Case No: 23033593/2017

EMPLOYMENT TRIBUNALS

Claimant: Dr Jane Ben-Shah

Respondent: Lushington Chiropractic Limited

Heard at: **London South** **On: 18 September 2018**

Before: **Employment Judge Fowell**

Representation:

Claimant: Mr P O'Callaghan, instructed by RSR Law In person

Respondent: Mr B Large, instructed by RBS & Natwest Mentor

RESERVED JUDGMENT

1. The claimant was dismissed for asserting a statutory right and so her dismissal was automatically unfair.

2. The amount of compensation for unfair dismissal is to be determined but will be subject to an uplift of 20% for failure to comply with the ACAS Code of Practice on Discipline and Grievances at Work

3. The claimant agreed a new contract of employment with effect from 1 June 17 which reduced her salary and made no provision for payments when covering shifts for self-employed colleagues. Having agreed those terms, she did not suffer an unlawful deduction from wages on dismissal, either in respect of salary generally or for such shift payments.

4. The respondent, in breach of contract, failed to pay the full amount of notice pay due to the claimant. The amount of the shortfall is to be determined.

5. The provision of the claimant's contract of employment whereby she was required to take four hours holiday per week was in breach of the Working Time Regulations 1998 and so her complaint under those Regulations in respect of annual leave is upheld, in an amount to be determined.

REASONS

Introduction

1. The claimant, Dr Ben-Shah, was employed by the respondent, Lushington Chiropractic as a chiropractor until 23 September 2017. They say that she was dismissed for poor performance: she says that it was because she complained about her pay being cut – strictly speaking, that she asserted a statutory right to receive her pay. The reason is important as she did not have the two years' service needed for a complaint of unfair dismissal but this is not needed where dismissal is for asserting a statutory right.

2. Dr Ben-Shah is a US national and came to the UK in 2014 on a Tier 2 visa. It was a term of her visa that she receive an annual salary of at least £30,000. She began working for the respondent on 21 March 2016 on £56,000.

3. The practice is run by Mr James Revell. It generally had several other chiropractors and about 15 other clinical or support staff. The other chiropractors were all self-employed, earning a percentage of the fees paid for each visit, so the claimant's recruitment was a departure for the company. Mr Revell expected her to see 95 patients per week. His case, in short, is that she failed to achieve this sort of target and so ultimately had to be dismissed: hers is that he cut her salary on two occasions and that she was dismissed when she threatened legal action.

Legal Background

4. Under s.104 of the Employment Rights Act 1996 (ERA) an employee's dismissal is automatically unfair if the reason or principal reason is that she alleged that her employer had infringed a relevant statutory right, in this case the right to protection of her wages. It does not matter whether she actually *had* the statutory right in question or whether the right has been infringed, as long as the claim was made in good faith and that the right in question was made reasonably clear to the employer.

5. Cutting an employee's pay is a fundamental breach of contract. The employee then has to decide whether to accept it or not, either expressly or by implication, such as continuing to work on the new terms. In legal terms the breach is said to be waived. Once that happens, the reduced pay is the new, correct amount. In the same way, reducing her pay is also an unlawful deduction from wages, but once an employee decides to accept the situation and waives the breach there is no longer an unlawful deduction.

6. In considering the rival claims I heard evidence over two days from Mr Revell and Dr Ben-Shah supplemented by a bundle of about 450 pages.

Findings of Fact

7. Dr Ben-Shah was recruited from a larger practice, known to Mr Revell, and had been seeing high numbers of patients. He would have preferred to recruit her

on a self-employed basis but given her visa requirement he accepted that she would need to be employed. They negotiated over salary and Mr Revell did some calculations. 95 patients per week, a high but manageable figure, would generate about £180,000 per year and so on that basis a salary of £56,000 was agreed. The rest of the income would cover overheads and a contribution to profit.

8. Given the normal practice of having self-employed staff Mr Revell did not regard this figure as set in stone. The email he sent with the contract explained his "expectation" that she would see 95 patients per week and that if this was unachievable then the salary would have to come down.

9. Another expectation was that she become a member of the Royal College of Chiropractors (RCC) and also either the United Chiropractors Association (UCA) or British Chiropractors Association (BCA). He attached considerable importance to this, taking the view that it showed a commitment to high professional standards. (It did not affect her ability to practice). He did not offer to pay the subscription fees however, which in each case was several hundred pounds.

