EMPLOYMENT TRIBUNALS

Claimant: Ms M. Lewis

Respondent: Caerphilly County Borough Council

HELD AT/BY: Wrexham/CVP **on:** 3rd – 6th April 2022

BEFORE: Employment Judge T. Vincent Ryan
Ms K. Smith
Ms M. Humphries

REPRESENTATION:

Claimant: Ms N. Newbegin, Counsel
Respondent: Mr. H. Zovidavi, Counsel

JUDGMENT having been sent to the parties on 6th May 2022 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Issues: The issues were agreed by the parties and provided to us in a document that is appended to this judgment. It was agreed by the parties that issues numbered 5 & 8 would be dealt with as remedy issues subject of course to the liability judgment. In the event the parties agreed the remedy issues except in relation to the s.38 Employment Act 2002 issue, and presented the Tribunal with a draft remedy Order that was confirmed by the Tribunal; additionally the Tribunal delivered its judgment in respect of the outstanding remedy issue.

The Facts:

1. The respondent (R):

    1.1. R is a large employer, a local authority. Amongst the forms of contract issued to employees are those referred to as NJC for the more senior management and JNC for less senior management including principal officers.

    1.2. R has a union recognition agreement with, amongst others, Unison.

1.3. Prior to 2009 there were various holiday arrangements including that employees with over five years' service would have an additional holiday entitlement, entitlement rising from 28 days per annum to 33 days per annum (with provision for a five day carry forward to the next year, and a "mortgage" provision for five days to be taken from the following year).

1.4. Separate to the holiday arrangements there is a system of flexi-time which in effect allows earned time off in lieu, with provision for employees to have a debit balance by agreement with their service head.

2. The claimant (C): C commenced employment in local government in 1991 and has been employed by the respondent from 1st April 1996 to date. at the material time she was Principal Officer - Catering. She was employed on JNC terms and conditions. At the material time following appointment as Principal Officer she was entitled to an essential car user allowance with mileage allowance, and she had an annual leave entitlement of 33 days. She has been at a member of Unison at all material times.

3. In April 2009 R embarked on a job evaluation and single status harmonisation project. R's intention was to harmonise contracts of employment with intended compromises over a period of time, and with trade union agreement, making compensatory payments for some lost benefits, and giving protection to certain benefits. R's intention was to vary, where possible, legally binding contractual arrangements, preventing or at very least reducing the risk of litigation. The respondent recognised that it could not achieve 100% harmonisation of contracts across the workforce, not least because it operated with NJC and JNC terms and conditions, there were local arrangements and for various reasons (such as TUPE transfers) 100% harmonisation was not possible; it was never sought. R wished to head off risks of equal pay and other discrimination claims, losing staff, of staff being unhappy and disincentivized, or of any industrial unrest. Partly for this reason, and also because of tortuous intervening legal proceedings, investigations, audits reports and the like, the implementation of single status has proceeded in fits and starts from 2009 to date. R took a "softly-softly" approach and litigation, including criminal investigation, intervened. As will be evident from our findings of fact there were lengthy periods of total inactivity. There is no evidence before us that any individual or group of individuals objected to any arrangements made in respect of the claimant in respect of her retained 33 days annual leave throughout the period of harmonisation to date or even complained about it. There is no evidence before us that there has ever been outside pressure on R to curtail the claimant's annual leave entitlement.

4. As part of the process described above R offered to buy out C's car allowance for £2,340.09 and holidays in excess of 28 days in the sum of £2,216.69. Employees entitled to such benefits could sell either or both of them, and a form was devised giving these options. Employees were to indicate their choices and attend a session with ACAS to sign up to a COT3 agreement reflecting settlement of potential claims on those terms and thus effecting changes in contractual entitlements.

5. C's Head of Service, Mr Hartshorn, contacted R's Chief Executive Officer on 5th March 2012 saying that selling out his holiday entitlement was not attractive and he asked that R offer lifetime protection for annual leave as a further option.

6. R's CEO advised him to so inform the Head of HR, Mr Hardacre.

7. On 7th March 2012 Mr Hartshorn told C that she could ask for lifetime protection of her annual leave at 33 days.

8. On 3rd April 2012 Mr Hardacre wrote to the Heads of Service and CEO confirming that the CEO had agreed an additional option namely that employees could opt to have their leave protected on a personal basis indefinitely. The options now available to assist harmonisation of contractual terms were the buy-out of one benefit or the buy-out of both benefits or for leave to be protected on a personal basis indefinitely. It was made clear that employees who had made an election before knowing of the new option could change their mind. The Heads of Services were told that they could cascade this to their staff. Those opting for protection of their holiday entitlement on a personal basis indefinitely, whether they had previously indicated another option or not, were to communicate their intention as soon as possible and confirm which of two sessions with ACAS they would attend to formalise documentation in respect of contractual compromise settlements where benefits were being surrendered for cash compensation. Insofar as any entitlement was being given up by employees R still required a COT3 agreement because that would prevent litigation in respect of the surrendered benefit.

9. On 5th April 2012 C notified the Head of HR that she wanted protection of her holiday entitlement (33 days) on a personal basis indefinitely; she confirmed that she would attend the 12th April ACAS COT3 signing session. The claimant had opted to sell her car allowance only and was required to sign the COT3 in respect of it. She was not required to sign anything with regard to retained holiday entitlement; she had not compromised, and had no potential claim in respect of, her accrued holidays.

10. C duly signed a COT3 agreement in respect of the car allowance.

11. On 7th January 2014 C wrote to her Head of Service confirming that there was an error in her then holiday record with regard to her annual leave saying it was 28 days when it was not. She wrote in similar terms on the 5th of January 2015 saying that her annual leave was 33 days (but in that year she also was carrying forward five days from the previous year).

12. On 27th January 2015 the Acting Chief Executive Officer presented a report to the Council confirming that certain payments to staff paid during harmonisation had been unlawful because they had not been ratified by the Council. The Council was asked to ratify those decisions retrospectively. It did so. The Council also ratified the recommendation that R "seek to negotiate" to harmonise the annual leave provisions in respect of the remaining five officers who enjoyed 33 days annual leave as opposed to 28 days (that is those who accepted the offer and opted for protection of their leave entitlement on a personal basis indefinitely, including C).

