



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112077/2019

**Hearings Held by Cloud Video Platform (CVP) on 24, 26 & 29-31 March 2021
and 13-16 September 2021**

10

Employment Judge O'Donnell

Jacqueline Armstrong

15

**Claimant
Represented by:
Ms Evans-Jones for
the March dates
and Ms Page for the
September dates
both solicitors**

20

Drimvargie Limited

**Respondent
Represented by:
Mr Bansal
Representative**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

1. The claim for unfair dismissal is not well-founded and is hereby dismissed.
- 30 2. The claim of unlawful deduction of wages in respect of the Claimant's pay for April 2019 is not well-founded and is hereby dismissed.
3. The claim of unlawful deduction of wages in relation to the Respondent's failure to pay the Claimant for the holiday taken in May 2019 is well-founded and the Tribunal awards the Claimant the sum of £311.69 (Three hundred
35 eleven pounds and sixty nine pence) in respect of this deduction.

4. The Respondent breached the Claimant's contract on the basis that it did not have reasonable and proper cause to suspend the Claimant for the period 13 to 20 May 2019 and did not have reasonable and proper cause to suspend the Claimant without pay for the whole period of her suspension. The Tribunal awards the Claimant the sum of the sum of £255 (Two hundred and fifty five pounds) as compensation for breach of contract.
5. The breach of contract claim in respect of notice pay is not well-founded and it is hereby dismissed.
6. The Claimant's applications for expenses and for wasted costs are refused.

REASONS

Introduction

1. The Claimant has brought complaints of "automatic" unfair dismissal, unlawful deduction of wages and breach of contract. These are resisted by the Respondent.
2. This case was originally due to be heard in March 2020 but had to be postponed due to the pandemic. There were a number of case management hearings throughout 2020 with a final hearing to be heard by way of Cloud Video Platform "CVP" originally listed for 24-26 March 2021.
3. For reasons set out below, the original hearing dates of 24-26 March were used for case management in order to ensure the case was ready to proceed. A first diet of the substantive hearing was held by CVP on 29-31 March 2021 and the hearing was continued on 13-15 September 2021 by CVP.

Case management on 24 March 2021

4. On reviewing the papers in advance of the hearing, it became clear to the Tribunal that there were issues of case management to be addressed before the hearing could proceed.
5. The first related to the document bundles being produced by both parties. A direction had been made that a joint bundle should be produced. However,

the Respondent had become concerned about documents not being included in the joint bundle or the format in which they had been included (for example, the copies in the bundle having information cropped off when photocopied). The Respondent had, therefore, produced their own bundle.

5 6. The Claimant's agent indicated that they had thought to use the Respondent's bundle as a joint bundle but that it had become clear that they did not have all the documents in that bundle. Mr Bansal for the Respondent indicated that he would be willing to provide any documents which the Claimant was missing.

10 7. The Tribunal was not willing to start hearing evidence in circumstances where one party did not have all the documents which may be referred to in evidence. Further, the Tribunal was not convinced that it had a complete version of the Respondent's bundle; the version lodged on 8 March 2021 ran to 47 documents; the Respondent added a 48th document after that and then
15 by letter dated 22 March 2021 added documents 53-59; the Tribunal could find no trace of documents 49-52 (there were some unpaginated documents hand-delivered on 18 March 2021 but it was not clear what these were).

8. The Tribunal expressed its concern at changes being made to the bundle so close to the hearing and in circumstances where this case had first been listed
20 to be heard in the previous year (until the pandemic necessitated a postponement) and where there had been a number of case management hearings in the intervening period.

9. Mr Bansal explained that he was a lay person and was being assisted by a family member who was a solicitor but did not work in this area of the law. The
25 Tribunal did note that and his explanation that some documents were being added in response to documents in the Claimant's bundle.

10. The second issue related to witness statements being used for evidence-in-chief which had been ordered by EJ Hoey in June 2020 (with dates for exchange adjusted by EJ Sangster in August 2020). The Respondent had

lodged statements for their witnesses by email dated 21 September 2020 but nothing had been received from the Claimant.

- 5 11. Ms Evans-Jones, who had only recently taken over conduct of the case from someone else in her firm, explained that they had not received the Respondent's witness statements and that the solicitor from whom she took over the claim had informed her that the direction for witness statements had been superseded by a subsequent Order.
- 10 12. In relation to the first point, the Tribunal noted that three separate persons within Ms Evans-Jones' firm had been copied into the email of 21 September lodging the Respondent's statement. In relation to the second point, the Tribunal asked for clarification as to what Order was being referenced and Ms Evans-Jones stated that it was the Order of EJ Whitcombe in February 2021. When asked to point to any part of that Order which revoked EJ Hoey's Order relating to statements, Ms Evans-Jones quite properly accepted that it did not
15 do so. In any event, the Tribunal noted that the exchange of witness statements was to have taken place in September 2020, five months before EJ Whitcombe's Order.
- 20 13. The Tribunal did not consider that it was in the interests of justice or in keeping with the overriding objective to proceed with the hearing in circumstances where parties were on very different footings when it came to evidence. Both sides may consider themselves disadvantaged (or the other side advantaged) where evidence is given in different formats.
- 25 14. Although it was said that the Claimant had not seen the Respondent's statements, the fact that these were sent by email copied to three people in the firm representing the Claimant would undoubtedly create the reasonable impression with the Respondent that someone on the Claimant side had seen the statements and had the advantage of that. The same advantage had not been afforded the Respondent.

15. Further, the Respondent had prepared their case on the basis of the statements forming the evidence-in-chief and so was not in a position to lead oral evidence from their witnesses without time to prepare.
16. There was also an issue with what were described as “statements” which were added to the Claimant’s bundle. These were of the nature of character references. The Respondent had set out their objections to these in correspondence. They would not insist on those objections if they could produce similar documents to counter those produced by the Claimant (which formed part of the additional documents 53-59).
17. Finally, the Claimant’s agent indicated that a revised Schedule of Loss which corrected some errors and provided more information was to be lodged. The Respondent objected to this as they had already replied to the one which had been lodged.
18. The Tribunal was of the view that the hearing could not progress until these matters had been resolved. After rising to consider the matters, it made the following directions:-
- a. Parties are permitted to use their own bundle of documents but this must be on the basis that both parties (and the Tribunal) have a complete copy of both bundles.
 - b. By 4pm on 24 March 2021, both parties will provide to each other an up-to-date copy of the index to their respective bundles showing all documents they seek to rely on with a document number and page number. This exchange should be copied to the Tribunal to confirm it has been done.
 - c. At the same time, the Respondent will send a copy of their index to the ET (at CVPHearingScot@Justice.gov.uk) along with a paginated copy of any additional or updated documents not in the 8 March version of their bundle.

- d. By 12pm on 25 March 2021, both parties to indicate to each other any documents from the updated indices which they do not have.
 - e. By 4pm on 25 March 2021, parties will provide to each other any such documents (properly paginated) so identified.
 - 5 f. Given that no evidence has been heard as yet, parties are free to include any document on which they wish to rely subject to both parties being entitled to make submissions on the relevance of any document as part of their closing submissions.
 - g. Any document which a party seeks to add to their bundle after 4pm on
10 25 March 2021 must be the subject of a formal application (complying with Rule 92) to which the other party can object if they so wish.
 - h. By 4pm on 24 March 2021, the Respondent to send their witness statements to the Claimant's agent. The Tribunal has copies and does not need these sent again.
 - 15 i. By 12pm on 25 March 2021, the Claimant will lodge with the Tribunal a copy of her witness statement that will stand as her evidence-in-chief with a copy to the Respondent. This is in keeping with the interests of justice and the overriding objective to ensure equal footing between the parties.
 - 20 j. On the basis that the Schedule of Loss is not evidence in itself and is more in the way of submissions on the award which the Claimant asks the Tribunal to make then she will be permitted to lodge a revised version. This should be done no later than 4pm on 25 March 2021.
 - k. The Respondent will be permitted to make any comments on the
25 revised Schedule of Loss as part of their closing submissions and do not require to lodge written comments (although they are free to do so if they wish).
19. The hearing could not progress until the directions above were met and so the Tribunal rose at lunchtime on 24 March and advised parties that it would

not sit for the rest of that day or on 25 March 2021. The hearing would reconvene by way of Cloud Video Platform (CVP) at 10am on 26 March 2021 to review the position and address any further case management issues.

5 20. During the break to consider the various issues, the Tribunal had been able to confirm that it was possible for the final hearing to proceed by way of CVP on 29-31 March 2021. These were the next working days after 26 March and so there would be very little delay in reconvening the hearing. Parties were all free to attend and so a reconvened final hearing to be heard by way of CVP was listed for 29-31 March 2021.

10

Case management on 26 March 2021

21. The Tribunal reconvened the hearing on 26 March 2021 to review progress on the directions above.
- 15 22. It was confirmed that both sides had received each other's witness statements.
23. In terms of the Claimant's bundle, Ms Evans-Jones confirmed that the only revision was the updated Schedule of Loss to be inserted for pp104-105.
24. In relation to the Respondent's bundle, Mr Bansal confirmed that an updated index had been provided and that the only revisions were the addition of
20 documents 48-59. He had provided versions of documents 26 and 30 for comparison between the Claimant's version and that of the Respondent (showing dates cut-off at the top) but confirmed that the documents in the Respondent's bundle lodged on 8 March 2021 were those to be used at the hearing.
- 25 25. Mr Bansal also confirmed that he will refer to documents 1-25 from the Claimant's bundle rather than the Respondent's bundle.
26. In these circumstances, the Tribunal was satisfied that both parties and the Tribunal had the same bundles to work from at the hearing.