10. As to her holiday entitlement, although the contract allowed for 28 days per year the covering email said that four of these were to be taken each week as holiday, so in fact her normal working hours were 36 per week. At the same time, by clause 10 of her contract she was required to be flexible and work such hours as necessary for the proper performance of her duties – seeing 95 patients per week. The four hours holiday were therefore largely ignored. She was supposed to take this on a Tuesday or Thursday afternoon but in practice she often worked through or attended marketing events instead.

11. These marketing efforts were an integral part of her work. There was a weekly Facebook post and 600-word blog to write. Events were organised in the evenings and weekends at gyms or other places, carrying out spinal assessments and extolling the benefits of chiropractic treatment. She was soon working long hours, above those contracted, to build up her own practice and to treat patients. Attached to her witness statement was a hand-written breakdown of working hours which Mr Revell accepted was broadly correct, according to which she did between 32 and 35 hours each week of clinical work and about 10 more for other tasks.

12. Despite the long hours she was working Dr Ben-Shah's practice did not build up as quickly as expected and Mr Revell began to be concerned. He was very aware of the cost to the business of supporting her while patient numbers built up, something he referred to in conversation as her 'deficit'. She interpreted this (mistakenly) as an actual sum of money, something she was expected to pay back, and as the months passed without anything being said about the amount, her concerns grew.

13. On 6 September 2016, about six months after her employment started, Mr Revell prepared a table setting out this deficit, comparing her earnings as an employee with the cost of a self-employed chiropractor. In the first full month, April, the gap was about £2500 but by August 2016 she was actually paid less. She was in

profit.

14. This table was included in Mr Revell's notes of their monthly one-to-one meeting. He noted she was working very hard but said she had not yet met her target. It is not clear why he thought so. The level of fees required to justify her salary was set out in the left-hand column of the table, as £14,408 per month, every month. This was now being met. The second column had a separate monthly target. For some reason this had risen to £15,015, a figure which was narrowly missed. So, although she had now met the required average and was being paid less than if self-employed, Mr Revell decided to cut her pay. On 16 September 2016, at the end of their next monthly meeting, he told her that her salary was being drastically re-shaped. She would now be on a basic salary of £35,368 per year, with a 33% bonus for any net monthly fees over £10,010. There was no negotiation.

15. Dr Ben Shah felt she had no choice but to accept this. If she left her job she only had four weeks to find another one at the right level or she would be in breach of her visa. She was also supporting a daughter in the United States who had cancer and was unable to work, leaving little left over. Pay was important to her, but the job was still better than no job at all. So, she put the best face she could on the situation, and stayed.

16. In all this, Mr Revell showed a remarkable insensitivity to the effect this major pay cut would have on Dr Ben-Shah, who had been making every effort to make a success of things. His own note of their meeting on 22 September 2016 stated that although standards of admin were sometimes a concern Dr Ben-Shah had been building good relations with clients, working hard, showed enthusiasm for events, even that she had been outstanding in her push for google reviews. It does not appear to have occurred to him that this pay cut would damage her morale and affect her performance, particularly in making the marketing effort required in order to build up more work.

17. Mr Revell also continued to expect her to see 95 patients per week. In his view, each chiropractor had a treatment room and so had responsibility for meeting a proportion of the firm's overheads. Whilst it was a demanding target, meeting it would mean that she earned a substantial bonus, not very much different from her previous salary. That is not how Dr Ben-Shah saw things and although outwardly she attempted to maintain her positive approach she felt offended and unappreciated.

18. One consequence was that Dr Ben-Shah dragged her feet over joining the professional bodies, saying that she did not have the money. It became a bone of contention and essentially a proxy for their other disagreements. Her reluctance was a form of mild protest against the pay cut. Mr Revell continued to press her over this. At one point she said that if it was so important to him he should pay for it, but he did not take up the suggestion.

19. They carried on with their monthly meetings. Neither of them took any notes but Mr Revell typed his record up shortly afterwards. These minutes became increasingly critical of Dr Ben-Shah's performance while her view was that Mr Revell was micro-managing her and being too fussy. (She said in evidence that

she used to call him Henry Higgins because he seemed to want to mould her into someone quiet and demure.) The notes of their meetings, although no doubt accurate, focus more on his concerns than on her reservations.

