EMPLOYMENT TRIBUNALS

Claimant: Mrs S Pagan

Respondent: Thicket Priory Ltd

Heard at: Hull remotely (by Video) **On:** 11, 12 and 13 May 2022

Before: Employment Judge Miller

Representation
Claimant: Mr Guildford (claimant's father)
Respondent: Ms K Nowell (counsel)

RESERVED JUDGMENT

1. The claimant's claim that she was unfairly dismissed under s 101A and/or s 104 Employment Rights Act 1996 is unsuccessful and is dismissed

2. The claimant's claim that she was wrongfully dismissed in breach of contract is unsuccessful and is dismissed

3. The claimant's claim for payment in lieu of untaken holiday pay under the Working Time regulations 1998 is unsuccessful and is dismissed

4. The claimant's claim for unauthorised deductions from wages is successful in respect only of the claimant's claim for unpaid contractual holiday pay on termination of her employment and the respondent must pay the claimant the sum of £107.69.

5. The claimant's other claims for unauthorised deductions from wages are unsuccessful and are dismissed.

REASONS

Introduction

1. The claimant, Ms Pagan, worked for the respondent as an operations manager. The respondent is a company that runs the country house of the same name where it hosts weddings and other events.

2. By a claim form dated 14 June 2021 and following a period of early conciliation from 19 April 2021 to 31 May 2021 the claimant brought claims of unfair dismissal, redundancy payment, for notice pay, holiday pay, arrears of pay and other payments. She also claimed automatically unfair dismissal.

3. Attached to that claim were detailed particulars of claim running to some 30 pages.

4. There were a number of preliminary hearings prior to this hearing. At a hearing on 31 August 2021 employment Judge Green determined that the claimant's dismissal took effect from 30 March 2021. The claimant's claim of "ordinary" unfair dismissal was dismissed on withdrawal in that judgement on 31 August 2021. Employment Judge Green also made other determinations following that hearing but I will return to those in due course.

5. There was a preliminary hearing for case management on 11 October 2021 before Employment Judge Lancaster. He set out the issues to be determined and they are attached as an appendix to this judgement. The claims identified as going forward at that point were

    a. automatically unfair dismissal under section 101A and/or 104 the Employment Rights Act 1996;

    b. wrongful dismissal/notice pay

    c. holiday pay under the Working Time regulations 1998; and

    d. unauthorised deductions from wages

6. At a further preliminary hearing on 11 January 2022 Employment Judge Smith determined that the claimant's continuous employment for the purposes of redundancy pay claim started on 1 November 2019. The claimant therefore has insufficient service to bring a claim for redundancy payment and that claim was dismissed on 11 January 2022.

7. Subject to my decision, below, the five legal claims set out in the case management order of employment Judge Lancaster are the matters for me to decide at this hearing. In respect of the claim for holiday pay under the Working Time regulations it is the respondent's position that this matter has been disposed of by reason of the judgement of employment Judge Green following the hearing on 31 August 2021. The claimant does not agree. That claim is also put in the alternative as a claim for unauthorised deduction form wages.

8. It is necessary, therefore, for me to decide also whether the claimant's claim for unpaid holiday pay is actually or effectively determined by the decision of Employment Judge Green. If it is, I cannot change or go behind that decision. If it is not, I must rely on such findings that Employment Judge Green made that are relevant to the claimant's claim for holiday pay.

The hearing

9. The hearing was conducted remotely using CVP. I was provided with an agreed bundle of documents of 450 pages. The claimant produced a witness statement and attended and gave evidence. Mr Bruce Corrie, the director of the respondent, provided a witness statement and gave evidence on behalf of the respondent.

10. I was also referred at times to documents in a bundle from one of the previous preliminary hearings. On one occasion, I was referred to a document that in fact only I had sight of. I read out the document with the purpose of identifying whether it was necessary for all parties to take the time to locate and refer to that document but Mr Corrie, who was giving evidence at the time, was able to answer the point without seeing the document and there was no objection from Ms Nowell or Mr Guildford about addressing the matter in that way.

11. The first hour or so of the first day of the hearing was spent discussing the issues to be decided. The scope of the remaining issues to be decided after the two preliminary hearings was not entirely clear. I took the remainder of the first day in reading and understanding those issues. The tribunal reconvened at 3 o'clock on the afternoon of the first day to ensure that there were no further practical matters to resolve so the evidence could start promptly at 10 o'clock on the second day and that is in fact what happened.

12. I considered that there was plenty of time left in the remaining two days to hear the case but it took longer than anticipated. Mr Guildford made a number of complicated submissions about the claimant's contractual position over her employment and I considered that in the remaining time after submissions, I could not realistically give a judgement that would do justice to the parties' arguments. Consequently, I now produce this reserved decision.

13. Finally, I note that the claimant was represented by her father who is not, as far as I know, legally qualified. I attempted to ensure that there was a fair hearing by assisting Mr Guildford in the way that he put his questions from time to time but I must note that if a person decides to represent someone at a tribunal, I am entitled to assume a degree of capability on their part to do so.

The holiday pay claim

14. As a preliminary point, it is necessary to determine what the findings of Employment Judge Green mean for the claimant's claim for unpaid holiday pay and whether that claim is in reality still live before me.

15. In an application dated 16 July 2021, the respondent asked that the hearing originally listed for 11 October 2021 be converted to a preliminary hearing to determine whether the employment tribunal has jurisdiction to hear the claim for unfair dismissal under section 98 Employment Rights Act 1996 and whether any of the claimant's claims have a reasonable prospect of success. The judge agreed to list the respondent's applications for hearing. Those were the issues intending to be dealt with at the hearing before employment Judge Green on 31 August 2021.

16. It was agreed between Employment Judge Green and the parties that there was insufficient time within the two hours allocated for the hearing to determine those matters. He therefore decided that he would determine the following three issues.

    a. Did the claimant require two years service as per clause 14.2 of the contract of employment to be entitled to 5 weeks notice?

    b. What was the effective date of notice of termination of the claimant's employment?

    c. In relation to the claimant's claim for accrued holiday pay in the time that she was on furlough, did the respondent give the claimant sufficient notice requiring her to take holiday? The respondent's position is that sufficient notice was given in terms of emails sent to the claimant. The claimant says she was not given sufficient notice.

17. Employment Judge Green gave the following judgement

    a. the claimant's claim for ordinary unfair dismissal is dismissed upon withdrawal

    b. as at the date of termination of employment, the claimant was contractually entitled to 4 weeks notice of termination of employment

    c. the effective date of termination of the claimant employment was 30 March 2021

    d. on 20 April 2020, the respondent gave the claimant sufficient notice requiring her to take holiday while she was on furlough.

18. Judgments a, b and c are clear and uncontroversial and to the extent that they impact on any of the decisions I have made I am unequivocally bound by those decisions.

19. Judgment d is less straightforward. Ms Nowell said that the whole purpose of the judgment and the arguments made by the parties for the purposes of that hearing was to decide whether the respondent was entitled to deduct holiday days from the claimant at the rate of 2.5 days per month during the period that she was furloughed.