27. The Tribunal took the opportunity to address some further matters at this sitting which it considered would save time when the final hearing resumed on 29 March.
28. First, the Tribunal addressed the issue of which side would lead evidence first. It was common ground that the Claimant would lead first and the Tribunal explained to Mr Bansal, as a party litigant, the sequence in which questions would be asked and, in particular, that he should be ready to start his cross-examination of the Claimant from the outset of the hearing.
29. Second, the Tribunal reminded parties that the witness statements form the evidence-in-chief of the witnesses but indicated that it would allow parties to ask supplementary questions in evidence-in-chief to address any issue which arises from the other side's witness statements that was not addressed in the statement of the relevant witness. The Tribunal made it clear that this was not permission to lead the evidence-in-chief orally but only to pick up on matters not otherwise addressed.
30. Mr Bansal raised an issue around matters asserted in the Claimant's statement which he wished to challenge. He gave the example of an assertion of someone other than the Claimant not being paid which he wanted to dispute. The Tribunal indicated that this is exactly the sort of matter which supplementary questions could deal with and that, in any event, the Claimant's assertions could be challenged in cross-examination.
31. Some of Mr Bansal's concern arose from his belief that he needed to produce documentary evidence to dispute any such assertion. The Tribunal explained that, whilst it could not give him advice or make the Respondent's case for it, it was a common misconception that oral evidence was not sufficient to prove a fact. The Tribunal explained that it would apply the civil standard of proof and the civil rules of evidence would apply which did not require corroboration of facts from at least two pieces of evidence as is required in the criminal courts.

32. After the Tribunal rose on 26 March 2021, the Respondent had sought to add further documents to their bundle on the basis that these were documents they wished to put into evidence in response to matters in the Claimant's witness statement which they had seen for the first time only the week before. The Claimant's agent expressed concern at further documents being added after the case management in the week before but would not object if the Claimant could add one further document to her bundle to address the documents being added by the Respondent.
33. On the basis that these documents were being introduced to address matters which had come to the Respondent's attention when they received the Claimant's statement only a few days previously, the Tribunal considered that it would be in the interests of justice and in keeping with the overriding objective to allow the Respondent to produce evidence to answer such matters. The Tribunal would also allow the Claimant to add a document that addresses the same matters.
34. However, the Tribunal allowed these documents to be added on the basis that it had formed no view as to the relevance of these documents nor had it come to a view as to the weight it should place on these. This would be an issue for parties to address in submissions.
35. Towards the end of the day on 29 March 2021, the Tribunal became concerned about the relevance of the evidence which was being presented by both parties, particularly in relation to the various claims relating to the Claimant's wages. In particular, the Tribunal was concerned that parties were leading evidence on issues which were not part of their pled cases. For example, there was a suggestion that the Claimant sought to argue that she had been underpaid over the whole period of her employment which was not a claim set out in her ET1 whereas the Respondent appeared to be leading evidence intended to show that the Claimant had been overpaid over the period of her employment which was not pled in the ET3.
36. In order to ensure that the issues to be determined by the Tribunal were clear to all parties and that only evidence relevant to those issues was led by both

parties, the Tribunal set out what it considered were the claims pled in the ET1 and the defences pled in the ET3:-

5 a. A claim for unfair dismissal under s104 Employment Rights Act 1996 (ERA). The Claimant asserts that the sole or principal reason for her dismissal was an assertion of a statutory right. The Respondent says that the reason for her dismissal does not fall within the scope of this statutory provision.

10 b. A claim for unlawful deduction of wages under Part 2 ERA in relation to the wages paid to the Claimant in April 2019. The Claimant says she was paid less than she was legally entitled to be paid in that month whereas the Respondent says that she was paid the correct amount.

15 c. A claim for unlawful deduction of wages under Part 2 ERA in relation to the Claimant's holiday pay. The Claimant says she was paid less than she was legally entitled to be paid in respect of holiday pay whereas the Respondent says that she was paid the correct amount.

20 d. A claim for unlawful deduction of wages under Part 2 ERA and/or a claim for breach of contract in relation to the period when the Claimant was suspended. The Claimant says that she should have been paid for this period. The Respondent says that they exercised the power under the Claimant's contract of employment to suspend without pay.

e. A claim for breach of contract in relation to notice. The Claimant says that she was either not given notice or was not paid for the notice period. The Respondent says that the correct notice was given and that the Claimant was paid for this.

25 37. The parties did not demur from what was set out by the Tribunal and so it proceeded on the basis that these were the issues to be determined.

Evidence

5 38. The Tribunal heard evidence from the following witnesses:-

- a. The Claimant
- b. Sharonne Bansal (SB)
- c. Robin Bansal (RB)
- d. Daniela Sapuruic (DS)

10

39. Evidence-in-chief was given by way of witness statements which were taken as read. Supplementary questions were allowed in relation to issues which arose from the other party's statements that had not been addressed.

15

40. As noted above, parties produced their own bundles of documents and where the Tribunal makes reference to page numbers in its judgments it will use "C" or "R" in front of the number to identify in which bundle the page could be found.

20

41. The Tribunal did hear a considerable amount of evidence from both sides, in both evidence-in-chief and cross-examination, which it considered irrelevant to the issues to be determined. The Tribunal's findings in fact set out below are focussed on the facts which emerge from the evidence that the Tribunal needs to find in order to determine the issues in dispute.

25

42. In assessing the credibility and reliability of the witnesses, the Tribunal was conscious that the witnesses were being asked to recall events from two years ago and their memories would inevitably have faded over time. The Tribunal was, therefore, very careful in reaching any conclusions on the credibility of witnesses solely because they had a less than perfect recall of events although that did impact on their reliability.

43. The Tribunal did find that the Claimant was a credible and reliable witness insofar as she could recall events. She gave her evidence on in an open and

honest manner being willing to accept matters being put to her even where they were not to her benefit and accepting when she could not recall why events had occurred. She did, on occasion, have to be reminded to answer the question being put to her but the Tribunal did not consider that she was seeking to be evasive or misleading in this but, rather, that she had fallen into the trap common to many witnesses of seeking to answer the question they think they are being asked or anticipating where a line of questioning is going.

5

44. In relation to the Respondent's witnesses, the Tribunal considered that Robin Bansal was a credible and reliable witness although his evidence was not of particular relevance. In particular, he could not recall a number of matters given both the passage of time and the fact that he had little direct involvement in the events which are most relevant to the issues in dispute.

10

45. Similarly, Daniela Sapuruic was found by the Tribunal to be a credible and reliable witness but could not speak to many of the facts which were directly relevant to the issues in dispute. Much of her evidence was related to the issues that arose between the Claimant and another employee which, whilst important in setting out the background of the case, were not matters which went directly to the issues to be resolved. In particular, the Tribunal did not require to come to a conclusion as to whether the complaints which the Claimant and that other employee made about each other were valid in reaching its decision on the claims before it.

15

20

46. The Tribunal should be clear that the evidence of the Claimant related to the complaints made by her and that other employee about each other was similarly not relevant to the issues the Tribunal had to resolve.

25

47. For the most part, the Tribunal found Sharonne Bansal to be a credible and reliable witnesses. The Tribunal did have to intervene a number of times during her cross-examination by the Claimant's representative when Ms Bansal became somewhat combative and started to argue with the representative to remind her that she should answer the question rather than argue with the representative. However, it is often the case that witnesses, particularly during cross-examination, will fall into the trap of seeking to argue

30

their side's case or feel that they are being attacked so the Tribunal did not consider that this fundamentally undermined Ms Bansal's credibility and reliability.

5 48. This was a case where there was little dispute of fact about the sequence of events. For the most part, the chronology leading to the Claimant's dismissal and the facts relevant to the dispute about her wages were not significantly disputed. Similarly, the documents relevant to the case were not disputed and it was considered that they said what they bore to say.

10 49. There were only two events where there was a dispute between the evidence of the Claimant and that of Ms Bansal which the Tribunal required to resolve.

50. First, there was a dispute as to how Ms Bansal reacted to the Claimant on 4 or 5 May 2019 when the Claimant sought to raise an issue about her April wages; the Claimant described Ms Bansal as being dismissive and turning her back on the Claimant; Ms Bansal said that she addressed the query.

15 51. The Tribunal prefers the evidence of Ms Bansal in relation to this event. It was clear from the documents that Ms Bansal had addressed the Claimant's issue as she had pointed out that certain dates which the Claimant considered should have been paid in April 2019 occurred before the cut-off date for the payroll and had been included in the previous month's wages. This is reflected in the
20 fact that the Claimant had written on the piece of paper she had prepared setting out the wages owed that these dates should be forgotten (C149). The document supports Ms Bansal's position that she had addressed the query rather than the Claimant's assertion of a dismissive response.

25 52. Second, there was a dispute as to what happened at the end of the meeting on 24 May 2019 and, in particular, whether or not the Claimant had said that she was resigning. Although the Tribunal is not dealing with a question of whether there had been a dismissal or resignation, it was Ms Bansal's evidence that this utterance by the Claimant played a significant factor in her decision to dismiss.

53. There was no evidence other than the oral evidence of the Claimant and SB as to what happened at the meeting on 24 May 2019. There was another person present but neither party called that person as witness. There were also no minutes or notes of the meeting produced by either side.
- 5 54. The only broadly contemporaneous document is the letter of 27 May 2019 lifting the Claimant's suspension (C50-51). The Tribunal notes that this does not contain any express reference to the Claimant having resigned at the meeting and the Tribunal considers that, if she had, it would expect such a significant matter to have been mentioned.
- 10 55. Rather, the final paragraph of the letter invites the Claimant to return to work and asks if she would like a return to work meeting before the Respondent provides her with her shifts. The Tribunal considers that this demonstrates that the Respondent was an employer who is expecting an employee to return rather than an employer who had been told by that employee that they were
15 resigning.
56. The letter does go on to say that if the Claimant decides "*otherwise regarding your future at the hotel or make the decision not to return or to work your notice*" then she should advise them. At best for the Respondent, this is ambiguous; it is framed in the future, rather than past, tense about a decision the Claimant
20 may make rather than one which she has; the only wording which could be read to suggest a decision had been made is the reference to working her notice but that cannot be read in isolation and has to be considered in the context of the other words used.
57. The Tribunal, therefore, considers that the wording of this letter does not
25 support the assertion that the Claimant resigned; it does not say that in terms and reads more as an employer anticipating an employee's response to the letter rather than confirming a decision already made by that employee.
58. In these circumstances, the Tribunal prefers the evidence of the Claimant as
30 the only contemporaneous document produced in evidence is more consistent with her evidence than that of the Respondent.

