EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss V Tsvetanova **v** **Griffin Catering Services Ltd**

Heard at: Watford (by CVP) **On**: 31 August,1 and 2 September 2022

Before: Employment Judge George
Members: Mr N Ramgolam
Mr D Bean

Appearances
For the Claimant: In person
For the Respondent: Mr M Foster, Solicitor
Interpreter in the Bulgarian language: Ms Violeta Mondashka

RESERVED JUDGMENT

1. The employment tribunal has no jurisdiction to consider the following complaints because they were not presented in time:

   1.1. Unlawful detriment on grounds of protected disclosure;

   1.2. Unlawful detriment on grounds of health and safety;

   1.3. Unreasonable refusal of a request for dependants leave under s.57A(1) Employment Rights Act 1996 (hereafter the ERA);

   1.4. Refusal of the right to exercise statutory leave under reg.15 Working Time Regulations 1998 (hereafter the WTR).

2. The claims listed in paragraph 1 above are dismissed on withdrawal by the claimant by letter dated 3 September 2022.

3. The claimant was unfairly dismissed.

4. The claimant was not wrongfully dismissed and her claim to be entitled to notice pay fails.

5. The claimant contributed to her dismissal and it is just and equitable for there to be an 80% deduction from both the basic and compensatory awards under

s.122(2) and s.123(6) of the Employment Rights Act on account of contributory conduct.

6. The respondent did not serve a valid notice under reg.15(2) Working Time Regulations 1998 requiring the claimant to take annual leave.

7. On termination of employment the claimant had 12 days' annual leave accrued and not taken on termination of employment.

8. The claim of unauthorised deduction from wages succeeds. The respondent owes to the claimant the following:

   8.1. 4.5 days' at 100% of the full gross daily rate in respect of annual leave that the respondent accepted had been accrued but not taken on termination of employment;

   8.2. 7.5 days' at 80% of the full gross daily rate in respect of annual leave accrued but not taken on termination of employment for which part payment had already been made;

   8.3. From that, the respondent is entitled to deduce 1 days' gross pay at 80% in respect of an over payment in September 2020.

9. The remedy issues set out in para.151 of the reasons will be decided at a remedy hearing on **30 January 2023 by C.V.P.**

10. **By 23 January 2023,** the claimant and the respondent are to send to each other and to the Tribunal updated statements of the loss which they each will argue the claimant can prove and any additional documents on which they will seek to rely.

REASONS

1. In this three day hearing we have had the benefit of an agreed bundle of documents numbered up to page 247 and page numbers in these reasons refer to that bundle. The claimant gave evidence in support of her own claim and the respondent relied upon the evidence of James Redshaw, the General Manager of the Red Lion Hotel in Middlesex and Jim Hughes, the respondent's Operations Manager to whom Mr Redshaw reports. All witnesses had approved witness statements which had been exchanged in advance of the hearing. The witnesses confirmed the truth of those statement in evidence and were cross-examined upon them.

2. There was a tribunal appointed interpreter in the Bulgarian language. The claimant has good spoken English and gave her oral evidence sometimes in English and sometimes in Bulgarian through the Bulgarian interpreter when she indicated that she was not able to understand the questions that she was being asked. The claimant and the interpreter had confirmed that they could understand one another and she used the interpreter where she felt it was necessary to do so.

3. Since the events in question the claimant has relocated permanently to Bulgaria and was giving evidence from there. The Bulgarian government have given a general permission to witnesses who are lawfully resident in their territory to give evidence in the Employment Tribunals of England and Wales subject to certain conditions. Two are that the judge should be satisfied that the witness participates voluntarily and has the implications of the proceedings fully explained to them. It was apparent that Ms Tsvetanova was participating voluntarily in the proceedings because she has brought them and the presence of the interpreter meant that the final condition of the Bulgarian government that the claimant should be able to understand the implications of the process with which she was involved was also fulfilled. Judge George also took steps to explain the proceedings to Ms Tsvatanova in non-technical language, through the interpreter where needed.

4. Another of the conditions of the general consent given by the Bulgarian government is that the judge should be satisfied that the individual giving evidence is lawfully resident in the territory of Bulgaria. The claimant produced a copy of a valid passport issued by the Bulgarian government and the Tribunal is satisfied that she is entitled to be resident in Bulgaria. The Tribunal is therefore satisfied that the Bulgarian government has consented to the claimant giving evidence from their territory in this case.

5. The hearing was conducted by CVP and the claimant was accessing the video platform through her smartphone. The connection to the claimant was not consistently strong, possibly because the battery life on her smartphone was limited. Furthermore, there were some connectivity problems with joining the respondent's representatives in a way that meant that there was no feedback. These technical difficulties meant that the timetable for the hearing did not proceed quite as smoothly as had been originally anticipated and for that reason it proved necessary to reserve our judgment. There has been an unfortunate delay in Judge George writing this reserved judgment for which she apologises.

6. As will become apparent, it was argued by the respondent that a number of the claims had not been presented within the relevant time limit and the Tribunal heard submissions on that prior to reserving judgment. On 3 September 2022 the claimant wrote to the Tribunal and the respondent to withdraw those claims which were out of time and stated that she did not want to withdraw her claims of "unfair dismissal, wrongful dismissal, unpaid wages and unfair deductions notice pay and payment in lieu of annual leave". This correspondence was forwarded to Judge George on 7 October 2022 after the Tribunal had reached conclusions on all of the issues. So as to avoid confusion, these reasons set out the Tribunal's conclusions on those claims, in particular to explain its conclusion that certain claims were presented out of time. The affected complaints are dismissed on withdrawal as set out in the judgment above.

7. Following a period of conciliation which lasted from 14 December 2020 to 25 January 2021, the claimant presented a claim on 18 February 2021. The respondent, which is part of the Fullers Group, entered a response on 18 March 2021. The claim arises out of the claimant's dismissal from her role

as Head Housekeeper of the Red Lion Hotel on 25 Septemebr 2020 following a period of continuous employment by the respondent which started on 9 October 2017.

8. The claim was case managed by Employment Judge McNeill QC (as she then was) at a telephone hearing on 11 November 2021 when it was clarified that the complaints brought by the claimant were:

   8.1 Unfair dismissal

   8.2 Detriment on grounds of protected disclosure

   8.3 Detriment on health and safety grounds

   8.4 Unreasonable failure to agree to dependants leave

   8.5 Unreasonable refusal of a request for annual leave

   8.6 Wrongful dismissal or a claim for notice pay

   8.7 Unauthorised deduction from wages including a complaint of underpayment of annual leave accrued and not taken on termination of employment.

9. It was confirmed at that preliminary hearing that the claimant was not bringing a complaint of automatically unfair dismissal on grounds of either protected disclosure or health and safety grounds. There were times during the hearing before us when the claimant referred to her dismissal and to her claim as being a claim for automatic unfair dismissal but it is clear on the face of the record of the preliminary hearing on page 56, that such a claim was disavowed on that occasion. No such claim was therefore before this Tribunal.

10. The claimant had provided further and better particulars following a request by the respondent and those are at page 49. They and the particulars of claim formed the basis of the issues which were clarified by Judge McNeill QC and are set out at pages 57 to 60 of the bundle. Those issues are replicated here retaining the original paragraph numbering for ease of reference.

The issues

11.

"Time limit issues

(i) There is no issue that the Claimant's claims for unfair dismissal, notice pay and a payment in lieu of annual leave have been brought in time.

(ii) Time limit issues arise, however, in relation to her claims for detriment and her claims under section 57A of the ERA and her claim in respect of being required to take holiday under the Working Time Regulations 1998. Were those claims presented within the time limits set out in sections 48(3)(a)&(b)

and 57B(3)(a)&(b) of the ERA and regulation 30(2) of the Working Time Regulations 1998 (WTR)?

(iii) If the claims were not brought in time, was it not reasonably practicable for those claims to be presented in time and, if not, when in what period was it reasonable to bring those claims?

(iv) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 15 September 2020 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.

Unfair dismissal

(v) What was the principal reason for the Claimant's dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the ERA? The Respondent asserts that the reason for the Claimant's dismissal was a reason relating to her conduct, namely her unauthorised absence from work.

(vi) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'? The particular reasons relied on by the Claimant in contending that her dismissal was unfair are that:

a. she was required to return to work on 48 hours' notice when she had commitments to two members of her family who were sick and required care and support;
b. the Respondent did not give her further time off or give her sufficient time to produce medical evidence which would support what she was saying about family members and her commitments;
c. the Respondent did not consider or agree to her offer to take time off as holiday, even if the holiday was unpaid;
d. a disciplinary procedure was commenced;
e. she was dismissed for gross misconduct;
f. she was dismissed while she and her family were in quarantine;
g. her appeal failed to overturn her dismissal.

(vii) Following clarification of her claims, it was clear that the Claimant did not pursue any claim for automatically unfair dismissal pursuant to sections 99, 100 or 103A of the ERA.

