark was made although neither party gave us the context for the remark.

118. The only written evidence provided to the Tribunal of the job offers made to the Claimant by Mr Sharp was in the Claimant’s letter dated 18 October. Mr Sharp did not write to the Claimant to confirm what the job offers were, although he did not dispute that

these were indeed the jobs he did offer to the Claimant.

119. Mr Sharp replied to the Claimant's letter by an undated response sent by email.

120. In that letter, Mr Sharp disputed to some extent the Claimant's allegations. One dispute was as to the Claimant saying that he had told her that her job was no longer available. Mr Sharp stated that he had not told the Claimant that her job was no longer available and said that he had told her that the "jobs criteria" (hours) had changed, that she wouldn't be needed until later and that opening alone might be hard for her to cope. Although the differences are more ones of degree than being completely different accounts, the Tribunal finds that Mr Sharp probably did say to the Claimant that the job she was doing was no longer available at that time and then went on to describe alternative positions to her whilst expressing some reservations about her ability to carry them out. This is more consistent with Mr Sharp offering her new positions rather than simply telling her that her hours of work had changed temporarily as allowed for under her contract of employment.

121. Mr Sharp finished his letter by stating that if it was decided in court that he was responsible for paying her redundancy he would, but that she had been offered alternative, flexible hours and jobs which she had refused. He informed her that her remaining holiday entitlement will be paid by 6 November.

122. Mr Sharp instructed the wages department to issue the Claimant with a P45 which she received on 4 November 2020. The following day she received the (undated) letter from Mr Sharp to which we have referred.

123. At no point in Mr Sharp's letter did he invite her to meetings to discuss the Claimant's letter, nor to warn her that if she did not accept one the three jobs offered to her she would be dismissed.

124. The Clamant, in her letter dated 19 October 2020, asserted that Mr Sharp was discriminating against her on age grounds and that she felt very strongly about this.

125. Essentially, the Tribunal finds, what took place was a misunderstanding and failure of communication between the Claimant and Mr Sharp. Her expectation was that she would return to her old job (i.e. the work she was doing at the same hours and days each week as before and same work as she had been doing) when it became available, as expressed in her letter dated 19 October. Until then she expected to remain on furlough. Mr Sharp's expectation was that the Claimant would do one of the jobs offered to her rather than remain on furlough, until her old hours and job became available. His impression or belief was that she was resigning from her employment.

126. Mr Hoyle accepted on the Respondent's behalf that the sending of the Claimant her P45, as he had instructed payroll to do, was a dismissal of the Claimant by the Respondent.

127. Were the first two jobs that Mr Sharp offered the Claimant, on the same pay as she had previously been earning, suitable alternative employment for the purposes of the redundancy legislation? The Claimant accepted in cross-examination that two of the jobs were suitable, the two that were at the same rate of pay, and we find that they were.

128. Was the Claimant's refusal to accept the jobs offered an unreasonable refusal for the purposes of the redundancy legislation? The Tribunal finds that it was not unreasonable in the particular context that it occurred. The Claimant's belief was that she would be able to get her old job back and that was what she wanted. It was not made clear to her by Mr Sharp that she had a choice between accepting one of the jobs or being dismissed and that, if dismissed, would not receive a redundancy payment. Had Mr Sharp invited the Claimant to another meeting by letter in which he warned her about a possible dismissal if she did not accept the job offers the Claimant might have, as stated in her evidence in cross-examination, have accepted one of the two positions she considers to have been suitable.

129. The Claimant was sent a final wage slip. She was not given any notice pay or pay in lieu of notice.

130. In answer to a question from a lay member, Mr Sharp explained that the role that the Claimant was performing prior to being furloughed was still being performed. So far as the hours of work was concerned, at some point not long after the Claimant was dismissed, the restaurant did return to opening at 10am.

Closing submissions

131. Both parties made oral closing submissions. The Judge directed the parties to ensure that they covered the issues set out by Employment Judge O'Brien at the Preliminary Hearing and to address the Tribunal on issues relevant to remedy, should the Claimant be wholly or partially successful in her claims.

132. Mr Hoyle's submissions on behalf of the Respondent included the following points:

132.1. He did not believe that the Claimant really believed that she had been subject to age discrimination.

132.2. Although the Claimant believed that she was entitled to continue to be placed on furlough this would have cost the employer money because he would have had to have contributed to it (this was evidence from Mr Hoyle, who was not a witness in the case, rather than Mr Sharp).