59. The Tribunal should be clear that, in relation to both these disputes of fact, it does not consider that the Claimant or SB has given deliberately false evidence. They were both attempting to recall events from some years ago and, in both instances, events occurred in circumstances where things were said and done in the heat of the moment when they both may have felt stressed or upset. These factors are likely to have affected their recollection and the Tribunal considers that they have misremembered when it came to giving evidence.

Findings in fact

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

61. The Claimant was employed by the Respondent as a breakfast cook. She commenced the period of employment directly relevant to this case on 26 October 2018. She had an earlier period of employment with the Respondent from April to August 2018.

62. The Respondent operates a hotel in Glasgow and the Claimant's role was to provide breakfast for guests. The hotel is managed by RB and SB.

63. The Claimant was provided with a main statement of terms and conditions of employment (C36-43) which was signed on behalf of the Respondent on 29 January 2019 and by the Claimant on 2 February 2019. This document sets out the terms and conditions of the Claimant's employment and the following clauses are of particular relevance to this case:-

a. Clause 7 confirms the Claimant's job title as breakfast cook.

b. Clause 9 states that the Claimant is paid £8.50 an hour. This remained her rate of pay throughout her employment.

c. Clause 11 states that the Claimant's hours of work are 30 hours over 6 days.

d. Clause 12 sets out the provisions relating to holidays. The holiday year runs from 1 April to 31 March. Employees are given the statutory

minimum holiday entitlement which is inclusive of public holidays.
There are provisions setting out the notice required to take holidays.

e. Clause 17 gives the Respondent the power to suspend employees,
with or without pay in particular circumstances.

5 f. Clause 18 sets out the notice each party has to give to terminate the
contract.

64. The Respondent pays its employees on a monthly basis at the end of each
month. There is a cut-off date for the payroll calculation which occurs part way
10 through the month. The practical effect of this is that any payment of wages
will be based partly on the hours worked in the same month as when the
payment is made and partly on hours worked in the previous month.

65. All employees were entitled to, and were expected to take, an unpaid break
during the working day. This was normally taken at the end of the breakfast
15 service.

66. Staff were required to complete a timesheet recording their start and finish
times as well as when they took their break. Copies of these are produced at
R115-145. There is a table with the first name of each staff member grouped
by the area in which they worked (that is, reception, housekeeping,
20 maintenance and breakfast) with columns for the staff to enter start and finish
times, break time and their signature.

67. The Claimant had been concerned that she was not always able to take her
breaks due to pressure of work. This was part of broader concerns which she
had about her workload. As a result, she began to record on the timesheets
25 those days when she did not take a break. However, there was no agreement
with the Respondent that when she could not take a break then she would be
paid for such time. It was understood by the Claimant that the breaks would
be automatically deducted from the hours recorded on the timesheet.

- 5 68. In the relevant period starting in the last week of March 2019 and continuing through the first three weeks of April, the timesheets at R115-145 show seven instances where the timesheet shows that the Claimant did not take a break. On every other day on which she worked, either a break was recorded or the column was left blank.
69. The actual hours worked by the Claimant fluctuated and it was common ground that her average hours over the whole of her employment was 25.5 hours. The hours worked by the Claimant were based on the work rota organised by the Respondent.
- 10 70. The Claimant was due to go on holiday for the period from 7 to 21 May 2019 (all dates inclusive) and was going abroad for this whole period. She had booked this period of holiday with the Respondent at the outset of her most recent period of employment with the Respondent because the arrangements for this trip abroad had been in place before she had returned to work for the Respondent.
- 15 71. Shortly prior to going on holiday, the Claimant approached SB regarding what she considered to be a shortfall in the wages paid to her at the end of April 2019. The witnesses could not recall the exact date on which this occurred but were agreed that it was either 4 or 5 May 2019.
- 20 72. The Claimant had produced a typewritten note of her calculation of her hours (C63-65) for the relevant period and gave this to SB. It was agreed at the time of this discussion between the Claimant and SB that the Claimant had included hours which had been paid in March 2019 because she had made an error in when the cut-off date for the March payroll would have fallen. A handwritten amendment to the typewritten note was made by the Claimant to reflect this and the hours in question were circled and the word "forget" was written beside them (R149).
- 25 73. There remained a difference of 8.5 hours between the Claimant's calculation and the hours calculated by the Respondent. This difference arose because

the Claimant had not included the unpaid daily break in her calculation whereas the Respondent had deducted this.

- 5 74. SB explained this to the Claimant who agreed that she had not included the breaks in her calculation and accepted that she had been paid the correct amount.
75. At the time of this discussion, the Respondent had received a complaint about the Claimant's conduct from another employee. This complaint was made by email dated 24 April 2019 sent to SB and RB. SB dealt with staffing issues and so this would fall within her responsibilities.
- 10 76. The Respondent did not inform the Claimant of this complaint at the time it was received. The Claimant and the complainer continued to work together until the Claimant went on holiday.
- 15 77. During the Claimant's holiday, SB came to the view that she required to investigate the complaint further. In order to allow for this investigation to take place and to avoid any potential confrontation between the Claimant and the complaint, SB decided that the Claimant should be suspended. She also decided that the Claimant should be suspended without pay.
- 20 78. SB sent the Claimant a letter dated 13 May 2019 (R48) informing her of the complaint (a copy of which was enclosed) and of other issues that had been brought to her attention. The letter concludes by informing the Claimant that she was being suspended, without pay, with effect from that date pending a meeting between SB and the Claimant on her return.
79. This letter was sent by email and the Claimant received it whilst she was on holiday abroad.
- 25 80. A meeting was arranged between the Claimant and SB for 24 May 2019 and this meeting went ahead on this date. The issues discussed are recorded in the Respondent's letter of 27 May 2019 (C50-51) which set out three particular complaints about the Claimant's conduct. SB did ask the complainer to join the meeting in the hope that this would clear the air and take steps to repairing

the working relationship but this was not successful. There was a dispute as to whether any blame for this lies with the Claimant or the complainer but this is not a matter which is relevant to the issues to be resolved in this case.

- 5 81. After the meeting, SB reflected on what had been discussed and considered that it would be appropriate to issue a written warning to the Claimant.
82. At 9am on 27 May 2019, the Claimant emailed SB (C226) asking for an update on the situation. Later that same day, SB sent the Claimant the letter at C50-51 which confirmed that the Claimant was being issued with a written warning as a result of the issues with her conduct and performance. The letter
10 concluded by informing the Claimant that her suspension was being lifted and inviting her to return to work. There was an offer of a return to work meeting made. The letter went on to state that if the Claimant "*decided otherwise*" regarding her future to the hotel or made the decision not to return or to work her notice then she should advise the Respondent.
- 15 83. The Claimant did not immediately reply to this letter. She was upset by the content and did not feel well enough to return to work. She saw her doctor who gave her a note stating that she was unfit to work from 30 May to 6 June 2019 (R46). This was handed into the hotel's reception by the Claimant's daughter. A subsequent doctor's note for the period from 6 to 20 June 2019
20 (R47) was also provided.
84. The Claimant was paid on 31 May 2019. This only included the pay for the hours worked from the previous cut-off date for the April payroll up to her holiday. It did not include any pay for the period when she was on holiday prior to being suspended.
- 25 85. The Claimant lodged a grievance of her own by email dated 4 June 2019 (C52-54) sent to SB and RB.
86. The Claimant then appealed the decision to impose a warning by email dated 5 June 2019 (C55, 57), again sent to RB and SB.

87. By email dated 6 June 2019 (R218), the Claimant renewed her query regarding her April pay (that is, the difference of 8 hours between her calculation and that of the Respondent) and also raised a query about her holiday pay due in the May 2019 pay. She also asked about her pay for the period when she was suspended.
88. At this time, both RB and SB were abroad on holiday from 5 to 9 June 2019. SB acknowledged the Claimant's email of 6 June later the same day (C59).
89. On her return to work on 10 June 2019, SB sent an email to the Claimant at 14.57 (C59). This was part of the same email chain as the emails of 6 June but SB changed the subject line from "unpaid earnings" to "Termination of Employment".
90. The email enclosed a letter terminating the Claimant's employment (C60). It went on to state that SB would check the sign in sheets (that is, the timesheets) for April and that any monies due to the Claimant would be paid in the June payroll.
91. The letter of dismissal made reference to the letter of 27 May and the lifting of the Claimant's suspension along with the request that she inform the Respondent about her return to work noting that the Claimant had not replied. SB was conscious that the Claimant would normally reply to any emails or texts very quickly and that the lack of a direct and immediate response to the letter of 27 May had caused SB to form the view that the Claimant did not intend to return to work. SB also had in mind previous incidents when the Claimant had offered her resignation in the heat of the moment; an example of which appears at R195.
92. The letter goes on to state that the Respondent had come to the view that things are not working out between the Claimant and the hotel including her "*recent conduct and disciplinary*" which has led them to terminate her employment.
93. The Claimant was given one week's notice and the letter stated that this would be based on her "*usual 30 hour week*".

94. The Claimant received a final payment of wages on 28 June 2019. This payment was made up of a sum for Statutory Sick Pay (SSP) of £301.60, a sum for holiday pay of £198.31 and a sum described as “*basic hours*” of £161.50. In relation to that last sum, it was not in dispute that the Claimant had not worked any hours since going on holiday and that this sum reflected a payment made for the notice period in addition to the SSP payable during the notice period.

Claimant’s submissions

95. The Claimant’s agent made the following submissions.

96. Ms Page started by addressing the evidence which had been heard and submitted that the Claimant’s evidence was more credible and reliable. It was submitted that RB had little recall of events. The Claimant had been very clear as to why she had not contacted the Respondent after the letter of 27 May 2019 and that this was because she was ill. She was also sure that she had left the meeting of 24 May 2019 on a high and that she had not resigned.

97. It was submitted that SB was not credible and reliable. She had been insistent that the Claimant had wanted her contract to say 30 hours a week but the Claimant had not worked 30 hours a week until January 2019 when she went full-time. The contract had been signed at the end of January and start of February 2019 which was said to be consistent with the Claimant’s evidence about when she increased her hours. Despite what the contract said, SB’s evidence was that she was not obliged to give 30 hours work.

