EMPLOYMENT TRIBUNALS

Claimant: Ms Claudette Dynott

Respondent: KMS (UK) Ltd

Heard at: London Central (by video) **On:** 11, 12, 13 July 2022

Before: Tribunal Judge A Jack, acting as an Employment Judge

Representation
Claimant: Mr D Ibekwe, Brighton & Hove Race Project
Respondent: Ms G Duffy, Peninsula Group Ltd.

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal under regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 fails and is dismissed.
2. The claim for unfair dismissal under s. 98 of the Employment Rights Act 1996 fails and is dismissed.
3. The claim for pay in lieu of annual leave under the Working Time Regulations 1998 fails and is dismissed.
4. The claim for breach of contract in respect of pay in lieu of annual leave succeeds. The Respondent is ordered to pay to the Claimant the sum of £31.56 gross as compensation. The Respondent is ordered to account to HMRC for any tax and National Insurance due.

REASONS

1. The claimant notified ACAS on 18 January 2021, and her ET1 was received on 13 February 2021.

2. There was a case management hearing on 18 January 2022. The claims were clarified as being:

   2.1 A claim for unfair dismissal under regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006;

2.2 A claim for “ordinary” unfair dismissal under s. 98 of the Employment Rights Act 1996;

2.3 Claims under regulations 14 and 16 of the Working Time Regulations 1998.

3. At the start of the hearing we clarified the issues, and the parties agreed to a list of issues.

4. The parties agreed the following list of issues relating to liability for unfair dismissal:

4.1 What was the reason or principal reason for dismissal?

4.2 Is the respondent able to show that the reason was redundancy? Does the availability of, or the extension of, the government furlough scheme show that the reason was not redundancy?

4.3 Or was the real reason the TUPE transfer and the fact that the claimant had protected rights?

4.4 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? Is the availability of, or the extensions of, the government furlough scheme one of the relevant circumstances? In particular, the Tribunal may need to decide whether:

4.4.1 The respondent adequately warned and consulted the claimant;
4.4.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;
4.4.3 The respondent took reasonable steps to find the claimant suitable alternative employment;
4.4.4 Dismissal was within the range of reasonable responses.

5. The parties agreed the following list of issues relating to liability under the Working Time Regulations 2006 (WTR):

5.1 Did the respondent fail to make a payment to the claimant in lieu of annual leave contrary to regulations 14 and 16 WTR, as a result of wrongly requiring her to take annual leave before her employment ended and as part of her notice period?

5.2 Did the respondent wrongly calculate the claimant’s annual leave entitlement as a result of failing to carry over leave from a previous leave year to the extent required by regulation 13(10) WTR?

6. As the hearing progressed it became clear that the second list of issues did not accurately capture the party’s positions with respect to pay in lieu of annual leave. The second question was not correct as

the question of carry over from a previous leave year under regulation 13(10) WTR was not relevant. Further, it became clear during Mr Gate's oral evidence that the claimant's contractual leave was 33 days a year, which significantly exceeds her leave entitlement under the WTR. The ET1 had advanced a claim for "failure to pay outstanding (accrued) holiday pay upon termination: Reg. 14 & 16 WTR" only, and this had remained the position at the case management hearing. However the respondent was content for the ET1 to be amended to make clear that there was a claim for pay in lieu of accrued holiday on the basis that there had been a breach of contract, in addition to the claim for pay in lieu of accrued holiday under the WTR. Applying the principles in *Selkent Bus Co Ltd v Moore* I permitted the claimant to amend her ET1 in this way.

7. The documents included a bundle of 127 pages and witness statements from:

   7.1 the claimant;

   7.2 Mr Gates, director of the respondent; and

   7.3 Ms Daskalova, senior operations manager of the respondent and the claimant's line manager at the relevant time.

   There was also a written opening statement on behalf of the claimant, a one page document entitled "KMS holiday report" and the Respondent's skeleton submissions regarding annual leave (dated 12 July 2022).

8. The claimant was employed by the respondent, a company that provides personnel to the hospitality industry, as a housekeeper working at the Strand Palace Hotel. Her service began on 19 September 1983. She was TUPE transferred to the respondent on 1 April 2019. The respondent did not attempt to change the terms of her contract either before or after the transfer. Her particulars of employment are at p. 49 of the bundle.