13. It was, and remains, C's understanding that throughout her employment with R from the date of the agreement in 2012 she would have the benefit of 33 days' annual leave. The Tribunal finds that, through its Head of HR, R had clarified the provision by changing the word "lifetime" to "indefinite" as it is understood that "lifetime" may exceed the period of employment and it was that period that mattered and was relevant; furthermore, that being a contractual term with an indefinite ending the possibility remained for a negotiated variation but not a unilateral variation by R, and there was no time limit or other trigger event preventing C from enjoying that benefit whilst employed by R.

14. On 5th March 2015 R's HR Service Manager, Ms Donovan, confirmed the Council's decisions, ratification, and recommendation of 27th January 2015 (p229). This notification was followed by a letter addressed to C by Mr Burns (the Interim Chief Executive) dated 10th March 2015 confirming that the Council requested he seek to negotiate harmonisation, whilst the letter also stated Mr. Burns' belief that it would be reasonable for the effective date for the change to the claimants annual leave entitlement to be 1st January 2016. Mr. Burns clearly envisaged that C's holiday entitlement would be reduced from 33 days per annum to 28 days per annum from that date regardless of any negotiation on harmonisation. He noted that the claimant may be disappointed with "this decision". At this point C had not negotiated any change in her holiday entitlement and indeed has never accepted such change. In the mind of R, it was to be an accomplished fact.

15. On 14th August 2015 Ms Phillips, Acting HR Manager, wrote to C (p 232) referring to the council's "decision to bring the annual leave entitlement of the few remaining staff on 33 days annual leave, of which you are one, in line with the annual leave entitlements of the remainder of the council's workforce, i.e., 28 days on completion of 5 years' service". She again indicated that the change would be affected on 1st January 2016. There was no reference to the Council's recommendation of seeking to negotiate, but the Council's outcome was referred to as a decision. The purpose of the letter was stated to be to advise of R's intention to serve notice that the change would be effected from that date.

16. C, and her colleagues still enjoying the 33 days' leave entitlement, complained to Ms Phillips at a meeting on 7 September 2015 that their option had been mis-characterised to the Council. The Council had been told that C and her colleagues had refused to change holiday entitlement whereas in fact they had positively chosen an option that was given to them by R, the option for their leave to be protected on a personal basis indefinitely. C subsequently confirmed this to Ms Phillips in writing on the 18th September 2015 in which letter she also criticised R for its handling of this whole matter and failing to honour its agreement with her. This in turn led to an acknowledgement from Mr. Burns that such an option had been granted. The option had also been accepted, and C had declined a cash payment as consideration for agreeing the alternative option of a reduction in leave.

17. Nothing further then happened until October 2016 when Ms Donovan suggested meeting with C, and her colleagues who were in the same position, to discuss the matter. That meeting did not take place at that stage because R did nothing

further about the matter until 2019. On 22nd March 2019 Ms Donovan again suggested a meeting as above. Throughout this period, which is from 2012 to 2019, C had believed that she was entitled to 33 days' annual leave in accordance with the agreement that had been reached, and R had, somewhat reluctantly, acknowledged the fact. The meeting in question took place on 27th March 2019 and this was the commencement of consultation on harmonisation pursuant to the Council's recommendation, that R seek to negotiate harmonisation of holiday entitlement, made in 2015. In fact, R confirmed that either C must agree to a reduction in leave entitlement from 33 days to 28 days per annum or R would serve notice terminating her employment and offering immediate re-engagement on exactly the same terms and conditions as before save as regards holiday entitlement which would be stated as 28 days per annum. R was prepared unilaterally to renege on the agreement to provide C with leave protection of 33 days p.a. on a personal basis indefinitely unless she voluntarily gave it up; there was to be no consideration for any voluntary concession. R was not prepared to provide financial compensation for the loss of benefit even when it was pointed out that C and her colleagues had forgone the opportunity to be paid for the loss of benefit initially.

18. C rejected R's ultimatum. She made no concession but rather insisted on working to her contract and the agreement with regard to annual leave that had been in place since 2012. Eventually she stood alone in this respect as her other colleagues either retired or agreed to the reduction voluntarily.

19. On 21st August 2019 R wrote to C with formal notice of termination of her employment effective close of business 20th November 2019 and an offer of re-engagement effective 21st November 2019 (P271). The letter was posted to C, and she received it some few days after the date of postage, 21st August. C was entitled to three months' notice of termination of employment in accordance with her contract. She was told that if she did not accept the new contract her employment would end. If the offer was to be accepted, C was instructed to sign the attached copy of the letter and the new contract and to return them to Ms Donovan within 10 working days of the covering letter and as a gesture of goodwill R would make an "ex-gratia one off payment" of £250 (less tax and NI). C did not sign the letter or contract and did not return the documentation to R. R did not make any payment to C in relation to these matters.

20. C was receiving advice assistance and representation from her trade union and her union representative was Ms Dallimore. On 29th August 2019 Ms Dallimore wrote to Ms Donovan appealing against the purported variation of the claimant's contract stating that any dismissal would be unlawful, and formally rejecting the financial offer contained in the letter of 21st August 2019. Ms Donovan inquired whether this was an appeal against termination of employment and Ms Dallimore confirmed that it was, but she did not alter the grounds of her complaint of 21st August. Ms Dallimore then provided additional grounds of appeal on the 2nd September 2019 stating C's case that R could not alter C's holiday protection provisions without agreement, that any attempt to terminate her employment would amount to an unfair dismissal, and that if R sought to change C's terms and conditions she would work under protest. Later in the chronology, for the avoidance of doubt on 26th August 2020 a Ms Turner of Unison, writing on behalf of C, wrote to Ms Donovan stating that there was no agreement that C that had

been dismissed and re-engaged in November 2019 (p284). At no point to date has C either directly or through Ms Dallimore accepted or acknowledged that her employment has terminated or that she has been employed on terms different to those which she enjoyed in 2012. C stated her intention to continue working to her contract as it existed prior to the 21st August 2019 notice and offer. She has done so ever since.