98. It was also submitted that there was a lack of consistency between RB and SB. It was said that RB had a vague recall of the Claimant’s employment and that he had not been involved in the decision-making process whereas SB had been clear that he was involved.

99. Ms Page, therefore, submitted that the Claimant should be preferred over the Respondent's witnesses as she was credible and honest whereas they were forgetful and gave implausible evidence which changed in re-examination.
100. Turning to the unfair dismissal claim, Ms Page made reference to s104(1)(b) of the Employment Rights Act 1996 (ERA) as being the statutory provision under which this claim is pursued. Reference was also made to s13 ERA as being a right conferred by the Act for which the remedy is a complaint to the Tribunal.
101. It was submitted that the main or principal reason for dismissal was the alleged deduction of wages. On 5 May 2019, the Claimant sought to speak to SB about her April wages. On 13 May 2019, the Claimant was suspended whilst on holiday; this related to a 3 week old complaint and she had worked with the complainant during that period. The Respondent knew that the Claimant was not due to return to work and so had no reason to suspend.
102. The Claimant was given a warning on 27 May 2018 after having to chase the Respondent about this. This led to the Claimant going off sick and she submitted a sick note for the period 30 May to 6 June 2019 with a second sick note being provided for the period after 6 June. The Respondent were, therefore, aware that the Claimant was not fit for work.
103. On 3 June 2019, the Claimant lodged a grievance and, on 5 June, appeals against her warning. On 6 June, the Claimant emails SB about issues relating to her wages and SB says she will respond on 10 June. She does so by dismissing the Claimant.
104. It was submitted that this sequence of events shows that the Claimant did nothing, following the written warning, to warrant any further disciplinary action. The proximity of the 6 June email raising the issue of deducted pay with the dismissal on 10 June suggests, it was submitted, that this was the reason for dismissal as SB had the allegations of deductions in her mind.

105. It was said that the Respondent's reason for dismissal was not credible. The Respondent had given the reason as being the Claimant not responding to the question about returning to work in the letter of 27 May but the Claimant had provided two sick notes and had been in communication with the Respondent in the period between 27 May and 10 June having raised an appeal, a grievance and a query about her pay. In her evidence, SB had said that the lack of reply was not the principal reason.
106. Reference was made to s104(2) ERA that it was not necessary for the employee to have the relevant statutory right or that it had been breached. Reference was made to the case of *Newall v Wright Ltd* 1997 EWCA 2082.
107. Reference was also made to *Kuzel* (below) for the proposition that it is for the employer to prove the potentially fair reason for dismissal and the Claimant did not bear the burden of proof. The Tribunal asked if this was correct as it understood *Kuzel* to be a case involving both "ordinary" unfair dismissal and "automatic" unfair dismissal where the burden of proving the reason would lie on the employer under s98 ERA for the "ordinary" unfair dismissal claim and the question in *Kuzel* was how this interacted with the position for the "automatic" claim. Ms Page replied that, even if the burden did lie with the Claimant, she had discharged it.
108. Turning to the deduction of wages claims, Ms Page made reference to s27 ERA which defines "wages" and this includes holiday pay.
109. It was accepted that the Claimant may have misunderstood the cut-off date for the April wages and so does not pursue a claim for the pay for the dates which would fall in the next pay period. However, there are still 8 hours missing from the April pay and those has been deducted. Reference was made to C63-65 which sets out the Claimant's position regarding hours and this was adopted as part of the submissions.

110. It was submitted that the Claimant was not paid for her two week holiday from 7 to 21 May 2019. The contract sets out a holiday entitlement of 28 days including public holidays. Reference was also made to the statutory entitlement under the Working Time Regulations. The Claimant was underpaid for this holiday and reference was made to the Schedule of Loss which sets out the sums in question.
111. In relation to notice pay, it was submitted that this should have been based on the 30 hours a week because this is the contractual basis. However, SB gave evidence that the amount paid was based on the average hours worked from October to when the Claimant stopped working. It was submitted that this was an incorrect average as it covered the period when the Claimant had worked part-time and she had only gone full-time in January 2019.
112. In relation to the Claimant's suspension, it was submitted that she was not paid for this period; it did overlap with her holiday but did also cover the period when she returned and would have been at work.
113. Ms Page submitted that there needs to be reasonable and proper cause for the suspension with reference being made to the case of *Gogay v Hertfordshire County Council*. It was said that suspension without pay was a punitive measure and not corrective.
114. It was said that the issues in the grievance were minor in nature with the Claimant working with the complainer for 3 weeks and then being on leave.
115. Reference was made to Clause 17 of the contract which it was accepted did allow for unpaid suspension but that the wording left significant ambiguity as to when unpaid suspension was allowed with no clear contractual term setting this out.
116. Further, even taken at its highest, the circumstances which allowed for suspension did not apply because the Respondent had not demonstrated that this was "necessary"; the complaint related to a verbal confrontation; the complainer continued to work with the Claimant for 3 weeks with no action taken by the Respondent which indicates that they did not consider it was

serious; the Claimant was on holiday when suspended and so was not in the workplace; there was nothing preventing the Respondent investigating matters.

5 117. It was submitted that this was a wrongful use of the suspension clause and reference was made to authorities in support of this proposition.

118. In relation to remedies, the Claimant was seeking compensation and reference was made to the Schedule of Loss. Further information was given regarding the Claimant's earnings in new employment.

119. In rebuttal, Ms Page addressed the following matters:-

10 a. In relation to the comments on the Claimant's credibility arising from the content of the ET1, this was completed by her representative at the time on her behalf.

15 b. In relation to the document produced in the Respondent's bundle which was the document the Claimant gave to SB on 5 May, it was not denied that this had "forget" written on it.

c. The Respondent could give no other reason to doubt the Claimant's credibility.

20 d. The Respondent placed a large reliance on the overpayment of holiday pay from the previous year but this was not pled in the ET3 and should be disregarded.

e. Similarly, any overpayment of Statutory Sick Pay has not been pled and is, therefore, irrelevant and should be disregarded.

25 f. The Respondent seeks to rely on a number of reasons for dismissal which are not pled. It was clear from earlier hearing dates that the reason was the lack of a response to the letter of 27 May 2019. The Respondent is seeking to change their position but have never amended their claim. The Tribunal cannot base its conclusion on these reasons.

- g. In respect of the evidence regarding the complainer losing a job with another employer because of the Claimant, it was the Claimant's evidence that this had only been a trial shift.
- 5 h. There was an insinuation that the Claimant's email on the morning of 27 May 2019 was her asking what happens next when she had resigned. Resignation had not been pled by the Respondent.
- i. In relation to the same correspondence, a point had been made that the Claimant had not replied to the Respondent's letter of 27 May in her email in the morning. The suspension was not lifted and the
10 Respondent's letter was not sent until later in the day.
- j. There had been no medical evidence that the Claimant was not unfit to have sent the emails which she sent when she was off sick and she had given evidence that her daughter had assisted her.
- k. SB had assumed that the Claimant was not coming back but there had
15 been no resignation.
- l. There was a large period of time between 27 May and 10 June 2019 but the Respondent was seeking to say that they could not dismiss for 10 days.
- m. The Respondent makes assumptions about the Claimant's pattern of
20 employment and the fact that she was looking to leave but there was no evidence of resignation and this was not pled.
- n. There is no basis to assume the Claimant would have been dismissed by the Respondent due to the pandemic and could have been furloughed instead.

25 **Respondent's submissions**

120. The Respondent's representative made the following submissions.

121. It was submitted that the Claimant was not credible but that the Respondent's witnesses were totally credible. Reference was made to the ET1 where the

box asking if the Claimant had found a new job was ticked “no” but that evidence showed that the Claimant was working when the ET1 was lodged. Reference was also made to the piece of paper which the Claimant handed to SB on 4 or 5 May 2019 and that when the Claimant added this to the bundle it did not have the handwritten note on it.

5

122. SB was a professional lawyer who has been in practice for many years and never been reprimanded nor had her integrity questioned. In relation to RB, it was pointed out that events occurred 2.5 years ago. He was not involved in HR at the hotel and it was true for him to say he does not remember. It was submitted that full weight should be given to their evidence.

10

123. Reference was made to caselaw which was authority that the reason for s104 ERA is to stop employers retaliating against employees who question their wages in good faith.

124. The Claimant’s queries about her wages were never the principal reason for her dismissal. The Respondent had no reason to retaliate against her and the queries were not made in good faith.

15

125. In the year to 31 March 2019, the Claimant had asked for no holidays but the Respondent paid her holiday pay at the end of the year. This was done out of goodwill and involved an overpayment. It was submitted that the method for calculating holiday pay was clearly set out in the contract and this was related to the work done, it was not paid in terms of days.

20

126. It was also submitted that the Claimant was overpaid wages during the period from 1 April 2019 up to the date she stopped working as well as being overpaid for 4 extra sick days.

25

127. Reference was made to Clause 10 of the contract which authorises the Respondent to make deductions from wages if the hotel is owed any money by the employee.

128. The Claimant worked average hours of 24.06 per week. The contract did say 30 hours but this was selected by the Claimant. The Respondent would ask the Claimant what shifts she would like although the Respondent would prefer she worked weekends.
- 5 129. It was submitted that the hours worked and wages paid did not reflect the Claimant's assertion that she was working excessive hours.
130. The Claimant claims that her wages were short. In a five week period, she worked 124 hours but this works out at 5 hours a day which is consistent with the average. Document 19 in the Respondent's bundle shows the shifts done.
- 10 131. In relation to the notice period, the Claimant was paid 19 hours in lieu in June and had 5 days statutory sick pay which equates to 11 hours (which was 5.9 hours extra) and so the Claimant did have 30 hours' pay.
132. There was no holiday pay due; the Respondent was only obliged to pay 24.06 hours for notice because that is the average hours worked.
- 15 133. The solicitor who represented the Claimant at the March hearing dates accepted that the information on R147 as correct. The sign-in sheets show 20.95 hours and 11 times that the Claimant did not sign in for her break. The Claimant knew that management took the break off anyway and this was explained to her by SB when they discussed the April wages.
- 20 134. The contract, at clause 17, clearly states that the Respondent has a right to suspend if the hotel considers it necessary or essential. The Respondents handbook at R152 outlines serious misconduct for which someone could be dismissed and this included bullying and harassment. The Claimant could have been dismissed but the Respondent made the decision to suspend.
- 25 135. SB only came in at weekends and so it was not possible to meet everyone in concise period of time.
136. The number of days which the Claimant could have worked during her suspension was 17.18 hours and when this was compared to the overpayments made to the Claimant then there were no deductions.