9. The coronavirus pandemic began in March 2020. The Coronavirus Job Retention Scheme came into force on 15 April 2020. The claimant and her colleagues were furloughed.

10. All staff working for the respondent at the Strand Palace hotel were warned of the risk of possible redundancies by way of a letter dated 24 June 2020 from Mr Gates. This stated that the hotels that the respondent provided services to had been closed as a result of the coronavirus pandemic, impacting very heavily on the respondent's income. Some hotels were making plans to reopen but the respondent's clients were forecasting occupancy rates of 25% or less. It was expected that consumer demand for hotels would remain significantly curtailed. The respondent was having to plan accordingly, and existing staffing levels were well beyond what was required for expected levels of occupancy. There was therefore going to be a collective consultation to consider making a number of redundancies. It was proposed to make more than 20 redundancies at most London locations (such as at the Strand Place Hotel), and a collective

consultation would be held for each location. The letter ended by asking that those staff who were already considering not returning to work to let Mr Gates know as soon as possible, "as the option of voluntary redundancy may be available to you".

11. Three employees were nominated to act as representatives of the staff working at the Strand Palace Hotel on 29 June 2020. The claimant took part in the process, nominating one of the employees who was appointed as a representative. The representatives were sent a letter which said that the reason for the potential redundancies was that the hotels that the respondent provided services to had been closed as a result of government restrictions since the end of March, due to the impact of covid, and that as a result the respondent had received little or no income for many months. The letter explained that it was proposed that the respondent's staff at the Stand Palace Hotel across all teams would reduce from a total of 67 to a total of 40. This letter stated that the method of selection by which employees may be dismissed if redundancies took place would be first of all by volunteers, and then based on scoring criteria, which were summarised.

12. I accept that these two letters give an accurate summary of the reasons for warning the respondent's staff at the Strand Palace Hotel that they were at risk of redundancies and for consulting on possible redundancies. The respondent's income had dropped to almost zero within two weeks of the first lockdown starting. It did not know what the future would hold, but the hotels that respondent provided services to were predicting occupancy rates of 25% or less when they were able to open again. I also find that the proposed method of selection for any redundancies was to be first by volunteers and then based on scoring criteria.

13. Meetings took place with the employee representatives on 1 July 2020, 6 July 2020, 10 July 2020 and 13 July 2020. One question discussed at these meetings was what would happen if full time staff went part time in order to minimize the number of redundancies. Mr Gates stated at the meeting on 10 July 2020 that entitlement to holiday and so on would be reduced pro rata in accordance with reduced hours, but length of service and all other terms would be honoured. Mr Gates stated at the meeting on 13 July 2020 that if a member of staff wanted to be made redundant then they would volunteer, but that there would be no difference between voluntary and compulsory redundancy in terms of payment. Everyone would receive the statutory redundancy payment. The claimant was kept informed about these meetings on the phone, by one of the nominated representatives.

14. Mr Gates emailed the claimant on 15 July 2020 inviting her to an individual consultation to be held on the phone. The email said that at the collective consultation meetings the nominated representatives had proposed (among other things) that job sharing be considered among the housekeeping roles that were at risk, and that those at risk of redundancy would be invited to apply for the new position of back of house attendant. He said that the respondent had agreed selection

criteria and had decided to offer the opportunity for employees to opt for voluntary redundancy. He said that he had arranged an individual consultation meeting to discuss this. The purpose of the one-to-one meeting, I find, was both to discuss "the opportunity for employees to opt for voluntary redundancy" and to discuss any suggestions that the claimant had that might avoid the need to make compulsory redundancies.

15. The claimant had a one-to-one meeting with Ms Daskalova on 23 July 2020. During that meeting the claimant raised concerns about her health and said that the fear of catching covid was too much. After that meeting, on 26 July 2020, the claimant emailed Ms Daskalova to say that she had reflected upon and carefully considered their conversation. She stated clearly that voluntary redundancy was her preferred option. She said that her reasons were a concern for her health, the need to avoid continued stress about uncertainty in relation to her employment, and covid restrictions such as wearing a mask on her commute and at work. I am satisfied that this contemporaneous document was an accurate summary of her reasons for deciding to seek voluntary redundancy.