21. Despite both C and Ms Dallimore confirming that they did not accept that C's employment had ended, they rejected the offer of employment on new terms, and C explicitly stated she would work under her existing contract and under protest if any attempt was made to change her terms in respect of leave entitlement, R has never insisted on C having to leave her place of work or to stop working. R did not, and has not, recruited any replacement for C and it made no provision to cover her work in November 2019 in the event that she had not reported to work on 21st November 2019. R has not enforced the purported termination of employment in circumstances where C has refused the offer of re engagement.

22. Throughout C's employment from April 2012 to date there has been an agreement in place for her 33-day annual leave entitlement to be protected on a personal basis indefinitely, that is without an end date or trigger event to change it during C's employment by R, albeit of course that any contractual term may be varied by agreement. C has never agreed to any variation of the holiday leave entitlement and protection that was agreed with R in 2012.

23. R's intention was to seek to negotiate and agree changes in employees' contracts aiming towards harmonisation, in full knowledge that it would never achieve 100% harmonisation across its entire workforce. Regardless of C's situation described in this judgment, and for other many and varied legitimate and reasonable reasons, R has not secured harmonisation between all of its employees. For example, senior managers enjoy holiday entitlement that exceeds more junior colleagues; some junior colleagues enjoy flexi-working arrangements not available to senior managers (albeit there is an understanding that they have a degree of flexibility and discretion in self-regulating their working hours). R had wanted employees to surrender contractual benefits in consideration of financial payments supported by a mutual signing up of a settlement agreement/COT3 through the good offices of ACAS. R agreed with C and some of her colleagues to provide contractual protection of their respective 33-day annual leave entitlements if they opted for it, and that protection was on a personal basis indefinitely. This meant that it did not attach to their office but was entirely personal and individual to each employee who opted for that protection instead of taking a financial compensation package. R's intention in making the offer was that the protection would be afforded indefinitely, without foreseen end date or trigger event that might limit it (and termination and re-engagement on the same terms save for changing this protection would be a trigger event), leaving open only the possibility of later concession or variation with or without compensation as negotiated and agreed between the parties.

24. The appeal hearing was held on 17th September 2019 Mr Street upheld a decision to terminate C's employment and to re-engage on the revised terms without compensation. He stated that R was withdrawing 5 days' annual leave from C and R was withdrawing the concept of indefinite protection. The Tribunal

accepts the accuracy of Ms. Dallimore's notes taken at this hearing. C did not agree to withdrawal of either five days' annual leave or indefinite protection.

25. R has refused to honour C's 33 days' annual leave entitlement in any holiday year from 1st January 2020 to date.

26. On 10th February 2020 C inquired whether R had changed her holiday entitlement, and in response Ms Donovan confirmed that R had changed it to 28 days per annum. C enquired so she could take advice.

27. C sought to book holidays from 20th to 23rd October 2020. On 29th September 2020 she received formal notification via the booking system that her request for leave on 23rd October 2020 was refused because it would exceed entitlement (at 28 days per annum). C was not allowed her leave on that day.

28. C presented formal grievances about her holiday entitlement to R on 20th November 2020, 28th June 2021, and 25th March 2021. R refused to consider any of these grievances.

29. C commenced Early Conciliation on 15th December 2020 and an Early Conciliation Certificate (ECC) was issued on 26th January 2021. A second such period of conciliation was undergone 24th December 2020 – 4th February 2021 when a second ECC was issued. C presented her first ET1 to the Tribunal on 26th February 2021. By virtue of the extension of time limits provisions, the latest date for presentation of C's claim in respect of refusal of annual leave by R (which occurred at the earliest on 29th September 2020 on receipt of automatic notification of her exceeding 28 days purported entitlement) was 26th February 2020. It was presented on that date. Arguably time commenced on 23rd October 2020 when the refusal occurred and the primary time limit would have expired later, but that is academic. C presented her claim in respect of the refusal of holidays in time.

The Law:

30. I will not go through the law in any great detail thanks to the clarity of the written submissions made by respective counsel which the Tribunal considered and in respective of which both counsel gave oral clarification. They have correctly identified the appropriate statutory, regulatory, and case law authorities. In applying the law, I will explain how we have addressed some of the differences of approach and interpretation of respective counsel. Where respective counsel disagree on the interpretation of the law that is to be applied in this case we preferred, approve and endorse (incorporating it into this legal analysis) the legal submissions of Ms Newbegin for the claimant (save only in respect of the claim under s.45A ERA). That said:

    30.1. Jurisdictional issues: claims of unlawful deduction from wages and in respect of unpaid holiday pay ought to be presented to the Tribunal within three months of the date of the matter about which the complaint is made unless it is not reasonably practicable; even in the latter situation a claimant must act within a reasonable time. A party must commence early conciliation

within that time. This has the effect of" "stopping the clock" and extending time for due presentation to the tribunal.

30.2. Contractual terms should be interpreted as meaning what they say according to the everyday usage of the words used; it is important that the contracting parties understand those words without them attracting an over technical and obscure interpretation. In interpreting a contractual basis, it is important to consider the actuality of the situation rather than the use of labels or obfuscating wording. A Tribunal should not imply contractual terms save where that is necessary to give effect to the contract. Parties to a contract most agree the basic terms, and to form a contract there must be an offer, acceptance, and valuable consideration. Valuable consideration could include payment, foregoing a payment, foregoing a right, entitlement, or claim, or providing service. Unless there is express agreement that one party may unilaterally vary the terms of a contract in certain circumstances, neither party may unilaterally vary contractual terms and conditions.

30.3. S.1 Employment Rights Act 1996 (ERA) requires an employer to provide a written statement of specified employment particulars. The required particulars include any terms and conditions relating to the entitlement to holidays, including public holidays, and holiday pay.

30.4. S.11 ERA relates to references to an Employment Tribunal. Where an employer does not give the required statement of particulars, or where the statement given is not compliant with the statutory provisions, a worker may require a reference to be made to an Employment Tribunal to determine what particulars ought to have been included or referred to in such a statement so as to comply with the requirements of S.1 ERA. by virtue of S.12 ERA where an Employment Tribunal determines particulars as being those which ought to have been included or referred to in a statement given by the employer to the worker, the employer shall be deemed to have given to the worker a statement in which those particulars were included or referred to. An employer is also required,s.4 ERA, to give a written statement of any changes to employment particulars.

