EMPLOYMENT TRIBUNALS

Claimant: **Mr A K Tewari**

Respondent: **The Trustees of Vishwa Hindu Parishad**

Heard at: **East London Hearing Centre**

On: **8, 9, 10 and 14 February 2023**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Ms Esther Godwins (an Advocate)

Respondent: Mr F McCombie of Counsel

JUDGMENT

Upon it being conceded by the Respondents that the Claimant was a worker for the purposes of the National Minimum Wage Act 1998 and the Working Time Regulations 1998.

1. **The Claimant was 'an employee' of the Respondent for the purposes of Sub-Section 230(1) of the Employment Rights Act 1996.**

2. **The Claimant was dismissed by the Respondents on 17 November 2020.**

3. **The Claimant's claim of unfair dismissal pursuant to Part X of the Employment Rights Act 1996 is well founded.**

4. **The Claimant's claim for notice pay brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is well founded.**

5. **The Claimant's claim for unlawful deduction from wages founded on the failure to pay him the national minimum wages during the 2 year period ending with his dismissal on 17 November 2020 is well founded.**

6. **The Claimant's claim that there was a failure to pay him accrued but untaken holiday pay pursuant to regulation 30 of the Working Time Regulations 1998 is well founded.**

And in respect of remedy

7. The basic award for unfair dismissal shall be reduced by 40% by reason of the Claimant's conduct before the dismissal.

8. The compensatory award for unfair dismissal shall be reduced by 40% reason of the Claimant's conduct before the dismissal which caused or contributed to the dismissal.

9. The Claimant acted unreasonably in failing to mitigate his loss and it would not be just and equitable to award losses postdating 1 August 2021.

10. The proper amount for an award to reflect loss of statutory rights and/or long notice is £500.

AND BY AGREEMENT as to the calculations

11. The Claimant is entitled to a basic award of £830.76 less 40% to reflect his conduct = £516.46.

12. The Claimant lost of wages for the period running from the end of the period for which he has received damages for wrongful dismissal to 1 August 2021 = £5,301.00.

13. The Respondent unlawfully deducted the sum of £6,831.84 from the Claimant's wages by failing to pay the national minimum wage between 18 November 2018 and 17 November 2020.

14. The Claimant is entitled to the sum of £1,513.68 in respect of accrued but untaken holidays.

15. The Claimant is entitled to £1,247.40 as damages for failure to give contractual notice.

The Awards:

16. The Claimant is entitled to a basic award of £516.46

17. The Claimant is entitled to a compensatory award of £5301.45 loss of wages + £500 loss of statutory rights (less 40% to reflect the Claimant's contributary conduct) (plus 18 % uplift to reflect the failures to follow the ACAS code. (£5301.45+£500.00) x 1.18 x 0.6 = £4,107.11

18. The Claimant is entitled to the sum of £6831.84 in respect of the claim of unlawful deduction from wages plus an uplift of 25 % to reflect the breaches of the ACAS code = £ 8,539.80

19. The Claimant is entitled to damages in the sum of £1247.40 by reason of the failure to give lawful notice

20. The Claimant is entitled to payment for accrued but untaken holiday pay in the sum of £1513.68

21. The Respondent is ordered to pay the Claimant the sums of £516.46 + £4,107.11 + £ 8,539.80 + £1247.40 + £1513.68 that is a total of £15,924.45

(which may be discharged by paying this sum less any deductions of tax and national insurance required by law)

22. Upon the Claimant stating that he has not received any state benefits during any relevant period and the Tribunal accepting that assertion it is declared that the recoupment regulations shall not apply to these awards.

REASONS

1. Vishwa Hindu Parishad is a registered charity whose objects include facilitating and promoting worship of the Hindu faith in the United Kingdom. The Respondents are the trustees of that charity. The Respondents operate a religious centre which was referred to interchangeably as a temple or as I understand it more properly, a Mandir from premises at 43 Cleveland Road in Ilford, East London ('the Mandir').

2. The Claimant has sufficient experience and knowledge of the Hindu faith to be regarded as a priest, or more properly, Purohit. He started volunteering at the Mandir from around 2013. He says that from around 2016 he worked full time at the Mandir and received a regular payment for his services. It is his case that the arrangement was a contract of employment.

3. On 17 November 2020 the Claimant was sent a letter summarily terminating the arrangement between him and the Mandir. He instructed a solicitor to act for him. On 14 December 2020 the Claimant solicitor invited the Respondents to permit the Claimant to appeal against his dismissal. The Respondents agreed to conduct an appeal and the Claimant attended a meeting on 29 January 2021 conducted by a Mr Christopher Edgley who is an independent human resources consultant. Christopher Edgley prepared a report dated 12 February 2021 he concluded that, whilst the Claimant has been guilty of some misconduct, the dismissal was unjustified and recommended that the Claimant was reinstated on terms which he believed reflected the existing arrangement.

4. The Claimant had contacted ACAS for the purposes of early conciliation on 5 January 2021 receiving an early conciliation certificate on 29 January 2021. On 3 March 2021 the Claimant presented his ET1 to the Employment Tribunal. He has brought claims of unfair dismissal, a claim for notice pay, a claim for holiday pay and for other arrears of pay which the parties have clarified was intended to refer to a claim for unlawful deduction from wages representing the difference between what the Claimant was paid and the national minimum wage.

5. On 11 March 2021 the Respondents wrote to the Claimant and informed him that they were accepting Mr Edgley's recommendations. They stated that the Claimant would be given a Final Written Warning. They further stated that the Claimant would be provided with a revised version of the casual 'Zero hour' contract in due course.

6. These proceedings have got a surprising procedural history. The Respondents applied to strike out the Claimant's claims on the basis that he was not employed under a contract of employment and that he was in any event unable to maintain a claim for unfair dismissal because any dismissal that took place on 17 November 2020 had vanished when a decision was taken on the appeal. Employment Judge Hallen heard that application on the 9, 10 and 11 of December 2021. He decided that the claims should not be struck out and gave very short reasons for his decision.

7. In 2021 the Claimant brought further proceedings in the High Court of Justice including claims for defamation. Those claims were struck out and it appears that permission to appeal those decisions has been refused by the Court of Appeal at least in respect of the majority of the defendants. The Claimant was ordered to pay a substantial sum in costs. The Respondents say has not paid anything under that costs order.

The hearing

8. At the outset of the hearing I was anxious to ascertain what the real issues were between the parties. In discussions the following concessions were made by the parties:

8.1. that the Claimant was a worker for the purposes of his claim for holiday pay and for the purposes of his entitlement to the national minimum wage; and

8.2. that if I were to hold that the Claimant was dismissed on 17 November 2020, then that dismissal was unfair; and

8.3. that the Claimant was no longer contending that he was dismissed for a health and safety reason and that his dismissal was automatically unfair.

9. The Respondents position was that the dismissal on 17 November 2020 vanished when the decision was taken to 'reinstate' the Claimant after the appeal. It took me some time to understand the Claimant's position. What emerged was that the Claimant's primary position was that the dismissal did not vanish at all but that if it did the actions of the Respondents sending him the letter of 11 March 2021 which purported to reinstate him amounted to an express dismissal. I asked whether the Claimant was arguing in the alternative that he had been constructively dismissed and I was told that he was not.

10. The witness statements of the parties included a large amount of material about whether the Claimant had, or had not, committed various acts of misconduct before his dismissal. Given that there had been a concession that if the Claimant was dismissed on 17 November 2020 it was unfair then it would only be necessary for me to deal with that evidence on the question of whether or not the Claimant had caused or contributed to his dismissal and even then only if I were to accept that that was the operative dismissal.

11. I was told that in the light of the concession by the Respondents that the Claimant was a worker the remaining disputes about holiday pay and wages were limited to disputes about quantum.

12. I therefore directed that we commence the hearing dealing only with the following issues of liability these were:

12.1. Did the Claimant had 2 years of continuous service under a contract of employment immediately before his dismissal on 17 November 2020? ('the employee issue')

12.2. Was the Claimant dismissed (either on 17 November 2020 or on 11 March 2021

12.3. That first issue required the tribunal to decide whether or not the effect of the decision taken on the appeal was to extinguish the dismissal of 17 November 2020 (the vanishing dismissal issue).

12.4. If the dismissal of 17 November 2020 was extinguished was the Claimant dismissed by the Respondent on 11th of March 2021?

12.5. If so, was the reason for the dismissal for a potentially fair reason falling within section 98(1) or (2)?

12.6. If so, was the dismissal fair applying the test set out in section 98(4) of the Employment Rights Act 1996?

12.7. If the appeal did not extinguish the dismissal 17 November 2020 then the parties agreed that the dismissal was unfair.

13. The Claimant was assisted at all times by an interpreter provided by the Tribunal Service. He explained that despite having a law degree and having passed his Legal Practice Course he was not comfortable giving evidence in the English language because of his strong accent. I was asked and agreed to allow the interpreter to assist Ms Godwins to take instructions from the Claimant. There was little practical alternative and I took a pragmatic stance that as long as the Interpreter understood his primary duty was to the Tribunal and not either party and that he did not reveal any privileged information permitting this course of action would allow the case to proceed smoothly.