16. Mr Gates wrote to the claimant on 31 July 2020 by email confirming acceptance of her request for voluntary redundancy, enclosing a letter outlining the terms on which she would be made redundant. Her 21 week notice period would start the next day, 1 August 2020, and her last day of employment would be 24 October 2020. Her holiday entitlement had been calculated as 22.25 days. She would remain on furlough but be paid 100% of her salary throughout her notice period. The letter said "we are therefore providing you with the statutory notice period that we require you to take these days as holiday in October 2020 as part of your notice period". Also enclosed was a document outlining the claimant's statutory redundancy payment.

17. The respondent had been advised by its external HR advice providers that it was permissible to require the claimant to take any remaining accrued leave in the latter part of her notice period, whether the claimant was on furlough or not, provided that the respondent gave the necessary notice that she was required to take her leave and she was paid full pay. The respondent accepted during the course of the hearing that this advice did not address the amendments made, with effect from 26 March 2020, to the Working Time Regulations 1998 by The Working Time (Coronavirus) (Amendment) Regulations 2020.

18. The claimant did not complain to the respondent about being required to take her annual leave during her notice period at the time, and the respondent did not receive a grievance from the claimant.

19. Of the respondent's staff who worked at the Strand Palace Hotel, seven opted for voluntary redundancy and 32 were made compulsorily redundant. All seven of those who opted for voluntary redundancy were staff who had TUPE transferred to the respondent. All 32 of the staff who were made compulsorily redundant were non-TUPE staff. Fourteen staff had TUPE transferred to the respondent: seven of

these opted for voluntary redundancy, and seven were not made redundant.

20. The respondent operates at 22 locations in London, one of which is the Strand Palace Hotel. In total it made over two thirds of its workforce, and half of its management team redundant.

21. The Government's Coronavirus Job Retention Scheme was intended to help avoid redundancies. It was not cost free for employers, and the cost of it for employers increased over time. It initially covered 80% of a furloughed employee's wages. From 1 August 2020 employers were required to meet the cost of employer's national insurance and pension contributions. In September 2020 the government covered 70% of a furloughed employee's wages and the employer was required to top up to 0%. In October 2020 the government covered 60% of a furloughed employee's wages and the employer was required to top up to 80%.

22. The claimant's annual leave year ran from 1 April to 31 March. Her particulars of employment state that her annual entitlement, after 10 year's service, was to 25 days per annum (bundle, p. 49). The respondent understood her to be entitled to 25 days per annum plus bank holidays. I accept Mr Gates' evidence that her contractual leave entitlement was to 33 days annual leave per annum. Her written particulars of employment require annual leave accrued in a year to be taken by the end of the same leave year: any outstanding entitlement at the end of each leave year was forfeited (clause 6). However I accept Mr Gate's evidence that on the basis of the custom and practice of the transferor company, she was contractually entitled to carry over unused leave from one leave year to the next, and that the respondent recognised this as a TUPE protected right.

23. The written particulars of employment provide that payment in lieu for annual leave would only be made in the year in which the claimant's employment terminates. It also sets out the method for calculating her annual leave entitlement upon termination of her contract. It does not enable to employer to require the claimant to take her annual leave on particular days, and it does not require an employee to take accrued leave during the notice period.

24. The claimant worked full time, and her normal working hours were spread over 5 days a week (clause 4, p. 49).

25. In the leave year 1 April 2019 to 31 March 2020 she took 30.03 days annual leave.

26. While on furlough the claimant was initially paid 80% of her salary. During her notice period, including the period within her notice period in which she was required to take leave, she remained on furlough but was paid 100% of her wages.

27. Having received the claimant's claim for holiday pay, the respondent reviewed its payroll and personnel records. On 2 July 2021, after these proceedings had commenced, the respondent made a payment of £422.76 gross to the claimant to rectify a shortfall in holiday pay.