Public interest disclosure (PID)/raising health and safety concerns

(viii) The Claimant relies on emails sent by her to her manager, Mr James Redshaw, on 29 February 2020 and 2 March 2020 in which she complained that a colleague had been permitted to return to work when he was visibly unwell with symptoms which indicated, in accordance with government guidelines, that he should have stayed at home. The Claimant relies on this matter both as a PID under section 43B(1)(d) and as the raising of a matter potentially harmful to health and safety under section 44(1)(c) of the ERA. It is not disputed that these emails were sent. Did they fall within the relevant statutory provisions?

(ix) If they did, did the Respondent subject the Claimant to detriment by threatening her with disciplinary action on the grounds of her emails?

Time off for Dependants

(x) Did the facts of the matter which are the subject of the claim entitle the Claimant to take a reasonable amount of time off for a dependant in accordance with section 57A(1) of the ERA?

(xi) If so, did the Claimant notify the Respondent for a reason applicable within the meaning of section 57A(2) of the ERA?

(xii) If so, did the Claimant make a request in respect of a dependant as defined by section 57A(3)-57A(5) of the ERA?

(xiii) If so, did the Respondent unreasonably refuse such a request?

Refusal of right to exercise statutory leave under regulation 15 of the Working Time Regulations 1998 (WTR)

(xiv) Did the Respondent provide valid notice requiring the Claimant to take annual leave in accordance with regulations 15(2) and 15(3) of the WTR? The Claimant contends that the Respondent was not entitled to require her to take leave when she was furloughed.

(xv) If so, did this have the effect of using the Claimant's remaining annual leave?

(xvi) Subject to the above, did the Claimant make a valid request to take annual leave within the meaning of regulation 15(1) and 15(3)?

(xvii) Further to point (xvi), did the Respondent unreasonably refuse such a request?

Payment in lieu of annual leave

(xviii) Did the Respondent fail to pay the Claimant the amount due to her in lieu of accrued but untaken annual leave on termination of employment?

Breach of contract/unauthorised deductions

(xix) Has the Respondent wrongly failed to pay the Claimant in respect of her notice period and/or is she entitled to her notice pay by way of damages for breach of contract?

(xx) Has the Respondent wrongly deducted any sum from the Claimant's wages? Any such claim should be clearly set out in the Claimant's Schedule of Loss.

Remedy

(xxi) If the Claimant succeeds in her claims for detriment, what is she entitled to by way of compensation for injury to feelings?

(xxii) What financial losses has the Claimant sustained?

(xxiii) Has the Claimant taken reasonable steps to mitigate her losses?

(xxiv) If the Claimant's dismissal was unfair because of any procedural failings, what was the chance that she would have been dismissed in any event if a fair procedure had been followed?

(xxv) Did the Claimant's conduct contribute to her dismissal and should her compensation be reduced to any extent for that reason?

(xxvi) Did the Respondent fail to provide the Claimant with a statement of particulars of her employment and, if so, is she entitled to additional compensation for that failure?"

The law relevant to the issues

Time Limits

12. The claimant has presented claims under ss.23, 48, 57B and 111 ERA. Section 23 ERA is the section under which complaints of unauthorised deduction from wages are made (including in respect of failure to pay annual leave accrued but not taken on termination of employment). Section 48 ERA enables a worker to complain about unlawful detriments, including on health & safety grounds or on grounds of protected disclosures. Section 57B ERA is the route by which a complaint of unreasonable failure to permit dependants leave is made. A claims of unfair dismissal is brought under s.111 ERA. These sections all make provision for the period of time within which claims must be made, subject to the effect of early conciliation on time limits. A claim of wrongful dismissal is brought under art.3 of the Extension of Jurisdiction (England & Wales) Order 1994 which is governed by the time limits set out in art.7.

13. The time limits set out in those provisions are worded slightly differently in terms of the start of the period within which a claim should be made but, in each case, the "the employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal" before the end of a period of three months. There is special provision for the situation where there are a series of acts or deductions or a continuing act but the start of the period of three months is,

13.1 In the case of an alleged unauthorised deduction from wages claim under s.23 ERA, the date of payment of the wages from which the deduction was made;

13.2 In the case of an alleged unlawful deduction claim under s.48 ERA, from the date of the act or failure to act to which the complaint relates or from the last of a series of similar acts or failures;

13.3 In the case of an alleged unreasonable refusal to permit dependants leave under s.57B ERA, from the date when the refusal occurred;

13.4 In the case of a claim of unfair dismissal or wrongful dismissal from the date of the effective date of termination.

14. In each case the three month time limit is subject, not only to the effects of early conciliation, but also to amendment where the tribunal is satisfied that it was not reasonably practicable for the complaints to be presented before the end of that period of three months and the tribunal considers that the claim was presented within a reasonable further period.

15. When the Tribunal is considering whether it has jurisdiction to consider a claim under the ERA or the Extension of Jurisdiction Order which was not presented within the relevant three month period, the burden of proof is on the claimant. 'Reasonably practicable means more than merely what is reasonably capable physically of being done but less than simply reasonable. When considering the claimant's explanation for the delay, the employment tribunal needs to investigate what was the substantial cause of the claimant's failure. Examples of situations where it might not be reasonable practicable to present the claim in time were given by Brandon L.J. (as he then was) in Walls Meat Co Ltd v Khan [1979] I.C.R. 52 CA at paragraph 44,

    ''The performance of an act. . .is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike: or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.''

    Unfair dismissal

16. The relevant statutory provisions in complaints of unfair dismissal where the respondent alleges that dismissal was because of the claimant's conduct are s.98(1), (2)(b) and (4) ERA. It is for the respondent to show the reason for the dismissal and that it is a reason falling within s.98(2). In this case the respondent relies on conduct which is a potentially fair reason within s.98(2). The reason for the dismissal is the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee": Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA.

17. If the tribunal is satisfied that the respondent has proved a potentially fair reason for dismissal then they must go on to consider whether the decision to dismiss the employee was fair or unfair. That depends on whether in all the circumstances the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee.

18. When the employee's conduct is said to be the reason for dismissal then we find guidance for the approach the tribunal should take to that task in the case of British Homes Stores v Burchell [1980] ICR 303 EAT and other subsequent cases which built upon the test which has become known as the "Burchell test". We need to be satisfied that before deciding to dismiss the employer had formed a genuine belief in the employee's guilt. However, in order for it to be reasonable for the employer to treat the conduct as sufficient reason to dismiss the employer must have had in mind reasonable grounds for that belief and at the stage that the belief was formed the employer must have carried out as much investigation as was reasonable in the circumstances.

19. The Tribunal must ask itself whether the conduct of the respondent fell within what has been described as the "range of reasonable responses". It is not whether we would have reached the same conclusion as the employers in question, but whether their conclusion or decision was one within the range of reasonable responses to the employee's conduct: Iceland Frozen Foods v Jones [1982] IRLR 439, EAT.

20. The same is true of the employer's conduct of their investigation into the claimant's alleged misconduct. The question for us is whether the investigation was within the range of reasonable responses which a reasonable employment might have adopted: J Sainsbury plc v Hitt [2003] ICR 111, CA. Was the investigation process one open to the reasonable employer? The employer does not need to carry out an investigation of such thoroughness that it could be compared with a police investigation. On the other hand as the ACAS Guide to Discipline and Grievance at Work (2015) says at paragraph 4.12

> "The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against."

21. If the tribunal finds that the dismissal was unfair and has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome and Mr Foster invites us to reduce compensation for this reason, in the event that we find the dismissal was procedurally unfair.

22. Finally the provisions of s.122(2) and 123(6) of the Employment Rights Act 1996 set out the powers of the tribunal to reduce any basic and compensatory awards because of conduct or contributory fault respectively which we are asked to use in the event that we conclude that the dismissal was unfair. Although, strictly speaking, a remedy issue, it was agreed that we would make a decision on whether compensation should be reduced because of either of these principles if we find that the claimant was unfairly dismissed.

Entitlement to holiday

23. Statutory annual leave entitlements are set out in the WTR and the effect of the relevant regulations is to provide that, in default of any other agreement between the employer and the worker, the annual leave year runs from the date of the workers' employment, the worker is entitled to 28 days' holiday each calendar year including bank holidays (under regs.13 and 13A WTR) and leave entitlement does not (in general) carry over from one year to the next. The worker is entitled to be paid on termination of employment for any leave accrued but not taken at the time the contract ends. The amount of the terminal payment is calculated as set out in reg.14 WTR .

24. Reg.15 sets out the way in which the worker and employer are to notify each other of the dates on which leave is to be taken.

"**15.— Dates on which leave is taken**

(1) A worker may take leave to which he is entitled under [regulation 13][and regulation 13A] on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker–

(a) to take leave to which the worker is entitled under [regulation 13][or regulation 13A]; or

(b) not to take such leave [(subject, where it applies, to the requirement in regulation 13(12))] ,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)–

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date–

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

(6) ..."