137. It was clear that communications between the Claimant and SB were fast and the Claimant would give quick responses.
138. The Respondent had plenty of reasons to dismiss before 27 May 2019; there was the radio being played loudly in the kitchen; the Claimant took the hotel's property (a reference to croissants) and gave these to other employees who signed the sign-in sheet for the Claimant.
139. However, the Respondent could not find breakfast cooks readily and so were stuck between a rock and a hard place. They tried to work with the Claimant and this is why SB asked the Claimant to shake hands with the complainer who had said she was scared to work with the Claimant. They were trying to make it possible for them to work together but they Claimant tried to question why it was said she was a bully.
140. It was explained to the Claimant on 27 May 2019 why the suspension lifted. On the morning of 27 May, the Claimant wrote to SB. It was submitted that when she did so, she should have replied to say when she was returning. It was asked why she was querying her employment status; she knew her suspension ended on 27 May and she should be returning to work on 28 May. SB replies to the Claimant asking if she was returning to work and offering a back to work meeting.
141. The Claimant claims that she got stressed and went to doctor but in cross-examination she said none of this. She was fit to write her grievance and her appeal against her warning. On 6 June 2019 she resurrected her query about her wages. However, she did not say that she was coming back to work or that she wanted a back to work meeting.
142. SB had to fill in the rota and, when she had not heard from the Claimant, has to assume that the Claimant has no intention of coming back. SB gets correspondence from the Claimant during her holiday and says she will deal with this on 10 June. SB says that she will re-check the wages and it was submitted that this shows there was no issue with paying what was owed.

143. The Claimant had said that her wages had been correct up to April 2019 and that she always checked.

144. The Claimant's suspension was justified and correct payments had always been made.

5 145. It was submitted that it cannot be concluded that the principal reason for dismissal was the Claimant querying her wages. It was the least important as shown by the evidence from SB and the documents.

146. Reference was made to the Claimant's work pattern with other employers and the fact that she worked for short periods. It was asserted that she wanted
10 to leave the Respondent and wanted to cultivate a claim for unfair dismissal.

147. In relation to the Schedule of Loss, the Respondent had provided a response to this at R231. The Claimant was claiming loss of wages at 30 hours but had never worked 30 hours. She had been paid one week's notice and overpaid holiday pay. The Respondent was not responsible for any loss of
15 wages after the Claimant lost her job at Bocclair House. The hotel had closed due to the pandemic in April 2020 and so the Claimant's employment would have terminated at the point anyway.

Relevant Law

148. Section 104 of the Employment Rights Act 1996 (ERA) deems any dismissal
20 to be unfair where the reason for the dismissal is that the employee brought proceedings seeking to enforce a relevant statutory right or alleged that the employer has infringed a relevant statutory right.

149. Under s104(2) ERA, it is immaterial whether or not the employee has the right in question and whether or not the right has been infringed.

25 150. The rights which are relevant statutory rights for the purposes of s104 are set out in s104(4) and includes any right conferred by the ERA for which the remedy is a complaint to the Employment Tribunal.

151. It was held in *Maund v Penwith District Council* [1984] IRLR 24 that the burden of proof regarding the reason for dismissal lies with the employer unless the employee does not have the requisite length of service to pursue a claim of “ordinary” unfair dismissal.

5 152. The question of how the Tribunal should approach the burden of proof in relation to the reason for dismissal in cases involving claims of both “ordinary” and automatically unfair dismissal (in particular, whether the Tribunal should find the automatically unfair reason proven if the employer does not discharge the burden of showing a potentially fair reason) was addressed in *Kuzel v Roche Products Ltd* [2008] IRLR 530 by Mummery, LJ:-
10

“The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
15
20

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced led by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.”
25

153. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in s86 of ERA which is based on length of service.
- 5 154. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.
155. Under s88 ERA where an employee has “*normal working hours*” under their contract of employment then the employer is obliged to pay them for those hours during the period of notice. The calculation of such payment is based on an average hourly rate of remuneration determined by dividing a “*week’s pay*” (as defined in ss220-227 ERA) by the normal working hours.
- 10
156. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
- 15 157. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker’s wages unless this is authorised by statute, a provision in the worker’s contract or by the previous written consent of the worker.
158. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.
- 20
159. The terms of the contract of employment can set out provisions relating to holiday pay. However, there are also statutory provisions in the Working Time Regulations 1998 relating to rights to annual leave.
- 25 160. Although an employer may have the power to suspend an employee reserved to them under the contract of employment, this power must still be exercised reasonably and there must be proper and reasonable cause for any suspension. As Elias J commented in *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402:-

5 *"It appears to be the almost automatic response of many employers to allegations of this kind [mistreatment of a vulnerable patient] to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established ... It [suspension] should not be a knee-jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. ..."* (para 71)

10

15

161. The question for the Tribunal as to whether any suspension is lawful is whether the employer had reasonable and proper cause to suspend (*London Borough of Lambeth v Agoreyo* [2019] IRLR 560).

20 162. Where an employer has a power to exercise any discretion under the terms of the contract, such as whether to suspend the employee on pay or not, then they must exercise that discretion lawfully and rationally (*Braganza v BP Shipping Ltd* [2015] IRLR 487).

25 **Decision – Unfair dismissal**

163. The question for the Tribunal in determining the unfair dismissal claim is whether the reason, or principal reason where there is more than one, for dismissal was that the Claimant had sought to enforce a relevant statutory right. This is the only legal issue for the Tribunal to determine in circumstances where the Claimant has less than two years' continuous

30

service and so the Tribunal is not concerned with the test for unfair dismissal under s98 ERA. If the Claimant seeking to enforce a relevant statutory right was the reason for dismissal then that is sufficient to render the dismissal unfair; if it was not then any question of procedural fairness or whether it was reasonable for the Respondent is irrelevant.

5

164. For the sake of brevity, the Tribunal will use the phrase “reason for dismissal” in the rest of this judgment but, for the avoidance of doubt, this is intended to refer to the question of the sole or principal reason for dismissal.

10

165. The burden of proof is set out neutrally in s104 ERA. The case of *Maund* makes it clear that where a claimant has two years’ continuous service then the burden of proving the reason for dismissal is a potentially fair one lies with the employer under s98. However, if the employer fails to discharge that burden then *Kuzel* makes it clear that this does not mean that the Tribunal must find that the “automatic” unfair reason is the reason for dismissal. There still requires to be some evidence from which it can reach that conclusion.

15

166. The Tribunal certainly does not agree with the submission made on behalf of the Claimant that *Kuzel* is authority for the proposition that there is a burden of proof on the employer to prove a fair reason for dismissal in cases where the employee has less than two years’ continuous service. The burden only lies on the employer where s98 ERA is relevant.

20

167. In this case, therefore, the burden is neutral and the Tribunal has to assess all the evidence to consider whether it could conclude that the reason for dismissal was one which fell within s104 ERA.

25

168. The first point to make is that the Tribunal is satisfied that the Claimant’s query about her wages made verbally to SB on either 4 or 5 May 2019 and her email of 6 June 2019 (R218) do amount to her seeking to enforce a relevant statutory right. The Respondent did not seek to argue otherwise but, even if they had, the Tribunal finds that the Claimant is raising issues about deductions from wages which amount to an assertion of the right under s13 ERA even though she has not labelled it as such.

30

169. The Tribunal should also be clear that it finds that the Claimant raised those queries in good faith. Although she may have been wrong about certain matters (for example, which dates should be included in which payroll run), this does not mean that she was acting in bad faith but, rather, on the basis of a genuine misunderstanding. There was insufficient evidence from which the Tribunal could conclude that the Claimant was not acting in good faith. For example, when the error with the April dates was pointed out it was common ground between the parties that the Claimant accepted this explanation without complaint. This is not the act of someone acting in bad faith.

170. Turning then to the question of whether these matters were the reason for dismissal, the Tribunal does consider that, although there is no burden of proof on the Respondent, the reason they assert for dismissal has to be examined.

171. The Tribunal finds that the reason for dismissal was the fact that the Claimant did not respond to the Respondent's letter of 27 May 2019 and, specifically, the request for her to inform them if and when she was returning to work and if she would like a return to work meeting. This is the very clear and unambiguous reason given in the letter of dismissal of 10 June 2019 (C60) as triggering the decision to dismiss and the Tribunal considers that this contemporaneous document is good evidence of what was in the Respondent's mind at the time.

172. In her evidence at the hearing, SB did mention other factors which she said weighed on her mind in making the decision to dismiss such as the Claimant's previous resignations. However, even then, it was still clear that the core reason for dismissal being relied on by the Respondent was the failure by the Claimant to respond to the queries about a return to work.

173. This reason, on the face of it, has absolutely no connection, however remote, with the Claimant's queries about her wages. If that was all the Tribunal had to consider then the claim of unfair dismissal would fail.

174. However, although it has not been couched in these terms, it is the Claimant's case that this reason is not the genuine reason for dismissal and is a sham intended to mask the true reason for dismissal which is the queries regarding wages made by the Claimant.

5 175. The Tribunal does, therefore, have to make an assessment of the reason advanced by the Respondent and not just take it at face value.

176. There were aspects of the Respondent's case regarding the reason for dismissal which the Tribunal found troubling. The Respondent was very focussed on the fact that the Claimant did not expressly say whether or not she was coming back to work but the Claimant had provided two sick notes from her doctor by the time the decision to dismiss her was being communicated. The Tribunal considers that a reasonable employer would have considered that this answered the question; the Claimant was not coming into work as she was not fit for work.

