RESERVED

EMPLOYMENT TRIBUNALS

Claimant: IAN BARNES

Respondent: FUJITSU SERVICES LIMITED

Heard at: Liverpool

On: 1 October 2026 & 5 October 2026 (in chambers).

Before: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Mr Fitzpatrick, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The complaint of breach of contract in respect of holiday pay accrued during the notice period is not well-founded. The respondent was not in breach of contract in failing to pay the claimant for holidays allegedly accrued after the date the claimant's employment ended, and the claim is dismissed.

2. The claimant's contract was not varied by custom and practice such that he was entitled to receive a full year's annual leave on dismissal by reason of redundancy according to his membership of the respondent's Majority Club, and his claim for breach of contract is dismissed.

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REASONS

1. This is a liability hearing held in public. Judgment by consent was issued earlier ordering the respondent to pay to the claimant the sum of £1316.21 which resolved the unlawful deduction of wages complaint.

2. The hearing was listed for 90 minutes although the parties agreed to start 30 minutes earlier given there were concerns that the hearing would go part-heard and the respondent had made an application to adjourn, which was refused.

3. I have before me the respondent's bundle totalling 414-pages, together with numerous documents from the claimant which I am assured by the claimant are in the respondent's bundle. Accordingly, I have only considered those documents in the bundle to which I was taken to either in witness evidence or during submissions.

4. I have before me a witness statement bundle which consists of a witness statement prepared on the claimant's behalf by Kevin Davies, workplace representative for UNITE the Union ("Unite") and member of the Manchester Bargaining Unit negotiating team. The claimant did not provide a witness statement and he did not give oral evidence. It is notable that in oral submissions the claimant made two concessions. The first related to the applicability of the ACAS Code on his grievance which did not include any reference to unlawful deduction of wages. The claimant agreed that the ACAS uplift was not applicable to the unlawful deduction of wages claim and the order that the respondent pay to the claimant the sum of £1316.21. The second concession was that the Majority Club benefits were discretionary.

5. On behalf of the respondent, I heard from Andrew Walker, employee relations business partner who managed the respondent's industrial relations with Unite and was responsible for advising on and implementing collective agreements.

6. I found both witnesses have tried their best to give honest evidence and have taken note of the contemporaneous correspondence in the bundle.

<u>The claim and remaining issues to be decided</u>

7. ACAS Conciliation took place between the 6 January 2026 to 10 March 2026. The claimant form was presented on the 9 April 2025 by which the claimant brought complaints of unlawful deduction of wages for accrued but untaken annual leave, breach of contract and unlawful deduction of wages.

8. The remaining issues as are follows:

   8.1 The claimant was dismissed via a payment in lieu of notice ("PILON"). Is he entitled to accrued holiday pay for the remaining notice and if so, had the

claimant worked his notice would have been required to take any accrued but untaken annual leave during the notice period such that there is no loss?

8.2 Was the claimant's contract varied by custom and practice such that he was entitled to receive a full year's annual leave on dismissal by reason of redundancy according to his membership of the respondent's Majority Club?

9. There does not exist very much factual dispute between the parties. I have taken into account the witness evidence, documents to which I was taken, written and oral submissions which I do not intend to repeat in any great detail, resolving any conflicts in the evidence on the balance of probabilities before arriving at the following findings of facts.

Facts

10. The claimant commenced his employment with the respondent on the 4 January 2000 and at the time of his redundancy on the 31 October 2025 when he was dismissed, worked as a senior development based on a site in Manchester.

11. The respondent and Unite are parties to a Recognition Agreement under which Unite is recognised for the purpose of collective bargaining in respect of employees within the Manchester Bargaining Unit ("MBU"). Kevin Davies is and remains a Unite workplace representative for the MBU having held this position since 2010 and is a member of the MBU pay negotiating team. During the relevant period Andrew Walker was the primary HR contact for matters involving the Recognition Agreement and advised on and implemented collective agreements and HR policies applicable to MBU members.

12. The claimant was a member of UNITE and during his redundancy procedure represented by Kevin Davies. The claimant was also a member of the Majority Club due to his 21 years' service with the respondent.

