EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103838/2022

Held at Dundee on 1, 2 and 3 March 2023

Employment Judge W A Meiklejohn

Miss Paula Connelly	**Claimant** **In person**
Dr Karen McConnach t/a Maid in Dundee	**Respondent** **Represented by:** **Ms J McLaughlan - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(a) the claimant's claim in respect of underpayment of redundancy payment, having been withdrawn in the course of the hearing, is dismissed;

(b) the claimant's claim of unfair dismissal does not succeed and is dismissed;

(c) the claimant's claim in respect of itemised pay statements succeeds and the Tribunal makes a declaration that (i) the respondent failed to give to the claimant itemised pay statements at or before the times when wages were paid and (ii) the itemised pay statements subsequently given by the respondent to the claimant did not contain the amounts of variable deductions from the gross amounts of wages, and accordingly section 8 of the Employment Rights Act 1996 ("ERA") was not complied with in

these respects; but there were no unnotified deductions during the period of 13 weeks immediately preceding the claimant's application to the Tribunal and no order in respect of unnotified deductions is made; and

(d) the claimant's claim in respect of holiday pay does not succeed and is dismissed.

REASONS

1. This case came before me for a final hearing to deal with both liability and, if appropriate, remedy. The claimant appeared in person and Ms McLaughlan represented the respondent.

Nature of claims

2. In her ET1 claim form submitted on 13 July 2022, the claimant brought claims of unfair dismissal, discrimination on the grounds of religion or belief and holiday pay. She also claimed (a) a redundancy payment on the basis that she alleged the amount she had received by way of redundancy payment was incorrectly calculated, (b) that she had not received a contract of employment and (c) that she had not received payslips until after her employment had ended.

3. All of these claims were resisted by the respondent. The respondent's position was that (a) the claimant had been fairly dismissed by reason of redundancy, (b) her redundancy payment had been correctly calculated, (c) she had received the holiday pay to which she was entitled on termination of employment, (d) she had been provided with a contract of employment, (e) she had received her payslips when she requested them and (f) the claimant did not have a belief which came within section 10 of the Equality Act 2010 ("EqA").

Procedural history

4. A preliminary hearing for the purpose of case management took place on 9 September 2022 (before Employment Judge Jones). The principal outcome was that a further preliminary hearing was fixed to consider whether the claimant's claims of direct discrimination and harassment should be struck out as having no reasonable prospect of success in terms of Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 or, alternatively, whether the claimant should be ordered to pay a deposit in order to continue with those claims in terms of Rule 39.

5. EJ Jones explained to the claimant that to come within section 10 EqA, it was not enough simply to have a belief or opinion. She referred the claimant to the case of ***Grainger plc and others v Nicholson 2010 IRLR 4***. At the second preliminary hearing, which took place on 8 November 2022 (again before EJ Jones), the claimant described her belief in terms that she should be entitled to choose whether she should be vaccinated against the Covid-19 virus.

6. EJ Jones decided that while the claimant was entitled to hold that opinion, it did not meet the required standard to amount to a philosophical belief in terms of section 10 EqA. The claimant's claims of direct discrimination and harassment were struck out as having no reasonable prospect of success in terms of Rule 37(1)(a).

7. Following this decision the respondent submitted an application for expenses on 1 December 2022 in terms of Rule 76(1)(a) and (b). I heard the parties' submissions on this application on 3 March 2023 and have issued a separate Judgment dealing with this.

Preliminary matters

8. The claimant had an issue regarding the timing of provision by the respondent of holiday information and a copy of the notes of the appeal hearing which took place on 21 April 2022. Ms McLaughlan said that the respondent had been unable to prepare the joint bundle of documents in line with the timescale ordered by EJ Jones because there had been a delay on the claimant's part in providing her documents. The claimant explained that this was due to her suffering an accident which had prevented her from

using her computer. She (the claimant) confirmed that notwithstanding her issue about timing, she was ready to proceed.

9. Ms McLaughlan sought leave to add one additional document to the joint bundle, being a summary of the respondent's income from her business in the month of February in the years 2016 to 2022. The claimant did not object and I allowed this to be added.

10. I raised with the claimant her complaint that her statutory redundancy payment had been incorrectly calculated. I explained that I had looked at the calculation and, based on the dates of commencement and termination of the claimant's employment (which were not in dispute) and her date of birth, it appeared that her redundancy payment had been correct. I invited the claimant to consider this. It is convenient to record here that the claimant accepted in the course of the hearing that her redundancy payment had been correct, and she withdrew this part of her claim.

