EMPLOYMENT TRIBUNALS

Claimant: Mr C Montanaro

Respondent: Lansafe Limited

Heard at: by CVP **On:** 4, 5 and 8 March 2021

Before: Employment Judge N Walker
Members: Ms J Tombs
Mr S Godecharle

Representation
Claimant: in person
Respondent: Ms L Halsall of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant:

1 was automatically unfairly dismissed pursuant to section 100(1)(e) of the Employment Rights Act 1996;
2 was dismissed in breach of contract and is entitled to his notice
3 suffered an unauthorised deduction from his wages in terms of both actual wages due and holiday pay.

The Claimant's remaining claims are dismissed.

The Respondent is ordered to pay the Claimant the following sums:

1 The sum of £416.00 being a net sum, by way of breach of contract
2 The sum of £ 2827.50 by way of unauthorised deductions made up as to £2,320.00 by way of unpaid salary and £507.50 by way of unpaid holiday pay, subject only to such deductions for tax and employee's national insurance as have been accounted for to HMRC in relation to these payments to the Claimant and for which the Respondent produces documentary evidence to the Claimant.
3 The sum of £3,346.98 being a compensatory award for unfair dismissal.

REASONS

The Claim

1 The Claimant brought claims of automatically unfair dismissal under sections 100(1)(d) and (e) of the Employment Rights Act 1996. The Claimant also brought claims of unauthorised deductions relating to his normal pay and holiday pay and he claimed breach of contract. The breach of contract claim was for both notice and a more general claim that he should have been put on furlough.

The Evidence

2 The Tribunal heard evidence from Mr Lee Roby who was the Respondent's managing director and from the Claimant himself. We had an agreed bundle of documents. In the course of the hearing, we were given a signed copy of the Claimant's employment contract as the Respondent had supplied the unsigned version in the bundle.

Facts

3 The Claimant is an IT professional. He is Italian but speaks English well, although clearly it is not his first language. He was unaware that he could have asked for an interpreter. We are satisfied that he understood the case as it progressed and we asked him to tell us if he ever was uncertain as to what was being said, or what he was asked. Nevertheless, we do not think he always fully understood everything that Mr Roby discussed with him in the course of his employment.

4 The Respondent is a computer specialist company which provides staff and services to other companies. Mr Roby is its managing director.

5 There were a number of key facts which were in dispute in this case. It was therefore necessary to determine what happened. We did this by reviewing the documents very carefully, but on occasions it was necessary to determine matters where there was no documentary assistance. This was a case where the evidence was frequently incomplete. The Claimant was a litigant in person. The Respondent had not disclosed certain documents that were referred to in their only witness's statement. The Respondent had not disclosed any communications between it and its client, Boohoo's IT department even though the Claimant was employed to work there and that was a key factor in the case. There were sometimes direct clashes of oral evidence on certain key facts.

6 The Tribunal was invited to consider the credibility of the witnesses and did so. We concluded that the Claimant was credible, and his evidence was consistent with the documents. Mr Roby's recollection was frequently unreliable. It was clear from the responses he gave during the course of his evidence that he was under a lot of pressure at work. He told the Tribunal that he got large numbers of emails each day and admitted he did not read them all. He seemed to be the main point of contact for much of the Respondent's business. He was often confused when referring back to events. We concluded that Mr Roby was not able to remember clearly or precisely what had happened. On occasions his evidence was clearly incorrect.

7 The Claimant started work for a recruitment company called Systeem on 14 August 2019. In practice, Systeem provided his services to the Respondent, which in turn provided his services to Boohoo, a well-known fashion group.

8 The Claimant's job title was IT Infrastructure Engineer. Mr Roby, in the witness evidence talked about the Claimant being a first and second stage responder. We understand that in practice he did a range of troubleshooting and work on any IT problems in the Boohoo office location at Euston Tower, London, and that would include induction work with new starters, as well as sorting a range of problems which could involve physical work which necessitated him being in the office, but a significant proportion of his work could be done through a computer remotely.

9 The Claimant's contract with Systeem ended in February 2020. In the bundle, we have emails in February 2020 between the Claimant and Mr Roby about the possibility of the Claimant working directly for the Respondent and continuing the work at Boohoo. In effect, the Respondent decided to cut out Systeem and contract directly with the Claimant, for him to continue the same work for Bohoo.

10 Mr Roby asked the Claimant to commence work on 17 February, which would be immediately after his contract with Systeem ended. The Claimant wanted to start work a week later, on 24th February. His reason for this was that he was due to go to Sweden to see his father-in-law, who was terminally ill.

11 Mr Roby was keen for the Claimant to start immediately and so they agreed that he would start and then take the three days off in his first week of employment, on the 19th 20th and 21st of February, in order to go to Sweden.

12 When the Claimant agreed in principle to this arrangement, Mr Roby sent him an email with attachments which were a contract of employment, a new employee details form and a new starter form for payroll. Mr Roby then sent the Claimant a revised employment contract, which he signed. Mr Roby also asked the Claimant for the dates of his trip to Sweden and then arranged for a holiday request form to be completed by an HR staff member, which he, Mr Roby, signed, so that it could be put into their administration records to confirm the dates of the holiday. The Claimant was never sent that form, nor was he shown it or told about it.

13 The Respondent has a Handbook. A hard copy of this handbook is usually given to staff at their induction meeting. It is also located on a web portal which is explained to employees at their induction, when they are given a password to access it. Mr Roby assumed the Claimant was given some sort of induction. However, he accepted that the usual process would have been for the Claimant to have gone to the Respondent's offices for that process, but as he was based in London and the office was in Wigan, that did not happen. Mr Roby, on being questioned about this, assumed the Claimant's line manager at the Respondent, Luke Finch, would have arranged for some sort of induction, but he had no knowledge of when that took place or what was done.

14 The Claimant's evidence was that he was never given any induction, nor did he get a password to the web portal where the Handbook was located. Mr Roby accepted that he would not have been given a hard copy of the Handbook unless he went to the office, which did not happen. The Claimant was the only member of staff working so far away and so his circumstances were unusual for the Respondent. The Claimant was effectively continuing to carry out the same job he had been doing for the previous six or seven months, so there was no need for him to have an induction into the work. He was familiar with the Boohoo operation.

15 As the Claimant denies having had the induction or being provided with a password and, as he was virtually continuing the same job he had previously done, and, as Mr Roby had no direct knowledge of any form of induction, the Tribunal conclude that the Claimant's evidence is correct. He did not get any induction or password to the Respondent's HR website. In consequence, the Claimant had no knowledge at all of the Handbook, or the various procedures recorded in it.

16 In the circumstances the only terms relating to holidays that the Claimant was made aware of, were those in the employment contract which he signed. This read as follows

> "*The Company's holiday year is from 1st April to 31st March. [In addition to paid holiday on all statutory and other public holidays], you will be entitled to 20 days holiday in each holiday year throughout which you are employed by the company.*
>
> *The Company will operate a system that you must follow for obtaining prior approval for holiday plans. Details of that system and of any changes to it from time to time will be made known to you. The Company will try to cooperate with your holiday plans wherever possible subject to the requirements of the Company. However you must not book holidays until your request has been formally authorised in writing by your line manager*."

17 We also note that the Handbook included the following relevant provisions:
3.1 which said under the heading unauthorised absence,

> "*Employees who deliberately failed to attend work without proper excuse or in breach of management instructions will be committing gross misconduct which could result in dismissal without notice or payment in lieu*."

5.4 which said under the heading disciplinary procedure,

> "*The Company reserves the right not to follow this procedure in full for employees who are within their first 2 years of employment with the Company*."

18 The Claimant wanted to take another holiday as he had been told that his sister was getting married early in March 2020. We understand that he did not know about the wedding a long time in advance. The Claimant says he then spoke with Mr Roby who agreed he could take the holiday he required. The Claimant did not recall the exact date but says the conversation occurred after the Claimant returned from Sweden and before he sent an

email on the 27th of February, so that it must have been sometime between the 24th and 27th of February.

19 The Claimant says that he asked for the holiday on the 9th and 10th of March being the Monday and Tuesday and that Mr Roby agreed and simply asked him to send him an email with the dates as a reminder, which the Claimant did in an email dated 27th of February 2020.

20 The email of 27th February says:

> "*Hello Lee*
> *Just an update, yesterday I sent a written letter to Kyle asking him to pay my last week of work (£725.00)*
> *And there is the wedding of my sister so I will be off the 9th and 10th of March included.*
> *Thanks*
> *Carlo*"

21 The Claimant says that the reason for the first part of the email was that in a discussion with Mr Roby, he had talked about the problems he was having in getting his last week of pay from Systeem whose relevant manager was Kyle Hewlitt. They also had the discussion about his holiday referred to above and so the email referenced the amount of outstanding pay since Systeem were waiting for payment from the Respondent.