Findings of fact

25. The standard of proof that we apply when making our findings of fact is that of the balance of probabilities. We took into account all of the evidence presented to us, both documentary and oral. We do not record all of the evidence in these reasons but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents, where they exist.

26. When the claimant started her employment with effect on 9 October 2017 it was under a written contract which had been issued four days previously (page 93). On 29 April 2019 the claimant was offered and accepted the position of Head Housekeeper at the Red Lion Hotel. This offer was made by email at page 100 which is on the following terms:

> "Hi Vanya
>
> As discussed on the phone, I am happy to offer you the post of Head Housekeeper here at the Red Lion Hotel with a start date to be confirmed!
>
> Salary wise will be £24,000 per annum and hours per week will be 40 with 28 days holiday per year".

27. This email was sent by Mr Redshaw and it is common ground between the parties that the only difference in terms and conditions between the claimant's contract after accepting the position of Head Housekeeper and prior to that change of position was the salary.

28. The facts surrounding the dispute between the parties arose during the coronavirus pandemic. In February 2020, as the news began to be dominated by the coronavirus illness and concern started rising about the spread of the disease, Mr Redshaw emailed all members of staff who reported to him and within the hotel. By that email he set out the company policy on Covid-19 and the measures being taken to keep staff safe at that point in time. This was approximately three to four weeks before the national lockdown.

29. On 29 February 2020 (page 104) the claimant wrote to Mr Redshaw by email on behalf of herself and other members of the Housekeeping Team who were concerned that a particular colleague had returned to work suffering from symptoms that they believed to be a potential sign of coronavirus. Among other things, the email says that the colleague had reported on the morning of 26 February that she was unwell, "sick and advised by doctors and NHS

111 to stay home not to go nowhere, not go to work, because of the symptoms and waiting results!".

30. The claimant continued that she understood that this colleague had taken her daughter to school, in breach of the NHS advice, which caused her to be concerned that the colleague was not following doctor's advice. The claimant listed some symptoms which those concerned believed the colleague had and stated that the colleague had told them that family members had returned from countries which were, at that time, a source of concern. The email continued that the Housekeeping Team would like some medical evidence that the colleague was safe to return to work.

31. The respondent's case is that this information was inaccurate and that the claimant's concern was based upon inaccurate information. Mr Redshaw's firm evidence was that he fully trusted the information that he had been given by the relevant colleague that she had followed all advice, that her symptoms were not in fact indicative of coronavirus, as that virus was then understood, and that she was fit to return to work. The claimant wrote again on 2 March 2020 repeating that she would like medical evidence.

32. The claimant argues that this was a protected disclosure or that it was otherwise using reasonable means to bring to their employer's attention matters which concerned the health and safety of an individual.

33. It is common ground that, on 3 March 2020, Mr Redshaw had a conversation with the claimant about these emails in which he asked her to stop sending emails and warned her that she would be subject to disciplinary action if she did not do so because he considered that the way in which she was airing her concerns was creating panic. The respondent's case on the detriment on grounds of protected disclosure claim is firstly that the complaint is out of time and, secondly, that it was not the communication of information itself that they objected to but rather the creation of panic.

34. The claimant did not contact ACAS within three months of 3 March 2020, the single alleged act of alleged unlawful detriment. She had not set out in her witness statement any explanation for the delay and gave her reasons by oral evidence. They can be summarised as being that she did not know about the technicalities of contacting ACAS prior to presenting the claim or exactly how to go about presenting a claim.

35. However, it was clear from her oral evidence that she knew that the employment tribunal service exists as a means of enforcing employees' rights. She also knew that she thought that what Mr Redshaw had done in threatening her with disciplinary action was wrong. We think that had the claimant started looking for a means to enforce her rights at this points there are no grounds for thinking that she would not have found out how to go about doing so as indeed she did when she was dismissed, when her appeal was declined and when she was not paid in full for the annual leave which she believed was due to her.

36. The claimant was placed on furlough with effect on 27 March 2020 (page 108). This is the first of a number of communications from the respondent by which they set out the arrangements for furlough. The correspondence is relevant to our findings on two matters of particular relevance: whether the respondent had the right to require the claimant to take holiday during furlough and whether the respondent had the right to bring the claimant back from furlough leave on 48 hours' notice.

37. The respondent accepts that any communication by the respondent of a requirement that the claimant take holiday during furlough would need to be compliant with the provisions of reg.15(2) WTR.

38. The claimant's oral evidence was that, with one exception, she had accepted all of the documents which had been sent electronically. These documents included a hyperlink by clicking on which the recipient could indicate their acceptance of the terms they contained. According to her oral evidence, the exception was the last communication which notified her that she was to be brought back from furlough leave and which the claimant stated she did not accept. However, the emails suggest that she also declined to signify acceptance to the requirement that she take annual leave within furlough at a specific time.

39. Taking the communications which relate to furlough in chronological order, on 27 March 2020 the respondent wrote to all employees (page 108) notifying them that they would be placed on furlough leave from 24 March 2020 until further notice. It is apparent from page 109 that the terms of the furlough agreement specified that any holiday that had been accrued prior to the commencement of the furlough would be deemed to be taken during furlough and that the intention was that the employee would not accrue holiday during furlough but if they did so they would be deemed to be taking that holiday during furlough also. It was also specified that furlough could be terminated by the respondent at any time for any reason with 48 hours' prior notice which meant that the employee had to remain available to return to work with 48 hours' prior notice.

40. The frequently asked questions document of the same date at page 111 contains the same information. The claimant argued that this conflicted with a different answer to a question at the bottom of page 113 which was "Can I book holiday for later in the year?" and the answer given was "No – as we don't know how long the current situation will go on for."

41. We do not agree that this is in conflict with the earlier statement that holiday should be deemed to be taken during furlough. We accept and agree with Mr Redshaw's interpretation that this referred to an employee seeking to choose when their holiday should be taken. In essence, the respondent was notifying employees that they would refuse request for holiday to be booked and Mr Redshaw explained that this was because they did not know when they would need to un-furlough employees and did not want to be in the situation that if they were trying to open up in a short space of time they could not guarantee that they would be able to call on staff because too many people had booked to be on holiday at the same time.

42. We also accept that the explanation for the blanket specification that people would be deemed to take annual leave during furlough leave was to avoid a return to work with a backlog of leave that would also potentially restrict how many staff they could call on when needed. These employees were being furloughed on 80% wages and the employer was not voluntarily topping up the wages. The consequence of being required to take annual leave by the employer during furlough leave was that, for the period of annual leave granted or directed during a month, they would be paid at 100% of their contractual wages.

43. Although this was not something that witnesses were asked about we notice that permission was granted for people to return to their home country when furloughed provided they were available to return with 48 hours' notice (see the bottom of page 113). It was not suggested that the claimant did anything wrong by travelling to Bulgaria.

44. A subsequent communication on 16 April 2020 which starts at page 115 and contained a further "Frequently Asked Questions" document at page 117 states the same position.

45. On 22 May 2020 the claimant exchanged texts with Mr Redshaw (page 122) where he notified his staff that the company wants everyone to use 5 days of holiday. The annual leave year in this organisation ran from 1 April to 31 March. It is common ground that the claimant had used all of the holiday that she had accrued in the leave year 2019 to 2020 and had been on annual leave immediately prior to going on furlough in order to clear out her holiday. The dispute concerns annual leave in the leave year 2020 to 2021.

46. The claimant wrote to her manager and said that she did not want to use her holiday during lockdown and wished to keep it for use in the future at a time when she needed it. Mr Redshaw advised her to tell HR of that when she got the email. It then appears that the claimant spotted that on the online employee platform she had been recorded as having taken five days holiday. On 23 June she texted Mr Redshaw at a time when she had accrued 6.5 days and was recorded as having taken 5 days to ask him to remove those 5 days holiday because she had not requested it. She was advised to email "coronaqueries" to take it up with them.

47. We have not been shown an email sent prior to 23 June notifying the claimant that she would be required to take that holiday but at page 127 and following there is an exchange which was presumably triggered by the text with Mr Redshaw. The claimant was told by the People Team that the respondent had chosen to exercise its right to require team members to take holiday while they were in furlough leave both to ensure that the team members receive their paid holiday entitlements and to manage the costs to the business.

48. The claimant pursued the matter as we see from page 128. This is an email dated 25 June 2020 which forwards to the HR Department an email of the same date (page 129 & 130) as follows:

> "Further to our email on 3 June 2020, I am writing to update you in the payment of future accrued holiday.
>
> Since the government updated it guidance last month, we have paid all team members for holiday accrued during April 2020 and May 2020. This is to be allocated to the week commencing 15 June 2020 and therefore paid on 26 June 2020.
>
> Moving forward, for furloughed team members only, we will automatically allocate and pay any holiday accrued in a month to the last days in that month. For example, June's accrued leave will be allocated to 29 and 30 June and paid on 10 July. As before, you will receive 100% pay for your holiday hours or days. Once you move to "flexible furlough" (part working and part furloughed) or return to work you will return to the usual arrangements for booking holiday."