15 177. The evidence of SB was also very much focussed on the fact that the Claimant did not, unlike her usual practice, reply immediately to the letter of 27 May 2019. However, as stated above, by the time the decision to dismiss was being communicated the Respondent had received both sick notes and other correspondence from the Claimant and so it could not be said that she was not in communication with her employer.

178. If SB had formed a view about whether or not the Claimant was not intending to remain in employment with the Respondent in the days immediately following the letter of 27 May then, by the time she issued the letter of dismissal, this conclusion must have been in doubt given the fact that the Claimant had supplied two sick notes, lodged a grievance and appealed her warning. These are not the actions of an employee who has resigned or who is not intending to return to work.

179. There was no evidence that SB gave any consideration to these matters before dismissing the Claimant on 10 June 2019. She did not rethink her conclusion that the Claimant had resigned (as was asserted in her evidence) or take

5 account of the fact that the Claimant's sick notes effectively answered the question of when she was returning to work. There was certainly no further effort made to clarify the position in light of the actions of the Claimant which the Tribunal considers any reasonable employer would have seen as the actions of an employee who considered that they were still in employment.

180. If this had been a case where the Tribunal was considering s98 ERA then these matters would have weighed heavily against the Respondent in assessing the fairness of the Claimant's dismissal under that provision.

10 181. However, this is not what the Tribunal is assessing in this case and the issue is solely whether the reason for dismissal was one which falls within s104. The issues which the Tribunal has outlined above relating to the reasonableness of the decision to dismiss does not automatically lead to the conclusion that the reason for dismissal reason asserted by the Respondent is not genuine.

15 182. There is almost no direct or even inferential evidence that the Claimant's queries about her wages had any bearing on the decision to dismiss or that the reason given for dismissal (despite some flaws in its logic) was not the genuine reason for dismissal.

20 183. The Claimant's query made on 4 or 5 May 2019 was not mentioned again by the Respondent at any stage. It only came back into play when the Claimant sent her email of 6 June renewing this query. On the face of it, the query was resolved by SB on the day and there was no evidence that this caused any lingering resentment from SB.

25 184. Indeed, when the query was renewed (and further queries regarding holiday pay and pay for the period when the Claimant was suspended were raised), SB responded by saying that timesheets would be re-checked and any monies owed would be paid to the Claimant. This was not the response of an employer who was annoyed by such queries to the extent that they were motivated to dismiss the Claimant.

185. Although the Claimant did not agree that the grievance raised against her was justified, there was nothing to suggest that this was, in any way, motivated by her query about her wages. Indeed, the grievance was raised before the Claimant raised her first query about her wages and so could not have been motivated by this.

186. The Tribunal considers that it is perfectly understandable that the Respondent, having received the grievance, sought to deal with it and it draws no adverse inference from the fact that this was investigated and a meeting to deal with it arranged.

187. The Tribunal will address the lawfulness of the Claimant's suspension below in the context of the breach of contract claim but in terms of the unfair dismissal claim there was no evidence that the fact that the Claimant was suspended (or suspended without pay) was in any way motivated by her query on 4 or 5 May so as to give rise to any inference that the query was a factor in the Respondent's process.

188. Similarly, although the Claimant considers that the warning given to her was not fair or justified, there is nothing to suggest that this was motivated by her query about her wages. The Respondent had clear reasons for issuing a warning (that is, the matter relating to performance and conduct set out in the 27 May letter) which had no connection to the Claimant's query about her wages. Further, there was no evidence to suggest that these were not the genuine reasons for the warning being issued.

189. In these circumstances, there is nothing in the events relating to the grievance and disciplinary process from which the Tribunal could draw an inference that the Respondent took the actions which it did because the Claimant raised a query about her wages.

190. The only link between the Claimant's queries and her dismissal is that the letter of dismissal was sent to her by an email which was the last in a chain of emails between her and SB that started with the email of 6 June in which the Claimant renewed her query about her April wages and raised further queries about her pay.

191. However, this is a very tenuous link and the Tribunal considers that all SB had done was use the most recent email from the Claimant to send the letter of dismissal. The Tribunal does not consider that, on its own, this is sufficient to draw any conclusion that the email of 6 June was a trigger for the decision to dismiss especially in light of all the other evidence in this case set out above.

192. In these circumstances, the Tribunal does not consider that there is any evidential basis on which it could conclude that the sole or principal reason for the Claimant's dismissal was because she had sought to enforce a relevant statutory right. The claim of unfair dismissal is, therefore, not well-founded and is hereby dismissed.

Decision – April 2019 wage

193. There are a number of claims relating to the Claimant's wages as identified above and confirmed with the parties. The Tribunal intends to deal with these in turn as they are broadly separate in terms of the issues to be determined albeit that there is some overlap between the claim for holiday pay and the breach of contract claim relating to the suspension without pay given that the period of suspension overlapped with the Claimant's holiday.

194. The Tribunal will begin with the claim for deduction of wages said to have occurred in the Claimant's April 2019 pay. Before addressing the specific issues in relation to that claim, however, there is an issue that applies to all of the claims relating to the Claimant's wages that needs addressed first.

195. The Respondent led evidence and made submissions that the Claimant had, over the whole of her employment, been overpaid and sought to rely on clause 10 of the contract (which authorises them to recover any money owed to them by an employee by way of deduction of wages) as providing a defence in any

circumstance where it is found there has been a specific deduction. The Tribunal considers that this argument does not provide the Respondent with a valid defence for the following reasons.

5 196. First, the ET3 lodged by the Respondent does not plead any case that the Claimant was overpaid and that any deductions which may have been made by the Respondent were made to recover any such overpayment. It is not, therefore, part of their case and the Claimant had no fair notice of this. The Tribunal has already noted this point above and confirmed with the parties during the course of the hearing the claims and defences. When this was
10 raised by the Tribunal, it was agreed by the Respondent that their defence to the various wages claims was that the correct amount had been paid and not that they had made deductions to recover overpayments.

15 197. Second, even if this had been pled, it was quite clear from the facts of the case that, at the time any alleged underpayment was made, the Respondent was not asserting that a deduction had been made to recover any overpayment. For example, when the Claimant was not paid during her suspension, the Respondent was seeking to exercise their power under clause 17 of the contract and not clause 10. They cannot now retrospectively seek to say that any underpayment was made for an entirely different reason.

20 198. In these circumstances, the Tribunal is only concerned with whether the Claimant was paid less than she was legally entitled to be paid on the basis of the facts as they applied at the time.

25 199. Turning to the specific issue with the wages paid to the Claimant in April 2019, the Claimant has produced a breakdown of her hours for the “pay” month (as opposed to the calendar month) at C63-65 showing the hours which she worked as 124.5 hours but that she was paid for 116 hours.

200. When this is compared to the sign-in sheets at R115-145 for the same period, it is clear that the difference in hours arises from the Claimant’s calculation being based on her start and finish times but not including any breaks. To

put it another way, the Claimant is seeking to be paid for her breaks for the relevant period.

201. Clause 34 states that the Claimant is entitled to take “*statutory rest breaks*” which can only be a reference to rest breaks under Regulation 12 of the Working Time Regulations 1998. Such rest breaks are unpaid and it was
5 common ground between the parties that the Respondent followed this practice and did not pay for rest breaks.

202. Looking at the sign-in sheets at R115-145, there is a column where employees would record their break. The Tribunal considers that this
10 provides clear and contemporaneous evidence of whether or not breaks were taken and its findings of fact on this adopt what is recorded in these documents. For the Claimant what is recorded in the break column in these documents falls into three categories:-

a. There are a number of minutes recorded in the break column which
15 can only be taken to mean that the Claimant had taken a break for this time. It is almost entirely 15 minutes which is recorded but, on one instance, a time of 10 minutes was noted.

b. The column is left blank.

c. The column is noted as “no break” or simply “no”.

20

203. The Tribunal does not consider that the Claimant was paid less than she was legally entitled to be paid for those days where she had marked on the sign-in sheet that she had taken a break. This break was unpaid (both in terms of the contract and the 1998 Regulations) and so the Claimant was not entitled
25 to be paid for such breaks.

204. In relation to the dates on which the break column was left blank, the Tribunal has no evidence that the Claimant did not take a break on such occasions. It could simply be that she forgot to record the break. Given the burden of proof is on her in a claim for deduction for wages, the Claimant has failed to prove

that she did not take a break on those dates. The Tribunal could not, therefore, conclude that the Claimant had worked through her breaks on these dates.

5 205. Finally, there are the seven dates on which the Claimant has marked the column indicating that no break was taken and so the Tribunal can make a finding of fact that she worked through those breaks.

206. However, the question is then whether the Claimant was legally entitled to be paid for the time spent working during any break. Clause 34 of the contract only states that employees are entitled to take rest breaks but does not say
10 what happens if a break is not taken. There is nothing in the other clauses of the contract that addresses this issue.

207. It was the evidence of SB that there had been a practice in the hotel for breakfast and housekeeping staff to take a break after the breakfast service was finished and that this was known to be unpaid with the time noted on the
15 sign-in sheet being deducted from their hours. In supplementary questions asked during her evidence-in-chief, the Claimant agreed that she understood the practice that SB described was what happened.

208. However, this does not address the question of what would happen if no break was taken and this evidence was predicated on the fact that all staff always
20 took their break.

209. Equally, the Claimant did not lead any evidence that she had reached an express agreement with the Respondent that she would work through and be paid for her breaks on the relevant days. Neither did she give evidence in which she said that there was a clear understanding or practice that she would
25 be paid for all hours worked on a day when she did not take a break.

210. The only evidence which provides any assistance on this issue was during the cross-examination of the Claimant when she was asked about the blank break column at R125. She replied that she probably forgot to mark the sheet and that she knew it would come off her wages anyway. This indicates an

understanding that hours would be reduced automatically to reflect the breaks which the Respondent considered were being taken.

211. Taking into account all of this evidence, and bearing in mind that the burden of proof is on the Claimant, the Tribunal comes to the view that there was an understanding on the part of the Claimant that breaks were to be taken by all staff and that this time would not be used to calculate wages.