14. Having taken a surprising amount of time to agree what was in dispute we proceeded to hear evidence. I heard from:

14.1. the Claimant himself; and

14.2. Vijay Khetarpal, the chairman of the Ilford Executive Committee and the person who sent the Claimant the letter sent on 11 March 2021; and

14.3. Dr Pratibha Datta, who was a person, co-opted onto the committee at the Ilford branch in order that she could give public health advice and one of the people that complained about the Claimant's conduct before his engagement was terminated on 17 November 2020.

15. Having heard the evidence I then heard submissions by both parties. Mr McCombie had produced written submissions and authorities. Ms Godwins had prepared written submissions in support of her client's case in which she referred to other cases. By the time I had heard submissions it was late on Friday 10 February 2023. Ms Godwins had indicated that she was in professional difficulties attending the tribunal on Monday, 13 February 2023. I therefore indicated that I would deliberate on that day and deliver a judgment on 14 February 2023. I would then proceed to deal with any other matters in the case.

16. I had prepared a written note of the reasons that I intended to give orally on 14 February 2023. Rather than read from that note I provided a copy to the parties with the caveat that, it was intended as a rapid way of giving reasons and that I would tidy it up if the parties formally sought full written reasons. I later gave oral reasons for my decisions in respect of remedy. The parties requested full written reasons for both decisions and I have combined those reasons in a single document.

17. Following my determination of the issues set out above we discussed what issues remained to be determined. The Respondent had formally admitted liability for claims of accrued but untaken annual leave pursuant to the Working Time

Regulations 1998 and a claim relating to a shortfall of pay by reason of a failure to pay the National Minimum Wage. That claim, by concession, had been brought only pursuant to part II of the Employment Rights Act 1996 as a claim for unlawful deduction from wages and was therefore limited to the period of 2 years ending with the date of presentation of the ET1. The parties had been able to agree the amount to be paid by way of an award subject to a dispute about whether the claims should be subject to an uplift by reason of a failure to follow a relevant ACAS code of practice.

18. The parties required me to adjudicate on the following issues in respect of the claim of unfair dismissal:

18.1. the parties had agreed the basic award payable under section 119 of the Employment Rights Act 1996 subject to the points below.

18.2. Whether I should make an order for reinstatement or re-engagement pursuant to sections 114 or 115 of the Employment Rights Act 1996?

18.3. There was no agreement about the loss sustained by the Claimant as a consequence of his dismissal and I was required to resolve the question of how much the Claimant would have earned had he not been dismissed.

18.4. The Claimant included in his schedule of loss a claim for loss of statutory rights claiming the sum of £3000. The Respondent agreed in principle that the Claimant was entitled to an award but suggested a conventional sum of £500 would be the most that was appropriate.

18.5. It was the Respondent's case that the Claimant had failed to comply with his duty imposed by section 123(4) of the Employment Rights Act 1996 to mitigate any loss. As a sub issue I was invited by the Claimant to find that the publication of an email newsletter giving details of his dismissal blighted his employment prospects.

18.6. I was required to deal with whether or not the tribunal considered that the conduct of the Claimant before the dismissal was such that it should be just and equitable to reduce the amount of the basic award pursuant to section 122(2) of the Employment Rights Act 1996; and

18.7. I also needed to ask whether the dismissal was to any extent caused or contributed to by any action of the Claimant and whether it would be just and equitable to reduce the compensatory award on that basis pursuant to section 123(6) of the Employment Rights act 1996

18.8. I needed to consider whether or not the compensatory award should be subjected to an uplift by reason of the admitted failure of the Respondents to follow the ACAS code of practice on discipline and grievances at work. If I were to order an uplift I was required to come to a conclusion as to the level of uplift.

18.9. The remaining issues were whether or not I should uplift the agreed amounts payable by the Respondents in respect of the failure to pay

holiday pay and the national minimum wage because of a failure to follow any ACAS code of practice.

19. In order to determine those issues the Claimant and Dr Pratibha Datta were recalled to give evidence on those issues. I then heard further submissions before giving a decision on the remaining issues.

20. The parties were asked to and did agree the amounts payable to the Claimant pursuant to the decisions I reached.

Findings of Fact – liability decisions

21. Having heard the evidence I make the following findings of fact. I do not set out the entirety of the evidence that I heard but have had regard to witness statements and oral evidence together with such documents in the bundle that the parties directed me to read. The fact that I may not mention some piece of evidence does not mean that I did not have it in mind in reaching these conclusions.

22. As I have set out above the Mandir at Ilford is a branch of the larger charitable organisation. It is run locally by a committee which is principally elected. There is an executive committee which comprises the Chairman the Secretary and the Treasurer who have delegated power to manage the Mandir on a day-to-day level. Within volume 2 of the bundle of documents was a copy of the constitution of the VHP (UK). That document says nothing about the terms upon which priests or other people doing work might be engaged. I was further supplied with a copy of bylaws of the organisation. Those bylaws provided for each branch to elect a committee. They further provided for the establishment of a Central Working Committee which was to be made up of the Founder/Permanent Trustees, the Chairpersons of each branch and the Secretary of each branch. One specific matter reserved to the Central Working Committee was expressed as:

'Any appointment on a subsequent release from duty of any employee including any Purohit shall be first referred to the Central Working committee who shall consider the matter and either approve or reject the same'

23. The Claimant started working as a priest at the Ilford Mandir in 2013. Initially he neither asked for nor was offered any remuneration directly for his services by the Respondents. The number of priests working at the Mandir varied. I further find that the opening times of the Mandir also varied from time to time. When the Mandir was closed no priest would be working. At various times there was, what was referred to as, a resident priest. That priest would be provided with accommodation at or close to the Mandir itself.

24. The core duties of the priests were to open and close the Mandir and to perform the religious rights throughout the time the Mandir was open. He would be required to keep the dais where the deities were placed clean by removing old offerings. He would be required to lead prayers and offer religious instruction to devotees. The Claimant was never given instructions about which prayers to say or about what he might say to devotees.

25. In 2016 a priest who had been working at the Mandir left. The Claimant was then asked whether he would fill the vacant position. He says that he was approached with *'a view to discussing formal employment'*. The Claimant was at the time studying for a law degree. There is no evidence that he or the committee members at the time gave

any great thought to formality. I find that the Claimant was asked to do many more hours than he had done as a volunteer. Within the bundle there is a letter from Dinish Agarwal who was at that time the assistant treasurer. That letter records the Claimant being paid a total of £600 for some days in January 2016 and February 2016. It goes on to say that following a meeting a decision had been taken to pay the Claimant £800 per month as 'a salary'. The Claimant says, and I accept, that at that time he was working in the region of 40 hours per week. The Claimant would have known that his salary was less than the national minimum wage. He was however content to agree the arrangement. I have seen an email sent by the Claimant on 29 October 2016 in which he writes to the then Chairman setting out that his duty hours were 5 PM to 8 PM Monday to Friday and 8 AM to 8 PM on Saturday and Sunday. That is a total of 39 hours. He goes on to say that he had worked 96 hours in excess of that and asked that he be paid £5 an hour but that his wages be donated to the Mandir.

26. The Claimant was paid £800 per month between March 2016 and November 2019. He says that he was not given particulars of employment or a written contract. It seems that during this period he did not question the arrangement.

27. I find that during this period the Claimant was asked to work such hours as were required. I do not accept that there was any agreement to guarantee the Claimant any specific number of hours. The flexibility in the arrangements is illustrated by what the Claimant says in his witness statement about events in September 2018. The Claimant says that he sought to reduce the number of hours he was working. The Respondents engaged another priest at that time and the Claimant suggests that he was told he would have no more work. It appears that the Chairman Darshan Chodha, wrote on the Claimant's behalf on 25 September 2018 suggesting that any dismissal was withdrawn. He said that the Claimant had been given his position on a permanent basis in early 2016 after completing 2 years of satisfactory works and that his salary had been fixed at £800 a month for 40 hours worked per week.

28. It appears that this dispute resulted in the Claimant being sent a draft contract of employment. That document is headed 'Contract of Employment'. In his closing submissions Mr McCombie accepted that had the contract been agreed to it would have amounted to a contract of employment. The contract provided for a 3 month probation period and thereafter the agreement would be initially for one year which may be extended. Within its currency the agreement could be terminated by one months' notice on either side.

29. The contract included a list of duties which set out the core duties of a priest which I have outlined above. Under a heading hours of work were terms setting out that the Claimant's normal hours of work would be 15 working from 5 PM to 8 PM on Monday, 8 AM to 5 PM on a Friday and with 3 hours on Saturday and Sunday on alternate weeks. The salary that is proposed was £300 'pro rata' plus 50% of 'Dakshinas' paid monthly in arrears. There was no additional payment for overtime.