30.5. S.13 ERA provides a worker with a right not to suffer unauthorised deductions from wages.

30.6. Regulation 13 Working Time Regulations 1998 (WTR) concerns entitlement to annual leave and provides that a worker is entitled 24 weeks' annual leave in each year and Reg 13A provides for entitlement to additional annual leave such that the aggregate entitlement is subject to a maximum of 28 days and leave to which a worker is entitled may be taken in instalments but it may not be replaced by a payment in lieu except in limited circumstances such as where the workers employment is terminated.

30.7. Reg 16 WTR concerns payments in respective of periods of leave. A worker is entitled to be paid in respect of any period of annual leave to which he/she is entitled under regulations 13 and 13A at the rate of a week's pay in respect of each week of leave. There are then set out provisions for determining the amount of weeks' pay for the purposes of this regulation.

30.8. S.45A ERA provides that an employee has the right not to be subjected to any detriment by any act or any failure to act by his/her employer done, amongst other grounds, on the ground that the worker refused (or proposed to refuse) to comply with the requirement which the employer imposed, and/or refused (or proposed to refuse) to forgo a right conferred under WTR.

Application of law to facts:

31. R offered C that it would either buy out all or some of her contractual benefits or allow her to retain her leave entitlement on a personal basis indefinitely at her election. The latter option did not relate to her substantive post and was therefore individual to her. She was offered and accepted this protection on an indefinite basis, that is without there being any foreseen end date, or trigger event to affect it, throughout the course of her employment by R. She could not pass on the benefit to anyone else; her successor in the substantive post would not receive it by right. Contractual terms can of course be varied by consent, typically following negotiation and for valuable consideration, but failing that there was no foreseen end to the benefit during the course of C's employment by R. That is the clear and obvious interpretation of the words "protection on a personal basis indefinitely". That interpretation gives business efficiency to the provision and would be the understanding of an officious bystander. Any other interpretation would mean that the arrangements made in their context lacked coherence. It also follows that such a term must have been implied into C's contract to avoid the obvious risk of R reneging; otherwise, R could renege without even paying the compensation offered as one of the options for surrender of that benefit at the time this option was chosen by C instead. Why would anyone agree to forgo financial compensation for surrendering a benefit while agreeing to rely on the whim of an employer who could at any time, even immediately, terminate a contract and attempt to re-engage on revised terms bringing the protection to an end? It was in C's mind, and must have been in the respondent's corporate "mind" that the agreement was to give her an option better in her view than the compensation package; being at peril of removal of the benefits at any time without compensation is not a better deal and would make no sense. R must have engaged with these considerations because the proposal was altered from "lifetime" to "indefinite"; this shows active consideration of the meaning and implications of the option.

32. With regard to an intention to create legal relations we accept that the bar is set low. At the time of the agreement regarding indefinite protection the parties were (and have remained) in a legal relationship of employer/employee working together in the context of an attempt to harmonise certain contractual matters through negotiation; they knew that formal documentation was to be signed up to reflect compensatory payments for the surrender of contractual benefits and that without that measure R would be at risk of claims being brought by employees. There was trade union involvement. Options were put forward formally. An additional option (indefinite protection) was added in the course of negotiations. The option was communicated by the CEO to C's Head of Service; more importantly in a refined and definite form it was communicated by the Head of HR, confirming its provenance being the CEO, to all senior leaders with an instruction for them to disseminate it. He also instructed on how, and to an extent when, that offer could be accepted. He even gave others who had already made

their choices (which may have involved giving up benefits for cash payments and signing a legally binding COT3) to change their minds and chose instead the additional option. In that context there was a clear intention on the part of R to enter legal relations in respect of this provision.

33. With regard to consideration, it is clear that R wished to retain its staff with continuity of employment and expertise and without any reorganisation. It wished to incentivise staff to ensure good and loyal service and a happy workforce. R wished to avoid the risk of litigation and wanted to settle contractual matters amicably with that in view. The holiday provision meant a lot to C who had been employed in local government for 30 years, and by the respondent for 26 years, by the time this matter came to a head. Albeit party to a group letter, C put her name to an email talking about the promotion of trust, honesty, and belief in R's core values and constitution, complaining that its handling of her holiday situation had undermined what R stood for. She asked that it do the fair and honest thing in honouring its agreement. There was clearly a matter of trust and confidence though we accept that C had no wish to leave her employment, or certainly no wish to leave it if she enjoyed the terms that she had agreed. We were also struck by C's oral evidence when she said, "I've done nothing wrong". She had not. She merely accepted an offer open to her and she did so as permitted and instructed. C had forgone payment for surrendering her full entitlement. She had accepted payment for the car allowance, but the option given to her of permanence in respect of 33 days' entitlement was more to her liking than further payment in lieu of holidays. On that basis she was prepared to work on and had no reasonable grounds to pursue legal action at the time. The tribunal considers that C has given valuable consideration for the implied contractual term of personal indefinite protection of her annual leave at 33 days p.a..

34. With regard to termination or attempted termination of C's employment the Tribunal finds that R did not give full contractual notice and purported to terminate the contract in breach of contract. It gave short notice. C did not accept that breach but continued to work for R. The notice of termination was also an apparent breach of the implied term regarding annual leave, because the only contractual change was to remove the right given to her on a personal basis of indefinite protection of that entitlement. To have effect, a repudiatory breach has to be accepted unequivocally. The claimant unequivocally did not accept the breach. She explicitly said that she was continuing to work under her existing contract, that she did not accept the attempted removal of her holiday entitlement, and in that regard, she was working under protest. C stated this repeatedly. The Tribunal finds R can have been in no doubt that this was an issue to C throughout the period from the first suggestion of her protection being removed to date.