20. The main item on the agenda each time was the number of patients seen and hence the fees generated. The weekly target of 95 was equated to 425 per month, a figure reached by multiplying by 4.5. The actual amount to the nearest unit should have been 412 however (95 × 52 ÷ 12). Had Dr Ben-Shah had the opportunity to take 5.6 weeks annual holiday and an adjustment made for time off, the monthly total would have been 367 (95 × 47.4 ÷ 12).

21. The actual figures began to decline following this pay cut. From a peak of 408 in August 2016 it slipped to 391 in September. Figures were then collected on a slightly different basis, at first measured to 25th of the month, then from 20th of one month to 20th of the next. Summarising those figures for 2017:

January	251
February	290
March	224
April	314
May	302
June	Not given
July	327
August	237
September	235

22. The reality therefore is that Dr Ben-Shah's level of activity dropped considerably during 2017, often to well below her target and the previous level. Mr Revell linked this drop to her approach and technique with patients. He observed some of her treatments and monitored closely the number of return visits, which were less than for other chiropractors, recommending among other things that she tell them what they needed rather than what she recommended. She resisted this sort of approach on grounds that too much pressure on patients was unethical. Whatever view each side took at the time it is hard with hindsight to avoid the conclusion that there was an immediate and sustained drop in performance following this pay cut and hence that the real reasons were to do with morale and motivation. It also follows that the root cause of this disagreement was never squarely addressed.

23. In keeping with his view that pay should follow performance Mr Revell responded to these disappointing figures with a further pay cut. This was made on 3 May 2017. Again, there was no negotiation; Dr Ben-Shah's salary was simply reduced to a flat £30,000 with the bonus as before. This time, Mr Revell made the choice even more explicit by terminating her contract and offering her instead a new contract on these terms with effect from 1 June. As before, for the same reasons, Dr Ben-Shah accepted and signed the new contract on 8 May.

24. When they discussed this second pay cut Dr Ben-Shah understood that she was at least to be paid extra for covering shifts for self-employed colleagues, earning

the commission they would have done. It was only at the end of June, when she checked her salary, that she realised this was not the case. This was not in the new contract and Mr Revell's view was that she was employed to treat patients and that all those she saw when covering other clinics counted to her monthly total and bonus. However logical that approach Dr Ben-Shah felt misled and was indignant about it. She rang ACAS and then on 4 July she wrote to Mr Revell complaining about the pay cut and the fact that she still had an unknown 'deficit' hanging over her. The next day they met and he explained that there was no deficit as such. Far from being reassured by this, she again felt that she had been misled and placed under unnecessary strain.

25. By the time of their next monthly meeting on 26 July Dr Ben-Shah had a stomach ulcer and was on her own admission very stressed. She explained that she had been in touch with ACAS and made clear, not for the first time, that she was struggling financially. As a result she had been looking for a second job and had been offered a locum position for any hours she could manage in August, which she planned to fit around her normal work on Mondays and Thursdays. Mr Revell was not happy with this and reminded her of her obligation to work 40 hours per week (not 36) but she insisted she needed another job to pay the bills.

26. These strains were revealed in an altercation at work with a colleague, Claire Wood, on 11 August. It is not clear what was said but it left Ms Wood upset, although Dr Ben-Shah felt she was being unduly sensitive. Mr Revell spoke to her about and afterwards noted (page 223) that he was concerned that she became so agitated with him.

27. The effect of all this is reflected in the monthly figures. In August and September 2016 Dr Ben-Shah saw 391 and 408 patients per month respectively, but in 2017 the corresponding figures had dropped to just 237 and 235, 40% less.

28. This did not escape Mr Revell, and August was a fraught period because of Dr Ben-Shah's absences doing locum work. On 31 August he emailed her to express his concerns and quoted again the section of her contract about working 40 hours. He wanted to know in advance for September the dates and times of any future locum work. She replied that day informing him that she had taken a three-month contract from 27 August, working Mondays and Thursdays in London, adding that she was still working late on Tuesdays and on Saturdays and Sundays for him. She also said that she did not want it to get ugly and that she could look for a full-time job elsewhere if he preferred.