30. The contract also provided for 'outside bookings' which needed to be booked by a Committee Member. There was a requirement that all outside income was shared 50/50. The contract states that the Claimant will be entitled to 2 weeks of annual leave at a time mutually convenient to himself and the management. He would not otherwise be paid for any absence through sickness or injury but was told that he would have to claim the Statutory Sick pay which he might be entitled directly from HMRC.

31. I find that 'Dakshinas' were gifts or sums of money paid directly by devotees to a priest. Traditionally but not invariably monetary gifts were in sums of £11, £51 or £101. These were generally made when a priest had conducted some ceremony.

32. The Claimant protested that he should not have to account for any 'Dakshinas' received by him. He took the stance that it was contrary to Hindu Teachings to require him to account for these sums. I was told, and I accept, that not all the priests agreed and that some did account for 'Dakshinas'. Other than being told that the Claimant was paid £11 for one particular ceremony the Claimant has not revealed how much he received by way of 'Dakshinas' from the congregation. After the Claimant protested he was not asked to account for any 'Dakshinas'.

33. The contract of employment provided for a grievance/disciplinary procedure. The disciplinary procedure was brief it stated *'All disciplinary issues will be dealt with initially by the person responsible for the Priest appointed by the Committee. If not satisfactory, the Management Committee will take the final decision'*. I find that the reference to a second decision if an earlier decision was unsatisfactory was a right of appeal.

34. The Claimant sent a long e-mail responding to the contract he was offered. He started by objecting to the imposition of a probation period stating that he had been employed since 2016. He then took issue with the description of the duties. He responded to a requirement that he make himself available for festivals by saying that he would agree that only if he had no previous commitments and he was paid a reasonable sum. He objected to what he saw was an instruction to keep the whole premises clean. I find that that was not the intention of the draft agreement but accept that it is not well worded.

35. The Claimant did not in his e-mail complain about the allocation of 15 hours per week. What he did say was that his rate of pay was less than the National Minimum Wage and he compared his pay with that of the resident priest who had free accommodation and some utility bills paid. The Claimant does not state in terms that there is no right to vary his hours of work.

36. I find that the Respondents did not pursue the issue of the written contract any further. I do not know why they took that stance. The Claimant was asked to, and did continue working as a priest for 15 hours per week and he was paid a regular sum of £300 each month. The Claimant says in his witness statement that he proceeded on the basis that his objections to the written contract had been accepted by the Respondents.

37. In March 2020 the Mandir was closed during what is usually referred to as the first lockdown. The other priests engaged by the Mandir had left at around the same time. The Claimant was asked to attend the Mandir and conduct prayers behind closed doors. I find that despite the fact that this would not have taken 15 hours per week the Claimant continued to be paid the same sum of £300 per week.

38. The Mandir reopened from 29 June 2020. There were a large number of measures put in place to attempt to restrict the spread of Covid 19. At this stage the Claimant was asked to undertake many more hours. I find that initially there was no discussion about adjusting the sums paid to the Claimant. Vijay Khetarpal said in his witness statement, and was not challenged upon this by the Claimant, that the delay in adjusting the Claimant's remuneration was because of the fact that the Committee was unable to meet because of covid restrictions. I accept that was the case. An increased payment was agreed and the Claimant was handed two cheques which he refused to

accept. They were subsequently posted and cashed by him. The decision that was made was to pay the Claimant £600 per month for the hours he was then working.

39. On 23 October 2020 a decision was taken by the Executive Committee, following advice from Dr Datta, not to hold any further congregations and to cancel a festival 'Akand Ramayan Path'. This was due to take place the following day. The Claimant did not agree with this decision. He sent an e-mail informing the Committee that he was not available for work on 24 October 2020 and asking to take the time off as 'casual/Annual' leave. The Claimant went and celebrated the festival in Leytonstone and he tells me, and I accept, that he was paid £11 as 'Dakshina'.

40. The Claimant sent a further e-mail on 26 October 2020 informing the Executive Committee that he was not available to work on 28 October 2020 as he had work as a priest elsewhere. He again asked to take the time off as Casual/Annual leave.

41. It is not necessary for me at this stage to deal with the disputes between the Claimant and the Committee specifically in respect of the precautions that needed to be in place during the Covid pandemic. It is sufficient to say that there were disagreements. The Respondents formed the view that the Claimant was disregarding instructions designed to keep the Mandir covid secure. That, and other matters, led to a meeting of the Executive Committee that took place in the absence of the Claimant. A decision was reached that his services would be terminated. That decision was set out in the letter of 17 November 2020. One of the matters that the Committee took issue with was the two occasions in October 2020 where the Claimant had, with short notice, informed the Committee that he would not be working.

42. As I have stated above, on 14 December 2020 the Claimant's solicitor suggested that the Claimant was afforded a right of appeal. It was suggested that the decision be taken by a member of the Committee who had not been previously involved with the decision to dismiss the Claimant. As I have said above a decision was taken by the Executive Committee to ask Christopher Edgley to review the decision and to make a recommendation.

43. Christopher Edgley met with the Claimant via Zoom on 29 January 2021. Christopher Edgley had statements from members of the Committee setting out their concerns about the Claimant. In his report Christopher Edgley is somewhat critical of the Respondents in particular commenting upon a lack of policies and the means of reaching the decision to dispense with the Claimant's services. He is also critical of the Claimant. He commented that the Claimant was fiercely critical of the Committee. He came to the conclusion that to some extent the misconduct alleged by the Committee was made out. He found that whilst it was sufficiently serious to justify a warning it was not sufficiently serious to justify dismissal. He states in terms that he is applying the test set out in the Employment Rights Act 1996. The conclusion he reached about the complaints about the Claimant giving short notice to work elsewhere included a finding that the Respondents had sometimes asked the Claimant to work at short notice. He went on to say *'On balance I believe both the management committees' action and AT's behaviour show a mutuality of obligation consistent with casual work rather than of substantive employment'*. He recommended that the decision to dismiss the Claimant should not be upheld. He suggested that the Committee *'re-engage the Claimant as a casual worker, ensuring the terms of his role, responsibilities and limits to his authority are clearly communicated and documented'*. He went on to recommend that the Claimant was given a final written warning.

44. I find that the Executive Committee consulted with the Central Working Committee and decided to implement Christopher Edgley's recommendation. In the letter of 11 March 2021 the Claimant was told that 'we have decided to re-engage you on the same terms as a casual (Zero-Hour Contract) worker'. The Claimant was also given a final written warning. At the foot of the letter the Claimant was told:

The new decision is that we will:

Re-engage you as a casual (zero hours contract) worker, only to be invited under explicit instructions of the VHP Ilford Mandir Chairman, to offer your priestly services, as and when required. As of now the Mandir is closed under the Covid-19 restrictions, your services are not presently required.

45. As of 11 March 2021 the Mandir was closed due to the renewed covid restrictions which were gradually relaxed during 2021.

Employment Status - The law to be applied

46. Section 230 of the Employment Rights Act 1996 provides definitions of the terms used in the Act. The material parts say:

> *s 230 Employees, workers etc.*
>
> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
>
> *and any reference to a worker's contract shall be construed accordingly.*
>
> *(4)….(6)*

47. The definition of 'employee' in Section 230 (1) of the Employment Rights Act 1996 turns on the meaning of the phrase 'contract of service' in sub section 230(3). That phrase is not defined but it has been understood as incorporating common law concepts of 'master' and 'servant' and the distinction between a 'contract of service' and a 'contract for services'.

48. In ***Market Investigations Ltd v Minister of Social Security*** **1969 2 QB 173, QBD,** Mr Justice Cooke said:

> *'the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task'*

49. The approach of Cooke J was considered 'useful' but not 'fundamental' in ***Nethermere (St Neots) Ltd v Gardiner and anor*** **1984 ICR 612**, CA. The privy Council in ***Lee Ting Sang v Chung Chi-Keung and anor*** **1990 ICR 409, PC** accepted that there was no single test for the existence of a contract of employment but said that the matter had never been put better than by Cooke J.

50. In ***Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** **[1968] 2 QB 497** it was said by Mckenna J that

> *'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'*

51. The approach of McKenna J has most recently been endorsed in the Supreme Court by Lord Clarke in ***Autoclenz Ltd v Belcher and ors*** **2011 ICR 1157, SC** where at paragraph 18 he described the passage above as the classic test for a contract of employment. He went on to add (at paragraph 19):

> *'Three further propositions are not I think contentious:*
>
> *i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service".*
>
> *ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo*

Publications Ltd v Tanton ("Tanton") [1999] ICR 693, per Peter Gibson LJ at p 699G.

iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at p 697G.'

