EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103112/2023

Held in Glasgow on 16 & 17 October 2023

Employment Judge P O'Donnell

Mr B Green **Claimant**

Llucias Kitchens **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. The claimant was unfairly dismissed by the respondent and the Tribunal awards the claimant the sum of £8301.23 (eight thousand, three hundred and one pounds, twenty three pence) in respect of this.

2. The claimant was dismissed without notice in breach of contract. No award is made in respect of this.

3. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the sum of £108 (One hundred and eight pounds).

4. The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay the claimant the sum of £275.40 (Two hundred seventy-five pounds and forty pence).

REASONS

Introduction

1. The Claimant has brought complaints of unfair dismissal, notice pay, deduction of wages and pay in lieu of untaken holidays. The respondent resists all the claims.

Evidence

2. The Tribunal heard evidence from the following witnesses:

   a. The Claimant.

   b. Scott Hewie (SH) – the owner of the respondent.

   c. Lee Henderson (LH) – an employee of the respondent

3. Parties produced separate bundles of documents; the claimant's bundle was page numbered whereas the respondent numbered each document. Where a document is referenced below, the letters "C" and "R" will be used to identify from which bundle the document came. Where the document appears in the claimant's bundle then the page number is identified, where it is the respondent's bundle then the number of the document will be used.

4. This was not a case where there was a significant dispute of fact about the events leading to the claimant's dismissal. There were some factual disputes about matters relating to holiday pay and some of the detail of what was said during certain conversations prior to the claimant's dismissal was not agreed by the parties.

5. The Tribunal considers that all of the witnesses sought to give evidence to the best of their recollection but it was clear that none of them had a clear recollection of events. They all accepted that there were certain matters that they could not recall. The Tribunal does not consider that any of the witnesses sought to mislead the Tribunal or give false evidence. However, their recollection of events could not always be relied upon.

6. Unfortunately, this was not a case where documents could fill the gaps in the recollection of witnesses. There was correspondence (for example, emails, text messages and letters) in relation to the claimant's dismissal which assisted the Tribunal to following events. However, in relation to other

matters, there was little or no correspondence or documents. In particular, the respondent did not produce any records relating to the claimant's holiday entitlement nor were there any documents showing when holidays were being requested or when the respondent was requiring leave to be taken. This is not a criticism as it reflects the small size of the respondent's business and the personal relationships involved but it does mean that the Tribunal was left with the oral evidence of the witnesses as to their recollection of events.

7. In this regard, it is significant that the respondent declined to cross-examine the claimant at all. The consequences of this was explained to him and a period to reflect on this decision was given but Mr Hewie decided not to cross-examine the claimant. The claimant's evidence was, therefore, unchallenged and so, in general, the Tribunal has preferred his evidence in respect of any dispute between him and the respondent's witnesses. Where there is any exception to this then the Tribunal will address this below.

Findings in fact

8. The Tribunal made the following relevant findings in fact.

9. The respondent is a kitchen fitting business owned by SH. He started the business in 2012 and for some time he was the only person working in the business.

10. The claimant was employed as a trainee kitchen fitter on 20 November 2019 and he was the first person, other than SH, to be employed by the business. The claimant's contract (C60-61) states that his hours of work are 40 per week 08.30-17.00. He was entitled to 28 days holiday each year with the holiday year being 1 January to 31 December each year. At the time of his dismissal, he was paid £9.50 an hour.

11. LH joined the business in 2022 and remains employed with the respondent at the date of the hearing.

12. The respondent is a very small business, presently employing only SH and LH. The largest number of people employed by the business was three (SH, the claimant and LH). Prior to the events giving rise to this claim, the

respondent had no formal written policies covering matters such as absence or disciplinary issues. SH did introduce such policies shortly before the claimant was dismissed but copies of these were not produced to the Tribunal.

13. The business would be closed over the Christmas and New Year period each year. Employees were expected to retain sufficient holidays in the relevant holiday year to cover the days in December and the days in January would come out of the entitlement for the new holiday year. This arrangement was not recorded in writing but was explained to the claimant and LH.