13. In a document tilted "Annex 1 Managing Changing Patterns of Employment through the Recognition Agreement with 'Unite the Union' for Fujitsu Services, Manchester" a framework was set out which includes redundancy consultation and under the heading "Dismissal the following is set out; "The individual's employment is terminated, and they receive whatever money is due to them. Depending on the circumstances, this might happen immediately on being given notice, during their notice period, at the end of their notice period or on some other date." Section 6 sets out the provisions on redundancy including 6.1.7(i) and (ii) relating to notice of dismissal which includes "where possible the Company will consider the wishes of the individual, particularly where this could assist redeployment." This clause is relevant in that at no point during the redundancy consultation and outcome did the claimant or his UNITE representative express any indication that he wanted to work his notice rather than receive a payment in lieu of notice which was not worked.

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14. 6.1.8.3 provides “Where…PILON is payable…untaken accrued holiday pay will be paid on dismissal.”

Majority Club

15. The Majority Club is a long service recognition scheme providing a number of discretionary benefits. One of the discretionary benefits was for employees aged 60 or older leaving by reason of retirement (and voluntary redundancy) to be paid their full contractual annual leave for the leave year in which they department, i.e. in the claimant’s case to the end of the leave year from 1 November 2025 had he retired or taken up an offer of voluntary redundancy and so I find on the evidence before me, rejecting the claimant’s case that compulsory redundancy provided employees with the additional holiday benefit.

16. I have considered the HR Handbook which expressly states that its contents are non-contractual and it is undisputed that the Majority club benefits are not covered by or included within any Recognition Agreement with Unite. I find the Majority Club benefits are discretionary and non-contractual, the claimant having referred to it as “discretionary” in his closing submissions.

17. It is accepted by both parties that in June 2019 the respondent consulted with Unite on the changes to long service awards including Annual Leave Benefit. The 31 March 2022 was the date for removal of the annual leave benefit, and it appears to be accepted that UNITE were not separately consulted on the removal of that benefit as of 31 March 2022.

18. In a document titled “Confirmation of Fujitsu’s position” dated 2 July 2019 it is recorded that:

18.1 “we are calculating employee’s payments for holiday up to their actual termination date… Fujitsu’s approach in this redundancy programme (and other previous programmes) is that employees who are confirmed redundant are not required to work their notice period. Instead they receive a payment for the salary and benefits they would have enjoyed during their notice period. A…PILON is a payment in lieu of benefits the employee would have received or enjoyed during notice…if there is no express PILON clause on the employee’s contract, then dismissal without notice will be a breach of contract, and the employee is entitled to damages….Fujitsu currently compensates the employee for both salary and benefits the employee would have received…whether there was an express PILON clause or not. In theory, an employee would have accrued holiday during their notice period, had they worked it. However, Fujitsu would (as it is entitled to do under the Working Time Regulations) require the employee to take any accrued holiday during the notice period. Therefore, the employee would have simply earned salary and received benefits during their notice period. As Fujitsu pays PILON…there is no loss suffered…and therefore no further payment in lieu of holiday during notice. It has been commented that employees don’t get the chance to “take” their holidays whilst working

notice. **However, they are in a better position, they do not work for any part of their notice period**…" [my emphasis].

18.2 "Fujitsu Majority Awards: These awards are non-contractual. Fujitsu's policy is to calculate service up until the last day worked. If an employee is due an award within a few days of their last day, we will consider the circumstances, on a discretionary basis. Fujitsu awards have been operating this way for many years."

Reinstatement of Majority Club Benefits

19. On the 8 August 2023 the respondent reinstated the annual leave benefit and notice uplift to 16 weeks for MBU members only following a grievance from a retiring employee. I preferred Andrew Walker's evidence that the discretionary benefit was limited to those employees who were either retiring or had taken voluntary redundancy, and that a "one off mistake" had been made in respect of one employee who was made redundant and received after raising a grievance annual leave benefit and holiday accrual. Had the benefits been paid to compulsory redundancy leavers dismissed by reason of compulsory redundancy who qualified for Majority Club benefits due to their long service as argued by the claimant, I would have expected to have seen more examples and not a single isolated incident, satisfied that given the benefit was discretionary in the first place, a general legal entitlement did not exist. I accepted Andrew Walker's evidence that the respondent used its discretion in favour of some employees who were either retiring or had taken voluntary redundancy, and the claimant did not fall into either category as it is undisputed the claimant's redundancy was compulsory.