52. In ***Carmichael v National Power plc*** **2000 IRLR 43** the House of Lords confirmed that there is an "irreducible minimum" of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

53. The requirement that the work be performed personally by the putative employee is also a necessary precondition in the statutory definition of worker. It is not necessary that the work is done exclusively by the putative employee/worker a limited power to delegate will not necessarily defeat employee or worker status. The circumstances where a power to delegate might be fatal to employment or worker status were fully explored in ***Pimlico Plumbers Ltd v Smith*** both in the Court of Appeal **[2017] ICR 657** and in the Supreme Court **[2018] ICR 1511**. In both courts it was held that a limited right to delegate would not necessarily be inconsistent with the dominant purpose of the contract being the provision of services personally. There is a useful discussion of the boundaries of the right to delegate in the Court of Appeal judgment of Etherton MR at paragraph 83 where, having reviewed the authorities, he said:

'In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'

54. The requirement for control will not be met merely because the putative employer can terminate the contract something more is required. It is necessary to demonstrate that the employer can, under the contract of employment, direct the employee in what he did see ***Wright v Aegis Defence Services (BVI) Ltd and ors*** **EAT 0173/17**. That is distinct from showing that the employer controls the way that the employee does the

work. Even a complete absence of day to day control is irrelevant if ultimately the employer retains the contractual power to direct what work should be done see ***White and anor v Troutbeck*** **SA 2013 IRLR 949, CA**.

55. There can be no exhaustive list of the features of any agreement that inform the question of whether it is or is not a contract of employment. The following might be relevant:

55.1. Who bears the financial risk of the arrangement?

55.2. Whether the remuneration is fixed or varies depending on results?

55.3. Who provides the facilities tools and equipment necessary for the performance of the work.

55.4. Whether the agreement provides for benefits such as sick pay, holiday pay and pensions? With the caveat that the employer cannot rely upon his own breaches of statutory duty to avoid an employment relationship ***Forest Mere Lodges Ltd*** **EAT0426/06**

55.5. Who pays any income tax is a relevant but not determinative factor ***Apex Masonry Contractors Ltd v Everritt*** **EAT 0482/04**

55.6. The label the parties have put on their relationship is also relevant but not determinative but may be of increasing importance in a finely balanced case – **see *Massey v Crown Life Insurance Co* 1978 ICR 590, CA.** The fact that a party has adopted one label does not mean that they cannot later retreat from that position - ***Young and Woods Ltd v West*** **1980 IRLR201, CA** and ***Smith v Goodmayes Insulations Ltd*** **EAT55/97 S**

55.7. What degree is the putative employee integrated into the business?

56. A checklist approach is not appropriate. In ***Hall (Inspector of Taxes) v Lorimer*** **1994 ICR 218, CA**, the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

> *'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation.'*

57. The assessment of the matters above requires an examination of what was or was not agreed in ***Autoclenz v Belcher*** **[2011] UKSC 41**, a was concerned with a complex written agreement the Supreme Court which the employees contended did not reflect the true agreement. Lord Clarke said:

'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.'

Discussion and Conclusions

Was the Claimant working under a contract of employment?

58. I need to address the three questions identified in ***Ready-Mixed Concrete***. The first of these is the question of whether the Claimant agreed to provide his services personally. There is little difficulty with that. There was no suggestion that the Claimant was not required to attend personally when he was asked to work. The Respondents have conceded that the Claimant is a worker. That status too requires that the contract include the provision of services personally. I am satisfied that the Claimant had agreed to provide any priestly services personally.

59. It is necessary for me to decide what was agreed between the parties about the quantity of work that would be offered to the Claimant and the associated question of whether the Claimant was obliged to accept some or all of the work that was offered. Unless there was at least an obligation to offer some work and a corresponding obligation to accept some work then there would not be the irreducible mutuality of obligations sufficient to found a contract of employment (or at least a contract of employment that existed in gaps between the work done – see ***Carmichael v National Power plc***. I need to make further findings of fact to determine what was agreed (if anything).

60. I have found above that from 2016 to 2018 the Claimant worked for around 40 hours. In 2018 an additional priest was recruited and the Claimant was then asked to work for 15 hours per week. It is clear that when rostering the Claimant's hours he was asked to give his availability. During the first lockdown the Claimant was only asked to perform prayers behind closed doors (but his pay did not reduce). When the number of priests reduced and the Mandir reopened the Claimant's hours were increased. On two occasions the Claimant told the Committee that he was taking leave to work elsewhere. The response of the Committee was to discipline him.

61. I find that the agreement between the parties was that the Claimant would be one of the priests at the Mandir and that he would be offered hours after a discussion with a member of the Committee as to his preferred times of working. The number of hours that the parties expected varied depending on how many other priests were engaged by the Mandir and turned in part on the decisions of the Committee as to when the Mandir would be open. I find that once the rota was fixed the Claimant was expected to work the hours that had been agreed. I find that during the currency of the arrangement neither party contemplated a situation where the Claimant might be offered no work at all. I find that the true agreement was that if there was work available then at least a fair proportion of that work, taking into account the availability of other priests, had to be offered to the Claimant. Once offered, absent ill health or similar, the Claimant was obliged to do the work.

62. I find that this is sufficient to satisfy the requirements identified in ***Carmichael v National Power plc.***

63. The next question identified in ***Ready-Mixed Concrete*** is the issue of whether the Respondent had sufficient control that this could be a relationship of master and servant.

64. It is common ground that the Respondents did not direct the Claimant in how to perform his spiritual duties. Whether they might have objected if the Claimant had departed from any orthodox Hindu teachings is untested because there is no suggestion that he did.

65. The Respondents did direct the days and times that the Temple would open. They did decide which festivals would or would not be conducted within the temple. As I have found above they decided how many priests would be engaged with a consequential effect on the hours of work that would be offered to the Claimant. They provided the Claimant with keys and directed him to open and close the Temple.

66. I find that some of the duties set out in the proposed employment contract reflected the terms that had been agreed. The Claimant was expected to be present at the Temple. He was expected to wear appropriate dress. He was expected not to use his mobile telephone during prayers. He was expected to keep the dais clean and tidy.

67. There were some aspects of the Claimant's work-life that the Respondents did not control. The Claimant successfully countered the suggestion that he needed to account to the Temple for a share of any Dakshina. He also declined to agree to account for any priestly activities he undertook outside his working hours.

68. I consider it important that the Respondents decided on how much the Claimant would be paid and that their decisions dictated how much work might be available for the Claimant to do. Ultimately they directed when the Claimant would work and how much he would get paid.

69. I remind myself that 'control' is only one of the matters I need to look at to decide whether this arrangement was a contract of employment. However, without a sufficient degree of control the arrangement would not amount to a contract of employment. In my view it is not significant that the Respondents did not direct the Claimant as to the performance of his spiritual duties. An absence of day to day control is not fatal to a contract of employment - ***White and anor v Troutbeck***. I am satisfied that there was a sufficient degree of control over the Claimant's work that this might amount to a contract of employment.

70. I turn then to the third question in ***Ready-Mixed Concrete***.

71. I consider that the following matters (terms) point towards the existence of a contract of employment:

71.1. the Claimant was appointed as a priest of this particular Mandir. He was regarded as 'one of the permanent priests' in contract to a volunteer or guest.

71.2. the Claimant worked for fixed hours on days that were agreed; and

71.3. he worked at the Respondents' premises using its facilities; and

71.4. he worked for a rate of remuneration that was set by the Respondent and not by him; and

71.5. The Claimant bore no financial risk but only in the sense that he would be paid whether or not he completed any particular amount of work.

72. The label placed on the arrangement by the parties is of some assistance. I find that in 2018 the label that was placed on the relationship by Darshan Chodra was that the Claimant was an employee. That is what he said in his e-mail protesting about the fact that the Claimant was told that he was no longer required. The Claimant was then offered a formal contract of employment. Mr McCombie asked me to find that the Claimant's reasons for rejecting that contract were consistent with him asserting that he was self employed and not an employee. I am not persuaded by that. The Claimant did object to clauses requiring him to be available for festivals but his objections were focused on the need for reasonable notice to changes in his working hours and, unsurprisingly, a suggestion that if he did additional hours he should be paid. The Claimant's objection to sharing Dakshina is not necessarily inconsistent with him being employed. There are other industries where gratuities are regarded as the property of employees. An objection to having to account for work done outside working hours is also not inconsistent with employment. I have regard to the fact that the Claimant used the phrase 'Casual/Annual leave' when he unilaterally changed his working hours in October 2020. I find that the Claimant knew that the respondents would be annoyed by his unilateral decision. The events took place against a background of disagreement about decisions about worship at the Mandir. There is some ambiguity about the Claimant's description of the leave. There is nothing in the reference to Annual Leave inconsistent with the Claimant being an employee. The Claimant says that in India the phrase casual leave is used to describe short periods of leave. I do not accept that the Claimant, with his knowledge of UK law was using the phrase in that sense. I find that the Claimant used the expression 'casual' because he wanted to get his way. In other correspondence the Claimant described himself as an employee.