49. This is the email which contained the proposal which the claimant states she did not signify assent to by clicking on the hyperlink. She makes the valid point that the emails do not contain an alternative method of declining. As we have said, she forwarded this email to HR with an email saying that she did not want to take holiday in this way.

50. This means that on 25 June 2020 the claimant was told that she would be paid on 26 June 2020 for holiday that had accrued during April and May. We have not seen the email of 3 June referred to in that email. We accept the claimant's oral evidence that she did not accept that course of action. The same email of 25 June 2020 told the claimant and other staff that they would be required to be on holiday on 29 and 30 June as being the 2 days holiday accrued due to employment during June. They therefore were given four days' notice that they would be required to be on holiday on 29 and 30 June. However, they were also told on 25 June, that they were retrospectively to be regarded as having taken holiday in the week commencing 15 June 2020.

51. It is common ground that when the claimant was paid for the days' leave that she was being required to take there was a top up of 20% paid through the payroll so that, for example, five days in the month would be paid at 100% and the others would be paid at the furlough rate (see the July payslip at page 223 for example).

52. The dispute with regards to holiday continued into July with the claimant repeating her objection and being told on 3 July 2020 (page 132) that the respondent would not agree to re-crediting her with the holiday and the matter was deemed closed.

53. By this time the respondent was beginning to make preparations for reopening the Red Lion Hotel. According to the record of telephone conversations that were included in Mr Redshaw's information for the disciplinary hearing, he telephoned the claimant on 29 June to tell her that they were reopening the hotel on 29 July. We accept that evidence.

54. It is well known that when the hospitality sector was able to reopen in the middle of 2020 there were in place government guidelines that directed stringent hygiene practices to minimise the risk of the spread of coronavirus.

In response to these the respondent introduced a 3-phase cleaning programme for the bedrooms. The initial plan was to open with a limited number of bedrooms; only 10 of the available maximum.

55. We accept that the respondent wanted to bring the claimant as Head Housekeeper back to work so that she was completely familiar with the requirements of the risk assessments and the measures that were being put in place. Not only was she going to need this knowledge herself but she would need to be able to cascade training to other members of the housekeeping staff as they returned to work. It made sense for the leadership in a department to come back first. The claimant, understanding correctly that this meant that she would have to clean bedrooms herself on occasion, was unhappy at what she regarded as being a change to her job content. However, we accept Mr Redshaw's evidence that, even prior to the pandemic, the claimant would clean bedrooms herself if individuals in the housekeeping team were unexpectedly sick.

56. We do not think it was unreasonable for the respondent to make this request of the claimant or to give this direction to her given the exceptional circumstances of the times. When a hotel was reopening during the coronavirus pandemic employees were reasonably needed to be flexible in the unusual circumstances because there were constraints on how many people could be brought back to work at one time. There were restrictions on how many people could be in a particular building at one time. We reject the claimant's apparent arguments that this was an attempt either to make her role of Head Housekeeper redundant or to change the terms of her contract.

57. There are some texts in the bundle from early July about plans to reopen one of the other hotels. Then on 16 July (page 138) Mr Redshaw told his staff that the bedroom side of the hotel would not be opened until September which meant that a lot of the team, including Housekeeping, would remain on furlough leave until September. This was followed by a further email that the claimant received dated 24 July 2020 (page 139) which warned of the reopening of the business and modifying furlough arrangements so that flexible furlough could be put in place. It did not contain a specific un-furlough date.

58. Mr Redshaw also sets out in his chronology at page 179 that he had catch up meetings on 21 July by telephone with the claimant and that, on 7 August, he told her that the respondent would be opening the bedrooms of the Red Lion on 1 September. We accept that the claimant was told that there would be a formal un-furloughing letter. However, it is clear that the terms upon which the respondent put staff on furlough included that they would be able to terminate furlough leave on 48 hours' notice. This was set out explicitly in the first detailed communication about the concept (see para.40 above). Furlough leave was accepted on these terms by staff, including by the claimant.

59. We accept that their contract entitled the respondent to give 48 hours' notice of their requirement that their employees return to work. In his oral evidence

Mr Redshaw accepted that different individuals have different circumstances and that some people might have particular difficulties in returning on that notice. But, to foreshadow the details of the communications between him and the clamant at the end of August, he said that he needed and expected to be given information if an employee was in that situation. We thought that Mr Redshaw was genuine in what he said and that it is likely that had he been provided with clear and cogent reasons why a particular individual would be inconvenienced significantly by a requirement that they return to work in 48 hours, that would not have been applied rigidly.

60. On 14 August Mr Redshaw orally told the claimant that she was to come back to work when the rooms were opening and again told her that this would be on 1 September.

61. There was a further telephone conversation on 18 August 2020 which is referred to in an email of the same date (page 143). By that email Mr Redshaw provided the claimant with all of the relevant covid-19 risk assessments. He set out the rationale for her returning to work supported by one team member and explained why that would reasonably mean that she would have to clean the bedrooms herself at last initially.

62. The claimant was asked by Mr Redshaw on 18 August whether she was currently abroad because he had noticed on that date and also on 21 July that the dialling tone appeared to be an international dialling tone. On 18 August 2020 she denied that she was abroad but when he repeated the question in a subsequent conversation on 27 August 2020, she admitted to being abroad. She had in fact travelled to Bulgaria on a date in July which she was unable to recall when asked in oral evidence before us.

63. We conclude it must have been at some point prior to 21 July. Mr Redshaw's statement that he had asked her on 18 August whether she was abroad is corroborated by his email to Mr Hughes of 18 August (page 145) where he makes that statement. It appears that the claimant had volunteered concerns about coming back that were articulated as connected with a wish to avoid public transport as well as a wish not to clean the bedrooms. It appears from those emails that the respondent's plan was for there to be training on 30 August and then a deep clean of up to 10 rooms on 31 August with 1 September being the first date on which it would be possible to book a room.

64. On 20 August 2020 the claimant replied to Mr Redshaw's email of 18 August (page 144). She said:

> "I'm more than happy to come back to work as a Head Housekeeper in Red Lion Hotel, however, I cannot take the risk with cleaning bedrooms now as a (sic) have clinically vulnerable people in my family. Also I will need more time to prepare for work as I do not want to expose them nor myself to the virus. I cannot return back to work from 30 August as you requested on the phone. If that is a problem for the workplace I can use my annual holiday for beginning of September."

65. The reason she gives for not wanting to clean the bedrooms is that she has clinically vulnerable people in her household. She did not explain in her

evidence to the tribunal who the clinically vulnerable people in the household would be at a time when she was working at the Red Lion Hotel. Her mother-in-law has a number of medical conditions which are evidenced in medical evidence at page 233. That is a certified translation from the Bulgarian original which confirms the discharge of the claimant's mother-in-law following a three day hospital stay that ended on 23 August 2020.

66. The claimant's mother-in-law was diagnosed with Parkinson's disease but is described as having "comorbidities" of "status post surgery" for breast cancer. Under the category of "Past diseases", the surgery and consequent chemotherapy and radiation therapy is dated 2009. This translation is certified by the Municipality of Anton, the village where the claimant now lives, on 24 September 2020 (page 235) and by the Ministry of Foreign Affairs on 30 September 2020.

67. The other medical evidence that is provided to the Tribunal by the claimant is an original copy and certified translation of a medical certificate in respect of her son which states (page 229) that he had experienced colitis spastica and had to be treated at home between 28 August and 18 September 2020. It appears that the original certificate is dated 18 September but the dates of the certification of copies and translations are the same as for the discharge information in respect of the claimant's mother-in-law.

68. This medical evidence was not before Mr Redshaw and Mr Hughes at the time of their decisions at, respectively, the dismissal and appeal hearings. The claimant's evidence to us was that this evidence was not received by her until 28 October 2020 but she did not put forward an explanation to why it took so long from the date of the certifications for the documents to be received by her.

69. So far as we know the claimant's mother-in-law had not relocated to the UK and Ms Tsetanvona did not actually state in evidence that it was her mother-in-law who was the clinically vulnerable individual referred to in the email on page 144; the individual who the claimant feared would be at risk were she to be working in the Red Lion Hotel in Middlesex and cleaning the bedrooms. More to the point, the claimant did not explain to the respondent who that individual was or who those individuals were.

