EMPLOYMENT TRIBUNALS

Claimant: Mrs LM Fownes

Respondent: Allison Cundell trading as Cut n Curl

Heard at: Hybrid hearing By Could Video Platform (CVP) and attended hearing

On: 22 June 2021

Before: Employment Judge Broughton (sitting alone)

Appearances
For the Claimant: Mr McKeown - lay representative
For the Respondent: Ms Smeaton - counsel

RESERVED JUDGMENT

1) The claimant's claim of unfair dismissal pursuant to section 94 ERA is well founded and succeeds but is subject to a Polkey deduction.

2) The complaint of automatic unfair dismissal under section 105 and 104 (1)(b) ERA is not well founded and is dismissed.

3) The claims for breach of contract and /or breach of the Working Time Regulations 1998 in respect of unpaid holiday is well founded and succeeds.

4) The claim for breach of contract in respect of the notice period is well founded and succeeds.

REASONS

Background and Issues

1. The claim was presented to the employment Tribunal on 20 October 2020. The effective date of termination of the claimant's employment was 24 July 2020. There was a period of Acas early conciliation from 2 September 2020 to 2 October 2020.

The issues

2. The respondent had produced a draft list of issues which were discussed with the parties on the morning of the hearing. Following those discussion, amendments to the issues were agreed and the final agreed issues were as follows

1. <u>Ordinary unfair dismissal (s.94(1) ERA 1996)</u>

1.1 Was C dismissed for a potentially fair reason? R relies on the potentially fair reason of redundancy (s.98(2)(c) ERA 1996) and/or some other substantial reason, namely a business reorganisation.

1.2 In the circumstances (including the size and administrative resources of R's undertaking) and taking into account equity and the substantial merits of the case, did R act reasonably or unreasonably in treating redundancy (and/or some other substantial reason) as a sufficient reason for dismissing C?

1.3 Did R follow a fair process?

1.4 If the dismissal was procedurally unfair, would C have been dismissed fairly has fair procedure been followed?

2. <u>Automatic unfair dismissal (unfair selection) (s.105 ERA 1996)</u>

2.1 If the reason (or if more than one, the principal reason) for the dismissal was that C was redundant, did the circumstances constituting the redundancy apply equally to one or more other employees in the same undertaking who held positions similar to that held by C and who have not been dismissed by R. C relies on Jennifer Boyle as a comparator; if so

2.2 Was the reason or principal reason for which C was selected for dismissal, that she had alleged R had infringed a relevant statutory right, namely her rights under TUPE 2006, the Working Time Regulations/Directive and/or the National Minimum Wage Regulations

3. <u>Automatic unfair dismissal (s.104(1)(b) ERA 1996)</u>

3.1 Was the reason or principal reason for dismissal that C alleged that R had infringed a relevant statutory right, namely her rights under TUPE 2006, the Working Time Regulations/Directive and/or the National Minimum Wage Regulations?

4. <u>Unauthorised deductions from wages/breach of contract</u>

4.1 What amount was due to C for holiday pay for the period March 2020 to July 2020?

4.2 Has R made an unauthorised deduction from C's wages and/or breached her contract in respect of holiday pay and/or was R in breach of the Working Time Regulations/Directive?

4.3 Did R act in breach of contract by paying C in lieu of notice pay on 24 July 2020?

Evidence

3. The Tribunal was provided with a bundle of documents numbering 153A pages.

4. The claimant and her witness, Ms Diane Roper produced witness statements and were cross-examined by the respondent.

5. Ms Cundell, the owner of the business Cut n Curl, gave evidence and was cross examined by the claimant.

Findings of fact

6. The Tribunal has considered all the evidence however, the findings of fact are limited to those which the Tribunal consider to be relevant to its decision. The findings are made on a balance of probabilities.

7. The respondent is a small, village hair salon. It is run by the salon owner, Ms Alison Cundell.

8. The Salon was gifted to Ms Cundell (who had prior to that worked there as a stylist). The previous owner along with one of the stylists Ms Bishop, had won a sum of money, hence the very generous gift of the business to Ms Cundell. It is not in dispute that this transfer of the business was a transfer within the meaning of regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The transfer took place in June 2017 (Transfer).

9. Ms Bisho who is a friend of Ms Cundell, continued to provide some support to the respondent. Ms Bishop provided cover for the claimant when she was on leave and worked when the Salon was busy. The respondent's position is that Ms Bishop has never been employed by her, she volunteered her services to assist Ms Cundell who had never run a business before. The respondent recruited another stylist, (Sharon) in September 2017.