22 The Claimant's email did not ask for reply and he did not get one, but on 6th March at 15.58 pm, i.e., the Friday before he was due to be on holiday, he sent a further email to Mr Roby which said:

> "*Hello Lee*
> *A while ago I have asked for 2days off next Monday and Tuesday. Have you seen the email?*
> *Thanks*
> *Carlo*"

23 Again, there was no reply. The Claimant says he told his colleagues in Boohoo and that he took the holiday thinking he had followed the same procedure as for his holiday to Sweden.

24 Mr Roby denies having any conversation with the Claimant in which he agreed to the holiday and says in his witness statement that no-one from the Respondent was aware of it until Luke Finch (who was the Claimant's line manager) was told about the Claimant's absence from Boohoo on Monday 9 March. Mr Finch is no longer employed by the Respondent and we have no evidence from him.

25 We concluded that the Claimant did ask for permission for this holiday. We are satisfied that there was a conversation in which the Claimant told Mr Roby that he wanted to take this holiday. We are also satisfied that Mr Roby told him to send him an email with the dates. In the light of his previous experience, the Claimant thought this was permission to take the holiday and that all he was doing was sending a reminder of the dates. We have been referred to the contract terms cited above. We note that the contract does say that details of the system will be made known to you.

Nothing was made known to the Claimant. However, the contract also refers to the request being formally authorized in writing by the line manager, which would have been Luke Finch. The Claimant does not suggest that he discussed his holiday with Luke Finch. We took careful account of the Claimant's second email about his holiday which could be interpreted as a reminder that he has an outstanding request for holiday, but we do not think that is the case. We noted that the Claimant tended to write very brief sentences in English, and this could distort the underlying meaning. We do not think he was asking for permission to go away, but rather trying to make sure the Respondent had not forgotten.

26 What is clear is that Mr Roby had forgotten, and the Respondent had not arranged cover for the Claimant's holiday. While some staff at Boohoo's offices at Euston Tower may have been told by the Claimant, the Boohoo IT team, which were based in Manchester, did not know about it. In consequence, on Monday 9 March when the Claimant did not turn up for work, the Boohoo IT team in Manchester, being Mitesh Patel and Leeroy McAdjar, contacted the Respondent and spoke with Luke Finch on Monday 9 March 2020 and we assume that Luke Finch raised the situation with Mr Roby that same day.

27 The first telephone call to the Claimant from Mr Roby while he was in Italy, which Mr Roby refers to in his witness statement was on 10 March. In the course of questioning, Mr Roby said that he was sure he spoke with the Claimant on Monday the 9th of March. He said he recalled it being the beginning of the week. The Claimant says they spoke on Tuesday after the Claimant had contacted Mr Roby.

28 The Respondent has not disclosed the documents showing the efforts they made to get replacement cover for the Boohoo role, although in his witness statement Mr Roby says "Eventually" the Respondent had to put in place a contractor to fulfil the duties required and he says that was at a significantly higher cost than the Claimant's daily rate. We do not know when that contractor commenced work or how many days the contractor worked for, but it seems but it took a few days at least for him to start.

29 Mr Roby explained in questioning that he had to get someone who had already got security clearance for Boohoo and had to persuade Systeem to send him a contractor who had been to Boohoo previously, but he was working elsewhere at the time and therefore Systeem charged him a significantly higher price per day.

30 The Respondent has not disclosed any emails between Mr Roby and Boohoo's staff about the situation. Mr Roby said this was all dealt with by telephone, which is surprising given the fact that Mr Roby sent an email to the Claimant on Tuesday 10th March which Mr Roby also copied to two of Boohoo's IT managers, Mr Mitesh Patel and Mr Leroy McAdjar.

31 Our conclusion is that on Monday 9 March Mr Roby became aware of the Claimant's absence. He did not call the Claimant that day or email him, but he was looking for cover for his absence.

32 On Tuesday 10 March, the Claimant had a return flight to London which was due to leave at 10:40 AM from the airport at Brindisi. Late on the 9th

of March, Italy went into a lockdown due to Covid 19, and everyone was instructed to stay at home, although it was permissible to travel for work.

33 The Claimant says he went to the airport very early to return a hire car and that he was accompanied in a separate vehicle by his brother because he was completely uncertain as to what would transpire. He says he took his luggage with him and, having returned the hire car, he sent messages. The bundle contains early morning messages sent to Becky Crawford at Boohoo and to Mr Roby. First, the Claimant sent a text at 6:50 a.m. to Becky Crawford. The Claimant then sent a text message at 7.03 AM that morning to Mr Roby. Both text messages were the same. Each contained a link to the UK government guidance on Covid for returning travellers which asked them to self- isolate for 14 days in returning from Italy, and after that a short message saying he would call soon.

34 It is important to note the position at this time as known to the Claimant. The government guidance which the Tribunal were given was dated later that day as it referred to the position as of 9.00 a.m. on 10 March, but this indicated that at that time 373 people in the UK had been confirmed as positive and six patients who tested positive had died. The largest number of positive patients was in London, being 91. The guidance also recorded that based on the World Health Organisation's declaration that this is a public health emergency of international concern, the UK Chief Medical Officers have raised the risk to the UK from low to moderate. The guidance stated that returning travellers who had travelled to the UK from the following places, even if they did not have symptoms, should stay indoors and avoid contact with other people . The list included travellers to the UK from anywhere in Italy on or after 9 March. Additionally, the Claimant was aware that in Italy the position was so serious, the government had introduced a countrywide lockdown.

35 In his witness statement the Claimant said as follows

> *"The coronavirus and its impact was a completely new situation for me, as I am sure it was for most people. I was not sure how to do in regards to my travel back and the ticket I had already bought. I had a few big concerns. The first was the fact that Italy advised against all travel unless for a few specific reasons. I was not sure if I needed a certificate to show in the airport that I was allowed to travel, or what was required for me. Secondly, I was not sure if it was safe to travel, there was not much information to get at the time. Thirdly I did not want to put anyone at risk and go against any public advice. I was of course also wondering how I could return to work because I had to self-isolate for 14 days on my return".*

36 There was a significant dispute between the parties as to how many phone calls took place between Mr Roby and the Claimant, when and what prompted them. The Tribunal therefore spent some time checking through the telephone call logs that we have. We note that we have telephone logs for some of the calls, but not for all of the phone calls. We were told by the Claimant that he had two phones; one for work and one which was personal. We are told that, when the Respondent effectively dismissed him, they shut him out of all their company systems so that he could not

access the phone records for his work phone. The Respondent has not attempted to disclose those records itself.

37 The records we do have show that Mr Roby called the Claimant on 10th March at 8:28 a.m. which was approximately 10 minutes after he, Mr Roby, had sent the Claimant an email - at 8:17 a.m. which complained that Mr Roby had not seen the emails from the Claimant regarding travel to Italy and taking time off. That email then recorded the holiday procedure which the Respondent said was applicable and said that Mr Roby was in the process of working with Boohoo to find a solution which would provide them with adequate support for the next two weeks. The full text was

> "*Subject: Boohoo KM support/*
> *Carlo, I have not seen these emails from you regarding travelling to Italy and taking time off. To take leave you must complete a holiday request form which must be authorised by myself. You have effectively taken un authorised leave in this instance which is not acceptable. You must also report directly to Lansafe for any kind of absence requests, late arrival to site or sickness. Do not liaise directly with the client Boohoo about these matters, Lansafe will inform the customer in these circumstances.*
>
> *I am currently in the process of working with Boohoo to find a solution which will provide them with adequate support over the next 2 weeks. I understand fully the coronavirus outbreak has caused problems with travel and especially Italy who is now in lockdown however, the situation we are in now would have been avoided if you had followed the correct procedures.*

38 It ended:

> "*Once I have instructions from Boohoo as to whether remote support is adequate I will advise you what to do. Please have your mobile and laptop top online so we have no problems contacting you*."

39 As noted the phone log shows Mr Roby called the Claimant about 10 minutes after that email. We have asked what was said in that call and it seems that it was effectively a repeat of the message in the email that the Claimant should be available online and with his mobile phone on and that Mr Roby would get back to him.