70. On 28 August 2020 (page 151) the respondent gave the claimant a formal notification that she was required to return to work with effect from 31 August 2020 on flexible furlough. By this they gave her the 48 hours' notice they were required to give under the contract. The claimant responded to this later in the day (page 155) and said that she had checked her online account and found that she had been scheduled to work on 31 August, 1 September and 2 Septemebr (see page 156). She asked to be kept furloughed for the next few weeks because:

> "I have vulnerable people in my family. At the moment my son is not well and I need more time to prepare to return back my to my workplace. If that is a problem I don't mind using my annual holiday for the next few weeks. I'm more than happy

> to return back to my job as Head Housekeeper in Red Lion Hotel – Hillingdon and I would like to thank you for choosing me-"

71. She said that she wanted more time. Although she refers to vulnerable people and her son being unwell, she was, in our view, vague about explaining the problem. Furthermore, the time period after which she envisaged being available to return to work was not set out and an indicative time period for her return was not given beyond asking to remain on furlough for the "next upcoming few weeks".

72. There is nothing in the claimant's emails to suggest that this is linked with her being abroad. She does not, for example, say "My son has unexpectedly fallen ill and is too sick to travel so I am not available to return from Bulgaria at 48 hours' notice as I otherwise would be" and give an estimated date for when she would be able to return. She does not link her absence in any way to being abroad. She ought to have anticipated that she would get a call giving 48 hours' notice and ought to have been upfront about any particular difficulties including the period of time. Overall she does not explain her plan for getting back to work as required.

73. The claimant argues that these two emails that dated 20 August 2020 at page 144 and that dated 28 August 2020 at page 155 were requests for annual leave that were unreasonably refused by the respondent or alternatively requests for dependants leave under s.57A ERA which, again, were unreasonably refused.

74. On 2 September 2020 Mr Redshaw replied (page 155) asking the claimant to provide a fit note or doctor's note to prove the vulnerability of her son within 48 hours. The claimant argues that this was something she could not do and she said as much on 10 September on page 165. However, she does not seem to have replied between 2 September and 10 September. We therefore reject her assertion in oral evidence that she replied to every email. She did say she was in a particularly difficult circumstance at the time in that she was caring for her mother and for her son but her husband was also in the house and was not working at the time so that is not a satisfactory explanation.

75. Mr Redshaw's letter requesting a medical certificate in respect of her son was prompted by an exchange of emails between him and Mr Hughes and the HR Department. These are at page 160 and we see that on 28 August 2020 Mr Redshaw asked the HR function for advice on the next steps informing them that it was the first time that the claimant had referred to her son. This was copied to Mr Hughes who responded to both Mr Redshaw and the HR function saying:

> "Could we move this on to the next stage please? I believe this may well simply be stalling … do we need to see evidence of the vulnerable person(s)? Please advise."

76. HR advised that the respondent request the claimant to provide a medical certificate.

77. As we say, there was no immediate response to the email of 2 September and on 8 September Mr Redshaw wrote again (page 164) saying that he was concerned that the claimant had been absent from work since her un-furlough date of 31 August 2020. He said that she could not be left on furlough pay if she was required to return to work which was the case in her instance. He continued:

> "You sated that you are unable to return due to vulnerable people in your family I replied to your email both by email and text and have tried to ring you, asking you to provide evidence as to your family's vulnerable status.
>
> If you are unable to provide the relevant documentation by 11 September 2020 I will unfortunately have no other option than to consider you absent without authorisation, where the next step would be to invite you to a formal disciplinary hearing."

78. He reminded the claimant of the requirements under the contract of employment that she notifies the senior manager of any unplanned absence and to continue to inform them of how long she would be absent for. The claimant replied on 10 Septemebr 2020 saying she had not been able to return to work within the 48 hour period due to:

> "My family's medical reasons. At the moment I have family members which are unwell and they need my support and care at this time, (including a person with vulnerable medical condition.)."

79. She said that she is not able to upload proof of medical documents in the timeframe set and would ask for a few weeks to prepare herself for work. She repeated that perhaps her annual holiday could help in her situation because she believed that she had 28 days on annual holiday that she had not requested.

80. Mr Redshaw responded within a few minutes of that email being sent asking her to telephone him as directed in the letter of two days previously when he had directed her to telephone him by 9 o'clock in the morning on 11 September. No telephone call having been received on 11 September Mr Redshaw invited the claimant to a disciplinary meeting (page 167) stating that the claimant was required to attend a disciplinary hearing for being absent without authorisation on 16 September 2020 at the Red Lion Hotel.

81. On 14 September 2020 the claimant emailed Mr Redshaw asking to postpone the hearing saying that she could not attend for family reasons (page 168). She did not say in that email when she was returning to work, when she would be returning to the United Kingdom or when she would be available for a hearing. The same day she was sent another notification to attend a disciplinary hearing on 16 September giving her the option of attending by telephone or to submit written representation in advance. She was given the right of representation and warned that it was a formal disciplinary hearing. She was warned that if she did not attend the hearing or submit representations in advance then a decision would be made on the basis of the evidence that they had at the time.

82. On 15 September the claimant emailed (page 172) saying that she was not ready for a hearing due to family reasons and asked for a postponement saying that she needed more time.

83. We find that the hearing did take place on 16 September 2020 because the notes at page 175 and 176, which read as though they were made in preparation for the hearing with the questions to be asked, are annotated "Vanya has not called into the hearing for submitted written representations". They were signed by Mr Redshaw and the Deputy General Manager and dated 16 September 2020.

84. Our conclusion is that Mr Redshaw decided that he would not make a decision but would attempt to reschedule the hearing. Furthermore, on 17 September 2020 (page 177) he wrote to the claimant again requiring her to attend a hearing on 2 September 2020 to consider the allegation of being absent without authorisation. She was given the option of attending by telephone or making written representations. Again, he stated that it was a formal disciplinary hearing and that if she did not attend or submit written representations then a decision would be made in her absence.

85. On 21 September 2020 the claimant emailed (page 178) to say that she was not ready for the hearing date of 22 September and was not in apposition to prepare or choose from the options for the hearing due to family reasons, "Also my family will be subject to isolation period! I would like kindly to ask you for more time! time to prepare myself for the earing meeting,."

86. It is clear from page 179 and 180 that the hearing was in fact convened on 22 September. The claimant appears to have presumed that the respondent would agree to a further postponement and told us in oral evidence that she was in fact driving through Europe on 22 September and that was why she could not telephone into the hearing. She did not say exactly when she arrived back in to the United Kingdom but it would presumably be within a day or so of that second hearing.

87. By email and letter of 24 September 2020 (page 181) Mr Redshaw wrote to tell the claimant that he had decided to dismiss her for "failure to follow company absence reporting procedures resulting in your absence without authorisation". He said that the last day of service would be recorded as 25 September 2020 and she would not receive notice pay as it was an act of gross misconduct. However, in the paragraph immediately before that it was stated that "the decision has been taken to dismiss you from the company with notice". We accept that this may have been somewhat confusing for the claimant but overall consider that the communication of dismissal without notice was clear. She was told of the right to appeal to Mr Hughes.

88. The claimant exercised that on 29 September by an email at page 183 and the hearing was heard on 16 October 2020. The notes are at page 193 and the claimant attended at the hearing which was conducted by Zoom. She was asked why she disagreed with the action taken against her and said:

> "The reason why is that I couldn't return to work in 48 hours to un-furlough. I explained to James people in my family were sick and needed my care. In the end I dismissed as gross misconduct."

89. Thereafter there are questions by Mr Hughes directed to the claimant's failure to attend the meetings, which she accepted. He stated that she did not provide evidence of the reasons why she could not return to work and, under the terms of the furlough agreement, had to return within 48 hours. The claimant said she could not accept it. Then he stated that she had been given more than 48 hours' notice informally.

90. Mr Hughes focusses his questions on the amount of notice of return both formal and informal and the claimant's failure to attend the disciplinary hearings as well as being given options to the respondent of her unavailability. He does say that he is trying to understand why she feels the time given was not enough but, according to the notes, at no time does he ask the claimant to explain what it was that prevented her from returning or whether she is willing to return to work now. On the other hand, an entry on page 196 records that he stated that he needs actual evidence of the medical reasons for her absence and tells her that what she is saying is not evidence. We remind ourselves that notes of this kind are rarely verbatim.

91. The claimant responds that she cannot provide the evidence now but will provide it on her arrival back to work. This does not appear to cause Mr Hughes to ask her when she will be able to do so. Equally the claimant does not explain what attempts she had made to get medical evidence which by the date of the appeal was in existence if not physically in the claimant's possession. The claimant must at least have asked for the medical evidence by that date and yet did not explain to Mr Hughes what the medical problems were and what she had done to try to substantiate them.

92. On the other hand, to judge by the notes, we do not think that Mr Hughes made the enquiries a reasonable employer would have made given that this was the first opportunity the respondent had to find out from the claimant what her explanation was for the absence.

93. The appeal was dismissed.

94. The claimant sought in her argument to compare the action taken against her with that taken against the colleague who was the subject of the emails she wrote in February and March 2020. She sought to argue that no action had been taken against that colleague and no requirement made for that colleague to provide medical evidence despite an absence of more than 3 days.