Evidence

11. I heard evidence from the respondent and the claimant. I also heard evidence from Mr C McCafferty on behalf of the claimant. I had a joint bundle of documents to which I refer below by page number.

Findings in fact

12. The respondent is a sole trader who has operated a cleaning business under the name "Maid in Dundee" for some 20 years. The claimant was her only employee, with the job title of Domestic Cleaner. The claimant's employment started on 30 November 2015.

13. The respondent operated her business from her home address. She did not have business premises. The work was carried out at clients' homes, with the respondent and the claimant working together. They travelled in their own cars. The cleaning materials were transported in the respondent's car.

Contract of employment

14. Shortly after the claimant's employment started she was provided with a contract of employment (77-80). In so finding I preferred the evidence of the respondent. I accepted that the respondent issued the contract in a form she had used for a previous employee. The document was not signed by either party which I believed might account for the claimant not recalling it.

15. A copy of the contract was requested by the claimant on or around 2 December 2021 and provided by the respondent on or around 7 December 2021. The slight delay was attributable to the fact that the respondent's father was ill at that time.

Clients

16. When the claimant's employment started the respondent had 31 clients. This number declined from March 2018 onwards and by the time the claimant's employment ended on 1 April 2022, the number of clients was 21. Client losses were recorded in a document prepared by the respondent (81) which indicated that these clients represented 22 hours of work per week. The respondent also provided a document headed "February Finances 2016-2022" (253) which showed income for that month declining from £2426 in 2016 to £1655 in 2022.

17. The claimant also prepared a list of the respondent's clients and what she estimated to be the hours worked for each (252). These estimated hours varied between weekly/fortnightly/monthly and so a direct comparison with the respondent's figure of 22 hours per week at as February 2022 was not possible. Also, the claimant's list did not reflect a client lost in January 2022.

18. There were some client gains and losses beyond those reflected in the parties' documents. One client left and then sought to return, but could not be accommodated. Looking at matters in the round, I was satisfied that the number of clients and the level of the respondent's income from those clients had declined from 2018 onwards.

Claimant's hours of work

19. The contract of employment provided (at clause 6) as follows –

> *"The hours of work will generally be between 09.00 and 14.00 Monday to Friday but on occasions you may be asked to work outside those hours. You are not guaranteed a minimum hours of work in any week but, where possible, you will be given your schedule for any week before that week commences."*

20. When her employment started the claimant worked between 18 and 22 hours per week. Her hours decreased as client numbers reduced. However, the respondent tried to provide the claimant with at least 16 hours per week as she understood the claimant needed this for the purpose of her entitlement to benefits.

21. At the time of the first national lockdown in March 2020 the respondent's business had to stop operating. The claimant was placed on furlough. While on furlough 80% of her wages would be covered by the Coronavirus Job Retention Scheme. However the respondent maintained payment at 100%, based on 16 hours per week. The business resumed operation when the easing of lockdown restrictions made it possible to do so.

Vaccination

22. When the Covid-19 vaccination programme was being rolled out in 2021, there were conversations between the respondent and the claimant about this. From these conversations it became apparent that the respondent was in favour of vaccination whereas the claimant had reservations.

23. The respondent regarded this as general conversation. She did not believe that she had put any pressure on the claimant to get vaccinated. She said that the claimant was entitled to her opinion.

24. The claimant said that her negative view about vaccination had developed between April and August 2021. This appeared to be based on publicity relating to side effects of the vaccines. The claimant came to regard discussions with the respondent about vaccination as harassment.

August 2021

25. Around this time the respondent carried out a risk assessment. The catalyst for this was growing concern about the Delta variant of Covid-19. The respondent's risk assessment was not documented. The outcome of the risk assessment was that the respondent decided to limit contact with elderly and vulnerable clients. The respondent reduced the claimant's hours of work to 10 per week, although she continued to pay the claimant for 16 hours per week.

26. This led to what the claimant called a "*falling out"* between the respondent and herself. The claimant had been off work with a viral infection following a period of annual leave, and returned to work on or around 23 August 2021 unannounced. There was a conversation inside a client's house. According to the claimant, the respondent told her that she was not taking Covid-19 seriously. The respondent did not believe this conversation could be overheard whereas the claimant thought it might have been. The respondent sent the claimant home, saying that she did not have enough cleaning supplies, and told the claimant to return on Wednesday 25 August 2021.