20. I deal with furlough in my findings of fact below, but, as is commonly understood, furlough refers to a period during which an employee is paid their wages, or a proportion of their wages, but not required to work (either at all, or partially depending on the time) as a result of the Covid-19 pandemic from March 2020.

21. She says that it is clear from the findings of employment Judge Green at paragraph 29 that his judgment means that the claimant was, in effect, deemed to have taken holidays at the rate of 2.5 days per month from 25 April 2020.

22. Paragraph 29 of employment Judge Green's judgment says

"Turning to the email dated 20 April 2020, this is clearer. Employees on furlough or full pay were told that they would have 2.5 days holiday deducted each month. It is reasonable to infer from this that an employee will effectively take holiday leave 2.5 days every month whilst on furlough or full pay. Consequently, the respondent was required to give at least five days' notice. Reasonable notice for holidays accruing after 25 April 2020 was given."

23. In his Judgment Employment Judge Green refers to regulation 15 of the Working Time Regulations 1998 which sets out the statutory notice provisions that an employer must comply with in order to compel an employee or worker to take leave.

24. There is no reference in regulation 15 to "reasonable notice". However, I conclude from the context and the words of paragraph 29 that Employment Judge Green found and decided that the respondent complied with the notice requirements in regulation 15 of the Working Time regulations 1998 by reason of the respondent's email to the claimant of 20 April 2020.

25. That the email says, as far as is relevant,

"During the current situation, all employees, whether on full pay or furlough will have 2.5 days holidays deducted each month which equates to the 'pro-rata' build up of your holiday days, to ensure holiday is then manageable for the business upon your return to work".

26. Rule 53 of the Employment Tribunal Rules of Procedure explains the scope of preliminary hearings. It says

(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—

(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);

(b) determine any preliminary issue;

(c) consider whether a claim or response, or any part, should be struck out under rule 37;

(d) make a deposit order under rule 39;

(e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).

(2) There may be more than one preliminary hearing in any case.

(3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).

27. The hearing on 31 August 2021 before EJ Green was a preliminary hearing and therefore must have been constituted under rule 53. At a preliminary

hearing a tribunal may only do one of the things listed in rule 53(1). The preliminary hearing was originally listed by EJ Shepherd to determine

a. Whether the Tribunal has jurisdiction to hear the claim of ordinary unfair dismissal under Employment Rights Act 1996, section 98; and

b. Whether the claims made by the claimant have reasonable prospect of success.

28. The first of those matters is the determination of a preliminary issue within rule 53(1)(a) (as defined under rule 53(3)), the second is a consideration whether a claim or response or any part should be struck out under rule 37 under rule 53((1)(c).

29. At the preliminary hearing, EJ Green decided that there was insufficient time to consider those matters and, instead, EJ Green decided with the agreement of the parties to determine the matters referred to above.

30. As rule 53(1) is prescriptive about the things that can be decided at a preliminary hearing, the matters to be decided must have fallen within one of the headings in that rule. In my judgment, the only part of the rule that can apply is 53(1)(b) – the determination of a preliminary issue.

31. A preliminary issue is one which a substantive issue that may determine liability. It does not appear to include the power to make discreet findings of fact which would not of themselves determine liability. For example, judgments a, b and c together are capable of determining the respondent's liability for "ordinary" unfair dismissal and notice pay entitlement.

32. I conclude, therefore, that the only way in which EJ Green could have made a decision about whether and, if so, when "the respondent gave the claimant sufficient notice requiring her to take holiday whilst she was on furlough" would be if that decision was capable of determining liability as to a particular claim.

33. The decision is said to be in respect of the claimant's claim "for holiday pay in respect of the time that she was on furlough". This relates to the claim under Regulation 14 Working Time Regulations 1998 – whether the claimant was entitled to payment in lieu of untaken holiday accrued at the termination of her employment.

34. I must assume that his decision is capable of determining the claimant's holiday pay claim.

35. The claimant remained on either full or flexible furlough from 24 March 202 to the end of her employment on 26 March 2021.

36. The matter is determinative, by itself, of the claim for holiday pay if EJ Green's decision was to the effect that the claimant did or did not have an entitlement to payment in lieu of accrued leave at the end of her employment.

37. The decision that the claimant was given appropriate notice under the Working Time Regulations 1998 is only capable of being determinative if it

also means that the claimant had therefore taken the whole of her accrued leave entitlement by the end of her employment.

38. I therefore conclude that EJ Green's decision about holiday notice means that the claimant was both given proper notice to take her holidays and that she did in practice take 2.5 days each month during full and flexible furlough on days she was not working as holiday.

39. Claims for holiday pay are therefore already decided and the effect of that decision is that the respondent was not in breach of the Working Time Regulations 1998 in so far as they applied to the claimant's entitlement to paid holiday and/or payment in lieu of untaken holiday at the end of her employment with the respondent in so far as the claimant took 2.5 days leave per month.

Facts

The claimant's contractual position.

40. The claimant started working with the respondent in early to mid 2019. It is not necessary to consider that period in detail as EJ Green has already made findings about the start of the claimant's continuous employment, being 1 November 2019. However, it is clear that the claimant had a working relationship with the respondent before then in various capacities.

41. From 1 November 2019 the claimant entered formal employment with the respondent.

42. Mr Guildford sought to argue that the claimant had a number of different roles under different contacts throughout her employment. He bases this on a series of contracts as follows:

    a. General Assistant. Commenced 15 March 2019 – this is no longer a live issue following the decision of EJ Smith that the claimant's continuous employment started on 1 November 2019

    b. Bar Manager. Commenced 1 November 2019.

    c. Operations Manager. Commenced 10 December 2019.

    d. Operations/Housekeeping Manager. Commenced 1 July 2020, (clause 6.1 agreed pay rise)

43. This dispute is already resolved, in so far as the commencement of the claimant's employment is concerned, by the decision of EJ Smith by which I am bound as set out at paragraphs 32 to 37 of his judgment. It is clear from that decision, as well as from the documents I have seen, that after some discussions and negotiation the claimant commenced permanent employment for the respondent as an Operations Manager on 1 November 2019.

44. EJ Smith said that at some point the parties brought forward the start date, which was originally due to be January 2020, and the claimant took on the job as Operations Manager. That must have been in the emails referred to

by the claimant around 9 and 10 December. In my view it is absolutely clear that the claimant and Ms Winkworth were continuing to discuss the particulars of her employment. By that stage no details about the claimant's holiday entitlement had been agreed.

45. There was a bar manager contract in the bundle. It was unsigned and was clearly a draft. It did not apply to the claimant.

46. The first (and only) signed contract was signed on 30 June 2020 (claimant) and 30 July 2020 (Ms Winkworth). That records the claimant's job as Operations Manager. It records her continuous start date as 1 November 2019. It sets out detailed terms about the claimant's employment. There are a number of emails between the claimant and Ms Winkworth discussing various contract terms and agreeing changes to them before the contract is signed by the claimant on 30 June 2020

47. Ms Winkworth emailed the claimant on 3 March 2020 to congratulate her on passing her probation period between 1 November and 31 January 2020. In March 2020 there were emails about the claimant's position as Operations Manager in relation to the furlough scheme (to which I will come).