73. I has some evidence that a new Chair of the Executive Committee had directed a member of the committee, with a legal background, to regularise the status of any employees. I consider that is consistent with an effort to ensure compliance with the requirements of the Charity Commission. It does not really help me with the status of the Claimant. No efforts were made to formalise his arrangements other than when he was offered a contract of employment in 2018.

74. It appears that neither the Claimant nor the Respondents have ever accounted for any tax or national insurance in respect of the Claimant's income or Dakshinas. That reflects badly on them all but does not tell me a great deal about the Claimant's status.

75. I find that the Claimant was permitted to and occasionally did work elsewhere as a priest. He has not told me how much he earned from that work. I am satisfied that that work was, other on the two occasions in October 2020, conducted in the Claimant's own time.

76. I consider the sums that the Claimant was paid and agreed to accept are somewhat remarkable. They are clearly less than the National Minimum wage. The Claimant knew that. I had given some thought to whether the parties regarded the payment not as wages but as a honorarium paid to a volunteer. I have discounted that. The Respondents have conceded that the Claimant was a worker. That is inconsistent with that suggestion.

77. I have considered whether there is any evidence that the teachings of the Hindu faith point towards or away from a contract of employment. There is one aspect of the arrangement that might suggest that there is no contract of employment which is the tradition of the faithful paying the priest Dahkshina as compensation for services. Had that been the entirely of the Claimant's income I find that that would be inconsistent with a contract of employment. Here the Dakshinas formed only a part of the Claimant's income.

78. There were no arrangements for holidays or sick pay. That is of less weight when the Respondents have failed to comply with a number of employment law obligations applicable to workers or employees.

79. Standing back from my findings of fact and looking at the entire picture I am satisfied that the contract in this case is consistent with the existence of a contract of employment. The Claimant worked regularly for the Respondents at times of their choosing and at rates of pay set by them. Whilst there are matters that point away from the existence of a contract of employment the overall picture is one of employment. I am satisfied that was the case.

The vanishing dismissal point

80. It is trite that where an employee exercises a contractual right of appeal against a dismissal and a decision is taken to allow that appeal then the employee cannot rely on the original dismissal for the purposes of bringing an unfair dismissal claim - ***Roberts v West Coast Trains Ltd*** **[2004] IRLR 788**. The effect of the successful appeal is to resurrect the contract. The following propositions emerge from the cases decided on this point:

80.1. That where an employer allows a contractually permitted sanction short of dismissal the employee cannot elect whether to accept that sanction or not and there is no termination of the original contract by reason of the sanction - ***Roberts v West Coast Trains Ltd***

80.2. The dismissal will vanish even where the employer takes no steps to implement the decision (or even refuses to do so) ***McMaster v Antrim Borough Council*** **[2011] IRLR 235, NICA**; ***Ladbrokes Betting & Gaming Ltd v Ally*** **UKEAT/0260/06**

80.3. That the decision on appeal need not even be communicated to the employee in order for the decision to have the effect of restoring the contract of employment. Its effect is 'automatic'. – ***Salmon v Castlebeck Care (Teesdale) Ltd*** **[2015] IRLR 189**.

80.4. It does not matter that the contractual appeal process is silent as to the effect of an appeal and does not provide expressly for the restoration of the contract if the appeal is successful. Any contractual right of appeal will be construed to have that effect unless contrary provisions are found in the contract ***Patel v Folkstone Nursing Home Limited*** **[2018] IRLR 924.**

80.5. If there are contrary provisions in the contract the effect of a successful appeal may be negated.

81. The question of whether it is necessary for the appeal process to be contractual is not as clear as it could be. In the recent case of ***Marangakis v Iceland Frozen Foods***

Limited **[2023] IRLR 140** the employee appealed a decision that her dismissal had vanished because she said she had made it clear that she did not want to be reinstated. The Employment Appeal Tribunal dismissed the appeal finding that, as the Claimant had not clearly withdrawn from the appeal process, the dismissal had vanished. The appeal proceeded on the assumption that the appeal process was contractual, a concession made by both sides. It is recorded that Counsel for both parties regarded the case of ***London Probation Board v Kirkpatrick*** **[2005] ICR 965** as having decided that the principle of a vanishing dismissal would apply in the same way to a non-contractual appeal process.

82. In ***Kirkpatrick*** the appeal process was formal and the EAT held that it was contractual. However the EAT did suggest that the principle was not dependant on the contractual position but was 'one of general application'.

83. I have read with care the authorities cited to me. In each case the appeal process was contractual. To address the question of whether the concept of a vanishing dismissal applies regardless of whether any appeal process is contractual I need to consider the legal basis for the concept. In my view it is clear that the basis is that of contract law. A dismissal cannot be unilaterally rescinded. The dismissal when a contractual appeal succeeds vanishes because that is what the parties have agreed will happen. The parties are bound by the terms of their agreement which will govern the effect of a successful appeal. I cannot see any contrary analysis in any of the cases cited to me.

84. I have come to the conclusion that in order for a dismissal to vanish the parties must have reached an agreement that that will be the case. If there is an contractual appeal process that will ordinarily be straightforward. The issue that is unresolved is when there is a non-contractual appeal process. What then?

85. ***Kirkpatrick*** provides persuasive authority for the proposition that the concept of the vanishing dismissal is of general application because it meets with the common sense approach to allowing both employees and employers to put matters right – see ***West Midlands Co-operative Society Ltd v Tipton*** **[1986] ICR 192**. How then does that fit into the contractual underpinnings of the decided cases?

86. I find that the answer to that is that whilst the right to appeal may or may not be contractual, in a non-contractual appeal process it remains possible for the parties to agree that if an appeal is allowed the result will be that the original dismissal will fall away. In other words whilst the process itself is not contractual the parties can agree to be bound by the outcome if the process is seen through to its conclusion.

87. I consider that that position is consistent with general principles of contract law. The proposal to conduct an appeal process (from whichever side) constitutes an offer which may be expressly accepted expressly o by conduct. The consideration is the opportunity to correct any errors made at first instance. That applies to both parties.

88. This analysis does not deal with the issue of continuity of employment. Where there is an express contractual appeal process the position is straightforward. The contract persists (for limited purposes) until the appeal is determined. Continuity would be preserved under Section 112(1) or Section 112(3)(c) of the Employment Rights Act 1996. In ***Kirkpatrick*** it was held primarily that continuity of employment could be bridged by a retrospective arrangement but alternatively that in that case the sophisticated appeals process amounted to an arrangement which was in place before the dismissal. In ***Welton v Deluxe Retail Ltd*** **[2013] IRLR 166** the EAT disapproved the suggestion that Section 112(3)(c) permitted continuity of employment to be preserved by an ex post facto arrangement. I consider that that decision is binding on me.

89. The conclusions I reach as to the law are:

89.1. That the legal basis for the vanishing dismissal concept are based on contract law: and

89.2. That it is possible for parties to agree to be contractually bound by the outcome of an appeal even where the process is not of itself contractual; but

89.3. For continuity of employment to be preserved the employee would need to establish that the custom or arrangement (being the appeal process) was in place before continuity was broken.

90. In order to apply that law to the present case it is necessary for me to consider whether there was an express or implied contractual appeal procedure.

91. The contract proffered to the Claimant did include an appeal process. The process is included in the contract of employment and, had it been agreed to it would in my opinion be binding. I do not think that the contract of 2018 was ever accepted by the Claimant. He made his objections clear. The silence of the Respondents is not in my view sufficient to amount to acceptance of the Claimant's proposed revised terms.

92. Does that mean that the offer of a contractual appeal process falls away? I find that it does. There could be no acceptance by conduct of some parts of the contract and not others. I find that the appeal process set out in that document did not become a term of the contract of employment.

93. I do not find that I can imply a contractual appeal process. Many contracts of employment do not include a contractual appeal process for good reasons. An employer may not wish to be held to a particular process and risk a claim as a result. It is simply not necessary to imply a contractual right of appeal.

94. Can I find that there was an existing 'arrangement' that the Claimant would be entitled to appeal any decision that he was dissatisfied with carrying with it the fact that he would be regarded as continuing in employment until that process was completed? I have not found this an easy matter. I have considered whether the requirement in the

constitution of the VHP for the dismissal of a priest to be referred to the Central Working Committee is sufficient to found an 'arrangement'. I do not think it does. It is not a right of appeal at all and there is nothing that would suggest that the Claimant might be regarded as continuing in his employment until any determination by that committee.

95. I have come to the conclusion that where, as here, the Claimant's continuity of employment was broken before any arrangements were put in place to hear an appeal continuity of employment has not been preserved. It follows in my view that the original termination of the contract of employment takes effect. It is not possible for continuity to be preserved by retrospective agreement between the parties. They might have agreed that the Claimant would be reinstated for contractual purposes but for statutory purposes he was dismissed.

96. I have therefore concluded that the dismissal of 17 November 2020 takes effect for the purposes of the unfair dismissal claim.

97. In case I am wrong about that I shall decide whether there was any subsequent dismissal.

A further dismissal?