The respondent had said in its letter of 31 July 2020 that the claimant's holiday entitlement had been calculated as 22.25 days, and that she was required to take those days in October 2020 as part of her notice. The respondent now considered that she had only been required to take 16 days leave during her notice period rather than the full 22.5 days she was considered to be entitled to. The respondent therefore considered that holiday pay was still due to her (Mr Gate's witness statement, paragraph 30). This was not however explained to the claimant in the letter sent to her on 29 June 2021 (bundle, p. 66), which simply said that a net payment of £338.36 was being made to her, in respect of an inadvertent underpayment in the last payment of wages made to her on 30 October 2020.

Unfair dismissal

28. An employee has the right not to be unfairly dismissed by her employer: s. 94(1) Employment Rights Act 1996 (ERA).

29. An employee is dismissed by her employer if the contract under which she is employed is terminated by the employer: s. 95(1)(a) ERA.

30. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal: s. 98(1) ERA. The burden is also on the employer to show that the reason is a potentially fair reason, such as that the employee was redundant: 98(2)(c) ERA.

31. An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish: s. 139(1)(b)(i) ERA.

32. S. 98(4) ERA provides that where an employer has shown the reason for the dismissal and that the reason is a potentially fair reason,

> the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's 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.

33. *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17 is clear that in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. The tribunal is to determine whether, in the particular circumstances of the 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 is fair: if the dismissal falls outside the band, it is unfair.

34. Regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides that where, either before or after a relevant transfer, an employee of the transferor is dismissed and the sole or principal reason for the dismissal is the transfer, the dismissal must be treated as being unfair.

Working Time Regulations 1998

35. The Working Time Regulations 1998 (WTR) were amended by The Working Time (Coronavirus) (Amendment) Regulations 2020, with effect from 9 pm on 26 March 2020. I outline the WTR as amended.

36. Regulation 13(1) WTR provides that a worker is entitled to four weeks annual leave in each leave year. Regulation 13(9)(a) WTR provides that regulation 13 leave cannot ordinarily be carried over from one leave year to the next. There is however an exception to that under regulation 13(10) WTR: where it was not reasonably practicable for a worker to take regulation 13 leave as a result of the effects of coronavirus, the worker is entitled to carry forward such untaken leave. Regulation 13(11) WTR provides that leave carried over under regulation 13(10) can be taken in the two leave years immediately following the leave year in respect of which it was due. I will refer to leave carried over under regulation 13 (10) and (11) WTR as 'coronavirus carry-over leave'.

37. Regulation 13A WTR provides that a worker is also entitled to additional annual leave. In any leave year beginning after 2009, a worker is entitled to 1.6 weeks.

38. Regulation 14 WTR makes provision relating to compensation related to regulation 13 and regulation 13A leave. Where a worker's employment ends during her leave year and, on the date on which the termination takes effect, the proportion of regulation 13 and regulation 13A leave she has taken is less that the proportion of the leave year which has expired, her employer shall make a payment in lieu of leave. This provision, clearly, is in respect of compensation for untaken regulation 13 and regulation 13A leave.

39. Regulation 14(5) WTR provides that where a worker's contract is terminated and on the termination date she remains entitled to leave from a previous leave year carried forward under regulation 13(10) and (11), the employer must make a payment in lieu of that leave. This provision specifically concerns coronavirus carry-over leave i.e. leave carried over under regulation 13(10) and (11). It ensures compensation for any such leave to which the employee remains entitled on termination. i.e. for any coronavirus carry-over leave which has not been taken when the employment terminates.

40. Regulation 15 WTR makes provision relating to the days on which leave is taken. An employer may require a worker to take leave to which she is entitled under regulation 13 or regulation 13A on particular days, by giving notice to her: regulation 15(2)(a) WTR. The notice must specify the days on which leave is to be taken and where the leave on a particular day is to be in respect of only part of the day,

its duration: regulation 15(3)(b). The notice must be given to the worker twice as many days in advance of the earliest day specified in the notice as the number of days to which the notice relates: regulation 15(4)(a) WTR.

41. The employer's right to require the worker to take regulation 13 and 13A leave on particular days can be varied or excluded by a relevant agreement: regulation 15(5) WTR.