132.3. The Claimant probably did receive the letter from Mr Rubin dismissing her after the insolvency of Gadman. If Mr Rubin brought the employment to an end, there was no TUPE transfer, so the Claimant did not have two years' service. She is therefore not entitled to bring an unfair dismissal claim.

132.4. Mr Sharp displayed no ill will to the Claimant and suggested that she contact ACAS and the Claimant accepted in her evidence that two of the positions offered to her were suitable.

132.5. If, contrary to the Respondent case on TUPE, there was continuity of employment from 2012, the Claimant's contract with Moorville continued and this contract referred to flexible hours of work.

132.6. In Mr Sharp's reply to the Claimant's letter dated 19 October, Mr Sharp was trying to reason with the Claimant.

132.7. The manner in which the Claimant's employment came to an end was 'foggy', even if the Respondent procedures were incorrect, but she did not have two years continuous employment but left after one year.

132.8. He accepted that the Respondent owed notice pay and submitted that 1.5 weeks' notice pay was owed by the Respondent to the Claimant but no furlough payment, accepting that Mr Sharp had dismissed the Claimant.

132.9. In answer to the Judge asking for his submissions on remedy, his submissions included that the Claimant was not looking for another job and that it was probably her plan to take furlough until the end of March and she was resistant to coming back.

132.10. The Claimant would not have returned to work after March.

132.11. As regards injury to feeling should the Claimant's age discrimination case be successful, she was not all that distressed.

132.12. The Claimant had not taken reasonable steps to mitigate her losses. Had she done so, she would have found work alternative quickly, as hospitality was short staffed, Clacton was a resort (this was evidence provided by Mr Hoyle and not in Mr Sharp's evidence).

133. The Claimant's closing submissions included the following:

133.1. She had loved the job, wanted to go back to what she was doing and was very upset at being dismissed after a period of furlough.

133.2. She was let go without any formal notice.

133.3. She should have received written warnings and verbal warnings if Mr Sharp was going to dismiss her and she should not have been let go.

133.4. She was waiting for Mr Sharp to phone her, but he did not.

133.5. She thought that she was dismissed because of her age.

133.6. She did not refuse the role he had told her to talk over the job offers and he did not call her back to discuss the offers.

133.7. If she had been younger, he would not have got rid of her and maybe he thought that she could not do the job anymore.

133.8. As soon as furlough finished, he got rid of me.

Conclusions

134. We take our conclusions from the list of issues draw up at the Preliminary Hearing to which we have referred earlier above.

Length of service

135. The issue is whether TUPE applied so as to preserve the Claimant's continuity of employment from 30 July 2012 until 31 October 2020, as she contends; or that her continuity of employment was broken by the letter of dismissal from David Rubin and partners dated 15 February 2019, as contended by the Respondents.

136. The Tribunal was provided with no evidence that the Claimant was told verbally on 15 February 2019 that she was dismissed with effect from that day. The Respondent's case was that she was dismissed through the letter that, they contended, must have been received by her. Applying the ordinary rules as to presumption of service the Claimant would have received the letter dated 15 February 2019 on 17 February although, as 17 February 2019 was a Sunday, it would have been on Monday 18 February 2019. Any letter of dismissal, or purported dismissal, therefore, took place after the second Respondent had taken over the running of the business on 16 February 2019. The contract of employment which the second Respondent issued to the Claimant gave her starting date of employment as being 16 February 2020, so that David Rubin's purported letter of dismissal was ineffective because by then her employer was the second Respondent. As is well established in caselaw a dismissal of an employee only takes place when the employee is informed that they have been dismissed, or ought to have been informed (for example because the employee refuses or fails to open a letter they have received). The second Respondent did not dismiss the Claimant on 15 February 2019. Nor could it be said that David Rubin and partners acted as the agent of the second Respondent (and neither was this argued on their behalf) when David Rubin's client was the director of Gadman Limited to whom they referred in their letter dated 15 February 2019.

137. Additionally, as was made clear in the *Slater* case, Regulation 8 of the TUPE Regulations only applies when relevant insolvency proceedings have commenced which is when the resolution of the members or the creditors meeting took place. Both in the *Slater* case and in this case the letter of dismissal took place before the commencement of insolvency proceedings, so that the Respondents cannot claim the benefit (from their perspective) of Regulation 8.

138. As Armstrong's restaurant continued to provide the same service without interruption during the period in which David Rubin and partners were instructed by Gadman Limited, continued to have the same employees supply the service, in the same premises and with the same furniture and equipment; and with the letter of dismissal having been given before the commencement of insolvency proceedings, the Tribunal concludes that a business transfer took place with the meaning of Regulation 3(1)(a) of the TUPE Regulations.