27. This reflected the fact that the claimant was not by then required to work on Tuesdays by reason of the reduced contact with elderly and vulnerable clients. According to the respondent, the claimant was *"not happy"* and *"got quite stroppy".*

28. When her hours of work were reduced to 10 per week, the claimant consulted ACAS and the Citizens Advice Bureau because she was concerned about her wages. The claimant was told that the respondent would still require to pay her for her contracted hours. The claimant did not discuss this with the respondent, but in any event the respondent continued to pay the claimant as if she was working 16 hours. The claimant described this as being *"blackmailed"* into getting vaccinated, but I regarded that as unfair and inaccurate. The respondent felt a sense of obligation to provide the claimant with pay for 16 hours per week.

29. The relationship between the respondent and the claimant became strained, with limited communication. According to the respondent, this continued for some months but things improved after the Christmas

2021/New Year 2022 holiday break. According to the claimant, things did not improve until a *"clearing the air"* conversation on 11 February 2022. Nothing turned on this difference of opinion.

Redundancy

30. By November 2021 the respondent considered that she was struggling financially. She told the claimant on or around 18 November 2021 that things were *"not great"* and that she (the claimant) should look for another job. According to the claimant this conversation took place in a client's driveway. The claimant complained in her evidence about the timing as it was three days before her daughter's birthday and the month before Christmas.

31. The claimant said that a further conversation took place shortly before Christmas 2021 when the respondent told the claimant she should not worry as she would not be paid off before Christmas. According to the claimant, this took place in the front porch of a client's house where a Ring doorbell was located.

32. There was then a discussion between the respondent and the claimant on 4 February 2022 which, according to the respondent, took place "*at the back of the car after a clean".* The respondent told the claimant that she was now at risk of redundancy. This was triggered by the loss of another client at the end of January 2022. The claimant's version of this was that, as they finished for the day, the respondent told her that she should *"ramp up"* her job search as she (the respondent) was not sure how much longer she would keep her on. I was satisfied that as from 4 February 2022 the claimant knew that she was likely to be made redundant.

33. There was another conversation on 9 February 2022. This took place inside a client's house. The respondent told the claimant that they should have a consultation process. She invited the claimant to think about any ideas for retaining her job. The claimant indicated that she was not comfortable speaking about this in a client's house and suggested meeting outside working hours. According to the claimant, the conversation continued at the next client's house (the one with the Ring doorbell). The claimant suggested meeting at a café on Saturday 12 February 2022.

34. There was a conflict in the evidence as to what happened next. The claimant's version was that she exchanged messages with the respondent after work on 9 February 2022 to ask, if she was to be paid off, when this would be so that she could advise the DWP. The respondent replied that they would discuss it the following day.

35. According to the claimant, there was a further conversation in a client's driveway after the last job on 10 February 2022. The claimant said that she has spoken to DWP and there was no limit on the number of hours she could work. She (the claimant) offered to change her hours to 10 per week. The claimant intended to look for another job to make up the hours. The respondent said this would not work. The claimant asked if that meant redundancy and the respondent confirmed this. The claimant asked when would be her last day and the respondent said she would pay her until 18 February 2022, and her notice would start from then.

36. The claimant's position was that she knew on 10 February 2022 that she would be on six weeks' notice as from 18 February 2022. She referred to a message she had sent a friend on 10 February 2022 (250) which included "*next Friday looks to be my last day".* There was a conversation between the parties on Friday 11 February 2022 but this was to *"clear the air".*

37. The respondent's version was that there had been no discussion on 10 February 2022. She and the claimant had spoken at the back of the car for about an hour on 11 February 2022. The claimant had suggested reducing her hours to 5 per week. The respondent said that she had thought about this but there were not enough hours of client work to do this. She had explained this to the claimant who seemed to accept it. Nothing more was said about meeting on 12 February 2022.

38. The respondent wrote to the claimant on 16 February 2022 (91). That letter began as follows –

> "*As discussed at our meetings in November and the 4th, 9th and 11th February, owing to a downturn in the business and my changed personal circumstances, I am very sorry to confirm that you have been selected for redundancy."*

The respondent's letter went on to refer to the claimant's entitlement to 6 weeks' notice. The letter was contradictory as to whether the claimant's employment would end on 18 February 2022 or 1 April 2022. It stated the amount of the redundancy payment to which the claimant would be entitled.

39. Notwithstanding the contradiction in the respondent's letter, it was common ground that (a) the claimant was not required to work her notice period which began on 18 February 2022, (b) she was paid as usual during the notice period and (c) her employment ended on 1 April 2022.

