EMPLOYMENT TRIBUNALS

Claimant: Miss S Fielding

Respondents: Sara's Group Limited

RESERVED JUDGMENT

Heard at: Manchester **On:** 9 January 2023 and 20 February 2023 In Chambers

Before: Employment Judge Holmes (sitting alone)

Representatives

For the claimant: Mr N Gerrard, Trade Union Representative
For the respondent: Ms G Kennedy – Curnow, Consultant

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The respondent made unlawful deductions from the claimant's wages in respect of sick pay, in the total sum of **£3827.38** , which sum the respondent is ordered to pay her. This is a gross sum, from which the appropriate deductions for tax and national insurance must be made.

2. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures by not providing the claimant with the outcome of her grievance , or any right of appeal, and the Tribunal , pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 makes an uplift to the said award of 25%, a further sum of **£956.84** which sum the respondent is ordered to pay the claimant.

3. Further, the claimant's complaint of failure to pay to the claimant an amount due to the claimant under regulation 14 (2) or regulation 16 (1) of the Working Time Regulations 1998 is well-founded and the respondent shall pay to the claimant the sum of **£1225.52** (133.79 hours @ £9.16 per hour) in respect untaken but accrued holiday (holiday pay), which sum the respondent is ordered to pay the

claimant . This is a gross sum, from which the appropriate deductions for tax and national insurance must be made.

REASONS

1.By a claim form presented on 1 February 2022 the claimant brings claims of unlawful deductions from wages , and for unpaid holiday pay. The claims arise from her employment with the respondent as a Team Manager (her term) at the respondent's convenience store at 6 to 7 Church Street, Darwen until her resignation on 22 October 2021. She had previously been employed by Martin McColl Limited , the Co-Operative Group, and Hanbury's Stores, her employment being transferred through a succession of TUPE transfers, the last of which was from Martin Mc Coll Limited to the respondent on 21 April 2021.

2. Prior to her resignation the claimant had been absent due to illness. She received only SSP , and raised with the respondent whether she should not in fact have received full pay, Company Sick Pay, to which she considered she was entitled under the terms of her previous contracts of employment as transferred under the series of TUPE transfers referred to.

3. Upon termination, the claimant received £198.69 holiday pay (i.e. pay in lieu of untaken holiday entitlement) based upon the respondent's understanding of her entitlements as being 29 days per year . The claimant contends that this is incorrect, and she was entitled, contractually, to a total of 39 days per year.

4. The claimant was represented by Nick Gerrard, trade union representative, and the respondent by Ms Kennedy – Curnow, consultant. The claimant gave evidence , but called no witnesses, and Ramesh Chauhan, director, gave evidence for the respondent. There was an agreed bundle, and the claimant had supplied a schedule of loss.

5. After the parties had concluded the evidence, and their submissions, the Employment Judge raised with them the case of ***New Century Cleaning Ltd v Church [2000 IRLR 27*** , which he considered may well be relevant to issues pertaining to the holiday pay claim. He therefore invited further submissions upon:

a. What were the dates of the holiday year?

b. Were holiday pay payments made by McColl Limited which left the claimant up to date on holiday pay entitlement at the point of transfer, namely the 1 April 2021.

c. When was the grievance outcome report received by the Respondent?

d. What impact does the decision in ***New Century Cleaning Co Ltd v Church [2000] IRLR 27*** have on this case?

6. The claimant provided further submissions on 13 January 2023, and the respondent on 12 January 2023.

7. Having heard the evidence, and considered the documents and submissions presented to the Tribunal, it now finds the following relevant facts:

7.1 The claimant was originally employed as a Chilled Manager by Hanbury Stores Group at the Darwen store 6 to 8, Church Street Darwen from 1984. That employment was subsequently the subject of a TUPE transfer to the Co – Operative Group Limited in or about 1999.

7.2 During that employment, the claimant's employment was subject to terms and conditions collectively negotiated by her trade union USDAW. The claimant's employment with the Co-Op was subject to a substantial Handbook (pages 24 to 61 of the bundle, in reverse order), which contained many provisions. In relation to holiday, the following provisions applied (page 50 of the bundle):

(18)HOLIDAY ENTITLEMENT

All colleagues in scope to the CEA Retail Agreement will be entitled to annual holiday with pay calculated on the
following basis;

Up to 2 years service	*= 22 days*
2 years service w more but no more than 3 years service	*= 23 days*
3 years service or more but no more than 4 years service	*= 24 days*
4 years service or more but no more than 5 years service	*= 25 days*
5 years service or more but no more than 10 years service	*= 26 days*
10 years service or more but no more than 15 years service	*= 27 days*
15 years service or more but no more than 20 years service	*= 28 days*
20 years service or more	*= 29 days*

There is some handwritten annotation on the version in the bundle, where the text " = 37" and " + 7 days B H " and " + 1 Floating day" and "8" encircled, have been added.