14. SH informed the claimant that the business would be closed on 2 and 3 January 2023 before the business shut down for the Christmas period. On 3 January 2023, SH sent a text to the claimant (C62) advising him that the business would now not reopen until 9 January 2023.

15. On 1 February 2023, a job was finished earlier than expected and there was no work arranged for 2 February 2023. SH spoke to the claimant and LH on 1 February advising them that they could either come to work in his garage building cabinets the next day or they could take the day off. They both opted to take the day off.

16. The same issue arose on 9 February 2023 and the same offer was made to the claimant and LH. They both opted to take the next day off.

17. On 12 February 2023, the claimant fell down some stairs while attending a music gig and injured his ankle. He attended hospital where his ankle was x-rayed and a fracture was identified. He was given what is described as a “moon boot” to wear to support his ankle while it healed. The medical advice was subsequently revised after the x-rays were looked at again and the claimant was advised to use crutches to take the weight off his ankle.

18. The claimant wished to inform SH of this as soon as possible but he left the hospital at 2am so did not consider it was appropriate to telephone. He, therefore, sent a text message to SH informing him of what had happened. The next morning there was a telephone call between the claimant and SH in

which the claimant informed SH that he had been signed off for 4 weeks to let his ankle heal.

19. SH visited the claimant the same day and they sat in his van. SH informed the claimant that his accident messes everything up as they had two jobs running in parallel. SH stated that he would need to come up with a solution and the claimant asked what this would be. SH replied that dismissal could be one option or using the claimant's holidays being another.

20. SH subsequently received a phone call from the claimant's mother using the claimant's phone. She explained that the claimant was a member of a trade union and she was upset by what had been said to him. SH felt that there was no recognition of the impact of the claimant's injury on the business.

21. After taking advice, SH sent the claimant an email (C64-65) with proposals for how to deal with the claimant's absence:-

    a. The claimant takes holidays at full pay to cover his absence but that this would be recorded as sickness absence.

    b. The alternative was that the claimant takes sick leave with the first 3 days at full pay and then £99.35.

    c. In both options, the claimant would return on light duties being paid 50% of his wages. He would also have to sign a waiver saying that the respondent would not be liable for any further injury he sustained.

    d. Nothing is said about the claimant being dismissed.

22. The claimant replied by email dated 23 February 2023 (C67). He explained that he was due to go back to the hospital the next day for another x-ray and would ask how soon he could return to work on light duties. He goes on to point out that the proposed reduction in his wage would take him below the National Minimum Wage. He makes his own proposal about taking some holidays to cover his absence and concludes by saying that he is sorry for what has happened and the impact it has had on SH.

23. The claimant and SH had a telephone call on the same day in which they discussed the claimant's response to SH's proposals. There was no agreement reached. It was SH's evidence that, at this stage, he had come to the view that he was 90% certain that it was a waste of time trying to get the claimant back to work but he did not discuss this with the claimant.

24. On 24 February 2023, SH sent the claimant a text (C68) stating that he considered that it was not in the interests of the business for the claimant to return to work sooner than the medical advice. This was followed by an email of the same date (C69) which acknowledged receipt of the claimant's fit note. The email goes on to say that the previous proposals made by SH were withdrawn and the claimant's absence would be treated as sick leave.

25. On 10 March 2023, the claimant sent a text to SH (C68) asking him to call. They spoke later that day and the claimant explained that the hospital had advised that he could return to work on light duties. He went on to state that if he returned on this basis then it would need to be paid at the National Minimum Wage. At the end of the conversation, the claimant understood that he would be returning to work on Monday 13 March 2023. On 12 March, he texted SH (C68) asking when he would be picking him up as he was still unable to drive. SH replied about an hour later (C68) saying that he was not expecting the claimant to return and would call him the next afternoon.

26. SH phoned the claimant on 13 March 2023 and informed him that he was being dismissed. The claimant asked why and SH replied that it was due to money as the business had been struggling since the covid pandemic.