40. It was not easy to resolve the conflict in the evidence as to what happened on 10/11 February 2022. The claimant's version was supported by the message dated 10 February 2022 while the respondent's version was supported by the letter dated 16 February 2022. My view of this was –

(a) The parties worked together each working day so it was probable that something was said on 10 February 2022 which gave the claimant to understand that her last day at work would be 18 February 2022.

(b) This was confirmed by the respondent during the conversation on 11 February 2022.

(c) It was not material whether the claimant had offered to reduce her hours to 10 or 5 per week, but 10 seemed the more likely number.

Appeal

41. On 9 March 2022, a solicitor acting for the claimant emailed the respondent (92) seeking confirmation of the claimant's accrued holiday entitlement on termination of employment, and also querying the amount of the claimant's redundancy payment. The respondent replied on 10 March 2022 (94-96) explaining the redundancy payment calculation and confirming the amount of the claimant's holiday pay entitlement (£57.60). She also referred to an earnings arrestment schedule for a summary warrant in favour of Dundee City Council, and detailed the amounts to be paid to Scott & Co, Sheriff Officers out of the sums otherwise due to the claimant on 21 March 2022 and 1 April 2022.

42. The claimant wrote to the respondent on 15 March 2022 (97) appealing her dismissal. She referred to (a) processes and procedures not being followed, (b) discrimination/harassment relating to her views on the Covid vaccine, (c) her belief that the respondent had roughly the same number of clients as when she started and (d) the fallout in August 2021.

43. The appeal hearing took place by telephone on 21 April 2022. The claimant was accompanied by Mr McCafferty. Mr P Whitehead, who I understood to be the respondent's partner, acted as notetaker. The notes of the appeal were included in the joint bundle (99-100).

44. The claimant and Mr McCafferty criticised the notes of the appeal as being inaccurate and not reflective of how the discussion had taken place. Both denied that the claimant *"began repeating herself in an angry diatribe"* towards the end of the appeal, and also that the claimant had "*abruptly hung up".* The respondent's position was that the notes were not intended to be a verbatim account, and were accurate.

45. Despite their criticism of the notes, neither the claimant nor Mr McCafferty was able to point to any material mis-statement or omission when invited to do so, with one exception. That related to the claimant allegedly saying *"I can't get you on redundancy, but I can get you on procedure."* The claimant and Mr McCafferty both stated that the claimant did not say this. The respondent's position was that she had done so.

46. I was satisfied that the notes were broadly accurate, and that the claimant was afforded a reasonable opportunity to explain her grounds of appeal. I was also satisfied that the claimant had said the words quoted in the preceding paragraph. I preferred the evidence of the respondent on this issue because (a) one of the claimant's appeal points related to the procedure followed by the respondent, so it was credible that she should have referred to this near the end of her appeal and (b) it seemed unlikely that notes which were otherwise accurate would be wrong in this one respect.

47. The respondent wrote to the claimant on 10 May 2022 (101) to advise that her appeal was not upheld. The reason given was there were "*not enough*

hours to justify the position of Cleaning Assistant, a fact that you freely acknowledged at the hearing."

Payslips

48. The respondent used the PAYE system provided online by HM Revenue and Customs to calculate the amounts paid fortnightly to the claimant. In doing this, she entered information in the available fields. Payslips were not issued to the claimant for, according to the respondent, *"environmental"* reasons. The claimant requested her payslips following her dismissal and these were provided (124-246).

49. None of the payslips contained any reference to holiday pay. The respondent's explanation for this, which was not challenged, was that the claimant was simply paid as usual during periods when holidays were taken.

50. From some point in 2019 the respondent implemented an arrestment of the claimant's earnings served by Scott & Co acting on behalf of Dundee City Council. In implement of this arrestment, the sums of £14.88 and £213.58 were deducted from the claimant's earnings on 21 March 2022 and 1 April 2022 respectively. A deduction in a sum similar to £14.88 was made by the respondent from earlier wage payments, the exact amount depending on the claimant's earnings in the relevant pay period. The claimant accepted that these deductions were for her benefit in the sense that her debt to Dundee City Council was correspondingly reduced.

51. None of the deductions for amounts caught by the earnings arrestment was notified to the claimant on her payslips. The respondent understood that the claimant would know how much had been deducted because Scott & Co would advise her. The last unnotified deduction was made on 1 April 2022.