The claimant's redundancy

20. On the 19 June 2025 the claimant was issued with a notice of risk of redundancy and following consultation on 24 October 2025 the claimant was sent and received a formal notice of termination on 24 October 2025 confirming his employment would end by reason of redundancy on the 31 October 2025, he would not be required to work his 16 week contractual notice and would be paid in excess of £52,000 which included a payment in lieu of 20 days accrued but untaken annual leave calculated to 31 October 2025. The claimant's holiday entitled was not calculated beyond the 31 October 2025 to cover the 16 week PILON and a payment equivalent to the balance of his full annual leave entitlement was not made under the Majority Club scheme.

21. The 24 October 2025 termination letter made the following position clear:

21.1 The claimant contract will terminate with effect from 31 October 2025.

21.2 The claimant will receive a payment in lieu of notice in addition to other payments which "are in full and final settlement of any claim you may have

relating to the termination of your employment contract., with the exception of any bonus payment…"

21.3 It will include a payment of 20 days leave earned but not taken.

22. The claimant's contract of employment cannot be found, and there is no evidence before me that the respondent was as a matter of contract entitled to dismiss the claimant with a PILON. However, the claimant accepted the PILON which was transferred into his bank account and did not give any indication that he wished to work his 16 week notice and accrue holidays. The claimant was content to accept the payment in lieu of notice on the basis that he did not need to work it. I accept Andrew Walker's evidence that had the claimant worked his notice he would have been expected to take any additional accrued holiday from 1 November 2025 during the 16 week notice period.

23. It is notable that the claimant's appeal sent by an email on the 31 October 2025 concerns the "annual leave calculation" and he does not appeal the PILON. I find as a matter of fact that the claimant accepted the principle of a PILON and at no stage sought to argue the respondent was in breach of contract and he should be working it, thus agreeing to a variation of his contract.

The law

24. The law as set out by Mr Fitzpatrick and it is not disputed by the claimant. I have set it out below as reflected in counsel's note.

25. For custom and practice to be of contractual effect, it must be:

25.1 Reasonable;

25.2 Notorious;

25.3 Certain, see **Devonald v Rosser & Sons** [1906] 2 KB 728 at 743, per Farwell LJ; and

25.4 Followed because there is a sense of legal obligation to do so.

26. Key, repetition and consistency alone do not suffice; a term may only become an implied term (and thereby enforceable) '*when the courts are able to infer from the regular application of the practice that the parties must be taken to have accepted that the practice has crystallised into contractual rights*', see **Solectron Scotland Limited v Roper** [2004] IRLR 4, per Elias J (as he then was) at [21].

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27. It is normally required that the term relied upon be communicated to the employees as an entitlement and not as a discretion, see, **Duke v Reliance Systems Ltd** [1982] ICR 449, per Browne-Wilkinson J (as he then was) at p. 452F-G. This is to support the '*inference that the employers intended to become contractually bound by it*', see **Quinn v Calder Industrial Materials Ltd** [1996] IRLR 126 per Lord Coulsfield at [7] as repeated '*acting upon…terms*' does not demonstrate this, *ibid*., [8], merely because employees '*may well have expected, quite reasonably, that the…terms would apply*', does not mean they are contractual, *ibid.*, [9].

28. Proving that a matter is adopted as an obligation rather than, e.g., a matter of policy rather, '*will often be a difficult matter to prove*', **Solectron**, [22].

29. It is for the Claimant to prove that a term is implied as a result of custom and practice.

Conclusion: applying the facts to the law

30. The claimant was dismissed via a PILON initially in breach of contract as the respondent was unable to satisfy me that the claimant's contract included such a provision. However, the claimant who was supported by UNITE at the time, did not ask the respondent to agree that he could work his 16 week notice period. Relying on the factual matrix above, I find the claimant agreed to vary his contract of employment by accepting the PILON. If I am wrong on this point, and the respondent is in breach of contract, the claimant would have suffered no loss on the basis that had he worked his 16 week notice (which he did not) the respondent would have required him to take all holidays accruing during the notice period with the result that the claimant has not suffered any damage. There is no satisfactory evidence that employees who benefitted from being members of the Majority Club regularly received payments in respect of holiday entitled that accrued during the notice leave period, i.e. 16 weeks in the claimant's case.