Meeting on 12 September 2017

29. This was the backdrop to their monthly meeting on 12 September. On this occasion Mr Revell invited the receptionist, Ms Henderson, to take a note. As usual, after the meeting he wrote up his own account, which appeared in the bundle, but there were no notes from Ms Henderson. Dr Ben-Shah insisted that she had seen them and given them to her solicitors, who were unwilling to use them as she had written her comments on them. I directed that they be produced for the second day of the hearing. It follows too that this important document was in the respondent's possession and had not been disclosed either. Since the contents were damaging to the respondent's case, this failure is more difficult

to excuse.

30. I base my findings on Ms Henderson's note, which was not disputed. As usual they began with the fees position, going over it in some detail together with the reasons for the shortfall. They then looked at what was manageable. Dr Ben-Shah thought that 95 patients per week was not achievable, especially given that there were now seven chiropractors in the practice instead of the four they had previously; 70 would be more realistic. She also said that the relationship was not working. She could not see herself, she said, at the practice past Christmas, although she was not committed to going or staying. Although she loved her job, she did not like her relationship with Mr Revell, and for his part he said that it was the biggest source of stress in his life.

31. They went on to discuss her stress levels. He said that he was unaware that he was causing her stress, and she responded by going back over the deficit issue, feeling misled and that every email caused her to hyper-ventilate. He did not accept that, but insisted that he wanted to make it work. He then asked if she accepted that she "worked for him" to which she responded that he "did not own her". After some further exchanges she produced a sick note from her GP, signing her off with stress from that day to 22 September. This seems to have been a tense moment as Mr Revell is recorded as telling her to breath and relax.

32. It is not clear, and was never explored, whether Dr Ben-Shah had always intended to produce this note, and if so why she went to work that day, but it seems more likely that she hoped to manage and had it with her as a fallback. Mr Revell then asked about the effect of this on her second job, to which she responded that she had to pay the bills. This mention of her second job – essentially whether she was well enough to do that - does not seem to have been a conciliatory step. He then reminded her of her failure to join any of the professional bodies, to which she replied again that she could not afford it.

33. They discussed some X-Ray training but Dr Ben-Shah said she was not interested until she had decided whether she was staying. She wondered in fact whether this was going to be her last day at work and said that she would like some job security. This led back to a discussion about her second job and the hours she should be working for the respondent, in which Mr Revell insisted that Monday and Thursdays were, as rendered in the notes, "NOT DAYS OFF".

34. At this point Dr Ben-Shah said that they should bring ACAS in. In her comments added later in the margin she stated that she was saying that she would not do any more cover until ACAS came in.
35. As an aside, it is relatively rare for ACAS to carry out a workplace mediation in person, and this is only possible on payment of a fee, usually met by the employer, but that does not appear to have been appreciated on either side. Both assumed that ACAS could be called in to referee or resolve their dispute. There is a further implication however, perhaps more common since the introduction of early conciliation, that this is the precursor to legal action, or in any event that it is taking matters to the next level and hence an unwelcome move from the employer's point of view.

36. That was the inference taken on this occasion, as Mr Revell's response was that

he was not going to be threatened. After some less confrontational remarks, when Dr Ben-Shah said that she would not go to work in her second job the next week and Mr Revell asked what he could do to help with her stress, she suggested again that the bring ACAS in so that they could hear both sides and bring about a resolution. She added that they were recommending to her that she bring an Employment Tribunal claim, or at least that they had said she should write to him setting out her concerns, give him 14 days to reply and then if necessary bring a claim.

37. Understandably Mr Revell did not see this as a good thing. His recorded response is rather elliptical – "working in management" – which may have indicated that he was an experienced manager and could deal with things without ACAS. I therefore accept Dr Ben-Shah's account that he also responded with words to the effect, "What are ACAS going to do?" meaning, "what good would that do?" and so was dismissive of the idea. The notes also record him then saying, "[that] sounds like [a] threat, if I don't leave you in peace I'll end up in [a] tribunal." She responded that she did not want that but that "if you threaten me I will protect myself."

38. From this point things began to settle back to more everyday discussion of hours and fees. As the meeting drew to a close he asked her if she had anything to add. She said she would take a week off and wanted to improve the relationship, she needed some time to sort out her financial situation. The last words recorded before stating the date of her return to work were "Employment Tribunal – Don't want to go down that route."