Holidays

52. The claimant's contract of employment included (at clause 9) the following provisions relating to holidays –

> *"(a) After you have completed your Probationary Period with the Employer, your holiday entitlement will be 28 days per year including statutory days.*
>
> *(b) At least eight weeks notice should be given and approval obtained for proposed holiday dates. In the event of too many employees requiring the same holiday period, adjustments may be required so that sufficient staff are available to the Employer to avoid disruption to the business.*
>
> *(c) Holidays not taken up before 1st December in any year will not be carried forward.*
>
> *(d) No holidays will be allowed in the period 1st December to 23rd December inclusive."*

53. What happened in practice was that the respondent and the claimant took their holidays at the same times, which they mutually agreed. These were during school holidays, because that suited both parties. The normal arrangements involved –

(a) One week during the Easter holidays.

(b) Two weeks (not necessarily consecutive) during the Summer holidays.

(c) One week during the Autumn holidays.

(d) Approximately two weeks during the Christmas/New Year holidays (depending on how the calendar and school holiday dates worked out).

54. The respondent kept a schedule on which she recorded the holiday dates. Sometimes long weekends would be taken. For the purpose of this case, the respondent prepared charts detailing the dates of the holidays taken by the claimant throughout her employment (103-105). These showed that the claimant had taken holidays as follows –

2015 – 6 days

2016 – 36 days
2017 – 35 days
2018 – 44 days
2019 – 32 days
2020 – 39 days
2021 – 28 days
2022 – 5 days

55. The claimant's position was that –

(a) Her holiday entitlement was more than the 28 days specified in her contract of employment, based on the aggregate of the weeks specified at paragraph 53 above. In other words, her contract had been mutually varied to reflect this increased entitlement.

(b) She had been unable to take some holidays due to periods of national lockdown, thereby losing holidays during one week in April 2020, two weeks in July/August 2020, one week in January 2021 and one week in April 2021. Days of holiday falling within a period of lockdown should be treated as lost, and should be carried forward for up to two years.

(c) She had not taken one week's holiday between 24 and 28 August 2020 nor two days' holiday on 27-28 April 2021.

Mitigation

56. The claimant told me that she had not worked or looked for work since her dismissal. She referred to the impact on her mental health and said that the DWP had declared her unfit to work or to look for work. She remained medically certified as unfit for work. She had no prospect of employment.

Submissions

For the respondent

57. Ms McLaughlan invited me to find that there had been a genuine business reason for the claimant's redundancy dismissal. There had been a full and reasonable consultation process. The respondent had met with the claimant, discussed alternatives to redundancy and had held off as long as

possible. The appeal was dealt with fairly. Ms McLaughlan submitted that the claimant's vaccination status had no impact on the decision to dismiss her. There was no evidence to support this.

58. Ms McLaughlan referred to the definition of redundancy in section 139(1) ERA and submitted that there had clearly been a downturn in work within the respondent's business. The business was already struggling before a further client was lost in January 2022. The requirement for two people to do the available work had ceased or diminished, so that it became unsustainable for the respondent to continue to employ the claimant.

59. Ms McLaughlan referred to ***Safeway Stores plc v Burrell 1997 ICR 523***. In that case the EAT, referring to the statutory predecessor of section 139(1) ERA, explained that there was a three stage process –

> *"(1) was the employee dismissed? If so*,
>
> *(2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,*
>
> *(3) was the dismissal of the employee….caused wholly or mainly by the state of affairs identified at stage 2 above?"*

60. In the present case, Ms McLaughlan argued, the answer was "yes" at each stage. The income of the respondent's business had declined so that it was no longer viable for her to employ the claimant. This was the only reason for the claimant's dismissal.

61. In terms of section 98(2) ERA, redundancy was a potentially fair reason for dismissal. The respondent had acted reasonably in terms of section 98(4) ERA. If the respondent had continued to pay the claimant for 16 hours per week, she would not have been able to pay herself for the hours she was working.

62. Ms McLaughlan referred to what the House of Lords said in ***Polkey v A E Dayton Services Ltd 1988 ICR 142*** (per Lord Bridge of Harwich) –

> "*….in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or*

their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

63. Here, Ms McLaughlan submitted, the respondent had engaged in reasonable consultation with the claimant. Their discussions took place outside clients' houses because the respondent had no business premises. The respondent did as much as could be expected. The respondent reasonably decided that the only alternative to redundancy offered by the claimant (reducing her hours) was not viable.

64. Ms McLaughlan argued that the falling out between the respondent and the claimant in August 2021 was unrelated to the dismissal. It was not credible that the respondent waited some six months to dismiss the claimant for that reason. The reason was clearly the loss of income in the respondent's business.

65. In relation to the payslips Ms McLaughlan accepted that there had been unnotified deductions but the monies which had been deducted had reduced the claimant's debt, and so there was no loss to her. Any award in this respect would give the claimant double recovery.