95. We do not think that this is an valid comparison. In the case of the colleague, Mr Redshaw accepted the reason given for the absence; he accepted that the colleague had been unwell on the basis of the detailed (presumably confidential) communication between them. The company policy on sickness absence did not require medical certification within the first seven days as is the standard practice.

96. In the case of the claimant, she was not herself ill. She claims she was asking for annual leave, dependants leave or unpaid leave because of the impact on her ability to attend work of the medical conditions of others. Given the different stories put forward at different times by the claimant, given her initial denial that she was abroad and the later acceptance that she was abroad, it was entirely reasonable that Mr Redshaw should be suspicious that she may not have a justified reason for her absence. We consider this to be a difference between the two circumstances that justifies the different approach.

Conclusions on the issues

Health & Safety or Protected disclosure detriment

97. Although it is now not necessary to make a determination on this point, we had come to the conclusion that the Tribunal had no jurisdiction to consider the complaints of unlawful detriment based on Mr Redshaw's warning that the claimant might be subject to disciplinary action because they were not presented within the relevant time period. The single act of detriment alleged was clearly that which took place on 3 March 2020. Although the claimant sought to argue later in the day that there was a continuing act she had not prior to that point included in the complaints that she raised other specific acts which were said to be detrimental treatment of her by Mr Redshaw. As such it was not within the scope of the issues before the Tribunal for us to consider matters such as whether she had been excluded from a particular meeting as a result of the email she had sent. This was not a complaint that she had previously made to the Tribunal. She had made clear at the preliminary hearing that she did not argue that the dismissal was automatically unfair on grounds that the reason, or principal reason, was a protected disclosure or health & safety grounds which underlines the point that this argument about a continuing act had not previously been made.

98. That being the case the date of the act complained of is 3 March 2020 and, under the time limits set by s.48 ERA, the claimant should have contacted ACAS no later than 2 June 2020. She in fact contacted ACAS on 14 December 2020 some six months late.

99. If one considers when this event took place in context, the claimant was placed on furlough a month later. Had this warning been something that she felt sufficiently aggrieved about that she wished to take it further then she had ample time to research her rights. It is for the claimant to prove that it was not reasonably practicable for the claim to be presented in time and she has not shown that that was the case. We do not consider that there was any particular impediment to her presenting the claim and she was not reasonably ignorant of the ability to do so.

100. There was no continuing act beyond 3 March. The claimant has not previously relied upon any other event and we cannot on the facts connect this allegation with any other complaint. Between judgment being reserved and the finalisation of this reserved judgment, the claimant withdrew all of the claims which had been presented out of time including this one. Therefore it

is dismissed on withdrawal but, had the claimant not withdrawn them, we would have dismissed the complaints of detriment on the grounds of protected disclosure or health and safety grounds because they were out of time.

101. That being the case, we did not need (quite apart from the claimant's withdrawal) to make a decision on the substantive issues involved in them. Nevertheless we make a comment that, on the facts found by us, we would not have found that a distinction could be drawn between the health & safety concerns communicated by the email of 29 February and the alleged effect of the email relied on by the respondents, namely alleged panic amongst the staff. The claimant was, we accept, reflecting concerns of those in her team rather than creating any particular panic and for her to copy her email to them in those circumstances would not, we think, have removed any protection that might have been created by the terms of it. Nevertheless, the reason that the claim was out of time and was withdrawn. We do not make a conclusion on the substantive issues in relation to that claim.

Arrangements for statutory leave/unauthorised deduction from wages

102. In our view, the emails from the claimant dated 20 August 2020 (page 144) and 28 August 2020 (page 155) were not requests for annual leave that comply with the requirements of Regulation 15(1) WTR or requests for dependants leave which comply with s.57A ERA. The claimant was not, as she accepted herself in oral evidence, making a request for annual leave to start on a particular date and, in the case of the later email, it was on any view not sent sufficiently far in advance of the first date of the holiday for it to comply with Regulation 15(1). Indeed, the claimant seemed rather to be suggesting that any annual leave should facilitate her absence for a period of time which she did not specify beyond stating it should be a few weeks. Given the respondent's need for the leadership to return this was unsatisfactorily vague.

103. We understand Regulation 15(3) WTR to mean that if the respondent is to require its employees to take 5 days' leave then they have to give notice of that 10 days before the first day of that leave and they have to give notice for particular dates.

104. The email of 25 June 2020 tells employees that they must take the 29 and 30 June 2020. That would therefore comply with Regulation 15(3) because notice was given four days before the first date and was given for specific dates. However, the five days which the claimant was told had been taken from her accrued allocation to which she refers on page 124 and 125, did not comply with Regulation 15(3) because the claimant did not know to which dates the holiday direction pertained. The claimant did not have, so far as we can see from the evidence in the bundle, the requisite number of days' notice. Ultimately, that was admitted.

105. We see no good reason why the respondent could not have sent notification to the claimant to tell her that her 5 days must be taken on particular dates and not have given that notification 10 days before the first one. Despite the

exceptional circumstances of that period of time, days' leave are days during which the employee is at liberty to do what they chose to do; they are no longer under an obligation during that day to communicate with their employer or to check for communications from them. They are not subject to the 48 hours' notice of return during that time. By that we mean that if the 48 hours notes expired a date which the respondent had directed to be a day's holiday then the employee would not be obliged to return on that date. Even though the employee was on furlough leave the obligations under the contract were maintained to some extent, specifically the obligation to be available to return to work at 48 hours' notice. Therefore, it cannot be said that there would be no difference between a day's furlough leave and a day's annual leave.

106. We are satisfied that the communications to the claimant which she accepted (see para.36 and 38 to 40 and 44 above) were effective to mean that the respondent had the right to require employees to return on 48 hours' notice. These communications told employees about the terms of the furlough leave, all bar one was accepted by the claimant and they followed by her continuing to be on furlough leave and receiving furlough pay. This incorporated that specification as the termination of furlough leave into her contract. Similarly, we accept that the respondent had the right to require employees to take annual leave during furlough. However, we do not see that that abrogated the requirements on the employer under Regulation 15(2) & (3) WTR to give the specified formal notice and such is not argued by the respondent.

107. The consequence of the lack of reg.15(3) notice is that the claimant had, on termination of employment, more leave accrued and untaken than she was credited with.

108. In her schedule of loss (page 67) the claimant alleged that she had 14 days' holiday accrued on termination between the start of the leave year on 1 April 2020 and the effective date of termination of 25 September 2020 (the date in the dismissal letter). Given that very nearly 6 months of the annual leave year had elapsed, we accept that figure. She says that the employer regarded her as having taken 9.5 days' leave during furlough so sought to pay her for 4.5 days' leave which she says she should be reimbursed at the weekly gross rate of £461.54.

109. The parties do not agree on the daily gross rate applicable for the employee when not on furlough. It is clear that the gross monthly rate of pay was £2,000 because the 80% paid on furlough was £1,600. The claimant's weekly rate equates to a daily rate of £92.31 gross. The respondent appears to say (to judge by the email at page 210) that the daily rate was £73.85 gross. We have not heard evidence or argument directed to the difference in the daily rate. However, it is common ground that the claimant had accrued but not taken on termination of employment, at least 4.5 days annual leave subject to her argument that she should be credited with further leave.

110. The payslip at page 225 is dated 26 September 2020. The respondent's evidence, which we accept, was that an employee is paid the wages due to them up to the date of the payslip. So, since the previous payslip at page 224 is dated 26 August then we conclude that the September payslip dated 26

September 2020 paid the claimant for wages covering 25 August 2020 to 26 September 2020 inclusive. The claimant had been told that her last day of employment was being treated as 25 September 2020. Therefore, she was overpaid in the September payment by one day. The payroll is done in the middle of the month and the claimant's dismissal was decided on after the payroll had sent the figures through.

111. In October (page 26) the claimant was given a payslip to show that she was being credited final holiday pay at £332.32 but deductions were made from that which are not easy to understand on the face of the payslip which the respondent's witness were unable to explain. She then received a net payment of £208.40. She challenged that payment and there is an exchange of emails at page 210. On 4 November the claimant asked HR for her leave calculations and on 10 November 2020 HR wrote to her and said that her final pay and holiday pay was calculated at 80% instead of 100% so she was due a top up because the holiday pay should have been paid at full pay. However, it was asserted that she was overpaid by 3 days but in error the respondent had reclaimed all 4.5 days leave. We observe that, if the October credit of £332.32 was (as the email of 10 November 2020 suggests) 4.5 days @ 80% of the full gross daily rate then that would be consistent with the full gross daily rate being £92.31 as the claimant alleges.