7.3 In relation to sick pay, these provisions are at clause (21), pages 49 and 48 of the bundle, in these terms:

(21) CO-OPERATIVE FOOD SICK PAY

If you have completed 12 months or more continuous service, subject to The Co-operative Food's absolute discretion, which shall not be unreasonably withheld and subject to your compliance with all procedures, you may receive The Co-operative Food Sick Pay, up to the maximum as detailed below . The entitlements relate to any rolling 12-monlh period

Table of Maximum Sickness

Length of Continuous Employment	*Allowance - Weeks*
Less than 1 year	*0*
1 year or more but less than 2 years	*1*
2 years or more but less than 3 years	*2*
3 years a more but less than 4 years	*4*
4 years or more but less than 5 years	*6*
5 years or more but less than 6 years	*9*
6 years or more but less than 7 years	*13*
7 years or more but less than 8 years	*18*
8 years or more but less than 9 years	*22*
9 years or more but less than 10 years	*26*
10 years or more	*30*

3 Waiting Days

Should you have commenced employment with The Co-operative Food on or after 1st August 2007, the 3 waiting day rule will apply, which means that The Co operative Food Sick Pay will not be paid for the first 3 days of each or any period of sickness absence, regardless of the duration.

[N/a]

Upon attaining 3 years or more continuous service, the 3 -waiting day rule will cease to apply and sickness entitlement will be in accordance with the table above.

And:

(22) ABSENCE FROM WORK - SICKNESS

Notification of Sickness Absence

If you are absent from work through sickness, accident or any other reason, you must follow the procedures set out below; -

You must personally speak to a member of the management team regarding any absence as soon as you know that you are unable to work. At the latest , you must call by 10 00am or 1 hour before your normal start lime, whichever is earlier. Notification by text message or e-mail, etc is not acceptable.

This notification must be made on your first day of absence, stating the reasons for the absence, the probable duration of the absence and any other relevant information.

You must contact management on a daily basis for the first week of absence and once a week, thereafter unless alternative arrangements are specifically agreed with your manager.

Notification of Intention to Return to Work

It you are absent from work for more than 1 day, you must personally telephone your manager the day before you anticipate retuning to work to confirm and clarify your start time.

Should your manager have concern as to your ability to resume your normal duties, they may request that you to see your doctor in order to obtain a sign-off certificate to indicate you are fit to work.

7.4 In 2011 there was a negotiation between USDAW and the Co-Operative Group as to new contracts for workers in their food stores. The result was a new standard form of principal terms of employment applicable to workers at the claimant's grade. The claimant , amongst others, was sent details of the new proposed Management Terms and Conditions by letter from her union, USDAW, dated 11 March 2011 (pages 62 and 63 of the bundle). The draft Statement of Principle (sic) Terms of Employment (pages 69 to 75 of the bundle was sent to her. It was balloted upon, agreed, and as a result of the collective agreements between the union and the Co-Operative Group, these terms became the terms upon which the claimant continued to be employed by the Co-Operative Group.

7.5 They included (page 71 of the bundle):

7. HOLIDAYS

Annual Holiday Entitlement

The Group's holiday year begins on 1st April and ends on 31st March each year. You are entitled to paid holiday in accordance with the table below which includes your entitlement to all public holidays as described below.

Under 5 full year's service as at 31st March	*36 days*
Between 5 and 15 full years' service as at 31st March	*38 days*
15 full years' service or more as at 31st March	*39 days*

And:

If you are not able to use all of you annual entitlement to paid holiday you may carry forward up to 5 days entitlement with the agreement of you line manager. Any other unused holiday entitlement will be forfeit.

Customary holidays

Nine days have been included in your annual holiday entitlement to reflect this fact. There is no entitlement to additional time off in lieu for working on a customary holiday. If you wish to take a day's leave on a customary holiday you should apply to book this as a holiday in the usual way.

7.6 In respect of sick pay, the applicable terms were:

8. SICKNESS ABSENCE

All employees are entitled to Group sick pay, as soon as they have completed 12 month's service. Group Sick Pay includes any entitlement to Statutory Sick Pay.

[The table set out in para. 7.3 above is then replicated]

And further:

Withholding Group Sick Pay

Group Sick Pay will not ordinarily be withheld in cases of genuine sickness. The Group does however reserve the right to withhold sick pay:

• from colleagues who fail, with cut good cause, to follow the Group's absence reporting procedures;

• from colleagues facing disciplinary proceedings, which includes the investigatory stage;

• from colleagues who unreasonably refuse to consent to the Group accessing medical records/reports or to attend medical examination s/assessments.