10. The respondent employed a third stylist Ms Roper, in March 2018; making 3 stylists in total including Ms Cundell.

11. The claimant was employed prior to the Transfer. Her duties included principally shampooing the clients and receptionist work, she was also responsible for ancillary tasks such as making drinks for the clients (although other staff also carried out such tasks from time to time). She worked 36 hours per week. The claimant has been employed since 2 March 2010 ie pre Transfer. The previous owners of the business had not provided staff with contracts of employment.

Lockdown – Covid pandemic

12. On 23 March 2020, the Government announced the first lockdown in the UK due to the Covid pandemic. Shortly prior to the 23 March 2020, Sharon resigned from the respondent leaving in terms of staff; the claimant, Ms Cundell, Ms Roper and Ms Boyle. The latter was

still at college and only worked on Saturdays .Ms Cundell and Ms Roper were the only stylists. The claimant worked Tuesday to Fridays.

Furlough scheme

13. The decision was taken by the respondent to put the staff on furlough during the lockdown period. The claimant signed a letter dated 2 April 2020 confirming agreement to be paid at the furlough rate of 80% of pay [**36**];

"Coronavirus Job Retention Scheme

In reply to your letter dated 31/03/20 and our telephone conversation on 01/04/20, I am in agreement to be paid 80% basic rate under the ' furloughed' worker scheme during the period of the coronavirus special measures"

Holiday Pay

6 It is not in dispute that the staff including the claimant, agreed to allow the respondent to use the holiday accrued and outstanding for the holiday year ending 31st of March 2020 (ie for the year 1 April 2019 to 31 March 2020), to top up their pay to 100%.

7 Ms Cundell set out what was proposed in a note to the claimant **[132]** in early May 2020. The relevant parts read as follows;

"*Your new hourly rate is now £8.72 effective from 1st April.*

Your holiday hours owed have been used to top up your wages to 100%. When they have all been used, I will top it up myself so you will get 100% of your wages while ever we are in lockdown"

8 The note did not require the claimant to confirm acceptance and the claimant's pay continued during 'furlough' to be paid at 100%.

9 Ms Cundell accepted under cross examination that the note did not state that the respondent would continue to 'top up' the wages by using the claimant's ongoing accrued holiday entitlement from 1 April 2020 to 31 March 2021 however, that is what Ms Cundell did (ie despite saying that she would pay the 'top up' amount she offset the claimant's annual leave entitlement against this portion of the payment). The claimant's payslips from April 2020 through to 31 July 2020, showed holiday hours being paid to top up that month's salary [**144-146].** The claimant accepted in cross examination that she was aware this was happening because she noticed the holiday payments on the payslips but did not consider she was in a position to object but there is no dispute that she did not give her express agreement to this.

10 Ms Cundell in response to questions from the Tribunal, stated that she did not get a new document signed from the staff agreeing to her continuing to use/offset their holiday entitlement after 31 March 2020, to top up their wages and gave evidence that ; *"I was not permitted to do it"* but *"it was an unusual time and a lot going on".*

11 The respondent does not assert that it served any notice as required by regulation 15, requiring the claimant to take leave to which she was entitled under the Working Time Regulations 1998 during any period while she was absent on 'furlough'.

12 The parties accepted the figures in the payslips as showing the holiday which had been due to the claimant for June and July but applied to top up her salary; 17 hours for July and 15 hours for June which equates, they both agreed to a total figure of £283.80 (gross)

Employment Contracts

14. Ms Cundell took advice from an HR consultant, Ms Rodgers. She had no prior experience of running a business and on advice decided to introduce contracts of employments.

15. The draft contracts were issued to staff in June 2020 while they were still on furlough [**37 – 41**]. A copy was posted to the claimant.

16. The relevant provisions of the contract were as follows;

5. Remuneration and Benefits

*5.1 Your salary amounts to **£8.72 per hour.***

6. Hours of work and overtime

6.1 Your normal working hours are 9:00am to 3:00pm on Tuesday and Wednesday and from 9:00am to 4:00pm on Thursdays and Fridays. On days where you work more than six hours, you will be entitled to an unpaid twenty – minute break.

6.2 The Company reserves the right to alter working hours as necessary or on a temporary or permanent basis.

7. Holiday and Holiday Pay

*7.2 From the commencement of your employment, your paid holiday entitlement will be at the rate of **135 per calendar year**. Please note your entitlement includes any bank holidays which fall on your normal working days, which must be taken out of that total.*

13. Notice to Terminate

13.6 The Company may also elect to terminate your employment with immediate effect and pay you in lieu of notice.

[Tribunal Stress]

Staff Training day – 30 June 2020

17. The Salon was re-opened on 4 July 2020.

18. The respondent had recruited a new stylist prior to re- opening, who started work on 9 July 2020 .

19. Prior to re-opening the staff were called in for a training day on Tuesday 30 June 2020.

20. Ms Cundell's evidence is that the evening before the training day, she discussed with her husband concerns about the need for the claimant's role going forward.