31. The claimant argued that as the respondent had not served him with a Regulation 15 notice under the Working Time Regulations 1998 ("WTR") the respondent's position that it would have "forced the claimant to taken accrued holiday during his notice…is legally unsustainable." I do not agree, There was no need for the respondent to serve the claimant with a section 15 notice when he had agreed to accept a payment in lieu of notice and did not work during the notice period. I accepted Andrew Walker's evidence as credible that had the claimant worked his notice, he would have been told that he had to take all holidays during the notice period. It would then have been open to the claimant to argue whether any notice was valid or not.

32. The claimant also argued relying on **Delaney v Staples [1992] 1 AC 687** and **Morran v Glasgow City Council [1998] IRLR 67**, damages for wrongful dismissal must place the employee in the exact financial position they would have enjoyed had notice been lawfully performed. Had notice been worked, 8

days of statutory and contractual annual leave would have accrued under WTR 1998. I do not agree on the basis that the claimant has suffered no loss given he would have been given notice that he had to work the holiday entitlement accrued during the notice period before his notice came to an end i.e. cutting short the period in which the claimant had to attend work. As it transpired the claimant was paid for and not required to attend during the entire 16 week notice period, and unsurprisingly he did not object to not being required to work.

33. With reference to the first issue, namely, is the claimant entitled to accrued holiday pay for the remaining notice and if so, had the claimant worked his notice would have been required to take any accrued but untaken annual leave during the notice period such that there is no loss, I find on the balance of probabilities that he was not entitled to accrued holiday pay, and in the alternative, had he been so entitled there was no loss.

34. With reference to the second issue, namely, was the claimant's contract varied by custom and practice such that he was entitled to receive a full year's annual leave on dismissal by reason of redundancy according to his membership of the respondent's Majority Club I find that there is no satisfactory evidence that employees dismissed by reason of compulsory redundancy had consistently and regularly received a full year's annual leave by reason of their membership in the Majority Club. An example of one "genuine mistake" is insufficient to establish on the balance of probabilities that payment of a full year's annual leave "*has crystallised into contractual rights*', see **Solectron Scotland** above. It is a discretionary payment, and the respondent did not intend to be contractually bound evidenced by the fact that there was no collective bargain leading to it, and there is no document produced by UNITE to such an effect. It is discretionary as admitted by the claimant, and I go on to find that it was a discretionary matter for the respondent to decide to pay the benefit to those employees who had retired or taken voluntary redundancy as a "sweetener" rather than those who were dismissed for other reasons, including compulsory redundancy when no sweetener was necessary.

35. The claimant relies on two comparators; the first was where a mistake had been made which I have dealt with above, the second did not assist him as there was not sufficient information before me from which I could be satisfied that the employee who raised a grievance in June 2023 had not returned as opposed to being made compulsory redundant. The evidence suggests that he was not made redundant as the claimant in oral submissions confirmed the employee in question "left to continue working elsewhere". I found no satisfactory evidence that the respondent had with sufficient regularity paid Majority Club employees a total of one year's annual leave for me to conclude that it had crystallised into a contractual right for employees dismissed by reason of compulsory redundancy rather than a discretionary payment upon retirement or a sweetener for voluntary redundancy. It is also apparent from the evidence that the discretionary benefit was not applied to everyone, hence the grievance referenced above. The fact that the benefit was granted over a period of time does not necessarily convert it to an implied term. The discretionary benefit had not been incorporated into any agreement, the evidence before me was that it

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was not automatically paid and the claimant could not have had a reasonable expectation that the payment would be made when he was not retiring and had not accepted a voluntary redundancy.

36. In conclusion, the complaint in respect of holiday pay accrued during a notice period is not well-founded. The respondent was not in breach of contract in failing to pay the claimant for holidays allegedly accrued after the date the claimant's employment ended, and the claim is dismissed.

37. The claimant's contract was not varied by custom and practice such that he was entitled to receive a full year's annual leave on dismissal by reason of redundancy according to his membership of the respondent's Majority Club, and his claim for breach of contract is dismissed.

Approved by:

Employment Judge Shotter

5 October 2026

Judgment sent to the parties on:

2 November 2026

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For the Tribunal:

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Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript

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is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/