27. SH sent the claimant a letter dated 18 March 2023 (C70-72) confirming that he had been dismissed:-

    a. The letter states that the last day of employment was 10 March 2023. However, the Tribunal finds that the effective date of termination was 13 March 2023 as this is the date that the claimant was informed that he was dismissed.

b. SH states that the dismissal was for "some other substantial reason" because there was a breakdown in the trust that he had in the claimant.

c. The reason for this breakdown in trust is said to be the claimant's *"inability to be autonomous, accountable and take responsibility for your recent situation by permitting your mother to contact me directly".* The letter then makes reference to a telephone call made by the claimant's mother to SH on 14 March 2023 and a text message on 13 March 2023.

d. The letter goes on to make state that there is other information which relates to the decision to dismiss:

   i. The financial viability of the business.

   ii. A comment which the claimant allegedly made about enjoying furlough.

   iii. An incident on 22 May 2022 when the claimant contacted SH multiple times whilst carrying out a job on his own.

   iv. A reference to the claimant being late on multiple occasions.

   v. The claimant attending work with a hand injury and a mark near his eye.

   vi. The claimant being absent from work in December 2022 due to a car accident.

   vii. There was a description of the events relating to the claimant's ankle injury and the impact on the business.

e. The claimant was dismissed without notice.

f. The letter was wholly silent as to any right of appeal.

28. The claimant appealed the decision to dismiss him by letter dated 22 March 2023 (C78). No appeal hearing ever took place.

29. The claimant received his final pay on 31 March 2023. The payslip (C119) shows a deduction of £108 in respect of holidays which the respondent says the claimant had taken in excess of his pro-rated entitlement as at the date of dismissal.

Submissions

30. Both parties handed up written submissions which have been noted but, for the sake of brevity, the Tribunal has not set out the detail of these.

31. The one point that the Tribunal would make is that the submissions of the respondent made a number of factual assertions about which no evidence was heard by the Tribunal and so no account has been taken of these assertions nor has the Tribunal made any findings of fact based on these.

Relevant Law

32. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

33. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 which include matters such as conduct, capability and "some other substantial reason".

34. The reason for a dismissal was described by Cairns, LJ in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213 (approved by the House of Lords in subsequent decisions such as *W Devis & Sons Ltd v Atkins* [1977] AC 931 and *West Midlands Co-operative Society v Tipton* [1986] IRLR 112) as follows:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

35. It is a matter of law as to whether any such set of facts or beliefs falls into one of the categories of potentially fair reasons for dismissal and, if so, which one(s).

36. The "some other substantial reason" is an open-ended category and so long as the reason is not minor, whimsical or capricious then it can be considered "substantial" and if it could justify a dismissal then it is a potentially fair reason (*Harper v National Coal Board* [1980] IRLR 260, *Kent County Council v Gilham* [1985] IRLR 18, CA).

37. If the respondent discharges the burden of showing that there was a potentially fair reason, the test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

38. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

39. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case *of Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

40. Procedural fairness includes giving an employee the opportunity to explain their actions or provide some form of mitigation.

41. The Tribunal should have regard to the ACAS Code of Practice on Disciplinary Practices and Procedures in Employment ("ACAS Code") in assessing the procedural fairness of any dismissal as well as considering whether the employer had complied with their own procedures and policies.

42. On the question of whether the procedure followed by the employer was reasonable, the case of *Sainsbury's Supermarket v Hitt* [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the process leading to dismissal.

43. The importance of warnings to allow an employee to improve their conduct, performance or attendance is confirmed in paragraph 19 of the ACAS Code of Practice:

"Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning."

44. Warnings give the employee an opportunity to change and improve as recognised by Lord Denning in *Retarded Children's Aid Society v Day* [1978] IRLR 128 at 130:

"'It is good sense and reasonable that in the ordinary way for a first offence you should not dismiss a man on the instant without any warning or giving him a further chance."

45. Warnings are relevant to both the question of whether a fair procedure has been followed and whether dismissal was a fair sanction.

46. The second broad issue in considering s98(4) is that the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

47. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the Employment Rights Act 1996 which is based on length of service.

48. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.

49. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

50. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

51. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

52. Regulations 13 and 13A of the Working Time Regulations 1998 make provision for workers to receive 5.6 weeks' paid holidays each year.

53. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:

(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(AxB)-C

where—

A	*is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];*
B	*is the proportion of the worker's leave year which expired before the termination date, and*
C	*is the period of leave taken by the worker between the start of the leave year and the termination date.*

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Decision – unfair dismissal

54. The first question for the Tribunal in determining the unfair dismissal claim is whether there was a potentially fair reason for dismissal.

55. The Tribunal has had some difficulty in identifying the reason for dismissal in the sense of a set of facts or beliefs held by the respondent (that is, Mr Hewie) which led to the dismissal. The reason for this is that the facts relied on by the respondent have not been clear and consistent.

56. In the telephone call of 13 March 2023, the reason given was the financial circumstances of the business but this has never been repeated as the reason for dismissal in any subsequent correspondence or in evidence (although it has been referenced).

57. In correspondence, the respondent has always said that there was a loss of trust and confidence but the cause of that loss has changed and evolved over time:

    a. On a plain reading of the letter of dismissal, the loss of trust and confidence is said to arise from the claimant's alleged *"inability to be autonomous, accountable and take responsibility for the recent situation by permitting your mother to contact me directly".* Although the letter goes on to list a number of other factors, it is only the contact from the claimant's mother which is expressly said to give rise to the loss of trust.

    b. However, there is a difficulty with the contact from the claimant's mother being the reason for dismissal; the letter of dismissal only refers to contact made on 13 and 14 March 2023 which occurred after the claimant was informed of his dismissal on 13 March 2023. Events which have not yet occurred cannot have been in Mr Hewie's mind when the made the decision to dismiss.

    c. In the ET3 (C35 paragraph 13), the contact from the claimant's mother is still relied on as giving rise to the loss of trust but there is also reference to the correspondence from the claimant regarding the options for his return to work as being an attempt to maximise the claimant's finances and not recognising his *"responsibility for his own contributing actions"* (although it is not said what these are).

    d. In his evidence before the Tribunal, Mr Hewie expanded the matters which are said to give rise to the loss of trust and confidence to the claimant's timekeeping, attendance, performance and conduct. Whilst some of these matters are referenced in the letter of dismissal and the ET3, they are not said to be reasons giving rise to the loss of trust and confidence in those documents.

58. The Tribunal would pause for a moment to comment on the reference in the ET3 and Mr Hewie's evidence relating to the claimant's response to the proposals for his return to work and, in particular, his complaints about the

claimant seeking to maximise the amount he would be paid on his return on light duties. This is a reference to the claimant pointing out that the proposals in question would take his hourly rate below the National Minimum Wage and the claimant is perfectly entitled to insist upon his legal rights. This cannot provide a respondent with a potentially fair reason and, in fact, if the claimant's insistence on being paid the minimum wage had been the sole or principal reason for the claimant's dismissal then the dismissal would have been automatically unfair under s104A ERA. However, for reasons which will become clear below, the Tribunal does not consider that this was the sole or principal reason for the claimant's dismissal.

59. It is noticeable that the claimant's injury and consequent absence from work was almost wholly absent from the respondent's reasons dismissal. Looking at the facts objectively, it is clear that it is the claimant's absence which triggers the events leading to his dismissal. Without the injury and absence, Mr Hewie would have had no contact with the claimant's mother nor would there have been any discussions around the claimant being on light duties and reduced pay.

60. It is very difficult to escape the inference that, had the claimant not injured his ankle, he would not have been dismissed and that it was the claimant's absence from work (with all of the consequences for the respondent's business) which is the real cause of his dismissal despite what the respondent asserts.

61. The Tribunal considers that, in normal circumstances, it has to proceed on the basis of the reasons given by the respondent and that the best evidence of the reasons in Mr Hewie's mind at the time of the dismissal would normally be what he wrote in the letter of dismissal. However, as noted above, the letter of dismissal references matters which occurred after the claimant was dismissed and so the Tribunal does not consider that these can be the reasons for dismissal.

62. The Tribunal bears in mind that the burden of proof in showing there is a potentially fair reason lies with the respondent and the Tribunal does not

consider that the respondent has presented evidence which discharges this burden. The respondent's position is confused, relies on matters which cannot be fair reasons for dismissal and relies on events which occurred after the claimant had been dismissed.

63. For these reasons, the Tribunal considers that there is no fair reason for dismissal and, for that reason alone, it finds that the claimant was unfairly dismissed.