212. If an employee chooses not to take a break (in the knowledge that such periods are deducted from their hours for the purposes of calculating their pay) without the employer's express or tacit permission then they cannot say that the employer is obliged to pay for them for that period in the same way as an employee who chose to work in excess of their contractual hours without first agreeing that with their employer could not say that the employer was obliged to pay them overtime.

213. In these circumstances, the Tribunal considers that, on the 7 dates in April 2019 when the Claimant did not take a break, she was not paid less than she was legally entitled to be paid.

214. The claim of unlawful deduction of wages in respect of the Claimant's pay for April is, therefore, not well-founded and is hereby dismissed.

Decision – Holiday pay

215. The terms of the Claimant's contract which address holidays are found at Clause 12. This states that the holiday year ran from 1 April to 31 March and, because the hotel operated every day of the year, every day would be treated as any other day and that the minimum statutory entitlement to holidays would be applied. It is made clear that any contractual entitlement includes both annual leave and public holidays. It sets out notice requirements for taking holidays, that leave must be taken in the relevant leave year with no entitlement for carry-over into the next year and provisions relating to pay in lieu of any unused holidays on the termination of employment.

216. What Clause 12 does not include, however, is any provision relating to the accrual of holiday entitlement or holiday pay. It does not state that holidays can only be taken if an employee has accrued sufficient entitlement to take a particular period of leave based on the proportion of the leave year they have worked. Similarly, nothing in Clause 12 states that payment would only be made for any holidays taken based on the amount of paid leave which had accrued that year.

217. If such provisions had existed then these would be incompatible with the statutory entitlement to paid holidays under the Working Time Regulations 1998 which do not require workers to have accrued sufficient leave before taking holidays or being paid for it except in the first year of employment. The Tribunal does note that exception which is set out in Regulation 15A and if the Tribunal was addressing whether the Claimant was entitled to paid leave under the 1998 Regulations then this would be relevant.

218. However, the Tribunal is starting with the Claimant's contractual entitlement and would only turn to the entitlement under the Regulations if the contractual entitlement was less than the statutory minimum. The exception in Regulation 15A is, therefore, not relevant to the contractual entitlement to paid holidays.

219. The Tribunal is satisfied that the express written terms of the contract do not state that employees are only entitled to take, or are only entitled to be paid for, holidays which they have accrued based on the proportion of the leave year which has been worked at the point the holidays are taken.

220. Further, other than a bare assertion in the witness statement of SB, there was no evidence led before the Tribunal that the express terms of the Claimant's contract of employment had been varied or clarified verbally regarding the need to accrue holidays before they could be taken and/or paid. This position was certainly not put to the Claimant in cross-examination and so there is no evidential basis on which the Tribunal could conclude that the Claimant and Respondent had agreed that she had to accrue holidays to be paid for them as asserted by SB in her witness statement.

221. As regards that assertion, it is noted that it is framed in broad terms as applying to all employees and there is nothing which explains how this position was expressly and unambiguously communicated to the Claimant or other staff.

5 222. In any event, it was common ground that the Claimant asked for and was granted two weeks' leave for the period 7-21 May 2019. This is inconsistent with any suggestion that holidays had to be accrued. Further, there was no evidence led that the Claimant was told that the whole of this holiday would not be paid at any point prior to her going on holiday, either when she booked it or at any point before the holiday commenced.

10 223. In these circumstances, the Tribunal is not prepared to find that there was any variation or addition to the express written terms of the contract. Those written terms do not require the Claimant to have accrued holidays before being able to take them or be paid for them, they simply require the Claimant to have given the requisite notice.

15 224. Although the Claimant could not recall the precise date when she had given the Respondent notice of the May 2019 holiday but she believed it was when she started working for them for the second time (which would have provided sufficient notice as required by the contract). The Respondent did not dispute this and certainly did not seek to argue that the Claimant did not give the
20 required notice.

225. The Tribunal is, therefore, satisfied that the Claimant gave the necessary notice and was entitled to paid holidays for the period of two weeks starting on 7 May 2019. The Claimant was not paid for that period of holiday at the time and the Tribunal considers that this amounts to an unlawful deduction of
25 wages under s13 ERA on the basis that the Claimant was paid less than she was legally entitled to be paid under her contract of employment for that period of holiday.

226. The next question is how much should the Claimant have been paid for that holiday. The issue here is that the Claimant's contract states that her hours
30 per week are 30 hours but she did not ever work 30 hours. The Tribunal

notes that this was not something which can be said to be caused by the Claimant and, rather, the shifts offered by the Respondent did not amount to 30 hours per week. Arguably that is a breach of contract by the Respondent in itself but no such claim was before the Tribunal.

5 227. The Tribunal considers that, given that it has found that the Claimant had a contractual entitlement to a paid holiday in May 2019, it is the terms of the contract which determine how much should be paid. The contract states that the Claimant is paid £8.50 an hour and that her hours are 30 hours per week. This amounts to £255 gross a week and so the Claimant should have been
10 paid £510 for the two week holiday she took in May 2019.

228. However, there are two matters which potentially impact on this sum.

229. First, the Claimant was suspended without pay for the second week of her holiday and if the Respondent had lawfully exercised their power under the contract to suspend without pay then this would mean that the Claimant was
15 not on holiday for that week and not entitled to be paid for it. For reasons which are set out below, the Tribunal considers that the Respondent did not lawfully exercise their power to suspend without pay and so the Claimant should be paid for the second week of her holiday.

230. Second, the Claimant was paid a sum described as holiday pay in her final
20 pay which was pro-rata payment based on the period of the leave year which she had worked before her dismissal. The Claimant would receive a windfall if this sum was not reflected in the calculation of the holiday pay to which she was entitled and so the Tribunal considers that the sum of £198.31 should be subtracted from the award to be made to the Claimant.

25 231. The Tribunal, therefore, awards the Claimant the sum of £311.69 (Three hundred eleven pounds and sixty nine pence) in respect of this element of the claim.

Decision – suspension

232. It is the case that Clause 17 of the Claimant's contract provided the Respondent with an entitlement to suspend the Claimant and that such suspension can be paid or unpaid. However, as the caselaw set out above makes clear, such contractual powers are only exercised lawfully if there is reasonable and proper cause.

233. The Tribunal considers that this issue can be split into two questions. First, was the suspension, in itself, lawful and, if so, whether the decision to suspend without pay was lawful.

234. Starting with the first question, the Tribunal notes that the Respondent's reasons for suspending the Claimant were to allow for an investigation into the complaint from the other employee and to avoid any confrontation between the Claimant and that employee.

235. These reasons are capable of amounting to a reasonable and proper cause for suspending the Claimant when she would otherwise be at work. However, part of the Claimant's suspension was when she was absent from work and not even in the country. In those circumstances, the Tribunal struggles to see how it can be said that the Respondent had reasonable and proper cause to suspend the Claimant when she was on holiday. It was not being suggested that she was going to get the first plane home on learning of the complaint against her in order to confront the other employee and there was no evidence that the Respondent was in any way prevented from investigating the complaint during the Claimant's absence on holiday.

236. The Tribunal, therefore, considers that the Respondent had no reasonable or proper cause for suspending the Claimant when she was on holiday. In such circumstances, the Tribunal finds that the Respondent did not lawfully exercise the power in Clause 17 and that it acted in breach of contract when it did so. The issue of the remedy to be awarded for this is dealt with below.

237. The position is different for the period when the Claimant was no longer on holiday and would, otherwise, have returned to work. The Tribunal can see why the Respondent would have wished to have the Claimant remain out of the workplace until investigations had been completed and the issue had been resolved.

238. The Tribunal, therefore, considers that the Respondent did act lawfully in suspending the Claimant for the period when she would otherwise have been at work after the end of her holiday, that is, the period from 22 to 27 May 2019.

239. This brings the Tribunal to the second question. Having found that the suspension for the period 22-27 May 2019 was lawful, the Tribunal must also consider whether the Respondent had reasonable and proper cause for this suspension to be unpaid.

240. The Tribunal considers that there was no reasonable and proper cause for the suspension to be unpaid. The Tribunal can see no connection between the need to investigate the complaint and the decision to suspend the Claimant without pay; there is no suggestion that doing so would assist the investigation. Similarly, the need to prevent confrontation between the Claimant and the complainer is not in any way met by suspending the Claimant without pay (indeed, it could have worsened the situation if the Claimant sought to blame the complainer for causing financial issues for the Claimant). There is nothing in these reasons which provide any proper cause for suspending the Claimant without pay; it was entirely unclear from the Respondent's evidence what purpose was being achieved (or was intended to be achieved) by suspending the Claimant without pay as opposed to simply suspending her.

241. To the extent that it was said by the Respondent that it was the seriousness of the complaint which required the suspension to be unpaid, this stands starkly at odds with their actions at the time; they allowed the Claimant and the complainer to work together for approximately two weeks after the complaint was received and then waited another week after the Claimant went on holiday before suspending her. There was certainly no evidence led by the Respondent that the seriousness of the Claimant's alleged conduct only came

to light once she was absent as it was their evidence that the investigation had not started until the Claimant had been suspended.

5 242. The Tribunal has considerable difficulty in accepting that the Claimant's alleged conduct was so serious that she required to be suspended without pay in circumstances where the Respondent took so long to suspend her and had no apparent issue with her continuing to work with the complainer during that delay.

10 243. In these circumstances, the Tribunal considers that the Respondent had not demonstrated any reasonable and proper cause for suspending the Claimant without pay and that this amounts to a breach of contract by the Respondent.

244. The remedy for the two breaches of contract (that is, the suspension of the Claimant when on holiday and the suspension without pay) would be to award the Claimant compensation equivalent to the wages which she lost as a result of these breaches.

15 245. However, the Tribunal has already made an award of a sum for the period of the Claimant's holiday in relation to the deduction of wages claim for the holiday pay. It would amount to double-counting to make a further award of damages in respect of the loss of wages for the same period; this would put the Claimant in a better position in relation to that period than she would have been had she
20 been paid the correct wages at the time.

246. The Tribunal, therefore, considers that it is just and equitable to only make an award in respect of the wages which the Claimant would have been paid had she not been unlawfully suspend without pay for the period 22-27 May 2019.