7.7 On or about 19 May 2014 there was a TUPE transfer of the claimant's employment from the Co-Operative Group to Martin McColl Limited ("McColl's" - see page 77 of the bundle).

7.8 There were no changes to the claimant's terms and conditions of employment whilst she was employed by McColl's, and on 1 April 2021 there was a further TUPE transfer of the claimant's contract of employment from McColl's to the respondent (see pages 79 to 79 to 92 of the bundle).

7.9 Prior to the transfer McColls conducted consultation with the claimant and her colleagues , commencing on 9 March 2021 (see pages 93 to 102 of the bundle).

7.10 In the claimant's individual consultation document (pages 96 to 99 of the bundle) dated 11 March 2021 the claimant mentioned that she had transferred over on Co-Operative terms and conditions, and that she had nearly 8 weeks holiday entitlement.

7.11 In the "Envisaged Measures" document (Pages 100 to 102 of the bundle) , prepared it seems by McColl's, and supplied to the respondent in or about March 2021, in the section detailing the terms applicable to the McColl's Retail Group, the details provided under Annual Leave (page 100 of the bundle) are an entitlement based on 28 days per annum, and a holiday year running from 1st January to 31st December, and under Sickness (page 101 of the bundle) reference is made to Company Sick Pay, said to be paid at the discretion of the company, for Store Managers or Relief Managers, up to a maximum of 8 weeks for those with over 10 years service. All other colleagues were entitled to SSP only. In the information provided to the respondent prior to or at the time

of the transfer (pages 145 to 148 of the bundle) the claimant is described as “Deputy Manager”, and her previous service with the Co-Op is referred to.

7.12 Whilst the claimant agreed to one variation of her terms of employment, in relation to the day of the month on which she was paid (see page 103 of the bundle) , she did not agree, nor was she asked to , to any others.

7.13 The claimant was off work sick from 4 July 2021. She went to her GP, and obtained a fit note for 2 weeks , to 18 July 2021 (page 104 of the bundle). She continued to be unwell, and so remained off work, and obtained a further fit note for the period 18 July 2021 to 25 July 2021 (page 105 of the bundle), and thereafter remained off work , with fit notes covering the periods in question until 20 August 2021 (pages 106 and 107 of the bundle). In terms of notification, the claimant took a fit note into the shop the day before her next shift was due to start. Thereafter the claimant took her further fit notes into the shop . It is agreed that the claimant remained off sick until her resignation on 22 October 2021.

7.14 The claimant received only SSP during this period, which she realised when she received her payslip for August 2021 (which does not appear to be in the bundle) .

7.15 Consequently, on 9 August 2021 the claimant wrote to Ramesh Chauhan of the respondent (page 108 of the bundle) raising a grievance that she had only been paid SSP, when she pointed out that she had a contractual right, as had been transferred pursuant to the TUPE transfer to the respondent , to full payment of sick pay.

7.16 Ramesh Chauhan replied in an undated letter (page 109 of the bundle) that all payments had been made in line with the information provided by the previous employer, and asking the claimant to provide a copy of the contractual obligations that she was referring to so that the issue could be resolved.

7.17 The claimant replied on 16 August 2021 (page 110 of the bundle) , pointing out her entitlement under the Co-Op terms and conditions, a copy of an extract from which she attached (page 111 of the bundle).

7.18 Ramesh Chauhan replied (again undated, page 112 of the bundle) asking for a copy of the claimant’s full employment contract, and the claimant replied on 19 August 2021 (page 113 of the bundle) informing him that a meeting with her union representative present should be arranged, or she would start proceedings.

7.19 Ramesh Chauhan considered that the matters raised should be considered by way of a grievance procedure, and by letter of 27 August 2021 (pages 114 and 115 of the bundle) he arranged a grievance meeting with a consultant from Peninsula Face2Face for 2 September 2021.

7.20 Zainab Gani of Face2Face was appointed to hear the grievance, and did so on the date arranged. The claimant was accompanied by Nick Gerrard in that meeting, Ramesh Chauhan was not present for it.

7.21 Zainab Gani prepared a report, dated 29 September 2021 (pages 116 to 121 of the bundle). Her conclusion and recommendations were that the claimant had indeed an

entitlement to sick pay , and at paras.34, 42 and 43 of her report, upheld this part of the claimant's grievance, finding that the respondent should pay her the higher level of sick pay that she had claimed.