64. However, the Tribunal, for the sake of completeness, will go on to address the question of whether the dismissal was fair in all the circumstances of the case in terms of s98(4) ERA.

65. The Tribunal has no hesitation in finding that the claimant's dismissal was procedurally unfair. This is not a case where there was a procedural defect or the process did not comply with the ACAS Code but, rather, no disciplinary process was followed at all. In particular, Mr Hewie closed his mind and came to the decision to dismiss without holding any form of disciplinary hearing and so the claimant was given no opportunity to put his case to the respondent before he was dismissed.

66. The Tribunal bears in mind that the respondent is a very small business but this does not excuse a complete failure to follow any form of dismissal procedure. A dismissal process (particularly a dismissal hearing) is an important safeguard for employees at risk of losing their job; it is an opportunity to understand why their job was at risk and try to put their case to their employer in an effort to save their job. The claimant was denied this opportunity.

67. However, the failure to follow a fair procedure potentially goes beyond just a failure to hold a disciplinary hearing. In his evidence, Mr Hewie sought to suggest that there were a number of earlier issues with the claimant's attitude, performance, timekeeping and attendance which came to a head when he went off work with his injured ankle. If that was the case then the respondent did not give the claimant any warning that there were concerns with these issues and that he needed to improve these or his employment was at risk.

Mr Hewie sought to suggest that he did give a verbal warning to the claimant about his timekeeping in January 2023 but this was never put to the claimant in cross-examination and the Tribunal is not satisfied that there was something said to the claimant which gave a clear indication that he needed to improve in all these areas or was at risk of losing his job.

68. For these reasons, even if there had been a fair reason for dismissal, the Tribunal would have found that the claimant was unfairly dismissed on the basis of the complete failure to follow any form of fair procedure.

69. Finally, there is the question of whether dismissal was within the reasonable responses open to the respondent. Given that the Tribunal has found that there was no fair reason for dismissal then dismissal could not be within the reasonable responses to the circumstances of the case. There was certainly nothing done by the claimant which justified dismissal in the circumstances.

70. For all these reasons, the Tribunal finds that the claimant was unfairly dismissed.

Decision – breach of contract

71. There is no dispute that claimant was dismissed without notice. The question is whether the respondent was entitled to dismiss without notice.

72. An employer is only entitled to dismiss without notice is where the employee has done something which amounts to a repudiatory breach of contract. This is normally something which amounts to gross misconduct, gross negligence or something of a similar nature.

73. Whilst it is true that a breach of the implied duty of trust and confidence can amount to a repudiatory breach of contract, the claimant has come nowhere close to have repudiating the contract in this case. None of the matters leading up to the claimant's dismissal (that is, injuring himself by accident, asking to be paid the National Minimum Wage, having his mother speak to Mr Hewie etc) are matters which repudiate the contract, either on their own or taken together.

74. In these circumstances, the respondent was not entitled to dismiss without notice and acted in breach of contract in doing so.

Decision – deduction of wages

75. The deduction of wages claim relates to a deduction of £108 made from the claimant's final salary in respect of what is said to be an overpayment of holiday pay.

76. It is correct that Regulation 14(4) of the Working Time Regulation permits a relevant agreement (for example, a contract of employment) to contain a provision allowing for the employer to recover compensation from the employee where they leave employment having taken more holidays than they had accrued at the end of the employment.

77. However, the recovery of such sums can only be done by way of a deduction from the employee's wages where the contract contains a provision allowing the deduction to be made or there is some other prior written authority. If there is not then such a deduction is unlawful under s13 ERA.

78. The claimant's contract contained no clause authorising the respondent to make the deduction in question nor was there any evidence of prior written authority.

79. The Tribunal, therefore, finds that the respondent unlawfully deducted the sum of £108 from the claimant's final pay. The Tribunal would draw attention to s25(4) of the Employment Rights Act which prevents an employer from recovering, by other means, any sum which has been unlawfully deducted.

Decision – holiday pay

80. The leave year operated by the respondent ran from 1 January to 31 December each year. The claimant was entitled to 28 days holiday a year. He had been employed for 10 weeks of the leave year at the date of dismissal so the proportion of the leave year worked was 10/52 multiplied by 28 days which results in 5.6 days holiday accrued at the end of employment.