21. Ms Cundell gave evidence that it became clear to her when she saw all the staff in the Salon on the training day that there would be a problem in observing social distancing with all 5 staff present.

22. There was lengthy cross examination of Ms Cundell regarding the Salon and the number and spacing between the workstations. The claimant's case is that there was plenty of room in the Salon to maintain social distancing with all staff present.

23. The undisputed evidence of Ms Cundell is that most of the respondent's clients are age 60 or over.

24. After being taken to various photographs of the salon and hearing the evidence, the Tribunal accepts the evidence on a balance of probabilities of Ms Cundell, that she had reorganised the salon so that more workstations than the claimant understood to be the case (6 in total) were in place but only four were usable. In any event, the crux of the respondent's case is that Ms Cundell decided that she should limit the number of staff dealing with any one person to minimise the health and safety risk associated with transmission of the coronavirus, and require the stylists to shampoo their own client's hair.

25. It was put to Ms Cundall in cross examination that the Government guidance did not provide that contact should be limited to one person and indeed it was put to her that the viral load is increased the longer the time is spent with a person and the guidelines provide that time should therefore be short as possible. However, the claimant conceded that the Government guidance did not state that. It does state that the '*activity should be as short as possible'*, which the claimant asserts would involve moving the client between different people so that the activity time per person is a '*short as possible'*. However, Ms Cundell maintained under cross examination her understanding was in effect that the safest course of action with vulnerable elderly people, would be to limit the number of people they had contact with.

26. The Government guidance issued in July 2020 which the Tribunal was taken to **HM Government Guidance : 'Keeping workers and clients safe during COVID – 19 in close contact services**" [**50**] provides as follows;

    - "*When providing close contact services, the nature of the work is such that maintaining social distancing will not usually be possible with actively serving a client. In these circumstances, employers, employees and the self-employed should do everything they reasonably can to reduce risk. Mitigating actions include :*
    - *further increasing the frequency of hand washing and surface cleaning*
    - ***keeping activity time involved as short as possible***
    - *using screens or barriers to separate clients from another…*
    - *Using back to back or side to side working (rather than face-to-face) whenever possible*
    - …."

27. The undisputed evidence of Ms Cundell is that with regards to the sinks which are used to wash the customers hair, that there are 3 sinks, one is forward facing which not many customers like and the other two are not sufficiently distanced; which is supported by the photographs [**138**] in the bundle. Hence, when the Salon re-opened, the respondent could only use one sink at a time to shampoo. Ms Cundall was questioned at length about the possibility of using more than one sink by using screens between the sinks, however her evidence is that she had considered screens but discounted it because they wash the

customers hair from the side and thus this was not therefore a viable option, which was not challenged by the claimant. It was also put to Ms Cundell that if the hairdressers are using visors they did not have to be 2 metres away from customers. The claimant referred to the Government guidance [**61]** which states ;

"*Calculating the maximum number of clients that can reasonably follow social distancing guidelines (2m, or 1m with risk mitigation* ***where 2m is not viable****, is acceptable) and limiting the number of appointments at any one time.* Consider the total floor space as well as likely pinch points in busy areas"

[Tribunal Stress]

28. Ms Cundell's evidence however is that she looked at the guidelines and at the National Hairdressing Associations guidance, (a copy of which was not present in the bundle) , and that she decided to maintain the 2 metre rule. The Tribunal note that the guidelines refer to 1 metre being acceptable where 2 metres is "not viable", which implies the Tribunal consider, that 2 metres is to be preferred. Ms Cundell also gave evidence again not challenged, that her clients require more room because they use walking aids i.e. walking sticks etc and being older and more vulnerable, would feel happier keeping a greater distance between them and the next customer.

29. While another Salon may, perhaps with a different clientele, have adopted a different approach, the respondent the Tribunal find, had a perfectly rational and convincing reason for deciding to proceed with maintain social distancing at 2 metres and limit the number of clients in the Salon at any one point and at the sinks.

30. The respondent's case however, is that the decision to remove the claimant's role was because of the health and safety concerning arising from the coronavirus but also the financial consequences of the pandemic. The respondent considered that commercially it was not viable for the claimant to be paid (on an hourly rate) to wash someone's hair while the stylist (who is also getting paid an hourly rate), is waiting with nothing to do because they are limiting the number of clients in the Salon at any one time and making longer appointments so that they have more time to clean down the areas before the next client. Ms Cundell considered that it also made more financial sense for the stylists to look after their own client from start to finish and that the customers preferred it. There was no need for receptionist duties because there were no ' walk in customers', everyone had a booking. There was also no need to make drinks for waiting customers.