66. In relation to holidays, Ms McLaughlan pointed out that if the claimant believed she had lost holidays during the Covid-19 pandemic, she could have asked for these. She did not do so. The right to carry over holidays (with reference to the regulation 13(10) of the Working Time Regulations 1998) applied only where it had not been reasonably practicable for the worker to take holidays due to coronavirus.

For the claimant

67. The claimant said that her main issue was with the respondent's failure of process and procedure. Redundancy consultation had not been carried out correctly. There had been no formal meetings at which she could have had a witness present. Having a witness would have avoided the *"my word against hers"* situation in which the claimant found herself.

68. The claimant suggested that the respondent had overstated the loss of business. She argued that she could have covered work which the respondent had cancelled, particularly as the respondent's position was that her (the claimant's) vaccination status was not an issue.

69. The claimant submitted that her relationship with the respondent had been fine until their falling out in August 2021. That had been due to the claimant's decision not to be vaccinated. It had created a hostile environment for the claimant in the period prior to her redundancy dismissal, and that amounted to unfair treatment.

70. The claimant said that her holidays had always been more than the 28 days mentioned in the contract of employment. Holidays were taken at agreed times during the school holidays. That had become the official holiday position.

Applicable statutory provisions

Definition of redundancy

71. Section 139 ERA (**Redundancy**) provides, so far as relevant, as follows –

> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
>
> *(a) the fact that his employer has ceased or intends to cease –*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business –*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
>
> *have ceased or diminished or are expected to cease or diminish….*

Unfair dismissal

72. Section 94 ERA (**The right**) provides, so far as relevant, as follows –

(1) An employee has the right not to be unfairly dismissed by his employer….

73. Section 98 ERA (**General**) provides, so far as relevant, as follows –

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) ….

(b) ….

(c) is that the employee was redundant….

(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case….

Itemised pay statements

74. Section 8 ERA (**Itemised pay statement**) provides, so far as relevant, as follows –

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of –

(a) the gross amount of the wages or salary,

(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made….

75. Section 11 ERA (**References to employment tribunals**) gives a worker the right to refer to an Employment Tribunal for a determination if a statement given under section 8 does not comply with what is required. Section 12 ERA (**Determination of references**) provides, so far as relevant, as follows –

(1) ….

(2) ….

(3) Where on a reference under section 11 an employment tribunal finds –

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or

(b) that a pay statement….does not, in relation to a deduction, contain the particulars required to be included in that statement by that section….

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement…., the particulars of the deduction required by section 8….

Holiday pay

76. Regulation 13 of the Working Time Regulations 1998 provides for the right to four weeks' annual leave in each leave year. It includes the following –

> *(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).*
>
> *(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it is due.*

77. There is no provision equivalent to paragraphs (10) and (11) of Regulation 13 in Regulation 13A which provides for the right to 1.6 weeks of additional leave.

Discussion

78. I deal firstly with two matters raised by the claimant. In relation to her assertion that she did not receive a contract of employment, I found that she had done so as recorded at paragraph 14 above. In relation to her assertion that she had not received the correct amount of redundancy payment, the claimant accepted in the course of the hearing that she had done so (see paragraph 10 above) and accordingly this aspect of her claim requires to be dismissed.

79. I now deal with the other claims brought by the claimant – unfair dismissal, itemised pay statements and holiday pay.

Unfair dismissal

80. In terms of section 98(1) ERA, it was for the respondent to show a potentially fair reason for dismissal. If the respondent did so, I had to decide whether she had acted reasonably or unreasonably in treating that reason as a sufficient reason for the claimant's dismissal in terms of section 98(4)

ERA. I found it useful to approach this by adopting the three stage process referred to in ***Safeway Stores plc v Burrell***.

81. Firstly, had the claimant been dismissed? Clearly the answer to this was yes. Dismissal was admitted.

82. Secondly, had the requirements of the respondent's business for an employee to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? Again, the answer was yes. The evidence showed that there had been a downturn in that business. There were fewer clients and a reduced level of income. The number of hours of cleaning needing to be undertaken had reduced.

83. That brought matters within the definition of redundancy in section 139(1) ERA. The respondent's requirement for a Domestic Cleaner had diminished to the point where it was no longer viable for her to employ the claimant.