48. On 23 June 2020, the claimant wrote to Ms Winkworth and said

    "As you know we were due to review the contract on the 25th March 2020, which was cancelled due to the current situation and going into locked down. I've had a good look over the current version of the contract, and if possible can you clarify the below points. I know some points have already been discussed and agreed so would just like to confirm in the contract if possible, hope this is ok".

49. The claimant then sets out a number of points in the contract that require clarification or amendment. Ms Winkworth replies and concludes

    "I hope this clarifies things for you, any queries let me know 😊 Definitely ready to box off all HR paperwork as a lot of it is formality and part of ensuring things are in place for your as an employee and us as the employer. Everything in the contracts are there to support a healthy relationship between employee / employer".

50. Shortly after that exchange, the contract was signed by both parties. It is clear and obvious that the contract signed by the claimant on 30 June 2020 and the respondent on 30 July 2020 is an agreed document covering the terms of the claimant's employment from 1 November 2019 to its termination. There is nothing else that I have been shown that could amount to anything other than negotiations and discussions of the final contract terms. It is not best practice for a contract not to be settled in writing prior to the start of the employment but it is not uncommon. I find that both parties – the claimant and Ms Winkworth – believed that they were continuing to discuss and negotiate contract terms in good faith up to 30 June 2020 and that they both believed that the recorded written terms represented the terms under which the claimant was employed.

51. I refer also to the claimant's assertion in her witness statement that she was offered additional roles including that if housekeeper in addition to

operations manager and a £2000 increase in pay in June 2020 prior to signing the signed contract. This is inconsistent with the claimant's other assertion that she was offered a pay rise to £30,000 in December 2019 and is simply not reflected in the terms of the contract she did sign. I prefer the respondent's evidence that the claimant was always going to be paid £28,000 per year subject to pay *reviews* and that the claimant had agreed that.

52. With respect to Mr Guildford, his arguments about the various roles were complex and confusing and that is because he was, in my view, trying to persuade me of something that was clearly not the case. The claimant was employed as an Operations Manager from 1 November 2019 and she continued to be so employed from 20 June 2020 and onwards. There is no credible evidence to suggest otherwise.

Contract terms

53. The relevant contract terms set out in the claimant's written contract are as follows:

54. Clause 5 says

HOURS OF WORK

5.1 The Employee's normal hours are 40 hours per week, it is recognised by both parties that the hours need to be flexible in accordance with the demands of the business, and the employee may be expected to work whatever other hours are necessary to meet the needs of the business.

5.2 The Employee must (unless prevented by Incapacity) devote his whole working time and attention to the Business.

55. Clause 6 says

PAY

6.1 The Employer agrees to pay to the Employee a fixed salary (accruing from work day to work day) at the rate of £28,000 per year which will be paid by direct credit into the Employee's bank account on 23rd of each calendar month.

Pay Reviews will be in January of each year. Any pay rise agreed will be from the 1St of February of that year.

56. Clause 15 says

15 HOLIDAYS

15.1 The Employer's holiday year runs from 1"April to 31" March.

15.2 The Employee is entitled to 30 working days paid holiday in each holiday year, public holidays and bank holidays are not in addition. Holidays will increase by 1 day per year to a maximum of 35 days. When booking

holidays, due account of the needs of the business must be taken. Holidays may be refused at the discretion of the employer.

15.3 Any holidays not taken by the end of the holiday year cannot be carried over and will only be paid at the discretion of the employer. All efforts must be made to take holidays in the allotted holiday year. Over the Christmas period where the Priory is closed, up to 5 compulsory holiday days must be taken.

15.4 On termination of this employment, the Employee's entitlement to accrued holiday pay will be in direct proportion to the length of service during the calendar year in which termination takes place. If the Employee has taken more holiday than he was entitled to, deduction will be made from the Employee's final pay. The Employer may require the Employee to use some or all outstanding holiday entitlement during the notice period and the Employee may only take any outstanding holiday entitlement during the notice period if she is expressly required to do so or if he obtains the Employer's prior consent which may be refused.

57. These are the terms which applied to the claimant.

58. The claimant said in her witness statement that she had initially been promised the job at £30,000 per year, than a pay rise from 1 February 2020 to take her up to £30,000. In oral evidence, the claimant said that she had been promised a £2000 per year pay rise in discussions in 2019. Mr Corrie said that the offer had always been £28,000 per year with pay reviews and the documents I was shown – including an email dated 29 August 2019 – confirmed that was the case. Prior to signing the contract the claimant corresponded in detail about the contract including, for example about the pay date. At no point in the correspondence before signing the contract did she say that in fact her wages should be £30,000 per year.

59. I refer to an email exchange on 3 February 2021 between the claimant and Ms Winkworth in which the claimant chases up her pay review and Ms Winkworth says in reply that any reviews will be discussed when circumstances change (it being a period during the covid pandemic while the claimant was furloughed (as to which, see below)). The claimant does not assert even then that she should already be receiving £30,000 per year.

60. I find that clause 6 of the contract relating to pay set out above reflects the discussion that the claimant and the respondent had prior to and shortly after the claimant starting permanent work for the respondent. There was no agreement between the claimant and the respondent that the claimant's pay would increase by £2000 from February 2020.

61. I do not accept the claimant's assertion that she was promoted to operations manager from 9 December 2019 together with a £2000 per year salary increase. This is inconsistent with the documentary evidence. The claimant refers in her witness statement a draft contract of 9 or 10 December 2019, but even that refers to a salary of £28,000 per year.

Lockdown and furlough

62. From 1 November 2019, as set out above, the claimant was working for the respondent. She was earning and being paid a gross monthly wage of £2,333 in accordance with her contract which provides for wages of £28,000 per year.

63. The claimant's job was very hands on. The job description lists tasks such as:

    a. On the job sales to promote weddings and events.

    b. Operations - Front of House and Back of House

    c. Safes and Bar Finances

    d. Managing stock control and stocktake

    e. Handling deliveries

    f. Maintaining the condition of beer and wine.

    g. Dealing with difficult customers

    h. Payroll / Syft /Recruitment/ training and motivating staff.

    i. Schedule staff work shifts and hours/ reviewing workloads and manpower to ensure delivery of high quality service.

    j. Housekeeping Management apport

    k. Show-rounds and 'on the job' sales

    l. Keeping the pantries stocked and clean, from a systems side of things, i.e. orders etc.

    m. Overseeing that common areas are kept clean and tidy during the time guests are here

    n. Overseeing all sorts of housekeeping bits and pieces that need doing when the guests are here.

    o. Support the General manager to develop and implement strategies for growing the business.

64. In evidence the claimant agreed that the main role of operations manager was to run weddings albeit that there were other jobs to do. That is consistent with the job description and the imprecation that everyone should muck in as it was a new venture.

65. In March 2020, as is well known, the government imposed restrictions on people leaving their homes, undertaking certain work and severely restricting many normal activities because of the Covid-19 or Coronavirus pandemic. That was commonly known as lockdown and it came onto legal

effect from 26 March 2020. Some businesses were allowed to continue to operate, but the respondent was not one of them.