35. The Tribunal is not attracted to R's submission that it should be purposive in its interpretation and find that the attempted notice was effective on the 21st November or, because the holiday provisions did not kick in until January 2020, that the termination date was effectively the 31st December 2019. R's letter of the 21st August 2019 is explicit as to what was being given and the purported effective dates. Even on R's case, if there was a termination it cannot have been 31st December just because one of the many clauses in the re-engagement contract did not kick in until the 1st January 2020. Everyone understands what R

was trying to do by its letter of the 21st of August 2019 and its terms are explicit such that it would be inappropriate for the Tribunal to give anything other than the clear and obvious meaning to the words used; it would be inappropriate to infer any amendment.

36. In short as regards the law on all of the above matters the tribunal favoured the claimant's submissions over the respondent's.

37. Turning to the specific issues and the agreed list of issues we have answered them as follows:

Jurisdictional issues

38. **Was C's claim of unlawful deduction from wages as pleaded in her original claim 160263/2021 presented out of time as argued by the Respondent at paragraph 1.2.1 of the Grounds of Resistance?** The respondent says that the effective date of termination of employment, and therefore the trigger date for the time limits, was the 20th November 2019 (notwithstanding counsel's submission that we should be purposive in our interpretation and decide upon 21st November or 31st December). C's employment was not terminated on 20th November 2019. The earliest that the claimant came up against a breach of her existing contract and entitlement to 33 days leave was on 29th September 2020 when she was notified that she could not take annual leave on the 23rd of October 2020 because that would be in excess of her 28 days' allowance. As explained above the latest date for presentation of the claim on this basis was the 26th of February 2021; the claimant presented her claim on the 26th February 2021. The Tribunal has jurisdiction.

Termination of the Claimant's contract of employment

39. **Did C's contract of employment with R terminate with effect from 20 November 2019, followed by re-employment with effect from 21 November 2019**?

    39.1. **Did the notice of termination given by R to C on 21 August 2019 operate to terminate C's contract of employment with R**?

        39.1.1. **C's position is that it did not so operate because it did not give the three months' notice as required by C's contract of employment**. The notice of termination given by R to C on 21st August 2019 did not operate to terminate her contract of employment with R. Short notice was given; this was a breach of contract and would have been a repudiatory breach if accepted as such by the claimant, but it was not. C continued in her established employment making it clear that the effective terms and conditions of employment were those that she had enjoyed before 21st August 2019. Furthermore, the purported notice of termination breached the implied term that C had personal and indefinite protection of 33 days' annual leave, and this was a further fundamental breach of contract as the sole purpose of R's letter of the 21st August 2019 was to renege on the earlier agreement as to holiday protection.

        39.1.2. **R's position is that the notice was effective and/or C affirmed any breach. C denies affirming any breach**. Notice was

ineffective, and C did not affirm the breach; she was steadfast in her opposition to any suggestion that her employment had been terminated and that she had been re-engaged on new terms. She clearly and repeatedly, both directly and through her trade union representatives, made her protest, belief, and understanding clear. R can have been in no doubt. C did not sign and return the proposed new terms and conditions; R did not pay C the £250 offered in return for her signature on the documents. On the contrary the claimant made it clear that she did not consider the purported termination to be effective.

39.1.3. **Is R entitled to rely upon the communications with ACAS referred to at paragraphs 2.8 and 3.1.2 of its Grounds of Resistance, or were those communications without prejudice, or inadmissible by virtue of section 18(7) ETA 1996?** No. dealings with ACAS are without prejudice and in any event, by virtue of section 18(7) Employment Tribunals Act 1996, evidence of them is inadmissible.

39.2. **Alternatively, was the effect of the correspondence between the Claimant and Respondent in 2012, in particular communication from Mr Hardacre to C that the option of having the 33-day entitlement protected on a personal basis indefinitely, that C's contract of employment became subject to an implied term that R would not exercise the right it would otherwise enjoy to give notice to terminate such contract for the purposes of removing C's entitlement to 33 days annual leave**? Yes, there was an implied term as submitted by the claimant. The context was a change in contractual provisions and then negotiation where C and others made it clear that they did not want to change a particular provision. R gave C various options and C accepted the option to sell her car allowance but to retain, personally, permanent protection of her holiday entitlement. A reasonable interpretation of that right is that it would be maintained throughout her employment by R and that R would not seek to renege on its agreement or deprive the claimant of it without agreement, and presumably compensation.

39.2.1. **If yes, did the notice of termination given by R to C on 21 August 2019 amount to a breach of C's contract of employment**? Yes, as stated above.

39.2.2. **If yes, is the result that that notice of termination did not operate to terminate C's contract of employment**? Yes, as stated above.

39.2.3. **R's position is that there was no variation and the contract terminated by notice given on 21 August 2019. R relies upon its intention to harmonize terms and conditions. R's position is that it received no consideration for the granting of an implied term**. I have already given our judgment with regard to the intention of the parties to enter into legal relations and consideration where the Tribunal finds that it was the parties' intention to make a legally binding agreement and there was valuable consideration.

39.2.4. **C's position is that her non-acceptance of the proffered pay out and her continuing in employment with R constitute valid consideration**. The Tribunal agrees with C's position for all the reasons

stated above. On the basis that the agreement was honoured, C would not only have continued in employment but happily so with goodwill and without making any tribunal or other litigious claims against R; that is what the respondent wanted from harmonisation generally.

39.3. **If there was a termination, what are the terms of the new contract**? This is no longer applicable.

Sections 1 and 11 ERA 1996 declaration

40. **Is C entitled to a declaration pursuant to sections 1 and 11 ERA 1996 that she is contractually entitled to 33 days annual leave**? Yes, there is a contractual term to that effect, and it cannot be varied unilaterally but can be, of course, by agreement.

41. **Is C entitled to a declaration pursuant to sections 1 and 11 ERA 1996 that C's contract of employment contains an implied term that R will not exercise the right it would otherwise in enjoy to give notice to terminate such contract for the purposes of removing C's entitlement to 33 days annual leave**? Yes, there is a contractual term to that effect, and it cannot be varied unilaterally but can be by agreement.