42. The provisions of regulation 15 WTR just outlined were not amended by the (Coronavirus) (Amendment) Regulations 2020 (the Amendment Regulations'). The Amendment Regulations did amend regulation 15(2)(b) WTR, in respect of the ability of an employer to require a worker *not* to take regulation 13 and regulation 13A leave on particular days. The amendment relates to regulation 13(12). This provides that an employer can require a worker not to take leave to which regulation 13(10) applies on particular days under regulation 15(2) only if the employer has a good reason to do so: regulation 13(12) WTR. So the ability of an employer to prevent a worker taking leave which it was not reasonably practicable for her to take due to coronavirus is restricted, and can only be exercised where the employer has good reason to require the worker not to take that leave. However the ability of an employer to require a worker to take leave on particular days under regulation 15 was not changed by the Amendment Regulations.

43. For a notice given under regulation 15 to be effective in requiring a worker to take leave on particular days it does not need to specify the precise dates on which say the leave must be taken. In the case of a worker on an oil rig whose working pattern alternates between offshore periods and onshore break periods, a contract which requires the employee to take annual leave during an onshore break period can amount to an effective regulation 15 notice that his employer requires him to take annual leave during his onshore periods: *Craig and others v Transocean International Resources Ltd* UKEATS/0029/08 and UKEATS/0030/08.

Unfair Dismissal

44. Hotels, including the Strand Palace Hotel, were closed. The requirements of the respondent's business for employees to work at the Strand Palace Hotel (including housekeeping staff) had, in the short term, ceased. Mr Ibekwe submitted that the purpose of the government's furlough scheme was to avoid redundancies, that the scheme was being used by the respondent, and that an announcement was made at some point that the scheme was to be extended. That does not alter my conclusion that the requirements of the business for employees to work at the hotel had, in the short term at least, ceased. Further, there was no certainly as to when hotels would be able to reopen, and the respondent's assessment was that when they did reopen occupancy rates would be at 25% or below the pre-lockdown rates. So the respondent's expectation was that even when hotels were able to reopen, its requirements for employees to carry out work at the Strand Palace Hotel (including housekeepers) would have very significantly diminished.

45. Mr Ibekwe argued that the real reason for the claimant's dismissal was that the respondent wanted to get rid of staff who were TUPE protected and, as a result of their longer service, were more expensive. I have found that half of the TUPE protected staff at the hotel opted for voluntary redundancy, whereas none of the non-TUPE staff opted for voluntary redundancy. Mr Ibekwe's submits that the respondent was clearing out as many of the TUPE protected staff as it could. However statutory redundancy payments were made whether the redundancy was voluntary or not: the respondent did not seek to create a financial incentive for TUPE protected staff to take voluntary redundancy. Nor was any pressure put upon on the claimant to choose voluntary redundancy. She was asked to consider the option of voluntary redundancy, and she stated that her preference was for voluntary redundancy. She gave very clear reasons for that choice, including an understandable concern for her health. The transfer had taken place in April 2019 and the respondent had not, either prior to the TUPE transfer or after it, attempted to alter the terms and conditions of the TUPE protected staff. The fact that 50% of TUPE protected staff opted for voluntary redundancy and no non-TUPE staff did is likely to be explained by the facts that (i) only those with two years' service are entitled to a statutory redundancy payment and (ii) statutory redundancy payments are greater for those with more service. It is not evidence that the respondent was attempting to clear out TUPE protected staff. I find that the reason for the claimant's dismissal was not the TUPE transfer, or the fact that the claimant had protected rights. The reason for the claimant's dismissal was redundancy.

46. I am also satisfied that the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The availability of the government's furlough scheme, and any announcement that furlough was to be extended, did not alter the fact that the respondent expected occupancy rates to be very significantly diminished when hotels were able to reopen again. The respondent's income had reduced to almost zero within two weeks of the first lockdown. It expected that the cost of retaining furloughed staff would increase (as the government started to require employers to pay national insurance contributions and pension contributions, and to pay a percentage of furloughed staffs' wages). The respondent warned all staff at the Strand Palace Hotel that they were at risk of redundancy, for reasons which were clearly explained. Nominated staff representatives were appointed, and proposals to reduce the need for redundancies (such as job sharing) were discussed. The claimant was told that one option was voluntary redundancy, and she very clearly stated that, after careful consideration, that was her preferred option. The respondent was operating in an environment of real uncertainty – regarding the progress of the pandemic, when hotels might be permitted to reopen, and exactly what the requirements of the hotel would be when it did reopen. I take account of the fact that the respondent was a large undertaking providing services to 22 sites across London, and having access to specialist HR and legal advice. I am however satisfied that in all of the circumstances, dismissal was within the range of reasonable responses.