98. In ***British and Beningtons Ltd v North Western Cachar Tea Co Ltd*** **[1923]** AC 48, the House of Lords held that there can be be a termination of the original contract in circumstances where the employer unilaterally imposes new terms, but the change must be such that the new agreement is entirely inconsistent with the old, or at least must go to the very root of the old agreement. In ***Hogg v Dover College*** **[1990] ICR 39** a letter imposing a change of terms from a full time to a part time role was held to be a dismissal.

99. In this case the Respondents wrote to the Claimant and told him that he would only be offered work at their absolute discretion (a zero hours contract). Their letter of 11 March 2021 made it clear that the offer was not for a contract of employment at all. What was proposed was an arrangement where the Claimant would have worker status.

100. I have considered whether such a letter is capable of amounting to a dismissal. I find that the case is on all fours with that of ***Hogg v Dover College***. I find that the substitution of a contract for services for a contract of employment went to the heart of the existing contract. As is clear from ***Hogg v Dover College*** a letter informing an employee that the employer has imposed terms inconsistent with the existing contract can, and I find does, amount to an express dismissal.

Was the dismissal for a potentially fair reason? Was it fair?

101. Given the concession made by the Respondent that any dismissal on 17 November 2020 was unfair. These issues relate only to my alternative finding that if the dismissal of 17 November 2020 vanished upon the success of his appeal there was a subsequent dismissal when new terms were imposed. Consideration of these issues is

predicated on the assumption that imposing terms unilaterally as an outcome of an appeal is capable of making the original dismissal vanish (which I have found it was not). The following analysis is therefore probably unnecessary.

102. I shall put to one side the question of whether the dismissal was potentially fair. I shall assume that the fact that the Respondents were told by Christopher Edgley to offer the Claimant a contract which guaranteed no work and stated that he was not an employee might amount to some other substantial reason if the belief was genuinely held that that amounted to a re-engagement on the same terms as had been in place. That may be a generous assumption.

103. Turning to the question of whether any dismissal was actually fair I do not accept that the Respondents had any reasonable belief in their suggestion that they had a contractual right to withhold all work from the Claimant. The Claimant had been offered and had undertaken work for several years on a regular basis. The decision that was taken was without any form of consultation. There was no attempt to meet with the Claimant and seek agreement or explain the rationale for the decision. Assuming that the Respondents could establish that there was a potentially fair reason for the dismissal I find that it was unfair.

104. It follows that I shall deal with the issue of remedy flowing from the dismissal that, on my primary findings, I took effect on 17 November 2020.

Remedy Reasons

105. It was necessary that I heard additional evidence to determine in particular the question of whether there was what is usually described as any contributory conduct. I am bound by my previous findings of fact and decisions as to the terms of the contract of employment when deciding what loss was sustained by the Claimant as a consequence of his dismissal.

106. I shall deal with each issue in turn setting out my findings of fact relevant to each question as I deal with each issue. Re-instatement is the primary remedy for unfair dismissal followed by re-engagement. It is necessary that I consider whether to grant either of those remedies first. However, the question of whether I should do so needs to be informed by my findings on the issue of contributary fault. Whilst that issue would not necessarily arise if I ordered re-instatement or re-engagement it is sensible to deal with it first.

Contributary conduct

107. The basic award or a compensatory award may be reduced if the tribunal find as a fact that the conduct of the Claimant before the dismissal justifies reducing the award.

108. In this case the Respondents invite me to make findings about the Claimant's conduct in 3 particular respects. These are:

108.1. a suggestion that the Claimant refused to cooperate with the Respondents in obtaining a Covid test and that he defied an instruction not to attend the Mandir before obtaining a negative test; and

108.2. that he attended the Mandir and took a bunch of keys when he had been asked not to attend; and

108.3. that he had failed to take reasonable steps to prevent the congregation singing prayers and gonging a bell giving rise to an increased risk of covid infection.

109. In order to determine these issues I heard evidence from the Claimant and from Dr Datta. I make the following findings:

110. In October and November 2020 was a resurgence of Covid infections in East London which was of particular concern to the South Asian community who had suffered a disproportionate degree of loss.

111. That the Respondents had sought advice during the pandemic from Dr Datta who a public health professional to advise them on the necessary precautions to keep the congregation safe when the Mandir was open. I find that the Respondents acted reasonably in treating Dr Datta as an expert in these matters.

112. After the first lockdown the Respondents circulated instructions which included an instruction that prayers were not to be sung in the temple nor was a ceremonial bell to be picked up and struck by worshippers (the phrase 'gonged was used during the hearing').

113. It is clear from the correspondence that I have seen that on occasions the Claimant raised reasonable concerns about Covid safety in the Mandir. That is entirely to his credit. However, it is also clear that he on occasions questioned the directions that he was given. In particular it is clear from correspondence written by Dr Datta that the Claimant had questioned the authority of the decision makers suggesting that it was important that matters were dealt with by a properly constituted committee. In reality the day-to-day decision-making about what was appropriate had been quite reasonably delegated to Dr Datta.

114. One example of the Claimant pushing back against the decisions that were taken was when in October 2020 when a decision was taken not to celebrate a Hindu festival the Claimant was of the view that this was contrary to the requirements of the Hindu faith and he informed the Respondent that he was unable to work and celebrated the festival elsewhere.

115. A further example is when in November 2020 the Claimant had been instructed that the temple was closed he unilaterally decided on 5 November 2020 to attend the

Mandir to perform religious rituals Pooja/Aarti because he claimed to be respecting the existing order of the President of the VHP.

116. Against that background I accept the evidence given by Dr Datta that on at least one occasion when she attended the Mandir she found that the devotees were singing Aarti contrary to her instructions. That the Claimant had failed to announce at the outset that they should not do so nor did he intervene when the singing started. It was suggested on behalf of the Claimant that it was unreasonable to expect the Claimant to intervene during prayers. I disagree. This was a public health emergency and the Respondents were entitled to expect the Claimant to ensure that the Devotees were given and followed clear instructions. I further accept that when this was raised with the Claimant he suggested that it was not his responsibility.

117. On 29 October 2020 the Claimant sent an email to the Chairman Mr Khertola in which he said *'I am not feeling well due to suffering from flu and am not able to perform my temples duty. Therefore, please sanction me medical leave from today 29/10/20 2 Sunday 01/11/20 evening accordingly'*. I find that the reference to flu symptoms would have caused any reasonable person to be concerned that there was a risk of a Covid infection. The existence of flu like symptoms were from the earliest days of the pandemic thought to be indicative of a Covid infection

118. What followed was a series of emails between the Claimant and Dr Datta. Dr Datta told the Claimant that he should undergo a Covid test. I find that that was unremarkable. The Claimant then suggested that he was ineligible for a test because he could not say at that stage that he had a fever. He said that he was simply tired having done a lot of work in the temple. Dr Datta maintained her position that the Claimant should have a test before returning to work in the temple. The Claimant protested and said that he did not pass the criteria on the NHS website because he did not at that stage have a fever. What was not clear was why he had described he had flulike symptoms when he sent his First email. I find that Dr Datta acted perfectly reasonably in treating any alleged reduction of symptoms cautiously. The Claimant then took the position that if the Respondent wanted him to have a Covid test they should pay for it. Dr Datta informed the Claimant that he should get a note from his GP saying that he was unlikely to pose a risk of coronavirus to the devotees. I find it is implicit in that correspondence that the Claimant was instructed that he should not attend the temple until the Respondents were satisfied that he did not have a Covid infection.

119. The Claimant did attend the temple during the period where he would otherwise be self-isolating. I find that he knew that he ought not to have done that and did so in defiance of proper concerns raised by Dr Datta.

Discussion and application of the law

120. Sub-section 122(2) of the Employment Rights Act 1996 provides that a basic award may be reduced:

'(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'

121. Sub-section 123(6) of the Employment Rights Act 1996 has a similar provision whereby the compensatory award might be reduced:

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

122. The proper approach to the application of these provisions was explained by Langstaff P in ***Steen v ASP Packaging Ltd*** **[2014] ICR 56** where he said:

'11 The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.

12 It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.

13 (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).

14 This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to

reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.'

123. I am required to consider whether any of the actions of the Claimant were culpable or blameworthy. I am not at this stage deciding whether they were breach of contract or whether they would by themselves have justified dismissal. It is my findings that need to be applied and not what the Respondents believed.

124. I have some considerable sympathy with the Claimant being generally exasperated with the actions of the Respondents. He had pointed out that he was entitled to the national minimum wage and I have no doubt he was frustrated by the refusal of the Respondents to recognise that.

125. Having said that, the Claimant appears to have shown some real resistance to the instructions that he was given in relation to Covid safety. I do not suggest for a moment that he was not concerned about Covid and give him credit for his own suggestions. However I do find that he had strong opinions about what was, and was not appropriate, particularly from a religious perspective.