25 247. This amounts to six days and the Claimant was contracted to work 30 hours over 6 days. The Tribunal considers that any compensation should be based on those hours as this is what the Claimant was contracted to work.

248. The Tribunal therefore calculates the loss of wages at £8.50 an hour for 30 hours and awards the Claimant the sum of £255 (Two hundred and fifty five pounds) as compensation for breach of contract.

Decision – notice pay

249. It is common ground between the parties that the Claimant was dismissed with the correct period of notice. The letter of dismissal clearly gives the Claimant one week's notice as required by her contract.

5 250. The letter also clearly states that the notice will be based on the Claimant's 30 hour week and so the Tribunal considers that the Respondent, at that point, is agreeing to pay the Claimant for the notice period using these hours. In any event, the Tribunal would have found that any pay for the notice period should be based on the hours set out in the contract. Based on the £8.50 hourly rate,
10 this would amount to £255

251. The real question in relation to this claim is whether the sum paid to the Claimant in June 2019 satisfied this.

15 252. The June 2019 payment included a sum for Statutory Sick Pay (SSP) which would have been payable both during the notice period and for a period prior to that.

253. At the time of the Claimant's dismissal, the weekly rate for SSP was £94.25 and so this is the amount of SSP she was entitled to be paid during her notice period. The Respondent also paid a sum of £161.50 on top of the SSP paid and there was no dispute between the parties that this was made in respect of
20 the notice period. These two sums amount to £255.75 and so the elements of the payment made to the Claimant in June 2019 which related to her notice period were sufficient to satisfy the sum which she should have been paid for her notice period.

25 254. In these circumstances, the Tribunal considers that the breach of contract claim in respect of notice pay is not well-founded and it is hereby dismissed.

Costs Application

255. At the end of the submissions on behalf of the Claimant, Ms Page made an application for expenses and/or wasted costs under Rules 77 and 80. This had not been foreshadowed during the course of the hearing and was made orally.

256. Mr Bansal sought time to respond to the application and for the Claimant's representative to put it in writing. He also indicated that the Respondent would intend to make their own application for expenses.

257. In relation to any application by the Respondent, the Tribunal explained that the Rules of Procedure allowed a party to make such an application at any stage up to 28 days after the final judgment and so it was not necessary for them to do so at the hearing.

258. The Tribunal would, if both parties were legally represented, normally expect a reply to such an application to be dealt with at the hearing. However, it was conscious that Mr Bansal was a lay representative and could not be expected to be able to respond to such matters as quickly as a lawyer may be able to. On the other hand, the Tribunal did not consider that it was in the interests of both parties for the resolution of the application to be dealt with as expeditiously as possible.

259. After some consideration, the Tribunal advised parties that it would deal with the issue in the following way. It would not require the Respondent to respond to the application at the hearing. The Tribunal would consider the application as part of its deliberations in the case and if it did not consider that the application had merit, on the face of it, would deal with it in this judgment. If it did consider there was merit then it would put in place a timetable for the Respondent to lodge a response and the Claimant's agent to provide any rebuttal before making a decision. The Tribunal emphasised that it would make no award of expenses against the Respondent without them having the opportunity to respond to the application.

260. Mr Bansal did not object to this. Ms Page indicated that the Claimant's preference was that the application be dealt with at the hearing but that she saw some force in what was being said and so did not object.

261. The Tribunal will set out below the terms of the expenses application, the relevant legal provisions which apply and then give its decision.

262. The application was made on the following bases:-

- a. The conduct of the Respondent was unreasonable in relation to the insistence of the Respondent's representative discussing case management orders and bundles.
- 10 b. There had also been vexatious conduct by the Respondent who had included the Tribunal in correspondence between parties, some of which had been marked "without prejudice".
- c. The Respondent had also insisted on communicating via SB which was not appropriate given that she was a witness.
- 15 d. The Claimant's representative had issued a costs warning to the Respondent in September 2020.
- e. The ET3 was not clear on the defence. There had been a preliminary hearing at which the Respondent had been directed to provide the reason for dismissal and they had not cooperated.
- 20 f. The Tribunal had ordered a list of agreed issues and the Respondent had not cooperated with this. It was said that they made concessions and then changed their minds.
- g. There was evidence led about irrelevant issues during the hearing such as the Claimant giving croissants to DS which did not feature in the reason for dismissal.
- 25 h. Expenses were sought for all the hearing dates (that is, March and September 2021) but if the Tribunal was not with the Claimant on that

then expenses were only sought for the continued dates in September 2021.

263. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a cost order:-

5

(1) *A costs order is an order that a party ('the paying party') make a payment to—*

10

(a) *another party ('the receiving party') in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*

15

(b) *the receiving party in respect of a Tribunal fee paid by the receiving party; or*

(c) *another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.*

20

(2) *A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.*

25

(3) *A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.*

30

264. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application:-

5 (1) *A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

(a) *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*

10

(b) *any claim or response had no reasonable prospect of success; [or*

(e) *a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]*

15 (2) *A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*

(3) *Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—*

20

(a) *the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and*

25

(b) *the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce*

reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

5 (4) *A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.*

10 (5) *A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.*

15 265. Rule 77 sets out the procedure for a costs order:-

20 *A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

25 266. The principle in the Rules is that costs do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs of the conduct of a party meets the threshold test set out in the Rule.

267. Rule 80 deals with wasted costs order in the following terms:-

30 (1) *A Tribunal may make a wasted costs order against a representative in favour of any party ('the receiving party') where that party has incurred costs—*

(a) *as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*

(b) *which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.*

5

Costs so incurred are described as 'wasted costs'.

(2) *'Representative' means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.*

15

(3) *A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.*

20

268. For the reasons outlined below, the Tribunal does not consider that the application for expenses made on behalf of the Claimant has merit and so will dispose of it in this judgment.

25 269. The primary reason why the Tribunal considers the application has no merit is that no evidence whatsoever was produced in support of the various assertions being made.

270. For example, it was said that a costs warning had been made to the Respondent in September 2020 but this was not produced to the Tribunal. In such circumstances, the Tribunal cannot assess what warning was given to the Respondent and the extent to which that corresponds with the grounds now being advanced.

30

271. It was also said that the Respondent had acted unreasonably in copying the Tribunal into correspondence between parties but none of this was produced at the hearing (and the Tribunal certainly does not consider that it should undertake the task of going through the file for this case to try to guess what correspondence may be being referred to). It is, therefore, impossible for the Tribunal to come to any conclusion about whether such conduct was unreasonable, vexatious or otherwise satisfies the test in Rule 76.

272. Reference had been made to the Respondent copying “without prejudice” correspondence to the Tribunal but, again, none of this was produced. In any event, the Tribunal takes account of the fact that party litigants or lay representatives do not understand the “without prejudice” rule and it is often the case that parties or witnesses will make reference to issues relating to settlement in ignorance of the fact that the Tribunal should, for the most part, not hear about such matters. This would not satisfy Rule 76 in itself without something more indicating that the conduct had gone beyond the pale and crossed the line into unreasonable or vexatious conduct.

273. Again, with reference to the issue of an agreed list of facts, nothing was produced to support the assertion of unreasonable or vexatious conduct. The Tribunal cannot, therefore, come to any conclusion that the Respondent has acted in a way which crosses the line and satisfies Rule 76. Whilst a Tribunal can direct parties to produce an agreed list of issues, it cannot direct parties to agree matters.

274. In relation to correspondence being sent through SB, the Tribunal is not aware of any rule that prohibits someone who might be a witness from being the conduit for correspondence. Whilst this might not be best practice, it certainly does not come close to amounting to the sort of conduct which falls within the scope of Rule 76.

275. As regards the comments about the Respondent’s defence, the Tribunal notes that at no point at the outset or during the hearing did the Claimant or her agent say that they did not have fair notice of the Respondent’s case. Indeed, in her rebuttal, Ms Page made reference to what was and was not

pled by the Respondent. If there had been a view taken that the Respondent had not complied with any Order of the Tribunal then an application for strike-out could have been made under Rule 37 or a further Order sought if further clarification was required. Neither of these steps were taken and the Claimant proceeded to the final hearing without demur.

5

276. In relation to the issue of the Respondent's representative insisting on discussing case management orders and the bundle, if this is a reference to correspondence between the parties then, again, none were produced. If, however, it relates to the issues set out at the start of the judgment which arose at the original dates in March then the Tribunal does note that there were issues regarding the bundles which it itself raised and which it considered had to be resolved before evidence was heard.

10

277. However, the issues with the bundle did not cause any significant delay or lead to the requirement for continued dates. The hearing would not have proceeded on the original dates in March because of the failure by the Claimant or her agents to provide a witness statement regardless of the issues with the bundle. The second set of dates in March were required more because of the issue with the Claimant's statement than the issues with the bundles.

15

278. As regards the need for the continued hearing dates, the Tribunal does not consider that this was caused by any issue with the bundles or discussion of case management. It was simply that the evidence from the witnesses who appeared on those dates took longer than anticipated and this is something which often happens in court proceedings.

20

279. This leads to the final point raised by Ms Page which was the assertion by her that irrelevant evidence had been led during the course of the hearing. She gives only one example of this (that is, the issue with the Claimant giving croissants to DS) which, in itself, would not have led to the additional dates being required. In any event, the leading of evidence which ultimately proves to be irrelevant is not unreasonable or vexatious in itself. Further, the Claimant's witness statement itself contains evidence about matters which

25

30

have proven to be irrelevant but it is then difficult to criticise when the other side, particularly where they have a lay representative, feels that they need to challenge such evidence.

5 280. The Tribunal has been addressing Rule 76 above but the application is also made under Rule 80 in terms of wasted costs. However, the Tribunal does not consider that Mr Bansal is a “representative” as defined in Rule 80(2) because he is not acting in pursuit of profit in his role as the Respondent’s representative. The application against him under Rule 80 is, therefore, not competent.

10 281. For all these reasons, the grounds advanced in support of the Claimant’s application for expenses do not, on the face of it, satisfy the test in Rule 76 and the application under Rule 80 is not competent. The applications are therefore refused.

15

20 Employment Judge: Peter O’Donnell
Date of Judgment: 12 October 2021
Entered in register: 15 October 2021
and copied to parties