47. In all the circumstances, I consider that the fact that the respondent made use of the Coronavirus Job Retention Scheme and the fact that it was extended, although relevant, do not take the dismissal out of the range of reasonable responses. The claims for unfair dismissal therefore fail.

Pay in lieu of accrued but untaken holiday

48. The claimant was entitled to 28 days annual leave each leave year under the WTR. She took 30.03 days annual leave in the leave year 1 April 2019 to 31 March 2020. So the issue of coronavirus carry-over leave does not arise. That is because she took her full WTR leave entitlement in 1 April 2019 to 31 March 2020, so she could not have been entitled to carry over WTR leave due to having been prevented from taking some of that leave due to the effects of coronavirus.

49. Her WTR leave entitlement for the period 1 April 2020 to 24 October 2020 was 28 divided by 12 multiplied by 7 = 16.33 days.

50. The claimant was entitled to 33 days each leave year under her contract. She carried over 3 days of contractual leave from the leave year 1 April 2019 to 31 March 2020. So her entitlement to contractual leave for the period 1 April 2020 to 24 October 2020 was 33 divided by 12 multiplied by 7 = 19.33 days, plus 3 days of carried over leave = 22.25 days in total. Her contractual entitlement was clearly not in addition to her WTR leave. Rather she was entitled to 6 days of contractual leave, over and above her entitlement to WTR leave.

51. The letter of 31 July 2020 to the claimant said "Your holiday entitlement at 31/10/20 is calculated at 22.25 days. We are therefore providing you with the statutory notice period that we require you to take these days as holiday in October 2020 as part of your notice period". The letter was also clear that her notice period would end on 24 October 2020, which would be the last day of her employment.

52. The claimant's written particulars of employment do not expressly enable the employer to require the claimant to take her annual leave on particular days, and there is no express term requiring an employee to take any outstanding holiday due during her notice period. Nor do I see any basis on which either of these terms could be implied.

53. Regulation 15 WTR only enables notice to be given in respect of leave under regulation 13 and 13A i.e. it only enables notice to be given in respect of WTR leave. So the notice given in the letter of 31 July 2020 could only have been effective in requiring the claimant to take her WTR leave of 16.33 days in the period 1 - 24 October 2020. It could not be effective in requiring her to take her contractual leave of 6 days over and above her WTR leave before her termination date.

54. That takes us to the important question of whether the notice given in the letter of 31 July 2020 was effective in requiring the claimant to take her WTR leave on or before her termination date.

55. The letter did specify the days on which leave was to be taken. It required her to take her leave during October 2020 and was also clear that her notice period would end on 24 October 2020, which would be the last day of her employment. It was, therefore, giving notice that she was being required to take leave in the period 1 - 24 October 2020 inclusive. Applying *Craig and others v Transocean International Resources Ltd,* the notice made clear what the period was in which the claimant was required to take annual leave.

56. The earliest day specified in the letter was 1 October 2020 and the letter was emailed on 31 July 2020, so notice was given 61 days in advance of the earliest day specified in the notice. Notice was therefore given to the claimant more than twice as many days in advance of the earliest day specified in the notice as the number of days to which the notice relates.

57. The notice said that it was requiring the claimant to take 22.25 days leave and for the reasons I have already given, it could only be effective in requiring her to take 16.33 days. My reasons for saying that relate to the WTR and would not have been clear to claimant. Further, there are only 24 days in the period 1 - 24 October 2020. So she could not have been required to take 22.25 days in that period, given that her usual working pattern is working 5 days a week. However the claimant was being required to take leave in the period 1 - 24 October 2020 inclusive, and it would have been clear that her employer was requiring her to take as much leave in this period as it could. I conclude that the letter was effective in requiring her to take 16.33 days leave in this period. I do not regard the error in the letter – saying that she was required to take 22.25 days leave, when she could only be required under the WTR to take 16.33 days leave – as preventing it being effective in requiring her to take her 16.33 days of WTR leave. I am satisfied that the letter was effective in requiring her to take her outstanding WTR annual leave.