66. On or just before 24 March 2020, the claimant met with Mr Corrie and Ms Winkworth and had at least one telephone call about the coronavirus situation and what was likely to happen with the business. I heard little evidence about those discussions but it seems likely that there was a great deal of discussion and uncertainty about what was likely to happen.

67. On 24 March 2020 Ms Winkworth sent an email to the claimant. This said:

> "This letter is to formally notify you that your position as an Operations Manager is being temporarily eliminated as a result of the COVID-19 virus.
>
> Please be assured that this furlough Is not an action taken due to dissatisfaction with your work performance and you remain as an employee of the company.
>
> You will receive 80% (or all 100% where possible) of your salary. We are awaiting exact details of how this Is to be calculated by the Government.
>
> At the time of writing, the length of the furlough period is unknown. We will keep you informed.
>
> We thank you for all the contributions you have made to our company and hope to see you back at work soon".

68. It is clear, and I find, that the respondent was proposing in this email what has become known as furlough – that the claimant would temporarily not be required to undertake her role as operations manager, but that she would be paid 80% of her salary while the arrangements were in place. The respondent expressed an intention to pay the whole of the claimant's salary if it could. I find, however, that this did not amount to a promise to do so. It is clearly a hope that it will be able to.

69. Mr Corrie sent a further email on 25 March 2020 which said, as far as is relevant:

> "It was good to talk to you both last night, I just wanted to put something myself in writing to reassure you. We have a great team, I really appreciate your understanding. It's just sensible to take advantage of the government offer during lockdown.
>
> - You will be paid your full salary until the furlough is paid by government. Once the furlough is over you will immediately be back to full salary.
>
> - If the government don't pay for some reason, then no worries we will pay full salary.
>
> - You remain valued employees of Thicket Priory throughout this, furloughed or not
>
> Thankfully Thicket Priory is financially secure, so we do not have to worry about that like so many other organisations. The start may be delayed , but

we will get through this and I'm sure people will still want to get married at Thicket".

70. It is difficult to know exactly what is proposed in this email. On a straightforward reading it appears to say that the respondent would pay 100% of the claimant's salary in the absence of payments under the Coronavirus Job Retention Scheme (CJRS) . It is unclear what payments would be made if and when the respondent started receiving payments under the CJRS.

71. The reference to appreciating the claimant's understanding is, Mr Corrie said in evidence, a reference to the claimant accepting the proposals orally the previous day on 24 March 2020.

72. In any event, on the same day the claimant replied to Mr Corrie and Ms Winkworth confirming her understanding of the situation.

73. It appears, and I find, that the claimant understands that she will receive at least 80% of her wages while not undertaking any work. The claimant says it is unfortunate that her position has been "eliminated" but while she recognises it would be difficult to do her job from home, there is still some work she could be doing. The claimant expresses some dissatisfaction with the way she feels the decision was communicated and requests that the respondent tops up her salary to100% (adding weight to my conclusion that the claimant believed she was entitled at that stage to a minimum of 80%) to avoid hardship.

74. In that email, the claimant asked to cancel all her upcoming holidays so that she could take them after covid.

75. Ms Winkworth replied the next day 26 March 2020 acknowledging that the way the decision was communicated was, in retrospect, the wrong decision. Ms Winkworth confirmed that the respondent agreed to top up the claimant's salary to 100% for the first 3 months of lockdown. It was clear that the top up would not continue beyond 3 months.

76. In respect of the claimant's request to cancel and save her holidays, Ms Winkworth said "With regards to holidays, this will work on a pro-rata basis so, if you are furloughed for 3 months, will equate to 1/4 of your annual holiday entitlement. Let me know if this needs further clarification"

77. Ms Winkworth asked the claimant to confirm her understanding of the details and on 17 March 2020 the claimant wrote to Ms Winkworth and Mr Corrie and said

    "Thank you Anna & Bruce for your email, I confirm that I understand all the details and I appreciate your clarification on the situation as best you can at this current moment in time and I appreciate you acknowledging my concerns.

    I think the offer is fair and reasonable and I feel much more reassured of the whole situation now"

78. I find, therefore, that as at 27 March 2020 the claimant was aware of the respondent's proposal that the claimant was not required to undertake any work as operations manager and that she would be paid 100% of her salary for 3 months. At that stage it was not known what the position would be after three months. The claimant agreed to this proposal, having negotiated the 100% top up which had then been agreed.

79. EJ Green has already determined that the email from Ms Winkworth of 26 March was not sufficient to require the claimant to take her holidays during furlough.

80. The claimant asserts that despite these arrangements, she undertook work for the respondent in the first three months of furlough. She has provided emails set out at pages 294 – 310 of the bundle covering the period from 6 April 2020 to 16 June 2020. The emails are between Ms Winkworth he claimant and other employees. It is clear, in my view, that the claimant was undertaking work for the respondent during this period and that Ms Winkworth knew of that and appears to have approved of it. There are emails dated 15 April and 22 April 2020 from Ms Winkworth headed 'team meeting notes' and these set out a list of work recently done or to be done by the claimant.

81. Mr Corrie was unable to give any satisfactory explanation about these emails and I find, on the balance of probabilities, that in April 2020 the claimant was undertaking work for the respondent with the approval of Ms Winkworth. In her witness statement the claimant said that in the months of April, May and June 2020 she undertook 32.5, 30.5 and 22 hours of work respectively. This is a modest assessment, I prefer the claimant's evidence and find that she did undertake that work.

82. On 20 April 2020, Ms Winkworth emailed the claimant about taking holiday. EJ Green has made findings about that which are discussed above.

83. From 1 July 2020, the government introduced a flexible furlough scheme which allowed employees to do some paid work and receive a CJRS top up for a further proportion of non-working time.

84. Mr Corrie sets out in his witness statement a chronology of the flexible furlough arrangements as in the table below. Except as specified below, the claimant received 100% of her salary for each month comprised of wages for worked hours and topped up with a combination of CJRS funding and money from the respondent.

1/7/20 – 31/8/20	Claimant working one 8 hour day per week totalling 40 hours in July (5 Wednesdays) and 32 hours in August (4 Wednesdays).
1/9/20 – 30/9/20	Claimant working one 8 hour day per week excluding one week off for school holidays. This totalled 32 hours
1/10/20 – 5/11/20	Claimant working one 8 hour day per week totalling 32 hours in October

5/11/20 – 2/12/20	Claimant did not work and was fully furloughed
2/12/20 – 31/12/20	Claimant working one 8 hour day per week totalling 32 hours for December
1/1/21 – 14/1/21	Claimant working one 8 hour day per week totalling16 hours
14/1/21 – 26/2/21	Claimant did not work and at this time and received 80% of her wages plus payment for holidays.

85. The claimant's stated hours of work in this period are:

July	41 hours
August	40 hours
September	32 hours
October	90 hours
November	167 hours
December	50 Hours
January 21	28 hours

86. There is a selection of emails from November 2020 between the claimant, Ms Winkworth, Mr Corrie and others discussing the work the claimant has been doing, This includes invitations to staff meetings, the claimant discussing a manual she has been creating and other matters. These emails are on different days throughout the weeks and a meeting is arranged for another day.