139. Even, however, if a business transfer did not take place pursuant to Regulation 3(1)(a), the transfer was a TUPE transfer within the service provision changes set out in Regulation 3(1)(b)(ii). The landlord of the premises where Armstrong's restaurant was situated, having engaged Gadman Limited to provide the service until insolvency proceedings were about to commence to place Gadman Limited into creditors voluntary liquidation, then engaged the second Respondent to take over the running of the service. It was, therefore, what is sometimes described as second generation contracting out of a service pursuant to Regulation 3(b)(ii) of the TUPE Regulations.

140. Even if, however, contrary to our findings of fact further above, Gadman Limited ran Armstrong's restaurant on their own account, not under a contract with the landlord of the premises to do so; and the landlord bought the business from David Rubin and Partners and contracted the second Respondent to continue the running of the restaurant, the TUPE Regulations would still have preserved the continuity of the Claimant's employment. Her employment would have been preserved by virtue of Regulation 3(b)(i) (sometimes described as "first generation contracting out".

141. The Claimant's continuity of employment was, therefore, preserved so that the Claimant has sufficient continuity of service in order to bring her unfair dismissal claim.

Unfair dismissal

142. The Claimant was, as accepted by Mr Hoyle, dismissed following receipt of her letter dated 19 October 2020 by Mr Sharp instructing payroll to issue her with a P45 and to write to her to say that she was sorry she was leaving. The Claimant had no point resigned from her employment, although she had refused the alternative jobs offered to her and at least expressed the possibility of receiving a redundancy payment.

143. It was implicitly recognised by Mr Hoyle in his closing submissions that the Respondent did not carry out a fair procedure in dismissing the Claimant. He failed to write to her to warn her of possible dismissal if she did not accept the jobs offered to her and invite her to a meeting. Nor did he notify her that she could appeal against her dismissal.

144. The Claimant was dismissed because she did not accept the alternative positions offered to her by Mr Sharp. This suggests that the reason or principal reason for her dismissal was redundancy, although we discuss the complications with her claim for redundancy further below.

145. In any event, whether or not the dismissal fell within section 98(1)(c) ERA (redundancy), the dismissal was procedurally unfair by reason of section 98(4) ERA. A reasonable employer, acting within the band of reasonable responses, would have invited the Claimant to a meeting, having warned her of the possibility or likelihood that she would be dismissed if she did not accept any of the positions offered to her, before dismissing her; and, if the outcome of the meeting was to have dismissed the Claimant, to have notified her of a right to appeal against the dismissal. Additionally, it would have been better for the Claimant's understanding of her options, if he had confirmed in writing what his offers were, rather than the Claimant writing to him to set out what she had understood he had told her.

146. The dismissal was not, as has been made clear in our findings of fact, an act of ill will on Mr Sharp's part, but rather a misunderstanding, a miscommunication between the two.

147. The Claimant was, therefore, unfairly dismissed.

Redundancy payment

148. The issue of whether the Claimant was dismissed by reason of redundancy or entitled to a redundancy payment is unnecessary in view of our conclusion that the

Claimant was unfairly dismissed. A basic award would be for the same amount as a redundancy payment.

149. The question of whether the Claimant's dismissal amounted to a redundancy within the meaning of section 139(1)(b) ERA is complicated by the confusion with which Mr Sharp approached the issue. Mr Sharp must have believed that her old position was redundant, at least temporarily, because he was offering her alternative jobs, as described in the Claimant's letter to him dated 19 October 2019. Two of the jobs offered to the Claimant were clearly different jobs to the one she was doing- the toilet cleaning and pot washing jobs. Whether the bar staff job offered was sufficiently different to the job she had been performing, or whether it was work that she could have been required to do under her existing contract of employment is difficult to ascertain without having been provided with evidence of what the bar staff job entailed and what differences there were with the job she had been doing. As, however, Mr Sharp was offering what he described as alternative employment, the Tribunal gives the benefit of the doubt to the job being suitable alternative employment.

150. If necessary to have decided the issue, therefore, the Claimant would have decided that the Claimant's dismissal was a redundancy situation.

Direct age discrimination

151. Did the Respondent dismiss the Claimant because she would have been in the age group of those 65 years or older; would the Respondent have treated a younger individual more favourably; and if the Claimant was dismissed because of her age, was that a proportionate means of achieving a legitimate aim?