7.22 Despite Zainab Gani recommending specifically (para.46 of her recommendations, page 121 of the bundle) that a copy of the report in its entirety should be made available to the claimant , it was not. It was provided to the respondent around 21 October 2021 (an email in which Ramesh Chauhan refers to this has been disclosed in an email from the respondent's representative on 12 January 2023) , but never disclosed to the claimant until disclosure in these proceedings.

7.23 On 8 October 2021 the claimant resigned, giving notice (page 141 of the bundle).In her letter she made reference to her entitlement to 8 weeks holiday, and, as she had taken 1 week, she had an outstanding balance of 7 weeks.

7.24 On 12 October 2021 the claimant wrote further to the respondent asking for a copy of the grievance report, having initially contacted Zainab Gani for it. She asked that it be supplied within 7 days. Ramesh Chauhan replied in the email referred to above on 21 October 2021.

7.25 On 5 December 2021 the respondent made its final payment to the claimant. The relevant payslip of that date is at page 153 of the bundle. The claimant was paid £198.69 by way of holiday pay. No explanation of how this had been calculated was provided to the claimant at the time. Whilst the respondent has suggested that pages 143 and 144 of the bundle do set out the calculation, with respect, they do not, and they are, in any event internal documents, one is undated, and the other is dated 22 April 2022.

8. Those, then, are the relevant facts, and not much was disputed on the evidence.

The submissions – the oral submissions.

9. In terms of the submissions, both parties initially made oral submissions, during the hearing. For the respondent , Ms Kennedy – Curnow submitted in fairly brief terms that the claimant had not shown that she had the entitlements that she was seeking. The respondent had never been informed of these entitlements, and had withheld the sick pay because he (in the person of Ramesh Chauhan) had a discretion to do so. No other employees had this alleged entitlement, and he had not been informed of it. When the clauses were examined, the respondent considered that the claimant had not complied with the reporting conditions applicable. She had not telephoned. He therefore had made the decision not to pay her the sick pay. In any event, the clause was a ceiling, not a floor, the employer only agreeing to pay "up to" a maximum, it was not an entitlement. Once the respondent was given the opportunity to make an informed decision, it had done so. She commented upon the schedule of loss, and contended that the claimant had only an entitlement of 29 weeks of holiday accrual. She reiterated the case on the holiday year. It was the respondent's case that McColl's had paid the claimant up until the transfer date.

10. For the respondent Mr Gerrard submitted that the wages claimed were properly payable under s.13 of the ERA. Whilst there must be some legal entitlement, the claimant had shown that she had one. He contended that the respondent was in breach

of the ACAS Code of Practice, and sought an uplift. He addressed the facts, and the effect of the new terms in 2011 negotiated between USDAW and the Co – Op. When the claimant transferred to McColl's she would not accept their terms and conditions, and remained on the terms as transferred. On the transfer to the respondent it had been clear that the claimant still had 7.8 weeks of holiday entitlement.

11. Turning to the sick pay issue, the reasons now advanced for not paying were never raised during the grievance in 2021. He pointed out that there was no such justification advanced in the ET3 when it was filed. The respondent had no good reason for not supplying the grievance outcome, and had denied the claimant a chance to appeal. He sought the maximum uplift.

12. At the conclusion of the oral submissions the Employment Judge sought further submissions on then effect of the decision in ***New Century Cleaning Ltd v Church 2000 IRLR 27*** which was of potential application if the sick pay provisions were truly discretionary, and other details where the parties' respective cases were unclear.

The submissions - the subsequent written submissions.

13. Subsequent written submissions were received from Ms Kennedy – Curnow on 12 January 2023, and Mr Gerrard on 13 January 2023. They will not be repeated here, as their content will become apparent, and they are in any event on file.

14. Finally, and by way of further assistance to the Tribunal the parties also, at the Tribunal's request provided further details of their respective calculations of the holiday pay entitlement, highlighting where the differences arose.

Discussion and finding.

i)The claim for enhanced sick pay.

15. The claims made by the claimant are separate and distinct, although they both have their origins in the terms of employment upon which she was employed by the Co-Op, upon which, it is common ground now, she remained employed whilst employed by McColl's, and which accordingly were the terms upon which her employment was transferred to the respondent in April 2021.

14. This case therefore, does not turn upon what the relevant terms were, but upon the construction of those terms, and their effect.

15. Starting with the terms as to sick pay, there is no doubt that the terms of the Co – Op handbook provided for some form of discretion. Whether the decision in ***New Century Cleaning Ltd v Church 2000 IRLR 27*** is of any application, is doubtful. Whilst the Tribunal accepts that the respondent's analysis of ***New Century Cleaning Ltd*** is correct, and that if the right to be paid enhanced sick pay was indeed purely discretionary, this would present the claimant with a potentially difficulty. The respondent's argument , however, is predicated on the wording of the Co – Op Colleague Handbook , wherein the provisions as to sick pay entitlement are set out in para. (21) on page 15 of the Handbook (page 49 of the bundle) , where the payment of

Co-Operative Food Sick Pay is stated to be "subject to The Co-Operative Food's absolute discretion".