81. The question is then whether the claimant took any holidays during 2023. The respondent's position is that the claimant took holidays on 2-6 January as well as 2 and 10 February 2023.

82. The Tribunal does not consider that the respondent gave the notice required under Regulations 15(2) & (3) of the Working Time Regulations in respect of 4-6 January and 2 & 10 February 2023. There can be an agreement between an employer or employee to vary the notice requirement but this must be in writing to satisfy Regulation 15(5) and there was no such agreement in this case. These days cannot, therefore, be deducted from the claimant's entitlement under the Working Time Regulations.

83. The position is different in respect of 2 and 3 January 2023. There is no dispute that the requisite notice was given. The dispute here is whether these holidays were to come from the claimant's 2022 entitlement or his 2023 entitlement.

84. The Tribunal considers that the more logical position is that holidays being taken in 2023 come from the 2023 holiday entitlement. It is consistent with the "use it or lose it" rule under the Working Time Regulations where there is no provision allowing for holidays to be carried over from one year to the next.

85. This is also consistent with the recollection of both LH and SH which, in this one instance, the Tribunal prefers rather than the claimant's evidence. The claimant did not present any evidence to show that he had saved two days from his 2022 entitlement to use on 2 & 3 January 2023 and the Tribunal considers that he has confused the position.

86. The claimant is therefore entitled to pay in lieu of untaken holidays in respect of 3.6 days. The contractual hours were 8.5 per day and the claimant's hourly rate was £9.50 an hour. Based on these figures the claimant is entitled to £275.40 in respect of holiday pay.

Remedies

87. There were a number of issues that the Tribunal required to determine in considering what compensation it would be just and equitable to award in respect of the claim for unfair dismissal.

88. First, the Tribunal considered whether there was any basis to reduce any award for contributory fault by the claimant. The respondent has not advanced any argument that there was a contributory fault and, in any event, there is no basis on which the Tribunal could conclude that the claimant contributed to his dismissal at all. There must be culpable and blameworthy conduct on the part of the claimant which contributes to his dismissal and there is none in this case; the claimant had had an accident which prevented him from working; when SH presented him with options for how to deal with his absence and return to work, the claimant sought to discuss those, raising perfectly valid and appropriate issues such as the fact that the proposals for his pay on a return to work would take him below the National Minimum Wage (and would, therefore, be unlawful). None of this is the type of conduct which could be considered blameworthy and culpable.

89. Second, there is the question of whether to make a "Polkey" deduction to reflect the prospects of the claimant having been dismissed anyway if a fair procedure had been followed. This would arise where the Tribunal has found that the dismissal was unfair solely on the basis of procedural defects and so has to consider whether the claimant would still have been dismissed if a fair procedure had been followed.

90. In the circumstances of this case, where there was no fair reason for dismissal, there is no basis on which the Tribunal could conclude there was any prospect of the claimant being dismissed at all.

91. In any event, the evidence heard by the Tribunal indicated that, had the respondent engaged in some form of fair process (such as holding a disciplinary hearing) and approached that with an open mind, there would have been an opportunity for both parties to have an open discussion of the issues raised by the respondent in the dismissal letter. For example, Mr Hewie could have explained why he felt the claimant was not taking

responsibility for the circumstances which would have allowed the claimant to reflect and respond. Similarly, the issue of the claimant using crutches after saying that he did not need these could have been raised by the respondent which would have allowed the claimant to explain the change in the medical advice he had received.

92. The Tribunal considers that had a proper process been followed and, more importantly, had Mr Hewie engaged in that with an open mind then it was very likely that the claimant would not have been dismissed.

93. For these reasons, the Tribunal has not made any "Polkey" deduction.

94. Third, there is no question of a failure to mitigate the claimant's loss. The burden of proving this lies on the respondent who has advanced no evidence or argument to discharge this burden. In any event, the claimant secured new employment very quickly after his dismissal and continues to seek better paid work. The Tribunal considers that this demonstrates that he has discharged the duty to mitigate his loss.