152. In paragraph 11 of the Preliminary Hearing list of issues, various matters were referred to as, if proven, being matters to which an age discriminatory dismissal could be inferred. Do the burden of proof provisions apply so as to shift the burden of proof on the Respondent to disprove that the dismissal was an act of age discrimination?

153. The Tribunal found that the remarks referred to in paragraphs 11(2)-11(4) of the Preliminary Hearing document were in fact made.

154. None of the remarks concerned are free standing allegations of age discrimination but merely background evidence as to the Claimant's case that her dismissal was an act of age discrimination.

155. The remarks that Mr Hoyle did not want to give 'an elderly lady a kid's uniform'; and referring to 'all the youngster had volunteers' are remarks that could suggest age discrimination. Had they been freestanding allegations of age discrimination, the Tribunal might well have upheld them.

156. In addition, the Tribunal is also mindful that the age profile of the Respondent's employees was of a young work force with the Claimant being by several decades the oldest employee. She was approximately 30-40 years older than all the employees except for the manager, Emma Williams and was considerably older than Emma Williams.

157. The Tribunal finds and concludes, therefore, that the burden of proof does shift to the Respondent to disprove age discrimination.

158. Have the Respondents satisfied the Tribunal that the Claimant's dismissal was in no sense whatsoever an act of age discrimination? The Tribunal finds and concludes that:

158.1. The remarks by Mr Sharp suggest, whether consciously or not, some underlying attitude which could be considered age discriminatory, hence the shifting of the burden of proof.

158.2. So far as the Claimant's dismissal is concerned, however, there is a wealth of evidence to suggest that Mr Sharp wanted to retain the Claimant in his employment rather than dismiss her.

158.3. Mr Sharp paid for the Claimant to go on training during lockdown and offered the Claimant alternative employment when the opening hours of the restaurant were reduced. The Claimant herself accepted at this hearing that two of the jobs offered were suitable. This suggests that he wanted to retain the Claimant.

158.4. When the Claimant met Mr Sharp on 12 October 2020 and told him that she did not think that the jobs were suitable, rather than simply accepting that at face value, he suggested that she speak with ACAS. This suggests an employer who was not rushing to dismiss the Claimant but wanted to retain her.

158.5. As found in the Tribunal's findings of fact, there was a misunderstanding in that Mr Sharp believed the Claimant wanted to leave her job and failed to communicate properly or go about the necessary procedures of finding out if this was in fact the case. This, the Tribunal finds was a misunderstanding rather than any intention to dismiss the Claimant because of her age. If the Claimant had accepted either of the two jobs she accepted at this hearing were suitable, she would have returned to work rather than being dismissed.

158.6. Nor did the Claimant help herself by the manner of her refusal of the job offers both at the meeting on 12 October and in her subsequent dated 19 October. She bears some responsibility for not suggesting that she and Mr Sharp needed to discuss the issue and she could have phrased her letter in a softer manner.

158.7. The Tribunal is satisfied that if an employee of a younger age group, whose working hours were no longer available in the same way because of a later opening of a restaurant, had then turned down three offers of alternative employment, the Tribunal finds that he or she would also have been dismissed. We also have in mind that this is a relatively small employer without its own Human Resources department and who only thought to get legal advice at the very eleventh hour, very shortly before this Tribunal hearing. This, perhaps, may explain the procedural failings as regards the Claimant's dismissal, even if it does not excuse them.

159. The Claimant's age discrimination claim regarding her dismissal, therefore, fails.

Notice pay

160. It follows from Mr Hoyle's concession that the Claimant was entitled to notice pay

and the Tribunal decisions on continuity of service because of TUPE that the Claimant is entitled to notice pay. The Claimant's notice pay claim succeeds.

Other payments

161. The Claimant was not entitled to furlough pay until the end of March 2021. She was dismissed so at that point her entitlement to furlough pay ended.

Remedy

162. Both in the ET1 claim and ET3 response, the figures for the Claimant's gross and net pay were agreed. The Claimant received £109 per week gross, £88 per week net.

Unfair dismissal compensation and notice pay claim

163. The Claimant had eight years continuous employment with the Respondent, by virtue of our findings of fact and conclusions on her continuity of employment. As she was aged over 41 throughout her employment, the Claimant is entitled to a basic award of 12 weeks pay at gross pay of £109, namely £1308. As the Tribunal awards the Claimant this sum, a redundancy payment would be a duplication of award, so we do not make it, having in mind section 122(4) ERA.