112. We understand the email of 10 November 2020 to be the respondent's explanation that the combination of the error in the rate and the mistaken deduction of 4.5 days instead of 3 days was accepted at that stage to mean that a payment should be made in the claimant's favour in the November pay run of £193.84. However, the November payslip (page 228) evidences a net payment of nil to the claimant for reasons which, again, the respondent's witnesses were unable to explain. On the face of the payslip, the claimant is credited with a holiday payment for 4.5 days at £73.85 and then a deduction of the same amount by way of monthly salary is also made.

113. Our conclusions on this are that the respondent erroneously took the view that by the September 2020 payment they had overpaid the claimant by 3 days when she had in fact only been overpaid by 1 day. The respondent also underpaid the claimant in respect of the 4.5 days that they accepted she was due by way of accrued annual leave by only paying that at 80% and not at 100%. The attempts in November to rectify matters did not do so because no payment was made to the claimant that month.

114. It therefore seems to us that taking into account the fact that the claimant had in fact been due to be paid an additional 7.5 days accrued annual leave on termination the respondent owes the claimant the following:

    114.1 100% of the full gross daily rate for the 4.5 days' annual leave that the respondent did not dispute the claimant should be paid; and

    114.2 7.5 days' annual leave which should be paid at 80% of the daily rate because there is no dispute that the respondent in fact paid the claimant for the days leaves that they directed her to take.

114.3 But that 1 days' wages can be deducted from the above because there was one day over payment in September 2020.

114.4 The only payments in October and November 2020 appeared to result from a recalculation of tax because in each case any credit for holiday pay was entirely offset.

115. Given that there is no agreement at present between the parties on the amount of the daily rate we make our judgment there has been an unauthorised deduction from wages as set out above and invite the parties submissions on how the figure should be calculated. As explained in para. 111 above, there is reason to think that the claimant's figure is the correct one but the respondent should have an opportunity to respond to that.

Unreasonable refusal of requests for dependants leave/annual leave

116. A notification of the requirement to take dependants leave is one to take a reasonable amount of time off during working hours in order to take action which is necessary to provide assistance on an occasion when a dependant falls ill or to make arrangements for the provision of care for a dependant who is ill. There are other sub paragraphs but those seem to be the ones which are most likely to be applicable given what we now know about the circumstances. However, the request for time of a duration of a few weeks is more than a period time that is reasonable and there is no information given that explains why the time is necessary.

117. If we are wrong and it is not that this information needs to be provided in a notification, it seems to us that it was entirely reasonable for the respondent to refuse any request for dependants leave when the claimant did not provide the information that they reasonably required to be provided.

118. Despite that, there is also the difficulty with these claims they have not been presented within the applicable time limits. If one were to consider that the 20 August and 28 August were dates of request of dependants leave those requests are not initially refused. The respondent asks for a fit note to be provide within 48 hours by an email on 2 September 2020. Then by the email at page 164 they give her until 11 September 2020 to provide medical evidence so that they can make a decision about whether to grant or not to grant er request.

119. It is on 11 September (page 167) that the claimant was required to attend a disciplinary hearing and this action is inconsistent with the granting of any request for dependants leave. We therefore conclude that if the claimant made a valid request for dependants leave it was rejected by the communication on 11 September 2020 at the latest. This means that the claimant should have contacted ACAS no later than 10 December 2020 and in fact did so on 14 December 2020. We accept Mr Foster's argument that the fact that she was only a few days out of time is of no assistance to her unless she first satisfies us that it was not reasonably practicable for her to present the claim or contact ACAS by 14 December 2020.

120. A complaint about a refusal to permit the worker to take annual leave (which is a right under reg.13 & 13A of the WTR) must be presented within three months beginning with the dated on which the exercise of the right should have been permitted or permitted to begin (reg.30(2) WTR). In other words, from the date on which the leave requested would have started. In the present case that is 31 August 2020 and therefore first contact with ACAS should have happened no later than 30 November 2020 and the claimant was approximately two weeks late.

121. The reasons that the claimant gave for not presenting these claims in time were essentially the same as those she gave in relation to the claim for unlawful detriment. It was not until the decision to dismiss her and the failure to pay what she regarded as being her full holiday entitlement that she was sufficiently motivated to make enquiries about how to enforce her employment rights. However, she also said that she was trying to resolve matters informally prior to taking action.

122. It is well established that following internal processes however understandable, does not make it not reasonably practicable to present a claim in time. It is true that up until approximately 22 September 2020 the claimant was in Bulgaria and she was looking after her son and mother in law for some of that time. She returned to the United Kingdom in a journey that seems to have taken more than 1 day but included 22 September and therefore well before the expiry of the limitation period she was back in the United Kingdom and her son had recovered.

123. It is probable that she did not know as a litigant in person that those complaints would have different time limits than that based on the dismissal but unless that ignorance is reasonable it does not make it not reasonably practicable to have presented the claim. She was clearly well able to articulate those individual complaints on the face of the claim form and we have concluded that it was reasonably practicable for them to be presented in time. Therefore the employment tribunal would not have jurisdiction to hear them because they were presented late. This is something which the claimant has now accepted so they are dismissed on withdrawal.

Unfair dismissal

124. We turn to the issues relevant to unfair dismissal and our conclusions on that.

125. Starting with the decision of Mr Redshaw which was communicated on 24 September and took effect on 25 September 2020, we accept his evidence (his witness statement at paragraph 27) where he says that he could only make his decision based on the information he had available, given the claimant's failure to be forthcoming with either a full explanation or the medical evidence required. We accept that he therefore took the decision to dismiss her as absent without leave because she had been absent for an extended period and had not provided an explanation to him. We accept that this was his genuine belief.

126. It was not simply that she had been absent on the 3 days that (as at 28 August 2020) she had been scheduled to work. We accept the respondent's evidence that the claimant would have been rostered for further dates after 2 September in subsequent weeks had she attended for work. Therefore, by the time of the 22 September 2020 hearing, the claimant had been absent since 31 August 2020. At no time had she said when she would be back.

127. As we have explained above, she was not treated differently from her colleague. We accept that the Head Housekeeper role was crucial to reopening and our conclusion on that is not undermined by the fact that the respondent did not immediately recruit into that position, did not have a Head Housekeeper even at the time of the appeal hearing or, indeed, much later. Of the other two individuals who were contemplated to be brought back one had a supervisor role and it seems to us that someone was brought back to carry out the functions that the claimant would have done including providing the lead on ensuring the risk assessments were adhered to. We accept that it was the claimant that they wished to return from furlough leave.

128. Given the attempts that Mr Redshaw made to make contact with the claimant to ask her to make contact with him and giving her the option of attending by telephone or providing written representation, we think that the investigation carried out by Mr Redshaw was within the range of reasonable responses.

129. In the light of what the claimant said about the reasons for her absence we think that his conclusion that she was absent without providing a reasonable excuse was one that was open to him.

    129.1 On one occasion she did not respond to his email - that of 2 September 2020,

    129.2 She did not telephone him when asked to do so before the deadline of 9 o clock on 11 September 2020,

    129.3 She made no substantive reply to the invitation to disciplinary hearings,

    129.4 The reasons that she gave that there were family members who were clinically vulnerable were phrased in a way that would cause a reasonable person to think she meant that she was living in a household in the United Kingdom with people who were clinically vulnerable which prevented her from carrying out the cleaning work at the hotel. This is not the same as saying that she could not return on 48 hours' notice because people were sick, the reasons she provided appear to put forward an impediment to being at work at all.

    129.5 This was not the same as saying that her son was unwell and she did not provide enough information to explain to Mr Redshaw why any illness would prevent her from working.

    129.6 Although the claimant had more annual leave than Mr Redshaw reasonably believed her to have, the respondent did not have to agree

to the claimant taking it at the time of her choosing. The claimant did not appear to understand or accept that point.

130. The claimant's reasons for not attending the disciplinary hearings were similarly couched in terms which did not give enough information about why she could not attend. In short, the claimant failed to fully explain why she was absent and she was given ample opportunity to do so. In our view, she had a responsibility under the reporting absence policy to keep the respondent updated about her likely date of return.

131. In all of those circumstances, Mr Redshaw had reasonable grounds for rejecting her explanations and concluding that she had not provided a satisfactory reason for her continued absence. Although she had asked to take annual leave or unpaid leave she had not made a valid request for that leave or for dependants leave. In any event, the respondent did not have to agree to it being taken at the time she requested. Furthermore, given that her working week was 5 days a week or, had she returned to work on flexi-furlough, 3 days a week, the annual leave that she had accrued and had not been credited as at 31 August 2020 would not have covered an absence from work of "a few weeks". Whether or not the respondent realised that they had failed to give notification under Regulation 15(3) WTR and therefore that the claimant should be regarded as having more days' annual leave is irrelevant to that conclusion. The time period over which she wished to take leave was very vague. The need for her to return was genuine. In all those circumstances, we consider that the decision made by Mr Redshaw that there was no satisfactory explanation for her absence was within the range of reasonable responses open to him.