40 We conclude that the Claimant and Mr Roby had an earlier call - before the 8.17 a.m. email, in which the Claimant told Mr Roby that he had asked for permission to go to Italy and take the days off, otherwise the fact that Mr Roby's email referred to that does not make any sense. We conclude that the sequence of events was that the Claimant sent the 7.03 a.m. text and said he would call Mr Roby later. There was then a conversation between the Claimant and Mr Roby in which they discussed the sudden lockdown and the difficulties of the position the Claimant was in. The Claimant says he wanted advice and guidance as to what to do and whether he should come back to England given that once he got back to the UK, he would need to self-isolate for 14 days according to the UK government guidance.

41 The Claimant also indicated that he would need some confirmation that he was travelling for work. The Claimant referred to this in his evidence and we note that it is referred to in a later email dated 25th of March which the Claimant sent to Mr Roby.

42 Having noted that Mr Roby and Boohoo's IT managers appeared to have considered that the Claimant had not followed the holiday procedure, the Claimant, perhaps in an effort to demonstrate that he had asked for time off, at 9.33 am forwarded a copy of his email of 6 March to Mr Roby in which he had referred to his request for the time off. That was sent to both Mr Roby and Elaine Moore at Lansafe and to Leroy McAdjar at Boohoo.

43 Mr Roby does not say he instructed the Claimant to come back to London. He simply instructed him to wait for a response. The Claimant took Mr Roby's instruction to wait for a response as an indication that he was not to return until he got further information and he did not have proof of the fact he was travelling for work, so he went home to his house and did not attempt to get on the flight. When asked, the Claimant did not know whether the flight he was booked on had left or not, but we understand that some flights were cancelled. The Claimant said if he had been asked to return to the UK by Mr Roby, he would have done, although he thought he needed some certificate or proof that he was travelling for work in order to be able to do so.

44 The Tribunal asked the Claimant why he did not get on the flight and he said "*I needed justification to get on the flight and go to the UK to show that I had work to do. I was concerned about my health. Being in the office was not possible. I wondered how is it possible? Can I travel? If I arrive in London, I will need to isolate because of government guidance. I expressed this concern to HR and Mr Roby. Mr Roby never let me know anything. Even if I arrived, I needed to isolate. I could not be present in the office. I was just waiting for an answer*."

45 The Claimant says when he got home, he got his laptop out and began working. This was despite the fact that he had applied to take that full day off work. However, he had been told by Mr Roby to keep his laptop on and his mobile phone on.

46 As noted, just before messaging Mr Roby, the Claimant also contacted Boohoo. The Claimant had sent a text at 6:50 a.m. to Becky Crawford, who we understand was a member of Boohoo staff in London, which said more or less the same as the message to Mr Roby with the same link.

47 At 15.59 on 10 March, the Claimant sent a short email to Mr Roby and Elaine Moore of the Respondent plus one other person, (probably Becky Crawford) with a further link. The email was headed "Tonight foreign office update" and had another link to the UK government guidance on covid 19 for public returning travellers. It seems the advice had changed slightly but not significantly.

48 The Claimant expected to hear from Mr Roby, consistent with the message he had been sent in the email and by phone, but Mr Roby did not contact him again for some time. The Claimant got no further instructions from Mr Roby, so he contacted the people at Boohoo and got confirmation from

Louis Lyttle, the son of John Lyttle, who we were told was the CEO of Boohoo, that he could continue to work remotely. He passed on a message that he had this to Mr Roby, who ignored it. However, the Claimant says he continued to work.

49 On 11 March the Claimant had an exchange of texts with Louis Lyttle in which he referenced the fact that he would be forced to stay inside for 14 days and was thinking what to do. Mr Lyttle responded saying "*Stay out for 24 hours*" to which the Claimant said "*But say thank u very much to John from me. He's very caring*" and then Mr Lyttle replied "*just off the phone with my dad he said relax for the next 24 hours. He said don't worry about pay or anything, we'll sort something out*." The Claimant replied, "*and u too*" and thanked him a lot and Mr Lyttle texted again "*Sppend time with your family and enjoy*".

50 The Tribunal were told that on 11 March, despite not having given the Claimant any further instructions, the Respondent wrote a letter to the Claimant to inform him that he was dismissed and put the date of dismissal as 6th March. Not only was that an effort to back date the date of dismissal but the letter contained a number of factual errors. The letter is relevant, so we have set it out in full.

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Private and Confidential
Mr Carlo Montanaro
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11 March 2020

Dear Mr Montanaro

On the 6th of March you took un-authorised leave from your station in London where you were working for Lansafe providing I.T support services for our client. The process for holiday requests was not followed and consequently your line manager and our service team where unaware of your absence. This left our clients without support and Lansafe were unable to find cover for your position, so we were unable to fulfil our obligations to our client.

You were required in accordance with your contract of employment to notify your line manager and inform by telephone of your reason for

absence and date of return to work. You are also requested to inform the HR Manager of the same. After numerous telephone calls and emails to yourself we still have not received any notification of reason for your absence or your proposed return to work.

Due to the above we would presume you had gone AWOL therefore we are notifying you of your proposed dismissal from the company on the ground of gross misconduct. We would invite you to attend a disciplinary hearing once you have contacted us to discuss the company's serious concerns about your absence from work and failure to comply with the company's absence notification procedure. We have had no contact from you to explain: your continued absence; your failure to notify the company of the reasons for your absence; and your failure to respond to telephone calls or emails from your line manager.

As a result, we have had no alternative but to hold the disciplinary hearing in your absence. The hearing was chaired by Lee Roby and Elaine Moore was also present at the hearing, your absence, its impact on the business and your failure to follow the company's notification procedure was discussed on the basis of the facts known to the company at the time.

It was decided that your employment should be terminated for the following reasons that you had gone AWOL and Gross Misconduct by failure to contact us as per your contract of employment.

Your termination date will be 6th of March 2020.

You will be paid up to and including the last day you attended for work. You will not be paid for your current period of absence. All payments owing to you will be sent to you as per usual end of month payment date along with your P45.

Yours sincerely

Elaine Moore
Director HR Manager

50 As noted above, there are a number of errors in the letter. The letter claimed that after numerous telephone calls and emails to the Claimant they still had not received any notification of the reason for the Claimant's absence or his proposed return to work. This was simply not correct. The Claimant had been in touch and was sitting with his laptop and mobile close at hand. He had explained the reason for his absence and asked for guidance about returning to work.

51 The letter suggested that the Respondent would have invited the Claimant to a disciplinary hearing but had no contact to explain his absence or his failure to notify the company of the reasons for his absence or his failure to respond to calls and emails from his line manager and had thus had no alternative but to hold the hearing in his absence. This was clearly incorrect as the Respondent had contact and was perfectly able to have held the hearing when the Claimant returned which he said he would have done if they had told him what he needed to do. Alternatively, some form of hearing

could have been constructed using an Internet communication system such a zoom with which the Respondent, as an IT company, would have been familiar.

52 The letter referred to a disciplinary hearing which had been held in the Claimant's absence, but we understand there was in fact no disciplinary hearing as such. Mr Roby said that that he had a meeting with Elaine Moore who carried out the role of HR director and she brought with her a letter, being the letter quoted above. Mr Roby did not describe any form of procedure what so ever. We understand that the Respondent's disciplinary process entitles them to carry out a reduced process for employees who have short service. However, the letter indicates that there was in fact some form of disciplinary meeting whereas in fact all that happened was that Mr Roby and Ms Moore appear to have agreed that they wanted to take action to dismiss the Claimant and that a letter would be sent to that effect.

53 The letter bore all the hallmarks of a letter constructed for another situation in which an employee had indeed left and been uncontactable for some time. It was not applicable to the present situation.

54 Mr Roby did not personally send the letter and we do not have any witness evidence from Ms Moore. Mr Roby, when asked about the letter and why it referred to numerous emails and phone calls said the line manager and others must have been calling the Claimant. That was patently not the case. He knew nothing about other calls to the Claimant. There were no indications of other calls and emails in the bundle. The Claimant had been in touch throughout. Mr Roby's evidence was that he read and then authorised a letter to be sent, but the letter he says he authorised made no sense at all in the circumstances.

55 The Claimant says the letter did not arrive and he knew this because he had arrangements at the flat where he lived in London for them to forward all his mail to him. He was sure from this process that no dismissal letter ever arrived. Moreover, a later email sent by Mr Roby on 20 March asked the Claimant when he could return to work which would be at odds with a situation where he had already been dismissed.

56 We do not need to determine whether the letter was actually sent as Mr Roby and Ms Moore were well aware that the Claimant was in Italy and not at his London home and even if they did post the letter to the London address, they knew it would not come to his attention until he returned there. They had an active company email for the Claimant which they could have used to send him the letter, but they chose not to do so. Mr Roby said that they did not have a personal email at that time, but in fact Ms Moore was able to write to the Claimant using his personal email on 1 April to send him his P45 and final pay slip, so that it is likely she had the address all the while. In practice the Respondent knew that the Claimant was sitting in Italy awaiting a response from Mr Roby which he had been assured would be given to him and he received nothing.