16. Were that to have remained the operative provision, the respondent's argument based upon ***New Century Cleaning Ltd*** would have much force. It did not, however. Rather, by the changes made in 2011, under the new contract, by clause 8 (page 72 of the bundle) the words "subject to The Co-Operative Food's absolute discretion" were removed. In their stead the term states that "All employees are entitled to Group sick pay, as soon as they have completed 12 month's (sic) service". There follow provisions (page 73 of the bundle) under which Group Sick Pay may be withheld, but the preamble states that such pay "will not ordinarily be withheld in cases of genuine sickness". There ensue three instances of when sick pay may be withheld, the first one being where colleagues fail, without good cause, to follow the Group's absence reporting procedures".

17. The respondent has rather overlooked this change in the wording of the relevant provisions. In its further submissions (para. 16) , it is stated that the claimant relies upon employee handbook at pages 24 to 61 of the bundle. She does not, she relies upon the terms contained in the Statement of Principle (sic) Terms of Employment document , which applied to her employment with the Co – Op Group from May 2011, and upon which her employment was transferred to McColl's, and thence onto the respondent.

18. Thus the right to enhanced sick pay was not discretionary at all, and the principles in ***New Century Cleaning Ltd*** do not come into play.

19. The respondent has, in the alternative , argued that the claimant's alleged failure to follow the absence reporting procedures disqualifies her from the right to be paid this sick pay. There is an inherent flaw too in this argument. Whilst , under the provisions cited, the employer had the right to withhold what would otherwise be payable, in certain specified circumstances, the respondent did not in fact do this. No decision was made not to pay the claimant this sick pay because she had not complied with the sickness absence reporting procedures, it was made because Ramesh Chauhan did not believe she had any such entitlement. His initial reply to the claimant's grievance of 9 August 2021 , which is undated, at page 109 of the bundle , was to the effect that all payments had been made to her "in line with the information provided to us by your previous employer". Failure to comply with sickness absence reporting procedures was thus not the reason for withholding the enhanced sick pay, ignorance of the claimant's entitlement was.

20. Thus, even if he had been entitled to withhold the claimant's entitlement in accordance with these provisions , (which the Tribunal doubts, as the failure to follow such procedures has to have been "without good cause", and the claimant clearly notified the respondent by the provision of fit notes delivered to the place of work, and left before she would have been obliged to inform the respondent of the date when she would return to work) , the simple fact is that Ramesh Chauhan did not in fact do so, so the claimant was, and remained , entitled to the payment of the enhanced sick pay. It cannot be the case that a respondent is entitled, months after the event, to rely upon the exercise of a discretion that it did not know it had, to disentitle the a claimant from an entitlement such as this. It is to be noted that compliance with absence reporting procedures was not a condition precedent to the entitlement to sick pay, the provisions

simply provide a right to the employer, in certain limited circumstances, to deny the entitlement. As the clause goes on to provide, any such decision would only be made after full and carful consideration of the facts. The time for any such consideration would be before the payment was due, which would be in the next pay period. The employer would not be entitled, in the Tribunal's view, retrospectively to decide not to pay, once the due date for payment had passed. Rather , by analogy with the cases on discretionary bonuses cited in argument, where, once the discretion has been exercised to pay a bonus, it then becomes due and payable, so when the employer has not exercised any discretion not to pay sick pay in these circumstances, the entitlement of the employee remains, and that sum becomes due and payable.

21. The term as to the need for the claimant to have three waiting days before this entitlement arose, was a provision in the Handbook (page 49 of the bundle and also would not have applied to the claimant in any event) which was also removed in the 2011 Statement, so there is no further basis for reducing the claim for full sick pay , as sought by Ms Kennedy – Curnow. The claim for sick pay therefore succeeds in full, subject to calculation.

Quantification of the sick pay claim.

22. In terms of the award , the claimant has set out in her Schedule of Loss her calculation:

The claimant's weekly pay was £357.24 (39 hours x £9.16 per hour)

The claimant was off work sick for 16 weeks (4 July to 22 October 2021

Sick pay therefore : £5.715.84 (16 x £357.24)

The claimant received SSP for the duration of her absence, in the figure of £1,888.46, on the respondent's case.