126. I find that he did not implement the instructions on at least one occasion to take reasonable steps to prevent devotees singing and going the bell. I find that he could have reasonably done so but thought it religiously inappropriate. I also find that he was argumentative when he was questioned about this.

127. I consider the Claimant acted unreasonably in refusing to accept what were the entirely reasonable concerns of Dr Datta that, having reported flu symptoms, he should have a Covid test or a note from his GP before returning to work. It was fair for him to suggest that if the Respondent wanted him to have that test it should have been paid for. However, what he did was to openly defy the instruction and attended the temple when he had specifically been told not to. What is more, the whole tone of his correspondence was unnecessarily argumentative.

128. If I were to categorise the Claimant's conduct I would say that he was stubborn, dismissive and argumentative in response to being told what to do by Dr Datta.

129. I need to weigh up the gravity of this conduct as a whole. Mr McCombie suggest that extremely grave. He relies upon this to support the Respondents position that it was entitled to summarily dismissed the Claimant.

130. I find that these events came about after the relationship between the parties had already become extremely difficult. Dr Datta unfortunately was a victim of some crossfire. I find that the Claimant had a propensity to be somewhat arrogant in his dealings with the committee. At regrettably the committee at times was itself high-handed.

131. I find that the conduct of the Claimant I have set out above was culpable and blameworthy. Two wrongs do not make a right. His attitude to Covid safety does demonstrate an attitude of unnecessarily questioning reasonable decisions. That is in my view culpable and blameworthy.

132. I find that this conduct did contribute to the decision to dismiss the Claimant. The Claimant has suggested that the reasons set out in the dismissal letter of 17 November 2020 are entirely false. I am not persuaded by that. I consider it likely that the history between the parties played some part in the sensitivity of the committee to the Claimant's rebellious nature but conclude that the actions which they had complained of in the dismissal letter did play a significant part in their reasoning. In particular I find that the Claimant's attitude to the instructions given by Dr Datta played a significant part.

133. I need to consider the extent to which it might be just and equitable to reduce the Basic or Compensatory awards. That is conventionally done by applying a percentage reduction. What is required is a balancing act between any culpable conduct of the Claimant and the actions of the Respondent in unfairly dismissing him.

134. I find myself in agreement with Christopher Edgley that the conduct complained of by the Respondents was quite clearly not conduct which an employer could reasonably dismiss the Claimant for a first breach of discipline. It was sufficiently serious in my view to justify a final written warning. I take that view because it was clear that the Claimant was questioning the authority of his employer.

135. I find that it would be just and equitable to reduce the basic and compensatory awards by 40%.

Reinstatement or re-engagement

136. I have reminded myself of the proper approach to sections 113 to 117 of the Employment Rights Act 1996. I remind myself that reinstatement is the primary remedy for unfair dismissal and must be considered before any consideration of whether compensation should be awarded. As such it is the default remedy. It is however a discretionary remedy. The scope of the discretion requires me to take account of the matters set out in section hundred and 116(1). These are:

> *(a) whether the complainant wishes to be reinstated,*
>
> *(b) whether it is practicable for the employer to comply with an order for reinstatement, and*
>
> *(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.*

137. The same considerations apply to an order for re-engagement.

138. In the present case the Claimant has indicated a wish to be reinstated or re-engaged. He has explained that he wishes to continue to serve the devotees in the community.

139. The Respondents resist any order. Their essential position is that there is a complete breakdown between the Claimant and the committee who would need to direct his work.

140. In deciding whether to make an order for reinstatement or re-engagement I do not have to decide once and for all whether the order would be reasonably practicable for the Respondents to comply with. At this stage I only need to have regard to that issue - ***Timex Corpn v Thomson*** **[1981] IRLR 522, EAT**.

141. I have regard to the following additional matters of fact .The Claimant issued High Court proceedings claiming defamation and breach of confidence. He named a number of committee members of the Ilford committee the executive committee at and members of the committee of the parent organisation as defendants. Those proceedings were dismissed with a reasoned judgment. The principal reason for the dismissal was that the proceedings had been commenced outside the relevant limitation period by one day. However, the factors in the exercise of a discretion as to whether to extend limitation which were considered by the High Court judge show that she regarded the Claimant's claim as being abusive and with little reasonable prospect of success. It was a necessary element of the Claimants defamation claim that he asserted malice in order to defeat a defence of qualified privilege. When the High Court proceedings were dismissed there was a costs order made a £41,000. The Claimant to this day does not accept that the litigation is at an end and he has not satisfied the costs order against him. Amongst the people that the Claimant had sued in the High Court were people who were essentially on his side and thought he should not have been dismissed. In a somewhat bizarre move it appears that some of those people including the Claimant's own brother have applied to set aside the dismissal of the claim against them. The Claimant has made applications to the Court of Appeal none have at this point in time been successful.

142. As part of these proceedings the Claimant in his witness statement has alleged a conspiracy against him by the committee in Ilford. He has suggested that Dr Datta instructed him to lie to the NHS. These are strong allegations.

143. I have found that the Claimant was, in part, responsible for the actions that led to his dismissal. Whilst I have not concluded he was wholly responsible by any means the basis of my finding is that there was conduct by him which evidenced what had become a very poor working relationship. He contributed to that.

144. I need to have regard to whether if I may order for reinstatement or re-engagement it will be practicable for the Respondents to comply with it (although as explained above it is not at this stage determinative. I should not take at face value an assertion that there is a breakdown in relationships. That might allow the Respondent a simple veto of a statutory remedy. An order may not be practicable if there remains a continuing breakdown of trust and confidence between the parties: ***Wood Group Heavy Industrial Turbines Ltd v Crossan*** **[1998] IRLR 680, EAT**.

145. I am satisfied that there is such a breakdown in trust and confidence that expecting the parties to work together in the future is utterly unrealistic. The relationship has been irrevocably destroyed by the outcome of the High Court proceedings and the allegations made within them.

146. Having regard to the issue of reasonable practicality and having regard to my findings in respect of contributary conduct in the exercise of my discretion I decline to make any order for reinstatement or re-engagement.

The loss sustained by the Claimant

147. In calculating the compensatory award I am required to ascertain what the Claimant would have received by way of remuneration, whether contractual or not had he not been dismissed by the Respondents. I should assume that the Respondents would pay the Claimant no less than the National Minimum Wage.

148. The following facts are relevant to that decision:

148.1. I have previously found that the contract of employment between the parties did not include a guarantee of any particular hours of work except that it was agreed that the Claimant would be offered a fair share of such work as was available having regard to the number of priests employed by the Respondents.

148.2. During the period following the reopening of the Mandir until the Claimant's dismissal I find that the Claimant worked for 35 hours per week.

148.3. As a consequence of the Covid pandemic the Mandir was closed for periods of time between 17 November 2020, the date of the Claimant's dismissal and 29 June 2021 when the Mandir reopened.

148.4. When the Mandir was closed during the first lock down the Claimant was asked to perform devotional duties behind closed doors. His payment at that time of £300 per week was not reduced.

148.5. At some point in 2021 an additional priest was recruited. I am not told whether they worked at all whilst the Mandir was closed. I am unable to make a specific finding about that.

149. The Claimant invites me to find that if he had not been dismissed he would have continued to be expected to work for 35 hours per week. The Respondents say that that is unrealistic but accepts that the Claimant may have been asked to work as many as 15 hours per week.

150. I have accepted that as a matter of contract the Respondents had the right to reduce the Claimant's hours if the need for his services had correspondingly reduced. To emphasise the rationale for that finding in my liability decision I have taken account of the fact that the Ilford branch of the Respondent was expected to be self-sustaining and principally relied upon charitable donations. The hours the Mandir was open were varied depending on the resources available and the demand by the devotees.

151. I take judicial notice of the fact that if there was a reduced need for employees during the Covid pandemic by November 2020 central government had put in place the furlough scheme and it would have been possible for the Respondents to have placed the Claimant on furlough or flexible furlough when that scheme was in place. However there was no right to be placed on furlough and it was open to an employer with a contractual right to reduce hours to simply exercise that right rather than placing an employee on furlough.

152. I need to decide the hypothetical question of whether the Respondents, had they not unfairly dismissed the Claimant, would have availed themselves of the furlough scheme. This is a small organisation which self-evidently has had scant regard to employment law. It appears they did not regard their priests as ordinary employees in any sense. Administering the furlough scheme would have placed a burden on the Respondents and I find that if they had an easier option they would have taken it. I find that the Respondents would not have placed the Claimant on furlough for all or part of the time he was required to work.

153. I find that if the Claimant had not been dismissed his hours would have been reduced when the Mandir was closed. If the Mandir was closed there was limited work that he could have been expected to do. I find that the additional priest would not have been recruited had the Claimant not been dismissed. There would have been no need to recruit an additional priest to cover such religious duties as were thought necessary when the temple was closed.