87. On the balance of probabilities, while I accept Mr Corrie's evidence about the Furlough payment arrangements – and it was not disputed that the claimant continued to receive 100% until January 21 – I find that the claimant was working for more than 8 hours each week. However, in oral evidence the claimant agreed that she was not told to work excess hours but that she chose to work excess hours to complete, for example, the manual as she presumed it would benefit the business.

88. It is also clear from the tone of the emails I have seen that the claimant remained engaged with and enthusiastic about the respondent's business. I find, therefore, on the balance of probabilities that the claimant chose to do extra work in the period from July 2020 to January 2021 in excess of one day per week. It may be that the work that the respondent allocated to the claimant was not reasonably capable of being done in one day per week, but that argument was not made and in any event I saw no evidence of the claimant telling the respondent that at the time.

89. In October 2020, the respondent dismissed another of its employees ostensibly for redundancy. Mr Corrie said in oral evidence that he made that

employee redundant in October 2020 to make savings. At the same time he reduced the building cleaning, reduced IT expenditure and refuse collection and took steps to save money by turning off or down lights and heating. He sad that the top up on the furlough payments was a further saving the respondent would have to start looking ta by October 2020.

90. The claimant said that that redundancy was not genuine, but she did not say why. By this time weddings and social activities had been severely restricted because of covid. Since March 2020 to October 2020 there had been one small wedding and one other event at the respondent's venue. I prefer the evidence of Mr Corrie about this and find that he was seeking to make savings by October 2020 because the venue had had little or no income in the preceding 6 or 7 months. I cannot make any findings as to whether or not the dismissal of the other employee was a redundancy within the strict legal definition, but I do find that Mr Corrie genuinely believed that the dismissal was because of the reduced financial circumstances of the respondent.

91. On 2 December 2020, the claimant had a conversation with Ms Winkworth about the arrangements in future and that was confirmed in an email of 3 December 2020. It said:

"December:

- Working one day full pay, Furlough 4 days, 80% covered by the Government, 20% top up & NI/Pension covered by Thicket Priory

January – March

- As of January the top up will no longer be offered by Thicket Priory, this of course will be reviewed depending on the business form January onwards

Working 1 day Full Pay, Furlough 4 days 80% covered by the government NI/Pension covered by Thicket Priory"

92. The next day the claimant replied saying

"Thank you for the confirmation of the furlough Plan.

Hopefully it won't be for much longer, I'm Sure I can see the light now :)"

93. I find therefore that on 4 December 2020 the claimant agreed that from January the arrangements would be that she would do one day a week work and be paid 80% of her wages for the other 4 days. At that point, the furlough scheme and lockdown restrictions were continuing to change regularly and there was a degree of uncertainty about what would happen.

94. The next relevant event to consider is Christmas 2020. Neither the claimant nor Mr Corrie was clear about the dates that the venue was open over Christmas 2020. Both seemed to agree it was open at some point, but neither could say when. This is relevant to the claimant's holiday pay claim. The claimant's contract makes provision for potential mandatory holiday at Christmas. What is clear, and I find, is that the claimant was not directed to take any particular days as holiday

95. In January 2021 there continued to be further government announcements and proposals. As can be seen above, the claimant in fact remained on 100% pay until the middle of January 2021. On 14 January 2021, Ms Winkworth emailed the claimant as follows (as far as relevant):

> "Following a review of the latest updates and information; from the lockdown, to the registration office update and the business budget, the decision has been made to fully furlough you between now and the end of March 2021, with a review at the beginning of March as to the plans for April.
>
> During this furlough period there are no work requirements. Tasks including Pinterest, posting the blogs to google and the database capture will all be taken care of…
>
> Your furlough will be based on your contracted days, i.e. 5 days furloughed where you will receive 80% of your pay as per the furlough scheme which is in place for businesses which are unable to open"

96. The claimant responded to that email on 15 January 2021 and said, again as far as is relevant,

> "Obviously, these- are uncertain times for many and I accept your decision to move from Flexi-Furlough to Full Furlough, I really appreciated the opportunity you have given me by making the best of this difficult situation. and allowing me to be involved in other parts of the business. which I'm sure wouldn't have been possible in normal circumstances…
>
> The recent business decision to halt all my work requirements and reduce our communications is a struggle for me to understand. My current way of working has been in place since March last year and continued up until yesterday. You have explained that your decision is not a reflection of my work, my continued effort or my future with the business which is reassuring to hear.
>
> After you have reviewed the finances this week and possibly recognised the business may be facing financial difficulties you have come to this decision, but it has no financial advantage to the business and potentially puts a further burden on the business".

97. The claimant then sets out her understanding of the respondent's financial position and confirms that she does not disagree with the decision to take advantage of the CJRS.

98. I find, from this exchange of emails, that the claimant agreed to the proposal that she do no work and continue to receive only 80% of her salary until 31 March 2021. I also find that the claimant was aware at this point that the respondent believed it was experiencing financial difficulties. The claimant agreed that she was not required by the respondent to do any work from January 2021 until the end of her employment.

99. At the end of January 2021 the claimant sent an email to Ms Winkworth. The copy is undated but the claimant's date of 29 January 2021 was not disputed. It is necessary to set out the whole email:

"I've received January: payslip and after carefully looking over ii I have a few question

1 The 'Furlough pay' has changed from what I have had on my payslip over the last year. As I never sent you over my hours from the beginning of January as was discussed, due to all the conflict and changes, I presumed I was going to be on full 80% furlough from the beginning of the month like I was in December. So, I was just wondering why the gross pay was different?

2 The "monthly pay" I would have expected to be £0 as this was normally where the 20% top up was but there's a small random figure- what is this?

3 I have noticed that my holiday allowance has gone down 2.5 days every month and I've not had any holiday notice or payment As you are aware Statutory annual leave can be rolled over for up to 2 years if it cannot be taken because of the current situation The Working Time (Coronavirus) (Amendment) Regulations 2020 were brought in at the end of March 2020 to amend the Working Time Regulations 1998 as to enable employees to carry over any untaken leave into the next year where it has not been taken due to the Coronavirus pandemic. I am happy to carry them over as I am entitled to if that benefits the business? Or can I use them as paid holidays and that will contributed to my short fall. As we have not agreed anything yet I just felt we should have something down in writing to ensure we are all clear what has been agreed by both parties"

100. The claimant agreed in oral evidence that this was the first time she had raised anything about holiday deductions with Ms Winkworth and that this was after the decision to put her on full furlough (without top up) had been made. The claimant said she had had conversations with other staff and I conclude she means about the holiday deductions.

101. I find that in this email, the claimant is not asserting that the respondent has done anything wrong. The claimant is asking for clarification of the position about her pay and holidays and making a suggestion to remedy what she perceives to be a problem with her paid holiday entitlement.

102. The claimant followed up this email on 2 February 2021 suggesting some dates she could take as holiday. The claimant agreed that she was not asserting in this email that the respondent had done anything wrong – she was again trying to request a way forward.