The claimant , however, disputes this, saying she has received only (and therefore should only have to give credit for) a total of £1,811.13. This is because "she received £346.86 in her November 2021 pay". The Tribunal, with respect , does not understand the claimant's case on this issue. The claimant's payslip for 5 December 2021 (page 153 of the bundle) shows a payment of SSP of £231.24, a different figure. The total amount of SSP paid to her is shown on page 149 of the bundle, as £1888.46. The Tribunal can see no reason why the total amount of SSP received (regardless of when it was received) should not be offset against the total enhanced sick pay that was due to her.

Company sick pay owed £5715.84 less SSP of £1888.46 = **£3827.38**

The award of the Tribunal is accordingly £3827.38 . This is a gross sum, from which the appropriate deductions for tax and national insurance must be made.

ii)The claim for holiday pay.

23. The first issue here is whether the claimant had a right to the enhanced holiday entitlement of, in her case 39 days, which she enjoyed under the Co – Op terms and conditions (page 71 of the bundle).

24.The respondent's position on this aspect of the claims is hard to discern. It formed only a brief part of Ms Kennedy – Curnow's submissions at the hearing. The respondent's case was that it did not accept that the claimant had this entitlement, the sole basis for which was that the respondent would not accept this because the claimant (or her union representative) had referred to a handwritten annotation to page 14 of the Co-Operative Food Colleague Handbook (page 50 of the bundle) where this enhanced entitlement had , to some extent, been handwritten.

25. That may be so, but the Handbook in question is dated 2008 (see page 61 of the bundle) , and the term relied upon was clearly a later addition. More relevantly, that term is a term in the revised standard form of principal terms of employment negotiated with the Co-Op in 2011as can be seen at pages 67 to 75 of the bundle. The claimant pointed out her entitlement during the consultation before the TUPE transfer to the respondent. The claimant's entitlement to 7.8 weeks was clearly stated in the employee information supplied to the respondent (e.g. page 145 of the bundle).

26. The respondent has, in short, no answer to this contention, and the claimant , the Tribunal finds had this entitlement at the time of the termination of her employment, and this claim too succeeds.

Quantification of the holiday pay claim.

27. In terms, however, of quantification of this claim, there remains a dispute in the calculation, accepting that the claimant did indeed have the higher contractual annual entitlement that she has successfully contended for.

28. The parties in further submissions and emails have set out their respective positions in respect of the calculation of the claimant's holiday entitlement, assuming that she established that she has the higher basic entitlement under the Co – Op terms and conditions of her employment.

29. Those positions are, firstly , both parties agree;

a) the Claimant has 39 day /7.8 week holiday entitlement which equates to 0.75 days entitlement per week.

b) 39 days includes bank holiday

c) 5 days holiday taken in May 2021 (39 hours)

d) £198.69 holiday pay was paid upon the claimant leaving employment (21.69 days)

They also agree her hourly rate of £9.16, and she worked 7.8 hours per day

30. The areas of dispute are the start date for the holiday year, whether the claimant had taken , and been paid for 63 hours of holiday prior to 1 April 2021, and whether she had taken and been paid for 6 bank holidays after that.

31. The claimant's case is as follows. She contends that the holiday year started on 1 January. She points out that McColl's holiday year runs from 1 Jan - 31 Dec, which is confirmed in page 100 of the bundle. In addition , no new measures were confirmed in TUPE consultation which is confirmed on page 97 of the bundle and reiterated in the respondent's letter to the claimant on page 103 of the bundle.

32. The claimant disputes that she has been paid for 6 bank holidays for the period of 1 Apr - 22 Oct as she worked the bank holidays with exception of one she was absent due to illness. The claimant would also point out that in this period, there are only 5 statutory Bank holidays, Good Friday, Easter Monday, two in May and one in August.

33. In her calculation of monies owed, the claimant disputes that she has taken holidays in the period 1 Jan - 1 Apr and accordingly believes the calculation for holiday pay owed is as follows;

Entitlement - 304.25 hours per year
Less:

-5 days holiday May 2021 (39 hours)
-£198.69 paid in Dec 2021 (21.69 hours)
-10 weeks of holiday year remaining (58.5)

=185.06 hours owed ; 185.06 x £9.16 = £1,695.14

In the alternative, if Tribunal finds that the Claimant has taken 63 hours holiday in the period for 1 Jan -1 April as shown in ELI information on p 147 , then the revised calculation would be as follows;

Entitlement - 304.25 hours per year

Plus 24.25 holidays carried over from 2020.