57 The Claimant continued to try to contact Mr Roby. He sent an email to him on Wednesday 11 March early in the morning to inform Mr Roby that his father in law had died overnight. Mr Roby not only failed to communicate

with the Claimant as he had said he would in his email the day before, but then ignored all the Claimant's efforts to communicate.

58 On Friday 13 March at approximately 3:38 p.m. the Claimant sent a message to Louis Lyttle to say that he understood they had superseded the previous guidance about self-isolation and he sent a link to the new guidance from the UK government and explained he had emailed Becky just now so she could check with health and safety he suggested that on Monday morning the update again in case it changed during the weekend so that on Tuesday he could take the …..the email is curtailed at that point.

59 At about 5.18 on 13 March the Claimant received a text message from Louis Lyttle of Boohoo which says "*Tell him to say Boohoo said ok*"
to which the Claimant replied "*Ok as in to work remotely or not to?*
and the answer was "*To work remotely*".

60 Within minutes, on Friday 13 March at 5:28 p.m. the Claimant emailed Mr Roby saying that he had tried to call him twice today but got no answer. He explained that Boohoo had told him it was okay to work remotely. He also said the guidelines have changed around Coronavirus and self-isolation and explained that the 14 days requirement for self-isolation have been removed. He suggested that they update on Monday so that he could come back to work as soon as possible.

61 On the Monday 16 March, the Claimant called Mr Roby again at about 9.48 am and at 9:54 a.m. he emailed to say he had just called but got no answer. He said he did not understand the lack of communication from Mr Roby.

62 On Wednesday 18 March at 10.51 am, the Claimant texted Leroy McAdjar at Boohoo to ask him if he could check with Lee Roby because for one week he wasn't replying to his emails or phone calls and he didn't know what the position was, and he reported that Louis [Lyttle] had told him that he could work remotely from which he was doing everyday. Mr McAdjar replied the following morning that he would touch base with Lee and let you know and asked if he tried calling or texting him to which the Claimant replied that he tried many times and sent him your emails, but he cut all communication. Although Mr McAdjar's response to the Claimant had seemed positive at the is point, there is no indication in the bundle that Mr McAdjar ever got back to the Claimant.

63 At this point the Tribunal was told that the Claimant contacted ACAS after which he decided that he should put his concerns in writing to the Respondent and record the fact that he was working and expected to be paid so at 4:40 p.m. on Wednesday 18 March he wrote to Mr Roby explained that he had called multiple times and sent emails but had not got replies and then he referred to the fact that he had been authorised by Boohoo to work remotely and was doing it every day as if he was in the office and was expecting his full salary. He recorded the fact that the situation was out of his control as Italy decided overnight to limit travels and measures will be implemented in the office in London too. He said yesterday and today there are already many people working from home and probably soon following Johnson recommendations employees have to work from home to limit the virus spread.

64 There is then the following sequence of events. The times on the emails are not easy to understand and we assume this is due to the fact the Claimant was working in Italy and his time zone was an hour ahead. An email is timed 19 March at 4:14 pm (but we think this was in fact 3.14 p.m. UK time and that the email we have printed in the bundle is showing the Italian time) Mr Roby emailed the Claimant asking him to confirm who gave him instructions to provide remote support to Boohoo while he had been away in Italy and the Claimant replied, "*hello Lee from John the CEO*". The Claimant's email is timed at 15.16 which would be minutes after Mr Roby's email and it clearly is a reply. After that, the same day at 6:44 PM Mr Roby wrote to the Claimant by email saying:

> "*Carlo, when was this? Was it before you went to Italy? in person/email or on the phone? I need you to be more specific please so I can confirm to Boohoo that you have been given this authorisation.*
> *I need this to make sure we both are following the right instructions and I have no record of you reporting this to me before?*
> *Please confirm*"

65 Mr Roby said this email exchange was initiated by him because he had received an enquiry from Boohoo about it, but this seems at odds with the sequence of the Claimant's communications, and we have nothing at all from Boohoo to suggest it did come from them.

66 The Claimant replied to Mr Roby the following morning at 10.27 saying:

> "*Hello Lee*
> *I called you and sent you emails from day 1 to keep you informed about the situation. If I had to leave Italy I needed also some also some proof to show in the airports but more the days passed getting no replies from you happened that they closed also the airport.*
>
> *And the 13th of march when Louis and John Lyttle confirmed I sent also another email to you saying that for boohoo was ok for me working remotely and I received no answer to that.*
> *I have collaborated with you to know if I could come back to the office.*
> *But I received no replies despite numerous attempts to contact you."*

67 On 20th March Mr Roby emailed the Claimant at approximately 3:58 p.m. and said

> *"Carlo when are you likely to be able to return to the UK* ?"

68 The Claimant replied approximately 4 minutes later saying;

> "*Hello Lee,*
> *I am keeping updated day by day. Waiting for them to open the airport and do less restrictions*".

69 We know that the UK lockdown was announced by the Prime Minister on Monday 23 March 2020. That meant that the only people who could travel to and from work were those for whom it was absolutely necessary, and the

effect was that those staff at Boohoo's offices in London who could work from home had to do so.

70 On 1 April at 10.32 am the Claimant email texted Louis Lyttle again apologising for involving him all the time but saying he'd still not been able to speak on the phone with Leroy or Mitesh about what was going on with the Respondent and asking if he should inform Jo Graham. He said he had never spoken to her but it was three weeks, since Iansafe was ignoring him and he was working every day. We do not know who Jo Graham was.

71 A short while later the Claimant received an email from Elaine Moore timed at 10:50 a.m. said:

"*Further to your dismissal please find attached your final wage document and P45*" concluding "*wishing you all the best in these current circumstances*" .

72 The Claimant then received payment from the Respondent which the Respondent now acknowledges, having investigated as a result of this hearing, was incomplete in that it did not include any holiday pay. The Respondent admits that the Claimant is entitled to some holiday pay and says it is 2 1/2 days holiday pay. The Claimant was not paid for the days when he went to Sweden. Additionally, the Respondent only paid the Claimant up to and including 6 March being the date it said he last worked.

73 Mr Roby in evidence said he had not checked whether the Claimant had continued to work for Boohoo and carry out tickets as they refer to them. It seems that when an employee requests assistance for an IT matter a ticket is created and the work done is logged and the ticket is signed off when the work has been done so that it would have been possible to check whether the Claimant was carrying out work for Boohoo, although it might have required Boohoo's cooperation. The Respondent did not attempt to do this, and Mr Roby conceded it was possible that the Claimant had therefore been working as he had not received any notice of his termination because he was in Italy and no email was sent about it.

74 It is our view that the Claimant was working every day. As can be seen for the facts detailed, he usually replied to emails within minutes which suggests he was sitting with his laptop or some email system open and monitoring it all the time. He has submitted some evidence of work he did but has said this is limited because he had no access to the system to locate the proof of his work. We accept that is correct. Mr Roby acknowledged it was possible that he was working. At no time prior to 1 April was the Claimant told not to work.

The issues

75 The claims identified in the order made at the Preliminary Hearing were as follows.

(1) An allegation of "automatically unfair dismissal" by reference to **Section 100(1) (d) and/or (e) of the Employment Rights Act 1996**;

(2) An allegation of breach of contract in relation to non-payment of notice money due;

(3) An allegation of breach of contract by reference to the operation of Covid-19-related Regulations and their impact upon the employment relationship between the Claimant and the Respondent;

(4) An allegation of unlawful deduction from wages; and

(5) An allegation of unpaid holiday pay due.

76 The issues which arise are these.

76.1 Automatically Unfair Dismissal claim

What was the reason for the Claimant's dismissal?

Section 100(1)(d) of the Employment Rights Act 1996.

76.2 Note: the Respondent says the reason was the Claimant's gross misconduct in being absent without leave – that is taking unauthorised holiday.

76.3 Was the reason or if more than one the principal reason for the dismissal that in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert he refused to return to his place of work?

Section 100(1)(e) of the Employment Rights Act 1996

76.4 Was the reason for the Claimant's dismissal that in circumstances of danger which the Claimant reasonably believed to be serious and imminent, he took appropriate steps to protect himself or others from the danger?

Breach of contract by reason of the Respondent's failure to pay notice pay.

76.5 The Respondent accepts it did not pay the Claimant any notice pay.

76.6 The Respondent argues that:

(a) the Claimant was not employed for sufficient time to be entitled to notice, and
(b) the Claimant committee an act of gross misconduct so that no notice was due.