132. It was also open to him to consider her actions to be gross misconduct because she had been absent from 31 August 2020 onwards and not merely the three days for which she had been rostered.

133. In her argument, the claimant drew our attention to the email on page 160 (see para 75 above) in which Mr Hughes told the HR function: "Could we move this on to the next stage please? I believe this may well simply be stalling". Mr Hughes was asked in cross-examination whether he thought there might be a conflict when he was asked to handle the appeal because he had advised those dealing with the claimant's absence to "move on … to the next stage, please". His first answer was that there was no conflict but at the time "I felt as though this employee was stalling a return to work and that was my only dealing with it"; by this we understood that this was his only involvement with the case. When it was suggested to him that these words might indicate that he had formed a view early on he said, "I believe that the employee was stalling a return to work - that was my view at the time". He then said that he believed that they may have someone who was stalling their return to work..

134. This email causes us a concern for two reasons. In the first place, it seems clear that the "next stage" was providing a deadline for return to work before instigating disciplinary action because those are the terms of the next communication from Mr Redshaw. It is clear from other emails in the bundle

that this was not Mr Hughes only involvement in monitoring the absence of the claimant. In our view, there is a risk that he has influenced the decision of Mr Redshaw to take things further when there may have been other options open to him. As we say, given the information available to Mr Redshaw, the actions he took were within the range of reasonable responses. However, we are of the view that this exchange made it difficult for Mr Hughes to approach the appeal with an open mind because he was judging the process followed by Mr Redshaw and the decision reached by him when that process was, to some extent, instigated by Mr Hughes himself.

135. We have weighed up the wording of the email at page 160 (which is conditional) with Mr Hughes' oral evidence (para.133 above) which was conditional in part but definite in part. His definite statements in oral evidence ("I felt as though this employee was stalling" "I believe that the employee was stalling … - that was my view at the time") cause us to be concerned that Mr Hughes approached the appeal having already formed the view that the claimant was, as he put it stalling her return to work. The essence of the appeal would be to consider with an open mind whether the claimant had been fairly treated up to that point and to consider her explanations if any, without prejudgment.

136. How the appeal hearing was conducted is, in light of that concern, extremely important. The notes of the hearing are at page 193 and our findings about it are at paras.88 to 92 above. Mr Hughes did not appear to explore in the hearing what the claimant's reason for absence actually was. He put her failure to attend meetings to her and asked her why she did not provide medical evidence but does not appear to probe the reasons behind the absence. We read these notes as indicating that the claimant had to do everything to try to change Mr Hughes mind. In our view, had he been genuinely open minded he would have asked those questions.

137. There was no need for Mr Hughes to write the email at page 160. We consider on the basis of his oral evidence that he was not genuinely open minded at that stage to the possibility that the claimant might have a satisfactory explanation. The fact that he did not explore her reasons for absence in any detail in the appeal hearing but instead focused on the claimant's failure to engage with Mr Redshaw and did not respond to the claimant's offers to provide evidence in due course, causes us to think that he still had a closed mind as at the point he heard the appeal. The obligation on an employer to carry out investigations continues up to the end of the appeal. When the claimant says she would provide medical evidence on her return to work, he does not appear to have asked when she proposed to return to work or what that evidence would be.

138. So as a matter of fact we think that he did not approach the appeal with a genuinely open mind. It was difficult for him to do so when he had created a risk of influencing his subordinate about what action to take next. This previous involvement would not make it inevitable that he was conflicted when hearing any subsequent appeal but it causes us to check carefully that the claimant did have, in substance, a fair appeal. Mr Hughes' oral evidence, combined with the way he conducted the appeal hearing, causes us to

conclude that his approach at the appeal hearing was not one someone who was genuinely open minded as to whether the offence had been committed or not.

139. We therefore conclude that the claimant did not receive a fair appeal hearing. It cannot be said in this case that had she received an appeal hearing it clearly would have made no difference. The particulars in respect of which the appeal hearing was unfair was that the decision maker had formed a view at an early stage that the claimant was seeking to avoid a return to work and did not make the enquiries that a reasonable employer would have made about her reasons for her absence, given this was the first opportunity to have a discussion with the claimant within the disciplinary process. We recognise that the claimant had had previous opportunities to explain her position but this was the first discussion that the employer had actually had.

140. We go on to consider whether the claimant did in fact commit the act of gross misconduct of being absent without a reasonable explanation. As argued by Mr Foster, although more is known now about the medical conditions of the claimant's son and her mother in law, and when the medical evidence was available, the offence is committed when the claimant fails to provide a satisfactory explanation for her absence and is absent for a substantial period of time.

141. The disciplinary policy at page 82 contains in it illustrative examples of misconduct, serious misconduct and gross misconduct. Examples of misconduct include persistent short-term absence and a failure to follow the absence notification procedure. Serios misconduct includes failure to return after an extended period of absence without adequate explanation and gross misconduct includes failure to comply with a reasonable order and (at point 24 on page 90) a continued absence from work without explanation.

142. The absence started on 31 August and was not merely limited to the 3 days for which the claimant had been rostered. She was absent for an extended period of time and no satisfactory explanation was provided by her as to when that period would end despite the opportunities for her to do so. The explanation that she gave did not provide sufficient information for it to be accepted. She seems simply to have expected the respondent to agree to her requests for an indefinite amount of further time without explaining why it was necessary; she asserted that it was necessary for medical reasons but could have provided more detail without which we consider her reasons as articulated really did not amount to reasons of substance at all.

143. Mr Redshaw said that, had she explained that her son was unwell and unable to travel and that this had made it difficult to return within 48 hours, then that would be different. The claimant appeared to think she should not be required to return within 48 hours which was not the case.

144. Overall, we conclude that the claimant did not provide an explanation for her absence and that being absent from work, without informing her employer when that absence was likely to end and without providing them with an

explanation for absence that they could evaluate was conduct so serious that it repudiated the contract and amounted to gross misconduct as alleged.

145. We therefore conclude that the claimant was not wrongful dismissed and is not entitled to notice pay.

146. The same conduct is relied on by the respondent as justifying a deduction from compensation under s.122(2) and s.123(6) of the Employment Rights Act both from the basic award and from the compensatory award. We agreed with the parties at the hearing that (although this is in fact a remedy issues) it was therefore proportionate and possible on the evidence and argument that we had heard for us to reach a conclusion on that issue.

147. The respondent also argued there should be a deduction to take account of the likelihood that the dismissal would have taken place in any event. We did not clarify at the outset of the hearing that this was to be an issue on which we would hear evidence and argument in the first instance. We therefore told the parties that, in our view, it was not fair to them for us to entertain those arguments ahead of our decision on liability.

148. We have found that the conduct was alleged against the claimant is made out and that conduct was very substantially the reason why the claimant was dismissed. It was entirely the reason why Mr Redshaw reached the conclusion that he did. However, there is a prospect that had the appeal hearing been conducted by someone with an open mind and had the appeal hearing been conducted by someone who made the investigations that a reasonable employer would have made at that stage that a different outcome would have been reached. We therefore considered that taking the disciplinary process as a whole, is not just and equitable to reduce the claimant's compensation to nil on account of contributory conduct because it was not the only factor in play that overall meant that her employment was ended. However, it clearly must be a very high level of contribution and we assess that just and equitable deduction at 80%.

Failure to provide statement of changes

149. The claimant having succeeded in her unfair dismissal and unauthorised deduction from wages claims we go on to consider whether her complaint under s.38 of the Employment Act 2022 is well founded. She argues that she was not provided with a contract of employment when she was promoted to Head Housekeeper. It is clear that the contract provided to her at the start of her continuous employment complied with s.1 ERA and the claimant does not contend otherwise. What she argues is that there was no reissue of the contract when her salary increased.

150. We consider that the document emailed to her or the email sent to her on 29 April 2019 at page 100 is sufficient to comply with s.4 ERA in that it notifies her in writing that her salary is to change to £24,000 gross per annum and that therefore no sum is due under this head.

Remedy issues

151. The following issues will be decided at the remedy hearing which has already been listed to take place on **30 January 2023 by C.V.P.**

151.1 What was the claimant's gross daily rate of pay?

151.2 What is the amount which the respondent should be ordered to pay in respect of unauthorised deduction from wages?

151.3 How much should the compensatory award for unfair dismissal be? The Tribunal will decide:

151.3.1 What financial losses has the dismissal caused the claimant?

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

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

151.3.4 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?

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

151.3.6 It has already been decided that it would be just and equitable to reduce the claimant's compensatory award by 80% to take account of contributory conduct.

151.3.7 Does the statutory cap apply?

151.3. What basic award for unfair dismissal is payable to the claimant? It has already been decided that it would be just and equitable to reduce the basic award because of conduct of the claimant before the dismissal by 80%.

_____

Employment Judge George

Date: …13 January 2023……..

Sent to the parties on: 13 January 2023

For the Tribunal Office