39. Despite all that, no mention appears in Mr Revell's notes of ACAS or Employment Tribunals. His notes end with a discussion about joining professional bodies.

Meeting on 23 September 2017

40. Dr Ben-Shah was then off sick as discussed until 23 September 2017. By then however she was convinced that she was about to be dismissed. She had already started drafting her claim form. As events transpired she was dismissed that day and immediately contacted ACAS. Her claim form was submitted on 24 September and had to be resubmitted later once early conciliation had been completed, but I accept her evidence that she started drafting this document before her dismissal and completed it shortly afterwards. Indeed, her claim form attached an addendum dated 22 September. This stated:

> "I am trying to switch to a new employer who is in the process of becoming a sponsor and will then be applying for a work permit for me. Once this is sorted I had planned to quit my new job and go and work for this new sponsor."

41. The meeting on 23 September was also attended by Ms Henderson who took a note. This fact appears from Mr Revell's own note at page 246 but was not appreciated, or at least not mentioned, during the hearing. It follows that this important document was not disclosed either. Given this failure, the discrepancies and widely different emphases between her notes and those of Mr Revell on 12 September, I cannot place too much weight on his version but it shows that he raised with her complaints by two patients – M and W.

42. Patient M is said to have been terrified of Dr Ben-Shah. He didn't like the techniques she used and she became angry when he said so. Patient W found her attitude unprofessional and had been derogatory about another chiropractor's work. Dr Ben-Shah became argumentative when asked about the choice of treatments and did not seem to be listening to her concerns. She cancelled her treatments with Dr Ben-Shah and had now returned for care with someone else.

43. He also referred to shortcomings on her patient files such as recording their informed consent. Those shortcomings were not elaborated on but there is a list at page 245, dated 22 September, of 13 of her files needing action, indicating that he had gone through them to check.

44. He also then mentioned a gym who had complained and refused to Dr Ben-Shah back as a representative of the practice. Finally he referred to her general performance, the fact that she was still on a high fixed salary and the failure to join any of the professional bodies, before telling her that she was dismissed. He then handed over a letter confirming this.

45. There was therefore no real discussion of these points and the outcome was decided in advance. Dr Ben-Shah did, according to his notes, make some protest, saying "come on", asking why he was bringing this all up now and saying that she was not like that.

46. In his oral evidence Mr Revell said that he took the decision to dismiss the previous day. Another chiropractor was visiting and was explaining about the practice's high standards of care. To demonstrate this he opened one of Dr Ben-Shah's files and there was no diagnosis recorded, then he opened another one and there was no informed consent on it, which he said was very embarrassing. He then went on to refer in evidence to the patient complaint, with one phoning in and one coming in to say that they were unhappy.

47. In his witness statement he said:

> "124. During Deborah's two week absence from the practice it had been brought to my attention that some of her files were incomplete in that medical consent and treatment plans were missing."

48. This is therefore slightly at odds with his later description of discovering these points for himself in the course of an introductory meeting.

49. Dr Ben-Shah responded in her oral evidence that Patient M was Mr Revell's patient, that he had told her that his adjustments were too aggressive and wanted to see her instead. When she saw him later at the train station he said he had been used as a pawn to fire her and was practically in tears. Patient W, she said, had been seeing another chiropractor (Caroline) who used a technique she did not use and was not trained on, so she had said they should try something different. Like her, she was an American lady and she thought they had got on well, seeing her about 20 times.

50. These points were not set out in her witness statement either so it is difficult to know with any confidence which version to accept. Whether or not Mr Revell

was making too much of their comments, I conclude that some criticism must have been expressed or implied. Neither put any concerns in writing, and it is not clear when they were made. Overall I am inclined to accept Dr Ben-Shah's oral evidence that she felt he was looking for a reason to fire her. She thought his manner strange at the meeting and asked him "Why are you making a big deal out of this?" She also felt that her paperwork was not perfect but was no worse than anyone else's.

51. I prefer that account in part because Mr Revell's notes record something of her surprised reaction but mainly because her account generally of this episode is more consistent and plausible. The failure to record key aspects of the meeting on 12 September and the failure to disclose the notes taken at either hearing necessarily undermine the respondent's case. The timing is also an issue. Despite all of the criticisms made of Dr Ben-Shah's performance in the preceding year Mr Revell had not dismissed her or even threatened to dismiss her, even when cutting her salary. He had said repeatedly that he wanted to make it work. That only changed following the meeting on 12 September when she went off sick.