76.7 What were the terms of the Claimant's contract - i.e. was the Claimant entitled to any notice?

76.8 When did the Claimant's contract terminate? This is the date when it was effectively terminated for which we need to have regard to case law relating to the date when the dismissal came to the attention of the Claimant. The respondent conceded shortly after the hearing started that this date was 1 April 2020.

Cases - Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22
Gisda Cyf v Barratt [2010] UKSC 41
Brown v Southall & Knight EAT 1980

76.9 Given that date, the Respondent also conceded that notice of one week was due.

76.10 Did the Claimant commit a fundamental breach of contract sufficient to entitle the Respondent to terminate without notice?

76.11 The Respondent says the Claimant failed to follow the contractual holiday procedure. That requires the tribunal to consider what were the terms of the contract as regards applying for holiday.

76.12 Note: The Respondent relies on the contractual terms in the contract. What were the terms relating to holiday?

76.13 Was it a fundamental breach of contract to go on holiday without express written permission?

Breach of contract claim by reference to the COVID-19 regulations

76.14 Note: the Tribunal has limited jurisdiction in relation to contract. Is this within its jurisdiction?

76.15 Did the Covid 19 regulations introduce any contractual entitlement?

Claim for unauthorised deductions.

76.16 Did the Respondent fail to pay the Claimant for the work he did?

76.17 Was any failure an unauthorised deduction from contract?

76.18 If it was an unauthorised deduction how much is properly due to the Claimant?

Holiday pay claim

76.19 What if any holiday pay is due to the Claimant?

Submissions

The Claimant's Submissions

77 The Claimant submitted that he had been employed by the Respondent for more than a month and previously had a working relationship with them. He travelled to Italy but the day he was due to travel back the government guidance response was issued telling people to stay indoors and self-isolate. He travelled to the airport unsure of what to expect and then called Mr Roby and HR. Because this was a health and safety issue, he was not certain if it was safe to travel. It appeared that it was advised against by the government. He told he was told to wait for instructions. These never came.

78 He had always tried to have a dialogue to find a solution, but Mr Roby did not get back to him. He was dismissed on the 1st of April. He believed he was dismissed unfairly for health and safety reasons. The dismissal was two lines in an email without any procedure and just a wall of silence. It had caused him significant financial difficulties. It had been applying for jobs but was unable to find a job.

The Respondent's Submissions

79 The Respondent's Counsel urged the Tribunal to prefer Mr Roby's evidence over that of the Claimant arguing that he was a candid and straight forward witness. He had explained that Boohoo were asking where the Claimant was, and he panicked and did not know what to do. He did send the dismissal letter as he would normally do. The Respondent was doing the best he could. He made concessions where he did not need to. His evidence was consistent. The dismissal of the Claimant was because he left his workstation. In contrast the Claimant had not included everything in his witness statement; for example, he did not refer to the two phones. Even taking account of the fact he was a litigant in person, this indicated he was not wholly reliable as a witness.

80 The Respondent argued the Claimant had never got authorisation for the holiday from the people he needed to. There may have been a misunderstanding as to whether he had authorization and he may have sent emails, but Mr Roby was clear that he had not seen them. Further the evidence was that he could not fly without a certificate was in contradiction to evidence provided by the Claimant.

81 The Tribunal should note that the Claimant cannot bring an ordinary unfair dismissal claim as he has less than two years service. Therefore, he has to demonstrate he falls within one of the health and safety sections relied upon.

82 The Respondent's primary submission on the claim under section 100(1)(d), was that the Claimant was dismissed for unauthorised absence and not for refusing to return to work. Mr Roby said he was told the Claimant was in Italy and he rang to ask why. The Claimant said he could not come home because it was dangerous, but he was dismissed for going in the first place.

83 If the Tribunal is not with the Respondent on that and believes he was given permission to go to Italy verbally in a telephone call, this is not a health and safety claim because he was not dismissed for leaving his place of work for health and safety reasons as the Respondent thought the Claimant did not have authorisation for the holiday.

84 The Claimant said that if he had been asked to go back, he would have done so that he was not refusing to return to his place of work.

85 The case of Hamilton v Solomon and Wu Limited UKEAT at 0126/18/RN sets out three questions which a tribunal has to consider being first whether there were circumstances of danger present. Those questions are:
Were there circumstances of danger present?
Did the Claimant hold a reasonable belief that the circumstances were serious and imminent?

What were the reasons for the dismissal?

86 On the first question of whether there were circumstances of danger present, the Respondent says that wouldn't have been the case if the Claimant had not flown to Italy but accepted that covid is a danger. However, while the circumstances of danger are wide, they are not so wide as to cover a plane ride home. The workplace was no danger. The Claimant chose to stay in Italy.

87 On the second question of whether the danger was serious and imminent, the Respondent argued that potential dangers are not imminent. The Claimant was told he could fly, but had to self-isolate. That was similar to someone in close contact with someone who has covid. It does not meet the test.

88 Then there is what is the reason for dismissal and that was that he had left the business without authorization. It was not a reason to do with the health and safety risk.

89 The Tribunal had referred the case of Edward and Others v the Secretary of State for Justice UKEAT/0123/14/DM. That is a case which refers to the question of it depending on what the Claimant was told. In that case, all that those Claimants knew was that the road was closed. The Edwards case can be distinguished from the Claimant's case as that there was nothing to prevent the Claimant from flying home. The Respondent appreciated what he said about a certificate, but the Claimant never said he would not return because of the danger. There was nothing he said that indicated that the risk would prevent him from doing so. There was no explanation by the Claimant that the danger did persist, and on 12th of March, the UK Government guidance about self-isolation when returning from Italy was withdrawn.

90 The case under section 100(1)(e) is that the Claimant took appropriate steps in the light of the serious and imminent danger. The Respondent relied on their previous submissions about the level of the danger and the fact that they did not regard it as imminent. The steps taken was that the Claimant never flew home, but he was not prevented from doing so. He went to his home in Italy. It was inappropriate to have gone home.

91 Section 100 (2) and (3) are relevant as these set out issues which need to be taken into account by the tribunal. There was no advice to suggest that Claimant could not return home. Section 100(3) provides that if it was negligent, that is a defence. In this case, the Respondent argued that the Respondent was left without support on the ground and if Mr Roby not found out the position there could have been serious consequences in terms of the contract for the Respondent.

92 As for the Claimant's additional breach of contract claim which appeared to amount to an argument that he could be put on furlough, that was not in place when the decision to dismiss was taken on the 11th of March.

93 To sum up the Respondent submitted that the reason for the dismissal was not related to health and safety.

94 The Tribunal then asked for submissions on the additional words which need to be introduced in section 100(1)(e) by the Balfour Kilpatrick case as to communication. The Respondent submitted that the Claimant had not taken appropriate steps and never said it was too dangerous to fly home. He sent the guidance, but was not saying it is an imminent danger.

95 As for the notice pay claim, the Respondent accepted that the effective date of termination was 1st April and the Claimant potentially had one week's notice pay due as a result. However, if his circumstances amounted to gross misconduct, he was not entitled to notice. The Respondent's argument was that the Claimant left his position, and that the dismissal was due to his gross misconduct in that he failed to follow that proper process so that the Respondent was unaware and had not covered his absence.

96 The Claimant also brought another claim for breach of contract which appeared to relate to the covid regulations and to furlough but the Respondent said that it had difficulty understanding that case but had not breached any contractual obligations to the Claimant

97 As for the Claimant's claim for outstanding pay due from the Respondent, the Claimant was dismissed from 6th March for taking unauthorised leave on the 9th and 10th of March. The Respondent never gave permission to the Claimant to work remotely. He had never been given permission to work remotely prior to this. He was told not to go anywhere and not contact Boohoo, so that no money was properly payable because he was not doing work which he was authorised to do. Mr Roby had spoken to him and told him not to do anything.

98 As regards holiday pay, the Respondent conceded at 2 1/2 days holiday was due. The Respondent disputed the Claimant's calculation of five days.

The Law

99 Section 100 Employments Rights Act 1996

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that -

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent he took (or proposed to take) appropriate steps to protect himself or other persons from the danger. "or to communicate these circumstances by any appropriate means to the employer" [words proposed by Balfour case]

(2) for the purposes of subsection 1(e) whether steps which an employee took (or proposed to take) were appropriate is to be

judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one the principal reason) for the dismissal of an employee is that specified in subsection 1(e), he shall not be regarded as unfairly dismissed if the employer shows that it was or would have been so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

100 The Health Protection (Coronavirus) Regulations 2020 provide at Regulation 3(1) that:

These Regulations apply where the Secretary of State declares, by notice published on www.gov.uk, that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health, and that the incidence or transmission of coronavirus is at such a point that the measures outlined in these Regulations may reasonably be considered as an effective means of preventing the further, significant transmission of coronavirus ("serious and imminent threat declaration").