164. The Claimant was entitled to eight weeks notice pay, at £109 per week, amounting to £872. The Tribunal awards the Claimant this sum. The intention in making an award of gross pay is to put the Claimant in the position she would have been in had the contract been correctly performed, in other words had she been given the eight weeks notice to which she was entitled. Although damages are calculated on a net basis, since the Claimant will be liable for tax on the element of the notice pay relating to pay, the Tribunal uses the gross figure in the calculation.

165. If the Respondent had followed fair procedures, Mr Sharp would have invited the Claimant to a meeting after receipt of her letter dated 19 October. A letter inviting her to a meeting, he would have confirmed what jobs were bring offered to her and for how long he considered it was likely it would be before she returned to her previous role and hours of work. He would also have alerted her to the fact that he was considering dismissing the Claimant if she did not accept one of the offers until her old role became available.

166. Inevitably a finding of what would have been likely to have occurred involves some degree of speculation. The Tribunal takes a broad-brush approach to considering remedy, as Tribunals have frequently been encouraged to do. The Tribunal finds that writing such a letter and having another meeting where the Claimant understood that she would either have to accept one of the positions offered to her or risk being dismissed would have offered further dialogue and resolution of the dispute between the Claimant and Mr Sharp.

167. The Claimant's evidence, which the Tribunal finds was genuine, was that she loved her job and we find that it was a job and hours of work that suited her. She had been an employee for over 8 years so a reasonably long serving employee. On the other hand, in answer to questions in cross-examination, the Claimant said that if there had been a meeting to discuss the alternative job offers, she 'might have' accepted the different hours. She did not say she probably would or certainly would. We find that there was a 50% chance that she would have remained in employment had Mr Sharp invited her to a

meeting as outlined above.

168. The Claimant made no efforts to mitigate her losses in that she never applied for any alternative works. The Claimant's explanation for not looking for another job was that she liked the job that she was in, she did not want another job; and that after working 55 years she had enough and that she had never been let go which was what was making her feel bitter.

169. As referred to above, it is not enough for the Tribunal to find that she failed to take reasonable steps to mitigate her losses. We also need to consider what the position would have been if she had taken reasonable steps to do so.

170. The period that the Claimant is claiming for is until the end of March. Using its industrial experience, the Tribunal finds that the Claimant, with restaurants being closed for part of the period in question by government order, would have been unlikely to have found herself alternative employment within that period. Nor did Mr Sharp give any evidence about employment opportunities within Clacton-on-Sea or nearby in order to make good any contention that she could have found alternative employment before April 2021.

171. The Claimant was entitled to eight weeks notice pay at £109 per week gross, amounting to £872.00. The Tribunal awards the Claimant this sum.

172. Although both parties agreed that the Claimant's employment ended at the end of October 2020, as the Claimant received her P45 on 4 November, this is the date the Tribunal has taken as the effective date of termination of employment. Eight weeks notice would have meant that the Claimant was paid until 30 December 2020.

173. In view of the Tribunal's findings as to mitigation of loss, and reduction of award by virtue of the guidance given in the *Polkey* case, the Tribunal finds it just and equitable in all the circumstances to award the Claimant compensation for loss of earnings from 30 December 2020 until 30 March 2021, reduced by 50%. This amounts to 13 weeks at the Claimant's net pay of £88 per week, which amounts to £1056.00. When this sum is reduced by 50%, this amounts to £528.00. There was nothing from the Claimant to show that she was receiving income support of other qualifying benefits in order for the recoupment provisions to apply. The Tribunal, therefore, awards the Claimant £528.00 for loss of earnings.

174. As the Claimant is not seeking alternative employment, the Tribunal makes no award for loss of statutory rights.

Furlough pay claim

175. The Claimant in her schedule of loss claimed furlough payments until April 2021. The Tribunal has taken this, with the Claimant being a litigant in person, as being part of a claim for compensation for unfair dismissal. For at least part of the time that the Claimant was claiming furlough payments, restaurants were closed because of the government restrictions in response to the covid pandemic so that, if remaining in the second Respondent's employment, she would have been eligible for furlough payments.

176. As the Claimant was dismissed on 4 November 2020, she was not entitled to

furlough payments from the time of her dismissal although, had she remained in the second Respondent's employment until the end of March 2020, her pay would have been some combination of furlough for when the restaurant was closed and/or the employees were placed on furlough, and pay, for when the restaurant was open and she returned to work. Our loss of earnings as compensation award for unfair dismissal covers the claim for furlough payments.

Employment Judge Goodrich

21 April 2022