52. Dr Ben-Shah was dismissed on notice and was expected to work it. She was required to come in on the following Monday, 26 September, to complete the corrective action on the 13 files and was then told that she would be paid for the rest of her notice period. Her final pay statement therefore included her pay for the first 12 days of September and the last two days worked (£1,136.66), SSP for the next 11 days to 22 September (£107.22), and the remaining pay in lieu of notice (£2,076.84). There was also a new and unexplained entry for four hours of holiday, representing a week's worth of holiday rather than a month's worth or thereabouts). Mr Large for the respondent accepted that there was an error in this final payment although the precise amount was unclear, and this hearing was listed to deal with liability only.

Conclusions

53. There was an agreed list of issues and the headline points were as follows:

    a. Was the dismissal automatically unfair?

    b. Was there an unlawful deduction from wages going back to the first pay cut in 2016?

    c. Was there a breach of contract over pay for covering other staff?

    d. Was there a breach of contract over her notice pay?

    e. What holiday pay was she entitled to on dismissal?

    f. What, if any, uplift is appropriate for any failure to follow the ACAS Code of Practice on Discipline and Grievances at Work?

Automatic Unfair Dismissal

54. My main conclusion is that she was dismissed for asserting her statutory right to

her pay. This follows from my findings above about the circumstances and timing of her dismissal. The reasons given were exaggerated and the timing was significant. It followed a difficult and fraught meeting in which Dr Ben-Shah made several references to ACAS involvement and to bringing an Employment Tribunal claim. The meeting ended on that note, yet no reference was made to his in Mr Revell's notes. Her dismissal followed on the very next working day. In all the circumstances the most likely explanation appears to be that she raised this threat of legal action and so this was the principal reason.

55. Whether or not she had a contractual right to pay for covering other clinics, or to her former salary, she protested these points in good faith. That was not challenged. Nor was there any doubt in the respondent's mind over the basis of the threatened claim. It was understood to be about her pay and to go back to the new contract in May or earlier.

56. As a matter of law, Dr Ben-Shah did in fact waive each of the two breaches of her contract when her pay was cut. She did so by continuing to work there after the first reduction and by signing the new contract after the second one. Although she said that she did so under duress, duress requires more than hard bargaining. It usually means the threat of injury or bodily harm. A threat of civil proceedings or even bankruptcy will not suffice: *Powell v Hoyland (1851) 6 Exch 67; Ex p Hall (1882) 19 ChD 580, CA.* Despite the inequality of bargaining power, this applies too in the employment context: *Hepworth Heating Limited v Mr J Akers [2003] All ER (D) 33 (Jul).*

57. Hence, at the time of her dismissal, Dr Ben-Shah's contract provided for a basic salary of £30,000 plus bonus and, subject to her notice pay being corrected to account for her annual leave, her claim for unlawful deduction from wages (the second issue) cannot succeed.

58. The same conclusion applies to her claim for covering colleagues. This did not appear in her contract of employment and appears to have resulted from a misunderstanding about what was discussed in May 2017.

59. Similarly, there was no breach of contract in her notice pay as a result of the new terms and conditions, although there appears to be a holiday pay discrepancy. I will return to holiday pay below.

60. The final stated question is the ACAS uplift, but this is in fact only one of the relevant issues on the subject of compensation. Although this hearing was not listed to deal with remedy, all issues relating to compensation need to be addressed, not just this one aspect.

61. Given Dr Ben-Shah's length of service, there is no basic award but there is a compensatory award. By section 123 Employment Rights Act 1996 this "shall be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to the employer".

62. This is not a case in which it was, or could, be suggested that the claimant's

compensation should be reduced to reflect any misconduct on her part. The only complaints made of her were about performance issues. Rather, it is a case in which the respondent says that her employment would have come to an end fairly for other reasons, one of which might be poor performance, another of which might be her resignation.