101 The Secretary of State made a serious and imminent threat declaration on 10 February 2020, formally declaring that coronavirus posed a serious and imminent threat to public health. This declaration is not determinative of the test under the act for whether the employee believed that danger but is potentially relevant.

102 The case of Oudaha v Esporta Group Limited [2011] ICR 1406 provides that it does not matter what the employee thought but rather what the employee reasonably believed at the time they acted.

103 The case of Edwards and others v Secretary of State for Justice (EAT 0123/14) demonstrates that travel to and from work may be within the scope of section 100(1)(d).

104 The case of Harvest Press Limited v McCaffrey [1999] IRLR 778 is authority for the fact that the phrase "circumstances of danger" in the legislation has a wide meaning and does not need to relate to the workplace itself.

105 By virtue of section 108(3)(c), an employee can bring a claim under section 100 without having completed any period of continuous employment.

106 Kuzel v Roche Products Limited [2008] EWCA Civ 380) is authority which confirms that the burden of proof is on the employer when it comes to determining the reason for a dismissal.

107 In Royal Mail Limited v Jhuti [2019] UKSC 55, the Supreme Court considered the approach to deciding the reason, or principal reason, for a whistleblowing claim under section 103A, which was specifically said to "relate equally to the other sections in Part X in which the same words appear." The Court confirmed that Parliament intended the legislation to

cover the "real" reason for the dismissal, to be interpreted in the light of its context and purpose. The problem of identifying the reason should be approached "in a broad and reasonable way in accordance with industrial realities and common sense."

108 In ***Oudahar***, the EAT laid out a two-stage test for cases falling within section 100(1)(e):

> **"*Firstly, the Tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.***
>
> ***Secondly, if the criteria are made out, the Tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair."***

In the Hamilton case referred to by the Respondent, this was extended into three questions. A first question was identified of whether there were circumstances of danger. Thereafter, the questions were whether the employee reasonably believed them to be serious and imminent and finally the second question identified in Oudahar becomes the third question.

109 In the case of Balfour Kilpatrick Limited v Acheson [2003] IRLR 683, the EAT held that the words "***or to communicate these circumstances by any appropriate means to the employer***" should be inserted at the end of paragraph (e).

Section 100(1)(e) therefore protects an employee where they:

- take appropriate steps to protect themselves or other persons from the danger;
- communicate to their employer that they plan to take appropriate steps to protect themselves or other persons from the danger; and/or
- communicate the circumstances of danger by any appropriate means to the employer.

110 The EAT in Masiak v City Restaurants [1999] IRLR 780 made clear that the reference to "other persons" in section 100(1)(e) extends beyond other employees and includes members of the public.

111 Section 13 of the Employment Rights Act 1996 provides that an employer may not make deductions from the wages of an employee without proper authority to do so .

112 The Working Time Regulations 1998 provide for employees to be paid holiday on termination of their employment which accrues throughout the period of their employment. Failure to make a payment on termination amounts to an unauthorised deduction pursuant to section 13 of the Employment Rights Act 1996.

113 The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 entitles Employment Tribunals to consider claims of breach of contract providing they meet the requirements in Article 3 which specifically mandates that the breach of contract must arise or be outstanding on the termination of the employee's employment. It is settled law that failure to pay notice pay falls within this legislation. Under section 86 of the Employment Rights Act 1996, an employee who has more than one month's continuous service is entitled to at least one week's notice unless there are circumstances which mean that they are not entitled to notice because they have broken the contract of employment in such a fundamental way that notice is not due.

Conclusions

Claim under section 100(1)(d)

114 In order to consider this claim, the Tribunal have considered first whether there were circumstances of danger. We note that the Respondent conceded that there were, and we agree. We have no doubt that the covid pandemic presented circumstances of danger as there was a risk of catching a contagious virus which could lead to serious illness and sometimes death.

115 The next question was whether the Claimant reasonably believed the danger was serious and imminent and which he could not reasonably be expected to avert. We have recorded the Claimant's explanation for the circumstances that he found himself in. He referred to it being a situation which he never encountered before, and he referred to his two big concerns one of which was the extent of the danger. He was aware that the situation had been declared a worldwide pandemic and there was a significant level of illness and deaths at the time. We note that the Claimant did not say a great deal about the concerns he had over the danger, but we do consider that he said enough to demonstrate that he did consider the general condition of the COVID-19 virus to be a serious and imminent danger. We have no doubt that it was reasonable for him to consider this a danger and that it was not a potential danger but an actual and existing danger, and one he could not be expected to avert. We are satisfied that it met this requirement.

116 Section 100(1)(d) apples where an employee either leaves his place of work, or refuses to return there. It is clear that the Claimant did not leave his work because of the covid pandemic. The Claimant left work on 6 March at the end of his working day with and the issue relates to his failure to return to work from Monday 9 March onwards.

117 The Claimant's case is that he did not return to work on Monday 9 March because he was on a legitimate authorised holiday. He then said he would have been due to return to work on Wednesday 11 March but did not do so because there were difficulties with the return flights, as he thought he required some form of documentary proof that he needed to travel for work before he could get on the flight and he would have needed to self-isolate on his return to the UK, in order to meet government guidance. He says he asked for advice and guidance from the Respondent but was never given

the documentary evidence of the work related need to travel or any further instructions or guidance by the Respondent. He further says that he did not return after that because the situation was superseded by the conversations and email about his return with Mr Roby in which he was told to wait for further instructions which never came. The Claimant does not suggest that he refused to return to work, or proposed to refuse to return. We do recognise that the Claimant says that he told the Respondent that he proposed to self-isolate in order to meet the government guidance. However, the Claimant specifically said that if he had been instructed to return to the UK, he would have done so.

118 We do not think this is a situation where the Claimant refused to return to work. We take the words "return to work" to mean a return to his normal place of work rather than to actual working. It was clear from the email exchange that the Claimant was prepared to work remotely and that he was willing to do that from the UK or from Italy. He did in fact return to working as normally as he could, given his location.

119 It was our clear impression that the Claimant was somewhat reluctant to return to the UK and preferred to remain in Italy if he was going to be required to self-isolate on his return. While we note that he had some concerns about the safety of the travel he would have to undertake, he could do a large part of his work remotely and he did confirm he would have returned to the UK if he had been asked to do so. He would have expected to comply with government guidance which meant he would not have been able to go into the workplace for a period, but this was not because of his specific concerns about the danger in the workplace but rather because he felt he should comply with the guidance. We recognise the Claimant had some concerns that he might pose a danger to other people in the workplace but once the government guidance on self-isolation was removed, his emails suggest he was expecting to make arrangements to return quickly. Therefore, we do not think these concerns played any significant part in his thinking. In the circumstances the claim under section 100(1)(d) fails because this was not a situation where the Claimant was not prepared to return or proposed not to return to his place of work.

120 The claim under section 100(1)(e raises the same questions about the serious and imminent threat and whether the Claimant reasonably considered it to be so. We have followed the sequence of questions laid out in Hamilton. A first question is whether there were circumstances of danger. Thereafter, the questions were whether the employee reasonably believed then to be serious and imminent and finally, did he take or propose to take appropriate steps to protect himself or other persons from the danger, or did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If the criteria are made out, the Tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps.

121 For the reasons we have set out above we are satisfied that there were circumstances of danger and the Claimant reasonably considered there to be a serious and imminent threat. We therefore have to consider whether the Claimant:

- took appropriate steps to protect himself or other persons from the danger;
- communicated to his employer that he planned to take appropriate steps to protect himself or other persons from the danger; and/or
- communicated the circumstances of danger by any appropriate means to the employer.

122 We have to consider whether the steps taken were appropriate judging by reference to the circumstances including in particular the Claimant's knowledge and the fact facilities available to him at the time.

123 The steps taken by the Claimant were to notify his employer and ask for advice and instructions as well as assistance with any documentation he required to demonstrate he was travelling for work if that was what employer wanted him to do. Thereafter he complied with the instructions he had been given which he understood to be to return home and await instructions. He was instructed to have his mobile and laptop on so that he was would receive instructions quickly and could communicate. He clearly did that, and he carried on working using those tools for work. Additionally, he notified the client whose premises he worked at and for him he actually did the work on a day to day basis although he did not discuss the position with the more senior managers in the team. We can see from the call log that we do have, that he had tried to contact Mitesh Patel, but we have no evidence as to what happened and whether he spoke to him or failed to get through to him.