103. Ms Winkworth replied to the emails on 3 February 2021. She acknowledged that there had been a mistake with the claimant's pay and confirmed that an additional payment of £215.38 (gross) would be made to rectify that. No complaint is made about that.

104. Ms Winkworth also noted that the claimant had been underpaid holiday pay by 85 pence and agreed to pay that. In respect of the claimant's query about deductions form holiday, Ms Winkworth said:

"3 Your holiday allowance has been going down each month, calculated pro-rate for your accrued holidays, as confirmed in writing with you at the beginning of furlough, email dated 26th March 2020: "With regards to

holidays, this will work on a pro-rata basis so, if you are furloughed for 3 months, will equate to ¼ of your annual holiday entitlement". In a responding email from yourself on 27th March your reply was "I think the offer is fair and reasonable.""

105. I have already referred to the findings of EJ Green about the email of 26 March and the subsequent holiday deductions.

106. The email concluded

"With regards to holidays going forward to February and March these will be as per the original agreement made at the beginning of the pandemic

Given the current circumstances of the business and your being fully furloughed from working, at present, any reviews will be discussed when circumstances change"

107. On 5 February 2021, the claimant sent Ms Winkworth a long email about her holiday entitlement during furlough. The claimant explained that in her view she had not taken any holiday since lockdown began and nor had any been agreed. She said, specifically, that the email of 26 March 2020 did not amount to adequate employer's notice to take holidays as it did not specify any days or dates that holidays must be taken.

108. The claimant described her email as including recommendations, and she referred to being given advice by the respondent about her holidays. She said:

"I trust taking the above into account we can now put this to bed as its becoming a major disruption to all the team as not only does this effect my position but It effects all the teams positions.

My recommendation Anna is to weigh up what you are trying to achieve and what your concerns are about paying staff holidays verses the legal risks of frustrating everyone but also keeping in mind the commercial risk and cost, reputation risk and risk in terms of future relations with staff before making a decision".

109. The claimant concludes

"Please take my comments in the spirit it's intended. If everyone just sits back and pats each other on the back the business will struggle to survive, so please take my comments as a real concern and not a witch hunt".

110. On 8 February 2021, Ms Winkworth forwarded that email to Mr Corrie at his request together with a chronology of events that broadly reflects the facts set out above. The email includes the following comments:

"...you then have the latest email will Sarah's latest queries/ challenges / demands.

Something I must add, I find it amazing that in the same email Sarah has laid out the amount of money we have voluntarily committed to topping her up which is over £6,000, then demand to be paid for holiday, which she has

been paid for as this is part of your monthly salary. Technically if she wanted to carry a whole years' worth of holiday into the next calendar year she would owe us money!

Furthermore taking advantage of a scheme the government brought in for carrying holiday for those working on the front line, saving lives therefore unable to take all their annual leave, not someone who is furloughed and being topped-up to do nothing, and at the same time still sending her child to school, which again is meant to be in place for front line workers, I find a little hard to believe.

Link to government guidelines with regards to the fact that the holiday roll over was put in place for health care and supermarket workers…

Obviously It goes Without saying that I hope it will be that Sarah is not entitled to any of the items she has

Mentioned in her email and I must say that I feel Sarah is definitely not showing any support for the business, you, the team or the industry at this stage"

111. Mr Corrie wrote to the claimant on the same day saying that he would be dealing with the matter going forward.

112. The claimant relies on the email from Ms Winkworth to Mr Corrie as evidence that the respondent was aware of the infringement that the claimant was asserting. I agree. The email that the claimant sent on 5 February 2021 does assert that the claimant believes that the scheme implemented by the respondent up to that point was not in accordance with the Working Time Regulations 1998. However, I also find that the comments of Ms Winkworth, while perhaps intemperate do reflect a genuine belief that if the claimant was right, she would be entitled to something – whether holiday or payment. That is reflected in the comment "I hope it will be that Sarah is not entitled…". If Ms Winkworth did not consider that the claimant would get from the respondent her full legal entitlement were it established she had not done so thus far, she would have no need to express that hope. This view is supported by the fact that the respondent very promptly corrected the claimant's wages and holiday payments, as referred to above, on a complaint.

113. On 10 February 2021, Mr Corrie provided a full and detailed response to the claimant explaining the respondent's position that it was entitled to compel staff to take holidays in furlough and referring to the email of 20 April 2020. He refers to the previous salary/holiday correction and says that the claimant has had her full pay including holiday pay during 2020.

114. On 16 February 2021, the claimant sent Mr Corrie a further long letter disputing Mr Corrie's email in so far as it related to holiday and holiday pay. In that letter, the claimant did also acknowledge that she was originally offered her job on a salary of £28,000 subject to review in the first year.

115. Mr Corrie replied on 17 February 2021 effectively stating that he was not prepared to discuss the matter about holidays further, having set out his view previously. He also said, in respect of January pay, that "I can only see

that 2 days was authorised and worked and we are paying these. I cannot see any evidence that 28 hours was authorised, we will not be paying additional unauthorised hours" which adds further weight to my conclusions that any additional hours the claimant was working during flexi-furlough were as a result of her own decision to do so.

116. On the same day, 17 February 2021, Mr Corrie wrote to the claimant to tell her that her job was potentially at risk of redundancy. Mr Corrie said that in February he had to review the ongoing costs to the respondent of continuing to keep employees on furlough and what would happen if the furlough scheme came to an end in March 2021.

117. Mr Corrie's evidence, which I accept, was that the business had no weddings until June 2021 except for one small one with 15 gusts in around April 2021. Mr Corrie's evidence, which I accept, was that he believed at that time the furlough scheme would come to an end in March 2021 and he had very few events booked in for the year.

118. I heard a great deal of evidence about the respondent's accounts and what they meant. Mr Guildford sought to demonstrate that the accounts were misleading or showed that in fact the respondent had significant capital reserves or income form deposits. I am not going to rehearse all that evidence, but I find that I prefer Mr Corrie's evidence about the financial state of the business at the time: that the future was uncertain and that they had very few, if any, weddings booked in. It was Mr Corrie's business and he relied on professional accountants t prepare his accounts. He was best placed to understand the profitability and future of his business and I have no reason to consider that he was dishonestly representing the state of his business.

119. There was a consultation meeting between the claimant and Mr Corrie on 24 February 2021. In that meeting. Mr Corrie explained that the business had lost between £1m and £1.5m. He confirmed that another member of staff was also at risk of redundancy. The claimant was accompanied by her father at that meeting and he expressed the view there that it was not a genuine redundancy situation but that it was to disguise a dismissal because of the claimant raising issues about holiday pay.

120. On 26 February 2021, Mr Corrie wrote to the claimant confirming that he had decided to dismiss her on notice expiring on 26 March 2021 because there was no alternative work for her to do. EJ Smith has already made a decision about the date on which the claimant's employment actually terminated.

121. The dismissal letter offered the right of appeal which the claimant exercised on 12 March 2021. The basis of the appeal was, as before the tribunal, that the real reason for the claimant's dismissal was that she raised a complaint about her holiday pay.

122. The appeal was heard by a director of a different company known to Mr Corrie on 23 March 2021 and Mr Guildford provided further written submissions on 25 March 2021. The appeal was refused in an email dated 6 April 2021.