154. I consider that if the Respondents had realised that they needed to pay the Claimant the national minimum wage that would have had a bearing on how much work they asked him to do. My reasons for that are that the Respondents had finite resources. However for the purposes of assessing how much work the Claimant would have been offered I put that to one side. If the Claimant had not been dismissed that would not have been a consideration because the Respondents did not recognise that they needed to pay the Claimant a lawful sum for each hour worked.

155. The assessment of loss on a hypothetical basis is not an exact science. Doing the best that I can and relying on the findings of fact I have made above. I find that the Claimant would have been asked to work for at least 15 hours per week whilst the Mandir was closed and would have been asked to work for 35 hours a week for any period when it was open.

156. Whilst the Respondent would not have actually agreed to pay the Claimant the national minimum wage I obliged to calculate the claimants loss on the assumption that the Respondent would have acted lawfully.

Loss of statutory rights

157. It is conventional to award a sum to reflect 'loss of statutory rights/the right to a long notice period'. In Harvey on Industrial Relations and Employment Law the rational is explained as follows:

> *'In SH Muffett Ltd v Head [1986] IRLR 488, [1987] ICR 1, the EAT held that whilst the notional figure for loss of statutory rights should be extended to £100, it should be only in exceptional cases that half the statutory notice entitlement should be paid as suggested in the Daley case. As the EAT pointed out, the significance of such a payment depends upon the double contingency that the dismissed employee will get a new job and that he will be dismissed from that job before building up the same period of notice applicable to the first job. The tribunal, when making an assessment of this kind, should take into account its knowledge of local job conditions.'*

158. In assessing the proper amount to award in respect of this head of compensation I have had regard to my findings below about the Claimant's efforts to secure alternative employment.

159. I see no basis for awarding the sum of £3,000 contended for by the Claimant. I have found below that if the Claimant had not acted unreasonably he would have replaced his lost income promptly. Absent the bad feeling engendered in this case there is no reason to believe that the Claimant is at any greater risk of future dismissal than anybody else.

160. I find that a reasonable sum to award in this case for this head of loss is the £500 contended for by the Respondents. Had they not agreed to pay that sum I may not have awarded quite as much.

Mitigation of Loss

161. Section 123(4) of the Employment Rights Act 1996 provides that in calculating the employee's loss, tribunals shall apply *'the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law'*.

162. The burden is on the Respondent to prove that the Claimant unreasonably failed to mitigate loss. It is not enough to show that there were reasonable steps that the Claimant could have taken it is necessary to show that he has acted unreasonably. See ***Wilding v British Telecommunications plc*** **[2002] EWCA Civ 349** and ***Cooper Contracting Limited v Lindsey*** **UKEAT/0184/15** Which provides a useful summary of the principles I have applied.

163. If there is a failure to mitigate that does not mean that the Claimant should receive no compensation. The compensation that should be awarded should take into account what the Claimant's losses would be had he not acted unreasonably.

164. The Claimant says that he has not obtained any work which would provide a replacement income. I make the following additional findings of fact:

165. The Claimant has a diploma in civil engineering and prior to his voluntary work as a priest he had supported himself by working as a site supervisor in the building industry. Whilst working as a priest he took a master's degree in law and passed his LPC. I find that he is well qualified to undertake a wide range of work.

166. The Claimant says that he has endeavoured to find work in the legal industry by making face-to-face enquiries on a couple of occasions. He says that on one occasion he was rejected because the employer had knowledge of his dismissal. The Claimant says that he is unable to work for his brother who runs a company in the building industry because if he were to do so his brother would be blighted by his reputation. The Claimant says that the entire building industry is close to him because everyone in his community is aware of his dismissal.

167. The Claimant has provided no documentary evidence of any effort to find work. He told me that he has not registered with any recruitment agent. I find that he is sufficiently worldly to know full well that he could search for work on the Internet through online agencies or indeed through agencies with physical premises. He has not done so. I take judicial notice of the fact that many people in the construction industry will find work through agencies and that the Claimant is well qualified and experienced to find that work.

168. The Claimant appears to have limited his consideration of work to work within his own community. He may be right that in his local community there is knowledge of his dismissal. However, he lives in London which is an enormous city. People from all communities work together and there will be numerous employers who would be utterly indifferent to the fact that the Claimant has been in dispute with this particular employer.

169. I find that the Respondent has proved that the Claimant has failed to take reasonable steps to mitigate his loss. I need to determine what the result would have been if he had taken reasonable steps to replace his income.

170. I would accept that for a short period the Claimant would be entitled to look for work in areas where he has particular skills. In his case that would include finding a role as a priest elsewhere, finding a role in the construction industry or seeking a training contract or working as a paralegal. However, if he did not obtain employment in those areas the duty to mitigate would require him to look further. I find that he is more than capable of doing a wide range of jobs. The income he needs to replace was paid at the national minimum wage. That means that any job would pay the same rate.

171. I accept that the existence of the second lockdown did create a hiatus in the employment field but that varied wildly across various sectors. While some sectors contracted others expanded. By mid-2021 there was a significant labour shortage in many sectors.

172. The Respondent has satisfied me that the Claimant has acted unreasonably in failing to look for and secure some employment.

173. Whilst a calibration remedy is not an exact science I find that the Claimant could have found employment sufficient to replace the income he lost by his dismissal by no later than 1 August 2021. His losses will be extinguished after that date.

ACAS Uplift

174. I shall deal with the ACAS uplift on the unfair dismissal claim first where it is conceded that there were failures to comply with the relevant code. The failures include not holding a meeting before the dismissal or informing the Claimant of the complaints against him. The Respondent did then offer the Claimant an appeal. Whilst the Claimant makes some criticism of the process of the appeal I am concerned with breaches of the code rather than the ACAS guidance. I consider that the offer of an appeal went some way towards remedying the procedural defects of the initial decision. In terms of the process followed it is relevant to note that the Respondents followed the recommendations of Christopher Edgley.

175. I must have regard to all surrounding circumstances. I take account of the fact that the Respondent is a small organisation. It does not appear to have had any specialist knowledge of employment law. However, that provides only modest mitigation.

176. I find that this is not the worst case of a breach of the code of practice but it is a bad case. I consider that it should be an uplift of 18% to the compensatory award payable to the Claimant.

177. Turning to the issue of whether I should award an uplift on the claim for unlawful deduction from wages. I conclude that the Claimant did raise the fact that he was being paid less than the minimum wage in writing in 2018. Any reasonable employer would have regarded that as being a grievance. The Claimant was in my view very fairly

drawing attention to the fact that the Respondents were committing a criminal offence. In 2018 they were prepared to recognise the Claimant as an employee let alone a worker. They were properly on notice of their own wrongdoing which continued until the Claimant's dismissal.

178. The relevant code of practice is the ACAS code of practice on discipline and grievances at work. There is a wholesale failure to deal with the Claimants email as a grievance. None of the procedural steps suggested by the code were taken.

179. I consider that this is at the very top end of the types of failures that would justify an uplift. I consider that the claim for unlawful deductions from wages should be subject to an uplift of 25%.

180. The Claimant did not raise a grievance about the failure to pay him holiday pay. The Respondent had no scheme in place and clearly did not believe it required to pay the Claimant holiday pay. Given the fact the Claimant did not raise a grievance I cannot make any uplift. I do need to consider whether to reduce the compensation payable to the Claimant. I consider that it would be entirely wrong to do so. The purposes of a grievance procedure are to enable disputes to be resolved without going to court or tribunal. In this case had the Claimant brought a grievance it is quite obvious that it would not resolve matters as the Respondents fought this point until the timely intervention of Mr McCombie who appears to have persuaded the Respondents to see reason. I declined to reduce the compensation in respect of this.

Agreement as to calculations

181. The parties were able to agree the basic award, the loss incurred by the Claimant, the amount of any holiday pay, and the amount of notice pay.

182. In writing up these reasons I note that there was a failure to uplift the sum I awarded for loss of statutory rights. There is no good reason to treat that head of loss differently than say a loss of wages. It should be subject to the same uplift. I have done so in my calculations above with the result that the sum to be paid by the Respondent is marginally higher than the figures given to me by the parties.

Post script

183. The parties sought written reasons for my decisions and those are given above. I had explained to the parties the burden providing written reasons puts on the tribunal and I have assumed that given the Respondents sought written reasons for my liability decisions and the Claimant reasons for my decisions on remedy that both parties are contemplating an appeal and further litigation.

184. At the conclusion of the hearing, in what is a first for me, I suggested that given the outstanding costs judgment in the High Court proceedings and the possibility of further appeals the parties at least contemplate some form of alternative dispute resolution. This dispute concerns a small religious charity. Having such a rift in the community is unfortunate.

185. I finish by commenting on the fact that it appears that no income tax or national insurance has been paid on any of the sums received by the Claimant either by way of wages or by offerings made by the worshipers. It was not suggested that I consider

whether the arrangement was tainted by illegality and I did not take the point of my own motion. A consequence of the litigation is that this matter is now in the public domain.

Employment Judge John Crosfill
Date: 14 April 2023