Less:

-63 hours
-5 days holiday May 2021 (39 hours)
-£198.69 paid in Dec 2021 (21.69 hours)
-10 weeks of holiday year remaining (58.5)

= 146.31 hours owed at £9.16 = £1340.19

34. The respondent's case is (now) that the holiday year runs from April – therefore entitlement is less (however it concedes that some holiday carried over from the previous year). The claimant's calculations do not include bank holidays, of which the respondent says 6 were taken between 1 April and 22 October 2021

35. Both parties refer to pages in the bundle which they say support their respective contentions, but these are from McColl's, and no witness has attended to explain them.

Discussion and Findings.

36. The first issue is what was the holiday year ? The claimant says it ran from 1 January, the respondent, from 1 April, each year (contrary, in fact, to what was submitted in its written submissions of 12 January 2023 but its position in its email of 24 February 2023). In terms of the history, under the Co – Op terms, as at 2011 (page 71 of the bundle) it was from 1 April each year.

37. The basis upon which the claimant so claims appears solely to be that in the Envisaged Measures document (pages 100 to 102) provided to her prior to the TUPE transfer, there is an entry "Our holiday year runs from 1st January to 31st December". That may well have been so for McColl's staff on McColl's terms and conditions. The claimant , however, was not, she was still on Co-Op terms and conditions.

38. The default position for when the annual leave year starts is that the leave year for the purposes of reg 13 of the WTR may be specified in a relevant agreement (reg 13(3)(*a*)). In the absence of such a provision, the leave year begins on 1 October in the case of any worker already employed on 1 October 1998, and in any other case on the date on which the employment begins and each subsequent anniversary of that date (reg 13(3)(*b*)).The claimant actually started her employment on 3 November 1996, but by 2011 the effect of the collective agreements and individual contracts of employment applicable to the claimant would be that her leave year then started on 1 April each year.

39. That, then would be the position upon the two subsequent transfers, first to McColl's, and then to the respondent. There is no evidence of any variation to that relevant agreement, and the statement in the Envisaged Measures document does not change that.

40. The Tribunal accordingly takes 1 April as the start of the leave year, and hence the starting point for any calculation of what pay in lieu of untaken holiday was due to the claimant upon termination. That renders the claimant's second calculation erroneous, as it applies the 63 hours into the wrong holiday year. The figure in the schedule of loss is also wrong, as it assumes the holiday year starts in Jannuary , whereas it starts in April.

41. The next issue is what was the claimant's entitlement on termination? The starting point again is the start of the holiday year, now established as 1 April . The claimant's employment ended , it is common ground , on 22 October 2021. All other things being equal, and ignoring the 63 hours taken and paid in the previous holiday year (see below), her entitlement , leaving part way through that holiday year , would be:

1 April 2021 to 2 October 2021 – 29 weeks and one day @ 0.75 days per week accrual

Holiday entitlement at termination : 21.82 days – 170.23 hours

To that, however, should be added the 24.25 hours carried over from the previous year:

Total accrued entitlement on termination therefore;

170.23 plus 24.25 =	194.48 hours
Less taken and paid – 5 days –	39 hours
Less taken and paid – 2.78 days -	21.69 hours

Total balance due : 133.79 hours @ £9.16 per hour = £1225.51

42. That, however, is on the basis that the claimant did not take and was not paid for any bank holidays. The Tribunal has no basis upon which to find that she did, and her evidence was that she did not. As the respondent has failed (in breach of its obligations to keep records under the WTR) to produce any records of the leave that the claimant actually took, the Tribunal accepts that there should be no deduction from this entitlement for bank holidays allegedly taken.

43. That leaves the issue of whether the claimant had been paid her holiday entitlement by McColl's prior to the transfer to the respondent. The documentary evidence on this is scant, but the respondent relies upon a document (in fact a document over 4 pages , 145 to 148 of the bundle) which was provided by McColl's , with employee details in preparation for the TUPE transfer. The claimant's details appear three lines up. They show that she had contracted hours of 39 hour, a holiday entitlement of 7.8 weeks (confirming the claimant's case on her Co-Op entitlement continuing) ,and on page 146, details of what purports to be her holiday entitlement and holiday taken. This appears to be working upon the (erroneous) basis that the claimant's holiday year started on 1 January , but in the "Paid Taken" column appears the figure "63.00", which is agreed to be a reference to hours. There appears a column at the end of this document "Balance as at 01/04" , where the figure of 15.3571 appears.

44. No witness has been produced to explain this document, and it is hard to reconcile the figures in it. It may suggest that as at 1 April 2021 the claimant had carried forward 24.25 hours from 2020 (on the McColl's 1 January holiday year basis) , which added to this entitlement (again from 1 January 2021) of 304.25 hours, would give her a total of 328.50 hours, which after deduction for the "paid taken" column, would produce a balance of 265.5 hours. It is, however, hard to make any sense of the ensuing columns.