95. Fourth, and finally, the claimant sought an uplift to his compensation in relation to a failure by the respondent to follow the ACAS Code of Practice. The Tribunal considers that the respondent wholly failed to comply with the ACAS Code given the complete lack of any dismissal procedure. This failure was wholly unreasonable; the respondent had closed his mind very early in the process; he gave the claimant no opportunity to save his job by failing to follow any form of procedure. An uplift is, therefore, appropriate.

96. In terms of the amount of any uplift, the Tribunal considers that the wholesale failure by the respondent to act in accordance with the Code means that it is appropriate to award a 25% uplift. In coming to that view, the Tribunal has taken into account the actual amount represented by that percentage as well the size and resources of the respondent. In particular, the Tribunal considers that there are no mitigating factors that would lead it to award a lower amount; the respondent closed its mind early in the process and engaged in no process at all.

97. Turning now to the calculation of the award to be made and starting with basic award. The claimant was 19 years of age when he was dismissed and had been employed with the respondent for 3 complete years. He was therefore entitled to a basic award of 1.5 weeks' wages

98. The claimant's gross wage fluctuated and so the Tribunal has taken the average wage based on his wages in November 2022, December 2022 and January 2023. The Tribunal did not consider that it was appropriate to use February 2023 as this included the claimant's period of sick pay. Based on these figures, the average gross pay was £1745.08 per month and £402.71 a week.

99. The claimant was, therefore, entitled to a basic award of £604.07.

100. Turning to the compensatory award, there are a number of heads of damages; loss of past wages; loss of future wages; loss of statutory rights. The Tribunal will address each of these in turn before considering whether the statutory cap applies.

101. In respect of the loss of past wages, the Tribunal considers it appropriate to award this from the date of dismissal (13 March 2023) to the date of the Tribunal hearing (16 October 2023). This amounts to 31 weeks.

102. Again, the claimant's net pay fluctuated and so the Tribunal has calculated the average pay in the same way as it calculated the gross pay above. This produces an average take pay of £351.65.

103. The total loss of wages to the date of the Tribunal amounts to 31 x £351.65 = £10901.15.

104. The claimant's earnings in his new employment must be deducted from this sum. The claimant earns £276.66 net and he has been employed in his new job from 17 April 2023. This amounts to 26 weeks up to the date of the Tribunal hearing. The amount to be deducted is 26 x £276.66 = £7193.16

105. The Tribunal, therefore, awards £3707.99 in respect of loss of past wages.

106. The claimant has sought future loss over a period of 26 weeks. The Tribunal considers that this is a reasonable period for the claimant to secure employment at the same level earnings as he had when working for the respondent given his age and work experience.

107. The gross amount of these losses are 26 x £351.65 = £9142.90. The Tribunal has deducted the earnings in the claimant's new job 26 x £276.66 = 7193.16. The Tribunal, therefore, awards the sum of £1949.74 in respect of future earning.

108. The Tribunal has not deducted any state benefits received by the claimant from this sum on the basis that, if these were paid to the claimant, they will be subject to recoupment provisions.

109. The claimant has sought £500 in respect of loss of statutory rights and the Tribunal considered that this was an appropriate sum to award in respect of this head of compensation given the period of employment and the statutory employment rights which the Claimant had built up as a result.

110. The total unadjusted compensatory award is, therefore, £6157.73. This is less than the claimant's annual earnings and so the statutory cap does not apply.

111. The Tribunal awards a 25% uplift to the compensatory award as set out above which amounts to £1539.43. This brings the total compensatory award to £7697.16.

112. In these circumstances, the Tribunal makes a total award (basic award and compensatory award) for unfair dismissal of £8301.23 (eight thousand, three hundred and one pounds, twenty three pence).

113. The Tribunal does not make any award of compensation for the failure by the respondent to give the claimant notice of his dismissal because the notice period is covered by the period over which the Tribunal has awarded loss of wages under the unfair dismissal claim and the claimant would receive a windfall by way of double-counting if it also awards compensation for loss of wages during the notice period.

Employment Judge: **P O'Donnell**
Date of Judgment: **23 October 2023**
Entered in register: **27 October 2023**
and copied to parties