42. Is C entitled to a declaration pursuant to sections 1 and 11 ERA 1996 that C's contract of employment contains an implied term that annual leave that she was not able to take in 2020 due to COVID-related work requirements could be carried over into 2021? The parties deferred this issue to be dealt with in a remedy hearing but in the event it did not arise.

Unlawful deduction from wages – s 13 ERA 1996

43. **In the event that the Tribunal considers it has jurisdiction to consider this claim, is C contractually entitled to 33 days annual leave?** For the reasons stated above the tribunal considers both that it has jurisdiction, and that C is contractually entitled to 33 days annual leave.

44. **If yes, did any of the following amount to an unlawful deduction from wages?**

44.1. **the failure to pay C for 5 days annual leave in 2020 and in 2021**? Yes. Not being allowed paid leave when one is entitled to it and requests it, or expects it, must be a detriment. It amounts to unfavourable treatment as C could reasonably perceive it.

44.2. **the failure to pay C additional amounts for 5 days annual leave in 2020 and in 2021 when she was required to be at work rather than being on leave**? The Tribunal finds that R's policy, in line with an agreement with the trade unions on its sites, was that employees should take their annual leave and they were not required to work instead of taking their leave. C was conscientious and diligent, but we have no evidence from which we could conclude that she was required to be at work and not be on leave. The only refusal of leave was over the difference of opinion as to whether she was entitled to 28 days or 33 days.

44.3. **the failure to compensate C for the 5 days annual leave in 2020 and in 2021**? Yes, as above.

45. **In respect of 2020:**

45.1. **Was C unable to take all of her annual leave allowance because of the pressures placed on her work with R as a result of COVID-19?** No, see above.

45.2. **If yes, did it become an implied term of C's contract that she be able to carry over that leave into 2021?** Not applicable.

45.3. **In the alternative, applying the approach of the Northern Ireland Court of Appeal in *Chief Constable of the Police Service of Northern Ireland v Agnew* [2019] NICA 32, [2019] IRLR 782, was each day of leave a composite amount that should be distributed evenly between each source to that those days that C was unable to take included part of C's statutory annual leave entitlement under Regulation 13 WTR 1998 so that C was entitled to carry that leave forward for two years pursuant to Regulation 13(9) and (10), as amended by the Working Time (Amendment) (Coronavirus) Regulations 2020 (SI 2020/365), being leave that it was not reasonably practicable for C to take as a result of the effects of Coronavirus?** C was permitted to take leave of 28 days p.a. regardless of Covid.

45.4. **Alternatively, is C permitted to designate which parts of her leave are statutory or non-statutory, either as of right or pursuant to Regulation 17 WTR 1998?** A composite approach is followed.

45.4.1. **If yes, is C entitled to designate those days not taken due to Covid as part of her statutory annual leave entitlement under Regulation 13 WTR 1998?** C was permitted to take leave despite Covid.

46. **If yes, was she entitled to carry that leave forward for two years pursuant to Regulation 13(9) and (10), as amended by the Working Time (Amendment) (Coronavirus) Regulations 2020 (SI 2020/365), being leave that it was not reasonably practicable for C to take as a result of the effects of Coronavirus?** The parties deferred this issue to be dealt with in a remedy hearing but in the event it did not arise.

Breach of Regulations 13, 13A and 16 WTR 1998

47. **Is it correct as a matter of law to treat each day of annual leave as a composite amount that should be distributed evenly between each source (per the Northern Ireland Court of Appeal in *Chief Constable of the Police Service of Northern Ireland v Agnew* [2019] NICA 32, [2019] IRLR, §§111 and 119) bearing in mind the decision of the EAT in Bear Scotland [UKEATS/0047/13] and the EAT's position in Smith v Pimlico Plumbers [UKEAT/0211/19, UKEAT/0003/20 and UKEAT/0040/20**]. The evidence of C and R was that nobody elected or designated the type of leaves they were taking but that leave was composite. That is everybody's understanding and that is our finding; it was not a fact in issue when the respective parties addressed it in evidence.

48. **In the alternative, is C entitled, either pursuant to Regulation 17 WTR 1998 or in any event, to designate which parts of her leave are statutory or non-statutory and so she is entitled to designate that the part of her leave not taken in 2020 as her statutory leave**? We have found as above and therefore not in respect of this alternative.

49. **If yes, did R breach Regulations 13 and 13A WRA 1998 by denying C part of her annual leave entitlement for 2020 and 2021? R's position is that C was not denied any leave**. Yes, C was denied leave for the 23rd of October 2020 and is not being allowed to take leave in excess of 28 days p.a. whereas she's entitled to 33 days p.a..

50. **Did R breach Regulation 16 WTR 1998 by its failure to pay C for 5 days of annual leave in 2020 and 2021**? C was not paid for five days annual leave to which he was entitled in 2020 and five days in 2021; she was paid her full annual salary whether she was in work or out of work on leave. She did not take leave that was unpaid and for which she was entitled to payment.

Detriment contrary to Section 45A ERA 1996

51. **Was C subjected to the following detriments by R**? Yes, all the matters listed below are detriments, to which C was subjected, because that is how the claimant could reasonably perceive them to be, save that C did not suffer direct financial loss as she was paid her full salary each year.

    51.1. R's failure in 2020 to permit C to take 33 days annual leave (in addition to the 5 days rolled over from 2019);

    51.2. R's failure in 2021 to permit C to take 33 days annual leave;

    51.3. R's refusal / failure to pay any or any adequate compensation to C for the refusal / failure to permit the Claimant to take 33 days annual leave in 2020 and 2021;

    51.4. the consequential financial loss / loss of free time / leisure time / family time / rest time that C was subject to.

52. **In addition, or in the alternative, even if the Claimant's contract had terminated on 20 November 2019, did the above amount to post termination detriments**? C's employment has not been terminated. She has remained employed by R in accordance with her contract as it stood pre-April 2012 with the sole amendment (save for pay increments) of the implied term relating to holiday entitlement protection.

53. **Was C was subjected to those detriments by R on the ground that**:

    53.1. C refused to comply with the requirement to reduce her annual leave entitlement contrary to WTR 1998 (s 45A(1)(a) ERA 1996)?