63. These possibilities involve some consideration of hypothetical events, of what would have happened if she had not been dismissed in this way. That question has to addressed on the basis that she had acquired the right not to be unfairly dismissed, just as if she had reached two years' service. It would defeat the purpose of the protection offered by section 104 Employment Rights Act if the respondent could argue that it was entitled to dismiss her the next day for any or no reason at all and so she was entitled to no compensation.

64. What therefore are the prospects of this respondent dismissing this claimant on performance grounds? That would require a fair decision following a fair process. The main reasons given for dismissal were file-keeping and patient complaints although this was against a background of low fees. All this is difficult to untangle. No original evidence was produced to substantiate the patient complaints, then or now, and Dr Ben-Shah did not have the opportunity to give her response. She could not, for example, compare her files with those of her colleagues. It is not clear how often patients complained or asked for another practitioner, but these were the only two patients who expressed any unhappiness in 18 months. It seems most unlikely that either aspect would be sufficient in itself to justify dismissal, or that Mr Revell would be thinking in those terms if relations had not reached the point they had.

65. Similarly, the failure to join one or more professional body could not have been a fair performance criticism since this simply involved expenditure on her part, something for which the respondent as employer ought to have been responsible.

66. The main concern throughout was over her level of fees. This too is not a straightforward issue. It is clear that at the end of her employment Dr Ben-Shah was seeing only about 60% of the patients she had been able to see the year before, a significant drop. At the same time, she was by then suffering serious levels of financial and personal stress. She had not had a proper holiday (apart from the odd day, mostly unpaid) since she started, was under constant pressure at work and was working seven days a week. That may have been by choice but not an altogether free choice. Even in April and May, around the time of her second pay cut, she was seeing about 300 patients per week, or 75% of her previous level. The further decline in her figures will also inevitably have followed from the recruitment of additional staff. But the biggest factor in the drop overall seems to have been her demoralisation resulting from these pay cuts.

67. However fluid Mr Revell thought that pay arrangements should be, in general pay is fixed and fundamental. To make a cut of this sort is bound to cause anger and offence. There was no discussion or negotiation, which might at least have taken the sting out of it, and the amount of the cut was severe. The headline rate also dropped by about £20,000, an extraordinarily high amount.

68. It may be said that Dr Ben-Shah had a choice. She could have left but she elected to stay. Having done so she should not mope but should carry on as a loyal employee, doing her best – or at least that she should not mope about indefinitely and should get over things after a month or two.

69. It does not seem to me, on the limited evidence available about her mindset, that Dr Ben-Shah did mope or withdraw her co-operation. Her role involved a significant amount of marketing, which means a continuing effort to charm and engage with clients and partners. This is not easy when motivation is low, but she soldiered on. She never quite met the target fees expected before the pay cut but was close. In the aftermath she was no longer able to muster the same energy and enthusiasm, and it slipped further out of reach. Maintaining the expectation that she 95 patients a week seems unrealistic, and the monthly inquest into her performance would also have been demoralising.

70. Hence although some of the fault for decline may be laid at her door, she is only human, and the lion's share of the blame has to be laid at Mr Revell's door. But for these cuts it seems unlikely that their working relationship would have taken this downward turn or that her performance would have suffered in the same way. That is relevant in considering whether it is just and equitable to reduce compensation on the basis of her performance.

71. The other possibility is that she would have resigned shortly in any event. There is ample evidence that she was considering a move, including her comments in the 12 September meeting about perhaps leaving at Christmas and in her claim form. This too has to be judged in the light of how things might have been had she been treated more fairly, without the two pay cuts, each of which was a fundamental breach of contract. If the claimant had had two years' service she could have resigned in response and claimed constructive dismissal but that is the background to her plans to leave. By way of analogy, if an employee suffers a campaign of bullying and harassment at work and is considering resigning but is dismissed unfairly first, it would not be just and equitable to reduce compensation on the basis that the employment would have come to an end shortly anyway.

72. Accordingly it does not appear to me appropriate to make any reduction to compensation to reflect the possibility that she would in any event have been fairly dismissed by reason of performance or her own resignation. In all respects other than her disagreements with Mr Revell she was happy in her job. As noted at paragraph 16 above, she was doing well in the first six months. She then stayed on despite considerable difficulties, in part because of the peculiar position she was in regarding her visa, so she is most unlikely to have left and I discount the possibility. As to her performance, a fair dismissal involves a consideration of the employer's conduct which was at the root of the breakdown of this relationship, and but for that no question of resignation would have arisen. I therefore make no reduction on *Polkey* grounds, as the principle is known.