84. Thirdly, was the dismissal of the claimant caused wholly or mainly by the state of affairs identified at stage 2? Once again, the answer was yes. The claimant's perception that her dismissal was in some way linked to the events of August 2021 (and/or her views on vaccination) was misplaced. The respondent's actions in (a) continuing to pay the claimant as if she was working 16 hours per week when she was actually working only 10 hours, notwithstanding that the contract of employment guaranteed no minimum number of hours, and (b) retaining the claimant in employment for a further period of 6 months were inconsistent with there being any connection between the events of August 2021 (and/or the claimant's views on vaccination) and the claimant's subsequent dismissal. The only reason for that dismissal was redundancy.

85. I then considered whether the respondent had acted reasonably or unreasonably in treating the claimant's redundancy as a sufficient reason for her dismissal. I decided that question in favour of the respondent. The respondent's income from her business had reduced significantly, as highlighted in the summary of that income for the month of February between 2016 and 2022 (253). By February 2022, it had become untenable for the respondent to continue to employ the claimant. The business only

had some 22 hours of work per week, to be shared between the respondent and the claimant. There was a cost to the respondent in paying the claimant as if she was working 16 hours per week when in fact she was actually working 10 hours. In these circumstances, the claimant's dismissal by reason of redundancy was reasonable.

86. In terms of the procedure followed by the respondent in dealing with the claimant's redundancy, I did not agree with the claimant's criticisms. Section 98(4) ERA directs attention to the size and administrative resources of the employer. In this case, the respondent's business could hardly have been smaller or have had less in the way of administrative resources. It was unreasonable to suggest that meetings should have been conducted more formally than they were.

87. The respondent had no business premises within which meetings could be held. The requirement was for consultation in advance of redundancy, and that was what the respondent did. It was in the circumstances not unreasonable for her conversations with the claimant to have taken place on or outside clients' properties. It was more important that the claimant should be told that her job was at risk and that was what the respondent had done.

88. I therefore found that the claimant's dismissal by reason of redundancy was not unfair.

Itemised pay statements

89. The requirement in section 8(1) ERA is that the employer gives the worker a written itemised pay statement *"at or before the time"* the payment of wages or salary is made. It was accepted by the respondent that this was not done. Accordingly, the claimant was entitled to a declaration to that effect.

90. The requirement in section 8(2) ERA is that the written itemised pay statement should contain particulars of the gross amount of the wages or salary and the amounts of any variable or fixed deductions from that gross amount. This was not done in respect of the sums caught by the arrestment

and paid by the respondent to Scott & Co. Again, the claimant was entitled to a declaration to that effect.

91. The amounts deducted from the claimant's pay but not disclosed on her pay statements were unnotified deductions within the meaning of section 12(5) ERA. The last of those deductions was made on 1 April 2022. The claimant's ET1 claim form was submitted on 13 July 2022. In terms of section 12(4) ERA, only unnotified deductions made during the period of 13 weeks immediately preceding the date of the claim to the Tribunal can be the subject of an order by the Tribunal to pay the amount(s) so deducted. Accordingly, as the last deduction made by the respondent was outwith that 13 week period, the Tribunal could not have made an order in respect of it.

92. For the sake of completeness I should add that I would not have been minded to make such an order if the deduction had fallen within the relevant 13 week period. That is because (a) the respondent had told the claimant about the deduction – it was detailed in the letter sent to the claimant's solicitor on 10 March 2022 – and (b) the amount deducted had been applied for the claimant's benefit as it reduced her debt to Dundee City Council. I could appreciate that suffering a wage arrestment would not have felt like a benefit to the claimant at the time, but that was the effect of the deduction.

Holiday pay

93. I approached this by considering firstly the contractual position. The claimant's contract of employment specified an entitlement of 28 days per year including statutory days. It did not specifically state that the holiday year was the calendar year, but I considered that it could be implied from the references in subclauses (c) and (d) of clause 8 (see paragraph 52 above) to "*December"* that this was the position.

94. It was clear from the evidence that the claimant's holidays did not operate in the way foreshadowed in the contract. The claimant did not seek and obtain approval for holidays per clause 8(b). Rather, it was a matter of agreement between the respondent and the claimant when holidays would be taken, and the practice was to do so within school holidays (as described at paragraph 53 above).

95. I considered whether this arrangement had displaced or varied the terms of the contract of employment, so as to increase the claimant's annual holiday entitlement. I decided that it had not done so, and that days in excess of 28 in any calendar year were a matter of concession by the respondent. I came to this view because –

(a) The number of days taken each calendar year varied quite considerably (see paragraph 54 above) ranging from 28 to 44 and was not the same in any two years.

(b) The number of days taken in December and January was not fixed but varied according to the school holiday dates.

(c) It was evident that there was a degree of flexibility in the holiday arrangements to accommodate what was mutually convenient for the parties.