58. Mr Ibekwe's argument was that the claimant could not be required to take her leave while she was on furlough, and that she had to be paid in lieu of her annual leave. He referred me to the government guidance on how holiday entitlement and pay operate during the pandemic (bundle, p. 87). However this states that taking leave and being on furlough are consistent, and says that in most cases it would be easier for furloughed workers to take leave during the furlough period (p. 90). I am satisfied that taking annual leave is consistent with being on furlough. In the period 1- 24 October 2020 the claimant was on furlough and receiving 100% of her wages. There was no evidence that she was ill due to covid at this time, or that she was on sick leave. There was no evidence that it was not reasonably practicable for her to take leave as a result of the effects of coronavirus during this period.

59. Mr Ibekwe referred me to the government guidance (at page 93), which states that "if the worker leaves employment, the employer must pay the worker for any untaken leave". This is explicitly about *untaken* leave. The guidance is also clear that employers can require workers to take holiday on particular days, if the necessary notice is

given (p. 87-88). For the reasons already given, I consider that the claimant was required to take her outstanding WTR leave in the period 1 - 24 October 2020.

60. Mr Ibekwe emphasised the importance of The Working Time (Coronavirus) (Amendment) Regulations 2020 (the Amending Regulations), and especially regulation 14(5) WTR, which was inserted into the WTR by the Amending Regulations. He suggested that it requires a payment in lieu to be made in respect of annual leave where a worker's employment is terminated. However regulation 14(5) WTR provides that where a worker's contract is terminated and on the termination date she remains entitled to leave from a previous leave year carried forward under regulation 13(10) and (11), the employer must make a payment in lieu of that leave. This provision specifically concerns coronavirus carry-over leave i.e. leave carried over under regulation 13(10) and (11). It ensures compensation for any such leave to which the employee remains entitled on termination. That is, it ensures compensation for any coronavirus carry-over leave which has not been taken when the employment terminates. It is not relevant in this case as, for the reasons given above at paragraph 48, the claimant was not entitled to coronavirus carry-over leave.

61. The written particulars of employment provide that payment in lieu of annual leave would only be made in the year in which the claimant's employment terminated. It says that no payment in lieu would be made for outstanding leave if the employee terminates the contract without giving the necessary notice, but that is not relevant here. I conclude that the claimant was contractually entitled to a payment in lieu of untaken contractual leave.

62. I conclude that the respondent was entitled to give notice requiring the claimant to take her outstanding WTR leave in the period 1-24 October 2020, and that it did so. It was not entitled to require her to take her outstanding 6 days of contractual leave during that period. At the termination of her contract, she had 6 days of untaken contractual leave and was therefore entitled to a payment in lieu in respect of them. No such payment was made at the end of October 2020, when her final wages were paid, so her claim for breach of contract succeeds.

63. Turning to remedy, there was no dispute that the claimant's relevant daily rate of pay was £75.72. The amount outstanding at the end of October 2020, when she received her final payment of wages, was therefore 6 times £75.72 = £454.32 gross. A payment of £422.76 gross (£338.36 net) was made to her on 2 July 2021. Ms Dufy asked me to consider whether or not that payment should be taken into account when assessing damages. Mr Ibekwe argued that I should not take this payment into account, saying that I should order the respondent to pay damages for the breach of contract, and should assess damages as the amount due in respect of pay in lieu at the time of the breach.

64. I am satisfied that I should take the payment made on 2 July 2021 into account when assessing what damages should be awarded to put the

claimant into the position that she would have been if the respondent had not breached the contract. That payment was made to rectify a shortfall in holiday pay, a shortfall which was identified following a review undertaken after these proceedings had commenced, although that could not have been known by the claimant or her representative until they read Mr Gate's witness statement. However the payment was made on the basis of the respondent's assessment that the claimant had not received the holiday pay due to her at the end of her employment. So it should be taken into account, when determining damages for the failure to make the payment in lieu of leave to which she was entitled.

65. The claimant should therefore receive damages of £454.32 minus £422.76 = £31.56 gross.

Judge A Jack
10 August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/08/2022

FOR THE TRIBUNAL OFFICE