123. The claimant received a final payment at the end of March 2021 and the payslip records that she received the following gross amounts:

    a. Monthly pay £466.67

    b. Furlough pay £1866.66

    c. Additional pay £30.75 (for pay in January and February 2021)

    d. Total £2364.08

124. This payment was for the month ending 31 March 2021. The claimant therefore received a payment of £2333.33 gross for March 2021.

Law and conclusions

Unauthorised deductions from wages

125. The claimant is making a number of claims of unauthorised deductions from wages.

126. Firstly, she says that her salary ought to have been £30,000 rather than £28,000.

127. Secondly, that in February and March 2021, she ought to have been paid 100% of her salary rather than 80%

128. Thirdly, the claimant says that she ought to have been paid for the work she did in furlough in excess of what she was supposed to do in furlough over and above her salary.

129. In respect of unauthorised deductions from wages, an employer is not permitted to make deductions from a worker's wages unless it is authorised in statute or by the worker either in writing before the deduction or as part of the contract. (S 13 Employment Rights Act 1996).

130. It is not disputed that the sums in question would fall within the definition of wages under section 27 Employment Rights Act 1996 and nor is it alleged that the claimant authorised the deductions in anyway. The only issue in dispute is whether the claimant had the entitlement to those sums or not. The tribunal is empowered to determine the claimant's contractual entitlement for the purposes of deciding whether there has been a deduction under s 13.

131. In respect of the amount of the claimant's wages, the claimant's contract and correspondence is clear that her salary was agreed as being £28,000. It is apparent from the communication and the contract that a pay review would be done, but it was not. Whether or not the failure to conduct the pay review was wrong it did not happen so that the claimant's contractual entitlement to wages remained as £28,000. The claim is not one for breach of contract for failing to conduct a review and the tribunal does not have the power to make an award for unauthorised deductions from wages on the basis of a "loss of chance".

132. For these reasons, this claim is unsuccessful.

133. In respect of payments in February and March 2021, firstly, in March 2021 the claimant was paid her full salary. There is therefore no deduction.

134. In February, the claimant was paid 80% of her wages. However, I find that she agreed in her communication on 4 December 2020 and 15 January 2021 with the respondent's proposals to stop topping up furlough. Specifically, she says "I accept your decision to move from Flexi-Furlough to Full Furlough". This was in response to communication that included a statement that the top up would cease. This had the effect of the claimant agreeing to receive 80% of her wages in return for not having to do any work and this is sufficient, in my judgment, to amount to a variation of the claimant's contract. The claimant was therefore only contractually entitled to 80% of her wage of £28,000 and that is what she received. To the extent that it is claimed, this also applies to 15 – 31 January 2021.

135. This claim also therefore fails.

136. In respect of the third issue, the claimant confirmed in evidence that in respect of the period of flexi-furlough (from 1 July 2020) the claimant chose to work additional hours over those that the respondent allocated her. She was not required to do any more than one day a week work and this was explicitly reflected in the arrangements she had agreed and her pay. For this reason, this part of the claim fails. In any event, there is no contractual term that the claimant has been able to point to that provides that the claimant would be paid additional pay for work done in excess of the one day a week in flexi-furlough.

137. In respect of the period from March to June 2020, this claim is substantially out of time. If it was the case that the claimant had a deduction from her wages for this period, the last deduction was at the end of June 2020. The claimant did not bring her claim until 14 June 2021. The time limit is three months plus early conciliation which lasted 6 weeks. The claim is very substantially out of time. I can extend time if it was not reasonably practicable for the claimant to bring the claim in time and the claim was brought within a reasonable period, but I have heard no evidence to suggest that it was not reasonably practicable for then claimant to bring the claim. I therefore refuse to extend time.

138. In any event, however, I have heard no evidence that would demonstrate that there was a term of the claimant's contact as varied by the furlough arrangements to the effect that the claimant would be paid for work done outside the 100% furlough arrangements in March – June 2020. In my view the claimant had no genuine belief that there was such a term at the time or she would have raised it earlier. The claimant has demonstrated a willingness and ability to raise detailed and technical points clearly and assertively., The fact that she did not do so demonstrates that she did not consider there was such a contractual term.

139. If neither the claimant or respondent believed there was such a term, this is very good evidence, in my view, that no such term existed. For these reasons this part of the claim also fails.

Notice pay/breach of contract

140. An employee is entitled to the greater notice between that which is set out in their contract of employment and the statutory provisions in section 86 Employment Rights Act 1996. The statutory minimum notice is one week for an employee who has less than two years' service. EJ Smith determined that the claimant's employment ran from 1 November 2019 to 30 March 2021. This is one year and 5 months. The statutory minimum notice the claimant would be entitled to was one week.

141. EJ Green held in his judgment of 31 August 2021 that the claimant was entitled to 4 weeks notice and her employment terminated on 30 March 2021 and that the claimant was given 4 weeks' notice from 2 March 2021 to 30 March 2021.

142. I have found that the claimant was paid £2333.33 gross for March 2021 up to and including 31 March 2021. This is 1/12 of £28,000, the claimant's salary. The claimant was therefore paid in full for her period of notice and her claim of wrongful dismissal /breach of contract is unsuccessful.

Holiday pay

143. EJ Green has, as discussed above, already determined that the respondent gave notice that the claimant was to take 2.5 days holiday per month from 25 April to the end of furlough.

144. In my judgment, furlough continued until the end of the claimant's employment. Although the claimant received her full pay during her notice period, the arrangement whereby the claimant was paid but not required to work in accordance with the CJRS continued from March 2020 until 30 March 2021. There were periods when the claimant did some work under the flexi furlough scheme as allowed under the CJRS, but these periods were still periods of furlough.

145. I therefore find, in accordance with the judgment of EJ Green, that the claimant took 2.5 days holiday per month from April 2002 to March 2021 inclusive.

146. The claimant's holiday year, as recorded in her contract of June 2020, runs from 1 April to 31 March. It provides that holiday not taken will not be carried over.

147. The Working Time Regulations 1998 provide for a minimum of 5.6 weeks holiday per year. For a person working 5 days per week, this is 28 days per year. The claimant's contractual entitlement was greater than this, being 30 days per year.

148. Regulation 14 of the Working Time Regulations 1998 provides that a payment in lieu of untaken holiday calculated on a pro rata basis must be paid on termination of employment.

149. It has been decided that, effectively, the claimant took 2.5 days holiday each month from 5 days after the notice on 20 April 2020. This means that

for the holiday year April 2020 to March 2021, the claimant took 12 x 2.5 days which is 30 days.

150. There is no evidence that the claimant took or was instructed to take any additional holiday at Christmas 2020. The claimant's employment ended, effectively, at the end of her holiday year. This means that she was entitled to take a minimum of 28 days holiday under the Working Time Regulations and she took, and was paid for 30 days. She therefore had no holiday outstanding under the Working Time Regulations 1998.

151. However, clause 15.4 of the claimant's contract of employment provides that the claimant is entitled to be paid on the same pro rata basis for her contractual holiday. The claimant is therefore entitled to be paid one day holiday in lieu of her untaken leave for the leave year 2020/2021.