96. I found that the details of the claimant's holidays provided by the respondent (103-105) were credible. I accepted the respondent's evidence that they were based on records kept by her (being the schedule referred to in paragraph 54 above). I therefore found that (a) the claimant had taken not less than her contractual entitlement of 28 days' holidays in each full year of her employment and (b) the payment of £57.60 in lieu of holidays accrued but untaken on termination of employment had been correctly calculated.

97. I considered whether the claimant was entitled to benefit from the carrying forward of holiday entitlement in terms of regulation 13(10) and (11) of the Working Time Regulations 1998. I noted from material which is publicly available that –

(a) There was a national lockdown from 23 March 2020.

(b) Lockdown restrictions began to be lifted on 19 June 2020 and the lifting of restrictions continued into July 2020.

(c) There was a further lockdown announced on 26 December 2020 with stay at home reintroduced as from 5 January 2021.

(d) Lockdown restrictions began to be lifted on 2 April 2021.

98. According to the respondent's details of the claimant's holiday dates (103-105) –

(a) No holidays were taken between 28 February and 14 July 2020.

(b) Holidays were taken between 14 July and 3 August 2020.

(c) Holidays were taken between 24 and 31 December 2020 and between 1 and 8 January 2021.

(d) No holidays were taken between 8 January and 27 April 2021.

99. The right to carry forward holiday entitlement under Regulation 13(10) arises where it was not reasonably practicable for a worker to take some or all of his/her leave as a result of the effects of coronavirus. Regulation 13(10) does not provide that any holiday dates falling within a period of lockdown can automatically be carried forward. The leave to which Regulation 13(10) applies is the 4 weeks referred to in Regulation 13(1) but not the 1.6 weeks referred to in Regulation 13A.

100. I accepted the respondent's evidence that the claimant took 39 days of holiday in 2020. It followed that, even if the claimant *"lost"* 10 days of holiday during the Easter school holidays in 2020, she had made these up over the rest of the calendar year. For the avoidance of doubt, I make no finding that the claimant had *"lost"* those 10 days of holiday. If she had done so, I would not have been persuaded that it had not been reasonably practicable for her to take those days within the relevant holiday year. However, as she actually did so, the point became academic.

101. Turning to 2021, the claimant's position was that she had (a) lost one week's holiday in January 2021, (b) lost one week's holiday in April 2021 and (c) not taken holiday on 27-28 April 2021. The respondent's position was that the claimant had taken 28 days' holiday, including between 1 and 8 January 2021 (recorded as 6 days).

102. I decided that the days of holiday which the claimant was recorded as having taken in January 2021 should not be treated as holiday which it was not reasonably practicable for the claimant to take. This was because –

(a) I had no evidence about the January 2021 holiday dates to support the contention that these had been *"lost"* as holiday. I was not persuaded that the existence of a national lockdown necessarily meant that holiday dates which fell within the lockdown period required to be disregarded for the purpose of calculating a worker's holiday entitlement.

(b) I also had no evidence as to the practicability or otherwise of the claimant taking holidays later in 2021 to make up for the January dates said to have been lost. Given that the claimant had enjoyed more than 28 days' holiday in every other full year during her employment with the respondent, I considered it more likely than not that it would have been reasonably practicable for her to take the allegedly lost days at some point later in the year.

103. I noted that the claimant was recorded as taking Easter holidays in earlier years as follows –

2016 – 6-8 April
2017 – 3-7 April
2018 – 30 March and 2-6 April
2019 – No dates in March/April

104. I accepted the respondent's evidence in relation to these dates. I considered that this did not support the contention that, but for coronavirus, the claimant would have taken a week's holiday in April 2021. In other words, I was not persuaded that it had not been reasonably practicable for the claimant to take a week's holiday at Easter 2021 so as to trigger the right, potentially, to carry that holiday forward. I say "*potentially"* because the right to carry forward was dependent on my finding that it had not been reasonably practicable for the claimant to take some or all of her annual leave within the relevant holiday year. I did not so find (see paragraph 102(b) above).

105. Accordingly I did not believe that the claimant's accrued entitlement to holidays on termination of her employment was greater than the respondent reflected in the holiday pay given to the claimant upon termination.

Disposal

106. For the reasons set out above, the claims of unfair dismissal and for holiday pay do not succeed and are dismissed. The claim in respect of itemised pay statements succeeds to the extent of the declarations I have made.

Employment Judge: **W A Meiklejohn**
Date of Judgment: **9 March 2023**
Date sent to parties: **10 March 2023**