124 We consider that that constituted appropriate steps. We have taken account of the circumstances and in particular the Claimant's knowledge which was of the UK guidance for which he forwarded the link to his managing director Mr Roby and to the HR contact at Boohoo as well as explaining the Italian lockdown. The facilities available to him were his laptop which enabled him to work remotely and his access using that equipment to Boohoo's systems in order to assist them in all aspects of the work he was engaged to perform, that could be done remotely.

125 We also consider that those steps constituted communicating the danger to his employer and so far is he could explain the position as fully as was possible in the circumstances.

126 The question which arises is why was the Claimant dismissed. We have to consider what was in the mind of the Respondent. It is accepted the decision to dismiss was taken by Mr Roby. Mr Roby says that he dismissed because the Claimant had taken unauthorised leave and indeed, in the course of his evidence, he said that he thought the Claimant believed he could get to Italy and back again without his absence being spotted. This is simply not credible. The Claimant had sent two emails referring to his holiday, one of which was sent on the Friday before he left for his holiday. An employee who is trying to take leave of absence without permission would not have sent those emails which would draw attention to his absence. Moreover, we have seen the dismissal letter allegedly sent at the time which we note makes no sense whatsoever. The dismissal letter,

which Mr Roby said he had read, claims that the reason for dismissal was the failure to follow the holiday procedure and the lack of contact. While there could have been some confusion over the holiday procedure, there was no lack of contact. As we noted, the letter reads like one which had been prepared for a different situation and had simply been amended and prepared to be sent to the Claimant, despite the fact that it was not applicable. It described circumstances which had not occurred.

127 This is a case where the employer has not demonstrated the reason for the dismissal. The evidence provided by the employer about the reason for the dismissal is not credible and is indicative of entirely unreasonable behaviour. In those circumstances, as the Respondent has failed to prove the reason for dismissal, we have to look closely at the Claimant's suggestion. It does appear to us that the dismissal was connected with the information provided by the Claimant that he could not return to work physically in the office for a period of time as he would have to self isolate for 14 days. It is clear that Mr Roby was discussing that with Boohoo, as he copied them into the email which said that he was in the process of doing so. We do not know what their response was, but we do know that the Claimant continued to work but that Mr Roby blanked him for some time until he read the Claimant's emails about having authority to work and actually working. At that point, Mr Roby asked who gave the Claimant that authority and when he learned that it had come from the CEO he then asked when the Claimant could return. However, the Claimant's information about when he could return was uncertain, and events were then superseded by the United Kingdom lockdown when everyone was required to work from home. At that point we understand that Boohoo decided they could manage the position from their Manchester IT hub.

128 About a week later the Claimant was sent the email which referred to the termination of his employment. The Respondent has not suggested that the termination arose because of the fact that the Claimant's services were no longer required by Boohoo. Therefore, we have to conclude the termination arose because the Claimant had communicated the difficulties with covid and the reason why he proposed to work remotely in Italy until the circumstances changed.

129 It was suggested by the Respondent that there are two defences to the claim. First the Respondent argues that the Claimant did not take appropriate steps as required by section 100(1)(e), but we reject that. Fundamental to the Respondent's case is that the Claimant should have ignored government guidance given in the middle of a serious health emergency. Additionally, the Respondent failed to provide the extra documentation which the Claimant thought he required or to provide any other advice to him so the steps he took were consistent with the limited instructions he received from the Respondent at the time.

130 It was also suggested by the Respondent that they have a defence under section 100(3) in that the Respondent says the Claimant was negligent in the steps that he took as he risked the contract with Boohoo which was a major contract for the Respondent company. We do not believe that the meaning of negligence in this context is some form of prejudice to a contract but rather negligence which would have had an adverse impact on some persons or some things in the nature that negligence is usually referred to in in tort. Moreover, we also reject that argument as the Claimant complied with the minimal instructions which he received from the Respondent.

131 It is therefore our conclusion that the Claimant's claim under section 100(1)(e) succeeds and that the Claimant was automatically unfairly dismissed.

132 We have considered whether the Claimant was dismissed in breach of contract in circumstances which would entitle him to notice. The Respondent accepts that the Claimant's length of service was such that he was entitled to notice and the real issue that arises in this claim is whether the Claimant had committed a fundamental breach of contract which entitled the Respondent to dismiss him without notice. The breach of contract relied upon by the Respondent is not, as set out in the alleged dismissal letter, the lack of contact from the Claimant but solely the fact that the Respondent regarded him as not having complied with the procedure for taking Holidays, so that he had taken an unauthorised leave of absence.

133 The employment contract provided that the Claimant would be given details of the procedure to apply for holiday, but this was never done. However, the contract also specified that holiday should not be booked until the line manager had given written authorization. The Claimant had failed to get approval for his holiday from his line manager in writing as required by that contract term. The contract makes it clear that the Claimant was due to contact Lee Roby on a daily basis and, as managing director, Mr Roby had the ability to give permission for holiday and indeed did so in the past without following the procedure. It seems clear from that that Mr Roby was regarded as having authority to confirm and agree to Holidays, with or without following any process of written request or written permission. The procedure which the Claimant followed was identical to that which he had followed previously in relation to his holiday in Sweden. On that occasion he had discussed the holiday with Mr Roby and Mr Roby had simply asked him to confirm the dates. In this case, we are asked by the Respondent to accept Mr Roby's evidence that there was no phone call between him and the Claimant at which this holiday was discussed. We have found that evidence is not credible. It is our conclusion that the Claimant did have a discussion with Mr Roby about that holiday. At most, it is possible that there was a misunderstanding and Mr Roby wanted the Claimant to send the dates in by way of a request for the holiday so that he could consider whether he could get cover, but if he did, we do not think he explained himself adequately and certainly the Claimant's clear impression was that the holiday had been approved. He believed and we accept he was genuine in thinking that he merely needed to send the dates for a record. He believed the first email confirmed the dates for Mr Roby. The second email was no more than a reminder to Mr Roby because the Claimant had not had any response from him about the arrangements for cover. We appreciate that there was scope for confusion and that the Claimant's limited English, coupled with Mr Roby's failure to read his emails, may have led to this misunderstanding.

134 The Handbook, which the Claimant never received, does provide that employees who deliberately failed to attend work without proper excuse or in breach of management instructions will be committing gross misconduct. If there had been an investigation into this situation it would have been clear that the Claimant had not deliberately failed to attend work without a proper excuse. He did indeed have an excuse. He did genuinely believe he had permission. He was not in breach of any management instruction as such.

In the circumstances we do not consider this could be amount to gross misconduct and therefore the Claimant is entitled to notice.

135 We take into account not only the fact that the failure to attend was due to a genuine misunderstanding, if not the fact that the Claimant actually had permission to take the holiday given verbally by Mr Roby. We also take into account the fact that Mr Roby emailed the Claimant asking when he could return to work on 20 March, which indicated that he was in fact willing to have him back at work assuming he could get him back in a reasonable time. We do not consider that the situation had got to the point of a fundamental breach of contract on the part of the Claimant which is what is required for notice not to be payable.

136 The Claimant had brought another contractual claim which appeared to relate to the failure to place him on furlough. We note that the furlough procedure was announced by the chancellor on 20 March 2020 but was to run from 1 March. This was before the date when the Claimant was given actual notice of the termination of his employment, namely 1 April. However, there was no legal obligation to put employees on furlough, whether under contract or by statute. The opportunity to put employees on furlough was an arrangement between the government and employers. The system required the employer and employee to reach an agreement about the employee's pay and agree that the employee would not work and thereafter the employer could apply for what was effectively a subsidy for the employee's wages. While employers were encouraged to use the system for employees, there was no entitlement on the part of employees, and there is no breach of contract that we can understand .

137 The Claimant claims arrears of pay by way of a claim for unauthorised deductions. The Respondent accepts that the Claimant was only paid up to the 6th of March, although his pay did not include payment for the dates when he was in Sweden. We have found that the Claimant's employment did not end until 1 April and that, before it did, the Claimant was working and continued to work. The Claimant was never given instructions by the Respondent not to work and he did notify the Respondent that he was working. It appeared that senior management within the Boohoo organisation had approved that, by which it seems they were saying they were willing to treat that as fulfilment of the contract between themselves and the Respondent and to pay for the Claimant to work those days. We accept that it is not for the Boohoo organisation to give the Claimant direct instructions, but when an individual is working in circumstances where their services are provided to another company, there is effectively a dual reporting line. The actual employer clearly has clear responsibility to give major instructions, but the client for whom the individual is working, also has authority to give day to day instructions. It was not unreasonable for Boohoo's management to give the Claimant instructions that he could carry on working on remotely. If the Respondent had clearly told the Claimant he should stop work, that would override the instructions from Boohoo, but they did not. As it stands, he was working and the only instructions he had from the Respondent were not to communicate with Boohoo's management over absences and matters such as lateness at work.