152. There is no basis on which the claimant has shown that she had carried forward leave from a previous year and the claimant's contract is clear that leave will not be carried forward as a matter of course.

153. The claimant's claim for unpaid holiday was also put as an unauthorised deduction from wages claim. Unpaid holiday pay is included in the definition of wages under s 27 Employment Rights Act 1996 and the claimant's claim is therefore successful to the extent that she is entitled to one day's pay in lieu of untaken holiday.

154. I have sufficient information about the claimant's salary to determine remedy on this point and it is not proportionate to list the case for a further hearing to determine this.

155. The respondent had previously indicated that pay accrued on a working day basis. Therefore, a day's pay is £28,000/260 which is £107.69. The respondent is therefore ordered to pay the claimant the sum of £107.69.

Unfair dismissal

156. The claimant brings claims of automatically unfair dismissal under ss 101A and 104 Employment Rights Act 1996. They provide respectively:

> **101A Working time cases**
>
> [[(1)] An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
>
> (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
>
> (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,
>
> (c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations, or

(d) being—

(i) a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or

(ii) a candidate in an election in which any person elected will, on being elected, be such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate.

104 Assertion of statutory right

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an [employment tribunal],

(b) the right conferred by section 86 of this Act, . . .

(c) the rights conferred by sections 68, 86, [145A, 145B,] 146, 168, [168A,] 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off) [. . .

[(d) the rights conferred by the Working Time Regulations 1998, [[the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 (SI 2018/58)],] the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003][, the Fishing Vessels (Working Time:

Sea-fisherman) Regulations 2004 or the Cross-border Railway Services (Working Time) Regulations 2008]][, and

(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006].

[(5) In this section any reference to an employer includes, where the right in question is conferred by section 63A, the principal (within the meaning of section 63A(3)).]

157. As the claimant has less than 2 years continuous service, the burden is on the claimant to prove that the sole or principle reason for dismissal was either because she refused (or proposed to refuse) to forgo a right conferred on her by the Working Time Regulations or that she had alleged that the employer had infringed a right of hers which is a relevant statutory right.

158. In respect of section 101A, the employer must have *actually* breached or proposed to breach the working time regulations. The alleged breach relied on by the claimant was that the respondent had removed the claimant's holidays from her (by deducting them each month) without following the process in the Working Time Regulations 1998.

159. The respondent did not do this as is clear from the decision of EJ Green and my findings above. Regardless, therefore, of whether the claimant alleged that this had happened or not, it cannot have been the reason for the claimant's dismissal so this claim is unsuccessful.

160. In respect of s 104, the burden is still on the claimant to show the reason for the dismissal, but the employer does not *actually* have to have infringed a statutory right. It is sufficient that the claimant makes the allegation that they have done so in good faith.

161. In my judgment, the email of 5 February 2021 from the claimant does assert that the respondent had infringed a relevant statutory right – namely the claimant's right to take paid holiday under the Working Time Regulations 1998. It was not correct, but in my view it was made in good faith. The claimant clearly was at that time convinced that she was entitled to holiday and the respondent had removed that from her. Further, it is clear from the tone and wording of the emails that while she is making the allegation, she was also seeking to resolve the problems in a conciliatory way.

162. The timing of that email and the subsequent email about redundancy is on the face of it suspicious. However, in my view the respondent genuinely believed it was facing financial difficulties, that the claimant and her colleague were not absolutely necessary to the immediate future of the business and the reason for dismissing the claimant was ostensibly for redundancy – that is because there was a reduced need for the people to do the work of operations manager. Further, the claimant had been aware of the financial difficulties for some time.

163. The claimant's role was concerned with the practical matters associated with events. There were no events and there were none likely in the near future. This is the most likely explanation for the respondent's decision.

164. Although not set out in my findings above, I have considered the fact that that the respondent advertised for new staff shortly thereafter. However, circumstances changed – as is well known – and the respondent needed, I accept, to recruit more staff when things did pick up to get the business running again.

165. I have also taken into account the fact that the claimant had raised a number of complaints previously and the respondent had dealt with them professionally and with no sign of irritation, that the claimant was given the benefit of a consultation period where none was required prior to her dismissal (her having less than two year's continuous service) and the email of 8 February 2021 which indicated that the respondent would do the correct thing, however, inconvenient.

166. For these reasons, the claimant has not shown that the sole or principle reason for her dismissal was because she asserted that the respondent had infringed a relevant statutory right and the claimant's claim for unfair dismissal is unsuccessful.

Employment Judge **Miller**

Date 1 July 2022

Appendix – Issues

1. Employment status

1.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

2. Unfair dismissal

Automatically unfair dismissal
If the Claimant did not have 2 years' continuous employment

2.1. Did the claimant do an act as defined in section 101A or 104 of the Employment Rights Act 1996? The Tribunal will decide:

What did the claimant say or write? When? To whom?
Has she proved that this was the reason or principal reason for dismissal?

Is this therefore an automatically unfair reason?

If the Claimant had 2 years' continuous employment

2.2. What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.

2.3. If so the Claimant will be entitled to a statutory redundancy payment.

2.4. If not was the principal reason automatically unfair as alleged?

2.5. *Nb although The Tribunal will also usually in an unfair dismissal/redundancy claim decide, in particular, whether:*

2.5.1. The respondent adequately warned and consulted the claimant;

2.5.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.5.3. The respondent took reasonable steps to find the claimant suitable alternative employment;

2.5.4. Dismissal was within the range of reasonable responses.

In this case the claim for ordinary unfair dismissal (which would include unfair selection for redundancy) has already been dismissed upon withdrawal.

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?

3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the claimant be compensated?

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the claimant's compensation be reduced? By how much?

3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? *Nb it expressly does not apply to redundancy dismissals.*

3.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.6.11 The statutory cap of fifty-two weeks' pay will apply and there is no power to award compensation for injury to feelings in an unfair dismissal claim.

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Wrongful dismissal / Notice pay

4.1. The claimant's notice period has been held to be 4 weeks.

4.2. She was not paid in full for that notice period, and the outstanding amount due ought to be capable of agreement in advance of the final hearing?

5. Holiday Pay (Working Time Regulations 1998)

5.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

5.2 What was the claimant's leave year? The current leave year as at termination on 31st March 2021 is agreed to have been 1st April to 31st March (as set out in a written contract dated 30th June 2019).

5.3 How much of the leave year had passed when the claimant's employment ended?

5.4 How much leave had accrued for the year by that date?

5.5 How much paid leave had the claimant taken in the year?

5.6 Were any days carried over from previous holiday years?

5.7 How many days remain unpaid?

5.8 What is the relevant daily rate of pay?

6. Unauthorised deductions

6.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

6.2 Were the wages paid to the claimant after 23rd February 2020 less than the wages she should have been paid by reason of a contractually enforceable increase in annual salary from £28000 to £33000 as from that date?

6.3 Were the 80 per cent furlough payments under the government scheme for January and February 2021 less that an enforceable

contractual entitlement to have this topped up to 100 per cent by the employer?

6.4 How much is the claimant owed?