    53.2. C refused to forgo a right conferred to her under the WTR, namely her right to annual leave, (s 45A(1)(b) ERA 1996)?

The reason that C was subjected to those detriments was R's honest and genuine belief based on legal advice that she was entitled to 28 days' holiday and that it had acted properly in terminating her employment and re-engaging her, despite her opposition. R was wrong in our view. Causation is not as claimed by C.

To what remedy (if any) is C entitled?

54. The parties submitted to the tribunal a draft remedy settlement stated to be by consent and that is incorporated into our judgment. **The only issue between the parties then was whether, R being in breach of Regulation 30 WTR but there**

being no order for compensation in respect of the same, is C is entitled to an award pursuant to s.38 Employment Act 2002 (EA). Having heard both parties' submissions the Tribunal concluded as follows:

54.1. Section 38 EA applies to proceedings before an Employment Tribunal relating to a claim by a worker under a number of jurisdictions that are listed in schedule 5 EA, and that list includes claims under WTR. If in proceedings to which this section applies a Tribunal finds in favour of a worker but makes no award in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the worker to, amongst other things, provide a written statement of employment particulars or changes to them, the Tribunal "***must***, subject to subsection (5) make an award of the minimum amount to be paid by the employer to the worker and may if it considers it just and equitable in all the circumstances, award the higher amount instead" (my emphasis). S.38 (5) provides that such duty does not arise if there are exceptional circumstances which would make an award, or increase, unjust or inequitable. References to the minimum amount is an amount equal to two weeks' pay and references to the higher amount is an amount equal to four weeks' pay.

54.2. R is concerned that this is a new claim being advanced and at a late stage without notice. The Tribunal confirms that this is not a claim. Consideration of this award is triggered by a judgment, and it does not have to be pleaded nor does a claimant have to indicate in advance that it is being pursued.

54.3. For this provision to apply there must be:

54.3.1. a finding in favour of a claimant in respect of a claim such as a WTR claim and

54.3.2. no award in respect of the finding and

54.3.3. breach of duties such as that under s.1 & s.4 ERA.

54.4. If those preconditions are met then, subject to exceptional circumstances making it unjust or inequitable, a tribunal "must" make an award of either two or four weeks' pay.

54.5. It is true to say that C was issued with a statement of employment particulars upon her appointment, but it is self-evidently the case that such a statement should be of the actual terms and particulars that apply in the individual case. A misstatement or under-statement is not a statement of the applicable particulars. In the same way a statement of variation is required under Section 4 ERA if there are changes to an initial statement of particulars. That statement of changes must also be accurate and full in respect of the matters required to be stated, or it is not a statement of fact. Outdated, incomplete or inaccurate statements of particulars or statements of changes are worthless as they do not communicate and confirm what it is intended ought to be communicated and confirmed between employer and employee.

54.6. The tribunal was not required to make a specific finding at the liability stage that R did not issue a written statement of particulars or change. The requirements are listed above. In fact, C was not issued with an accurate

statement of written particulars or even notice of change when the respondent agreed to provide her with protection of her annual leave entitlement.

54.7. The relevant circumstances in this case were R's attempt at harmonisation, the results of an audit such that retrospective ratifications of certain decisions was necessary, and that the respondent was under no direct, particular or increased pressure to force through a change to C's terms (when at most it had received was a recommendation to seek to negotiate). R has not explained why no statement was given to C. R agreed the additional option in respect of holiday protection but did not confirm it in writing. The situation was however confirmed and well known even being acknowledged by the acting CEO several years before matters came to a head. The Tribunal does not consider that these amount to exceptional circumstances that would make an award or increase in an award unjust and inequitable. The onus, which was not substantial, was on R. It failed to discharge its duty to C.

54.8. The Tribunal is required to give a respondent an opportunity to address the issues raised by these provisions. The matter has been raised appropriately as a remedy point and at the appropriate time, that is following the liability judgment. Both parties have been given the opportunity to address the issue and have done so.

54.9. All the preconditions applying, but the exemption in ss(5) not being applicable, the Tribunal must then decide whether to award C two weeks' or four weeks' pay. R Has a large HR department and, we believe, legal department or at very least access to professional legal advice and assistance. C has been put through a lengthy procedure and process relating to her holiday entitlement and she appropriately raised grievances that were rejected out of hand and without consideration. An option was provided to C in writing, and she accepted it in writing. R then failed to commit to writing the change in the contractual particulars to reflect the agreement reached. All things considered the Tribunal finds that this is not a minor or routine failure on the part of R, but a significant one. The Tribunal considers that it would be just and equitable in all the circumstances to award the higher amount to C instead of the minimum amount. The Tribunal awards C four weeks' pay.

54.10. The parties agreed that four week's pay for these purposes amounts to £2,152.

Employment Judge T.V. Ryan

Date: 27 May 2022

JUDGMENT SENT TO THE PARTIES ON 31 May 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

Appendix

Claim Nos: 1600623/2021 and 1600979/2021

IN THE EMPLOYMENT TRIBUNAL
BETWEEN:

MARCIA LEWIS

Claimant

AND

CAERPHILLY COUNTY BOROUGH COUNCIL

Respondent

UPDATED LIST OF ISSUES

Those parts that are underlined are subject to C's application to amend dated 28.03.22 which the ET ordered be determined at the start of the substantive hearing.

Jurisdictional issues

55. Was C's claim of unlawful deduction from wages as pleaded in her original claim 160263/2021 presented out of time as argued by the Respondent at paragraph 1.2.1 of the Grounds of Resistance?

Termination of the Claimant's contract of employment

56. Did C's contract of employment with R terminate with effect from 20 November 2019, followed by re-employment with effect from 21 November 2019?

56.1. Did the notice of termination given by R to C on 21 August 2019 operate to terminate C's contract of employment with R?

56.1.1. C's position is that it did not so operate because it did not give the three months' notice as required by C's contract of employment.

56.1.2. R's position is that the notice was effective and/or C affirmed any breach. C denies affirming any breach.

56.1.3. Is R entitled to rely upon the communications with ACAS referred to at paragraphs 2.8 and 3.1.2 of its Grounds of Resistance, or were those communications without prejudice, or inadmissible by virtue of section 18(7) ETA 1996?