45. This document is, however, some confirmation that the claimant took and was paid holiday from McColl's up until the date of the transfer on 1 April 2021. It is also clear from this document that the claimant had carried over 24.25 hours.

46. The claimant's case on this issue is unclear, and she does not deal with it in her witness statement.

47. The position as the Employment Judge sees it is this. If the claimant did take, but was not paid for, holiday prior to the transfer on 1 April 2021 any deductions from her wages would have been the responsibility of McColl's. That would, it is true , also have transferred to the respondent, but the date of any such deduction would have been when the payment should have been made. Normally, holiday pay is due the week or month in which the holiday is taken, or, perhaps , in the next pay period. If the claimant took,

but was not paid for, any holiday whilst still employed by McColl's then she should have brought any claim for unlawful deductions from wages within 3 months of the deduction being made. Even assuming that the last date for any such deduction to be made would have been April 2021, when her pay for March would have been due, if the claimant had taken any holiday up until the date of transfer, any claim for not being paid for it should have been made (in this case , now against this respondent) within three months. That would be by the end of July, maybe August, 2021 at the latest. These claims, however, were not presented until 1 February 2022. Further, the claim made in these proceedings is in respect of the sums due in respect of untaken holiday upon termination, not in respect of pay for holiday which had been taken, but which is unpaid.

48. The Tribunal cannot increase any award for unpaid pay in lieu of untaken holiday by the addition of other unpaid sums, which do not arise in the same way. Quite apart from that, the Tribunal is not satisfied on the evidence, that any such sums are due, and the Tribunal will not add them to the amount to which , it is satisfied, the claimant is entitled upon termination in respect of pay in lieu of untaken holiday.

49. The Tribunal's award, therefore , in respect of pay in lieu of untaken holiday is:

170.19 hours @ £9.16 per hour = **£1225.15**

Uplift for failure to follow the ACAS Code of Practice

50. Finally, the claimant seeks an uplift to any award that the Tribunal makes for failure of the respondent to follow a relevant ACAS Code of Practice. That failure is in relation to the respondent's failure to provide the claimant with the outcome of the grievance process, which was outsourced to Face2Face, whose report was dated 29 September 2021. Although it was supplied to the respondent on or about 12 November 2021, it was not disclosed to the claimant until these proceedings.

51.The respondent has proffered no explanation or excuse for this failure, other than in the ET3, where it is excused on the basis that the claimant had resigned. The claimant requested it directly from the respondent by letter of 12 October 2021 (page 142 of the bundle). Ramesh Chauhan does not address this issue at all in his witness statement, despite this being expressly pleaded in the rider to the claim form (para. 25, page 12 of the bundle).

52. The provisions whereby a Tribunal can make such an uplift are in the Trade Union and Labour Relations (Consolidation) Act 1992, s.207A, which provides:

207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) (N/A)
(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

53. In terms of a relevant Code of Practice, the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) is applicable. In relation to grievances it provides , under "Keys to handling grievances in the workplace" there appears (after setting out a process for holding a grievance meeting with the employee) :

Decide on appropriate action

40.

Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

Allow the employee to take the grievance further if not resolved
41.

Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.

42.

Appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance.

54. The respondent did none of this. Whilst the respondent was provided with the report, the claimant was not. No explanation or excuse has been provided. Whilst a right of

appeal was envisaged in the report (para. 49, page 121 of the bundle), the claimant was never advised of this.

55. The report, of course, upheld the claimant's grievance in respect of her sick pay entitlement. It did not deal with her holiday pay, as this issue had not arisen at that time. In the absence of any reasonable explanation from the respondent for the withholding of the report, the only inference that the Tribunal can draw is that it was withheld because it upheld the claimant's grievance, and hence her claim for enhanced sick pay. The respondent has, in the face of that finding, proceeded to defend the claimant's claim for that entitlement. There has not been, nor could there be, frankly, any contention that this was not unreasonable.

56. Whilst the provision of the outcome is the end of the process, and it can be said that the respondent did not wholly fail to comply with the ACAS Code of Practice, this failure, which also led to a failure of any right of appeal, was in the Tribunal's view , most serious, and deliberate. It was an attempt to conceal from the claimant (and until its disclosure, the Tribunal) that she had good prospects of success on this aspect of her claims. In these circumstances, the Tribunal does consider that the maximum uplift of 25% is appropriate, and this will be applied to the award in respect of (but only in respect of) sick pay.

Employment Judge Holmes
DATE: 3 March 2023

RESERVED JUDGMENT SENT TO THE PARTIES ON 6 MARCH 2023

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2400546/2022**

Name of case: **Mrs S Fielding** v **Sara's Group Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 6 March 2023

the calculation day in this case is: 7 March 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.