138 From at least the 23rd of March large numbers of Boohoo's staff were working remotely. We have been told by the Respondent that he was unable to carry out his work because one thing he was needed for was to carry out employee inductions to explain the Boohoo computer system to

them, but we have no evidence that there were specific inductions which he did not do and the rest of the time we have a concession from Mr Roby that the Claimant probably was working. We therefore conclude that he was due to be paid up to and including 1 April when he received the notice of termination effective immediately.

139 The Claimant has also claimed accrued holiday pay and given his length of service it is clear that he was entitled to accrued holiday pay up to and including the date when he left being 1 April.

Remedy

140 We took evidence from the Claimant about his claim. He was cross examined by the Respondent in relation to his efforts to mitigate his loss. Mr Roby gave evidence for the Respondent on remedy, and we also had had submissions from the Respondent about the Claimant's claim, and we had the Claimant's schedule of loss. The Claimant has not found work. He has made significant efforts to look for another job. In addition, we note that the Claimant received universal credit from 24 June 2020 in the amount of £1027.39 monthly.

Arrears of pay

141 In relation to the claim for arrears of pay, we have reviewed the payslips. The Claimant was paid for the 7 days he worked in February 2020, (but not for the 3 days of holiday he took) and the Claimant was paid for 5 days in March 2020, but no more. Our finding that the Claimant's employment was only ended on 1 April 2020 and that he continued to work the rest of the time means that he is due 21 day's pay for the March period and 1 April (being the day when he was notified that his employment was ending) less 5 days leaves 16 day's pay outstanding. That amounts to 16 times £145 per day equals £2320 gross. We have left the holiday days to be addressed separately.

Holiday Pay claim

142 We also found for the Claimant in terms of his holiday pay claim and our calculation is that the Claimant worked for 6 1/2 weeks and that he was entitled to 3.5 days holiday at £145 per day, totalling £507.50.

Tax and national Insurance

143 Both the award for arrears of pay and for holiday pay are gross sums which are subject to the deduction of tax and Employee's National Insurance. The Respondent must pay him these amounts in full, subject only to the deduction of any Tax and Employee's National Insurance which is properly due on these sums and where the deduction is paid to HMRC by way of Tax and/or Employees National Insurance on these sums and must provide documentary proof of the specific payments to HMRC to the Claimant.

Breach of contract claim

144 We do consider that the Claimant was entitled to compensation for the breach of contract and failure to give him notice for which we have awarded him one week's pay which amounts to £725 gross. An award for breach of contract is usually made on a net basis. The Claimant's payslip for February shows he received £1015.00 for 7 day's work and paid £432.60 tax leaving

a net sum of £582.40 for the 7 day's work amounting to £83.20 net per day which means the notice pay claim totals is £416.00 net for the notice period.

Unfair Dismissal Award

145 The Claimant said that he had made a considerable effort to find other work but has been unable to do so. The initial emails between the Claimant and Mr Roby indicate that the contract was expected to last for about six months. However, we also heard evidence from Mr Roby that the Respondent did not continue to carry out work of the nature carried out by the Claimant for Boohoo after the lockdown because they were able to do this for themselves from their Manchester IT hub. The Claimant disputes this because he had photographs of the Respondent's logo on a van outside the London office of Boohoo where he had worked and he understood that they were carrying out security installation, which he was qualified and capable of doing.

146 We considered this evidence carefully. The Respondent raised two additional issues. First it was suggested that the Claimant had not made sufficient effort to find another post and that his evidence started in September 2020. We reject that and accept the Claimant's evidence that he did not realise he was supposed to print out everything he had done. We accept that he had printed out a snapshot but had worked continuously to try to find other work.

147 The second argument raised by the Respondent is that the Claimant's engagement would have ended in any event in April as the Respondent had no further ongoing work from Boohoo. We do not have any documentation at all to confirm this.

148 We are concerned about the lack of disclosure indicating that Boohoo terminated the contract for the IT support in the Boohoo London office where the Claimant worked. However, we recognise that Boohoo would have tried to suspend any unnecessary costs. They would not have needed any additional contractors for a while, and therefore the Claimant's services were of limited value after 1 April. Nevertheless, without any disclosure from the Respondent, we cannot simply assume that the Respondent's contract with Boohoo could have been terminated immediately. Moreover, it was not clear to the public at first that the initial lockdown was more than a one off so that there was a chance the work would have resumed after the lock down. The essence of the Claimant's breach of contract argument was that the Respondent would have continued the Claimant's employment given it did not need to bear any significant cost due to the government furlough scheme. This was really an argument on remedy.

149 We considered the Claimant's argument that he might have remained in full employment. We appreciate that some pieces of work may have been carried out for Boohoo by the Respondent. However, we do not think they were consistent or took up significant time.

150 We concluded that we could not be satisfied that the Claimant would have been dismissed by the Respondent as quickly as was lawfully possible after the lockdown, by giving him his notice, which was the one week. As noted, we do not know what the terms of the Respondent's contract with Boohoo were. There was no documentary evidence that Boohoo terminated the Respondent's services. There was some ongoing business relationship as evidenced by the Respondent's van being outside the Boohoo offices in London. Having weighed up all the evidence, it is our view that there is a 50 per cent chance that the Claimant would have been put on to the furlough

scheme. The Claimant was originally told by Mr Roby that he had work for six months so that at that point, he could have expected to remain in work until mid-August 2020.

151 The original furlough scheme operated between March and 30 June 2020. The system operated by providing to the employer an 80 percent subsidy in relation to employees who were on payroll before 19 March 2020. The Respondent could have paid the Claimant 80 per cent of his pay capped at the government maximum of £2,500 per month or £80.65 per day, until 30 June 2020. Thereafter there was a revised scheme called the flexible furlough scheme. Non-essential shops opened on 15 June 2020 and tiered local lock downs came into effect from 1 July 2020. If Boohoo still remained working from home and intended only to use their own IT hub in Manchester after 30 June 2020, as we are told was the case, we consider the Claimant would have been dismissed at the end of June 2020.

152 We therefore conclude that the Claimant is not entitled to any basic award because his length of service was not sufficient for any basic award to be made. We further conclude that there is a 50 per cent chance that the Claimant's employment would have continued during the first furlough scheme, but that he would have been on the capped maximum pay as that was the limit of the employer's subsidy under the first furlough scheme.

153 The Claimant did not have significant length of service and had not accrued any statutory rights and thus there is no award for the loss of them.

154 We considered the case law that suggests in some circumstances in detriment claims there might be an award for injury to feelings, but this case law is in doubt and it is our view that it is not open to us to follow it.

155 In all the circumstances we propose to make an award for the unfair dismissal of 83 days (that is because we have already compensated the claimant for the first week under his notice claim) at £80.65 per day equals £6,693.95 divided by 50 percent equals £3,346.98. We have not uplifted the sum for any breach of the ACAS code although we considered it. Because the Claimant has such a short period of service, we have allowed no uplift. Nevertheless, this is an egregious example of a failure to comply with the Code, had the service been longer we would have awarded the full 25 per cent uplift.

Recoupment

156 Recoupment is applicable on a small part of this award. The calculation below sets out the prescribed period and the amount awarded in relation to that period, which is called the prescribed element. The amount of the prescribed element is then stayed until the DWP either serves a notice on the employer called a recoupment notice, or notifies him in writing that it does not intend to serve such a notice. The notice must be served within 21 days of the decision being sent to the parties, or as soon as practicable thereafter. The DWP may claim a total or partial repayment ("recoupment") out of the award of an amount not exceeding the amount of the benefits. The recoupment notice serves as an instruction to the employer to pay the recoupable amount to the DWP by way of deduction out of the sum due under the award. The recoupable amount is then recoverable by the DWP as a debt. The balance of the amount of the prescribed element is then paid by the employer to the employee. Time

for payment of the remaining sums (i.e. those not subject to recoupment) commences immediately.

157 The total monetary award is £6,590.48. Of this, only £3,346.98 is payable in respect of the unfair dismissal claim and therefore potentially subject to recoupment.

158 The amount of the prescribed element is £3,346.98

159 The dates of the period to which the prescribed element is attributable are from 2 April 2020 to 30 June 2020.

160 The amount by which the total monetary award exceeds the prescribed element is £3,243.50.

Employment Judge N Walker

1 April 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

01/04/2021.

FOR EMPLOYMENT TRIBUNALS