56.2. Alternatively, was the effect of the correspondence between the Claimant and Respondent in 2012, in particular communication from Mr Hardacre to C that the option of having the 33-day entitlement protected on a personal basis indefinitely, that C's contract of employment became subject to an implied term that R would not exercise the right it would otherwise enjoy to give notice to terminate such contract for the purposes of removing C's entitlement to 33 days annual leave?

56.2.1. If yes, did the notice of termination given by R to C on 21 August 2019 amount to a breach of C's contract of employment?

56.2.2. If yes, is the result that that notice of termination did not operate to terminate C's contract of employment?

56.2.3. R's position is that there was no variation and the contract terminated by notice given on 21 August 2019. R relies upon its intention to harmonize terms and conditions. R's position is that it received no consideration for the granting of an implied term.

56.2.4. C's position is that her non-acceptance of the proffered pay out and her continuing in employment with R constitute valid consideration.

56.3. If there was a termination, what are the terms of the new contract?

Sections 1 and 11 ERA 1996 declaration

57. Is C entitled to a declaration pursuant to sections 1 and 11 ERA 1996 that she is contractually entitled to 33 days annual leave?

58. Is C entitled to a declaration pursuant to sections 1 and 11 ERA 1996 that C's contract of employment contains an implied term that R will not exercise the right it would otherwise in enjoy to give notice to terminate such contract for the purposes of removing C's entitlement to 33 days annual leave?

59. Is C entitled to a declaration pursuant to sections 1 and 11 ERA 1996 that C's contract of employment contains an implied term that annual leave that she was not able to take in 2020 due to COVID-related work requirements could be carried over into 2021?

Unlawful deduction from wages – s 13 ERA 1996

60. In the event that the Tribunal considers it has jurisdiction to consider this claim, is C contractually entitled to 33 days annual leave?

61. If yes, did any of the following amount to an unlawful deduction from wages?

    61.1. the failure to pay C for 5 days annual leave in 2020 and in 2021?

    61.2. the failure to pay C additional amounts for 5 days annual leave in 2020 and in 2021 when she was required to be at work rather than being on leave?

    61.3. the failure to compensate C for the 5 days annual leave in 2020 and in 2021?

62. In respect of 2020:

    62.1. Was C unable to take all of her annual leave allowance because of the pressures placed on her work with R as a result of COVID-19?

    62.2. If yes, did it become an implied term of C's contract that she be able to carry over that leave into 2021?

    62.3. In the alternative, applying the approach of the Northern Ireland Court of Appeal in *Chief Constable of the Police Service of Northern Ireland v Agnew* [2019] NICA 32, [2019] IRLR 782, was each day of leave a composite amount that should be distributed evenly between each source to that those days that C was unable to take included part of C's statutory annual leave entitlement under Regulation 13 WTR 1998 so that C was entitled to carry that leave forward for two years pursuant to Regulation 13(9) and (10), as amended by the Working Time (Amendment) (Coronavirus) Regulations 2020 (SI 2020/365), being leave that it was not reasonably practicable for C to take as a result of the effects of Coronavirus?

    62.4. Alternatively, is C permitted to designate which parts of her leave are statutory or non-statutory, either as of right or pursuant to Regulation 17 WTR 1998?

        62.4.1. If yes, is C entitled to designate those days not taken due to Covid as part of her statutory annual leave entitlement under Regulation 13 WTR 1998?

62.4.2. If yes, was she entitled to carry that leave forward for two years pursuant to Regulation 13(9) and (10), as amended by the Working Time (Amendment) (Coronavirus) Regulations 2020 (SI 2020/365), being leave that it was not reasonably practicable for C to take as a result of the effects of Coronavirus?

Breach of Regulations 13, 13A and 16 WTR 1998

63. Is it correct as a matter of law to treat each day of annual leave as a composite amount that should be distributed evenly between each source (per the Northern Ireland Court of Appeal in *Chief Constable of the Police Service of Northern Ireland v Agnew* [2019] NICA 32, [2019] IRLR, §§111 and 119) bearing in mind the decision of the EAT in Bear Scotland [UKEATS/0047/13] and the EAT's position in Smith v Pimlico Plumbers [UKEAT/0211/19, UKEAT/0003/20 and UKEAT/0040/20].

64. In the alternative, is C entitled, either pursuant to Regulation 17 WTR 1998 or in any event, to designate which parts of her leave are statutory or non-statutory and so she is entitled to designate that the part of her leave not taken in 2020 as her statutory leave?

65. If yes, did R breach Regulations 13 and 13A WRA 1998 by denying C part of her annual leave entitlement for 2020 and 2021? R's position is that C was not denied any leave.

66. Did R breach Regulation 16 WTR 1998 by its failure to pay C for 5 days of annual leave in 2020 and 2021?

Detriment contrary to Section 45A ERA 1996

67. Was C subjected to the following detriments by R?

67.1. R's failure in 2020 to permit C to take 33 days annual leave (in addition to the 5 days rolled over from 2019);

67.2. R's failure in 2021 to permit C to take 33 days annual leave;

67.3. R's refusal / failure to pay any or any adequate compensation to C for the refusal / failure to permit the Claimant to take 33 days annual leave in 2020 and 2021;

67.4. the consequential financial loss / loss of free time / leisure time / family time / rest time that C was subject to.

68. In addition, or in the alternative, even if the Claimant's contract had terminated on 20 November 2019, did the above amount to post termination detriments?

69. Was C was subjected to those detriments by R on the ground that:

69.1. C refused to comply with the requirement to reduce her annual leave entitlement contrary to WTR 1998 (s 45A(1)(a) ERA 1996)?

69.2. C refused to forgo a right conferred to her under the WTR, namely her right to annual leave, (s 45A(1)(b) ERA 1996)?

To what remedy (if any) is C entitled?

70. Is C entitled to:

70.1. declaratory relief?

70.2. compensation, including compensation for injury to feelings?

70.3. an uplift pursuant to section 207A TULRCA 1992 due to the Respondent's failure to hear the Claimant's grievance?

70.4. Interest?