73. As to the ACAS uplift, Dr Ben-Shah's dismissal was not the worst imaginable breach of the ACAS code, but only in that it was done at a meeting and the reasons, although not the correct reasons, were given at the time. She did not appeal against the dismissal either, although her dismissal letter did not mention

any right of appeal, which could only have been to Mr Revell. In the circumstances an uplift of 20% is appropriate.

74. There is a statutory cap of one year's gross pay, or 52 weeks' gross pay calculated in accordance with section 221 Employment Rights Act, which applies here regardless of the fact that Dr Ben-Shah was dismissed for asserting a statutory right. The assertion of some statutory rights avoids the cap, as listed at section 124(1A) but section 104 is not among them.

75. The final issue, although not listed as such, relates to the holiday pay claim. This is wider that the holiday due in the notice period and concerns the amount of holiday actually taken. This involves a consideration of the requirement that Dr Ben-Shah take it in chunks of four hours a week while meeting her target. It was not possible to identify exactly which hours were allotted on any given week for this purpose, but the reality was that the entitlement was largely ignored in practice. Was this lawful?

76. A period of leave is not working time nor a rest break. Actual time off has to be provided. This follows from the definition in Regulation 2 of the Working Time Regulations 1998. Regulations 13(9) and 13A(6) provide that the statutory annual leave entitlement may be taken in instalments rather than all at once, but the leave must actually be taken. It cannot simply be replaced by a payment.

77. In the present case, the pay would be the same in a week in which the claimant worked 36 hours plus 4 hours' holiday or where she worked 45 hours and took no actual holiday. No clue can be drawn from her pay statements about whether leave was actually taken, but if no actual leave was taken in any given week then clearly Dr Ben-Shah was deprived of her right to annual leave.

78. It was common practice until recently in some sectors to have 'rolled-up' holiday pay, where those with irregular hours had a holiday supplement and they booked their time off without pay. This was considered by the European Court of Justice in *Robinson-Steele v RD Retail Services Ltd 2006 ICR 932, ECJ.* The court emphasised that the entitlement of every worker to paid annual leave is an important principle of Community law from which there can be no derogations. That being so, workers must receive a payment for holiday in addition to the pay for the work done. It is unlawful for an employer simply to designate part of the remuneration that a worker already receives as holiday pay. It concluded that rolled-up holiday pay arrangements cannot be lawful in any circumstances. Furthermore, 'Member States are required to take the measures appropriate to ensure that practices incompatible with Article 7 [of the Working Time Directive]… are not continued'. If this was not the case, said the ECJ, workers could be encouraged not to take their full annual leave, thereby undermining the health and safety purpose behind the Directive.

79. It was argued for the respondent that the arrangement here was not in breach of the Regulations as notice was given by the employer (in the email covering the contract of employment) of the need to take holiday in these instalments, and indeed this was agreed. It provided that the holiday be taken on Tuesday and Thursday afternoons. But this does not appear to me to be compliant with the Regulations or serve the necessary purpose of ensuring that leave was taken.

No specific hours or times were stipulated and no effective measures appear to have been taken to ensure that she took this time as leave. Clearly the whole of Tuesday and Thursday afternoon would be more than four hours, so the arrangement was not clearly defined.

80. Apart from the obvious scope for abuse, Regulation 15 provides that a worker may take leave on such days as she may elect, not on days chosen by the employer. This is subject to the right of an employer to give a counter-notice of days on which it can be taken. No such notice was given here on any occasion by the employee, or any counter-notice by the employer, and a standing instruction of this sort will not suffice. Even if such an arrangement were effectively policed, and leave actually taken when specified by the employer, the lack of any choice on the part of the employee effectively defeats the purpose of the Regulation. In the circumstances the proper approach appears to be that the respondent demonstrate the occasions when leave was validly taken under the Regulations.

81. Such claims can also be brought as a series of unlawful deduction from wages and hence claim arrears from a previous holiday year in appropriate circumstances. A decision on that point will await submissions at the remedy stage. Arrangements for a separate remedy hearing of one day's duration will be sent out by separate notice.

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Employment Judge Fowell

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Date 30 September 2018