31. The respondent's evidence is that the decision was a combination of factors; the health and safety concerns as well as the financial considerations including that they may face a further lock down and that the future remained uncertain.

Contract of Employments

32. At the end of the training day on 30 June 2020, the staff were asked whether they had brought in the new contract of employment and whether they had any issues with it. The claimant raised concerns about the calculation of her holiday pay under clause 7.2, the respondent's ability to change her working hours under the new clause 6.2, and her hourly rate set out in clause 5.1 which was set at the national minimum wage. There was a short conversation and Ms Cundell invited the claimant to stay behind afterwards to discuss the contract further with her. Ms Cundell asked if the claimant would like her to speak with Mr McKeown, as he knew about holiday pay. Ms Cundell telephoned Mr McKeown and Ms Cundell agreed to check the holiday calculation with the HR consultant.

33. Mr McKeown confirmed that the claimant only relies on what was said by her at the meeting on 30 June in support of her claim that she had made an allegation that the respondent had breached a relevant statutory right .

34. In terms of what was said, in the claim form the claimant states; [7]

    "*The real reason I believe I was made redundant was because **I asked for my statutory rights".***

    [Tribunal Stress]

35. In her evidence in chief with regards to what was said at the 30 June meeting, she states;

    "*38. At the end of the session the Respondent asked for the contracts to be signed and handed in. Four Employees included the Respondent present [sic]. Diane Roper said hers was not yet signed because she had not gone through it yet. The Claimant objected to signing hers, **saying I had rights under the TUPE**.*

    39. The Claimants objections to the Respondent were as follows.

    40. Clause 6.2: Which would give the Respondent the right to change the Claimants hours at any time. This would make it non- negotiable for me and I would just have to accept whatever was decided.

    *41. Clause 6.3: The Claimant pointed out that for the first time ever my hourly pay would be minimum rate, so **any future overtime needs paying** when I do it rather than Time off in Lieu. ..*

    *42. Clause 7.2 **I queried** my holidays which I believe to be incorrect*

    43. Training day Tuesday 30th June …The Respondent asked the Claimant if I would prefer, she removes Clause 6.2 and she would get Kathryn Rodgers (HR) to check the holiday formula. To which I agreed."

    [Tribunal Stress]

36. Ms Cundell in cross examination did not recall any specific reference to "*statutory rights*" by the claimant at the meeting, which is consistent with the claimant's evidence in chief .

37. The claimant accepted under cross examination that Ms Cundell did not say that she was not prepared to change the contract. Although the claimant was not in the event given a copy of the amended contract which reflected her concerns, (because the redundancy process was started), she was taken to an amended contract in the bundle **[42]** and accepted that this addressed the issues she had raised. It is not in dispute the amended contract, reflecting the issues the claimant had raised, was issued to all staff.

38. Under cross-examination when asked about clause 6.2, it was put to Ms Cundell that this clause had been inserted because she did not trust staff to work when she required them to do so, she refuted that suggestion and explained that she was; "*… upset on the day with the response I got from Lynne*". The Tribunal infer from Ms Cundell's response, that she was hurt because she and the claimant had worked together a long term, were on friendly terms and it appeared that the claimant was questioning Ms Cundell's intentions in terms of how she intended to operate the new provisions.

39. In the past it is not in dispute that the claimant had always been paid above the national minimum wage and had been content therefore when she worked overtime, to simply have the time off in lieu . When she received the new draft contract the wages were set at the national minimum wage rate and the claimant's case is that she believed it would be illegal to work overtime now unless paid for it (rather than take time off in lieu) because it would take her below the national minimum wage and she would not have to be paid. That the claimant explained, was her concern.

40. The claimant accepted that she received a text message on 30 June 2020, from Ms Cullend after the meeting **[144]** stating;

> *"I will be drafting a new contract, wording clause 6.2 and changing hourly rate. The holiday entitlement will still be worked out in hours as you work different hours on different days. Kathryn is happy for you to email her with any on-going queries after reading new contract x"*
>
> And
>
> "*I will redraft your contract your hourly rate will be £9 an hour instead of minimum wage. Let me know if Alan agrees with everything and I'll print them out* x"

41. The claimant accepted that this was not the behaviour of someone who was not willing to negotiate. The claimant also accepted that £9 per hour was implemented for everyone else in the salon.

Amended contract of Employment

42. The contract was amended[**42-46**] and it is not in dispute that the relevant clauses were amended copy as follows(changes underlined);

> *5.Remuneration and Benefits*
>
> *5.1 Your salary amounts to £9.00 per hour.*
>
> *6. Hours of work and overtime*
>
> *6.1 The Company reserves the right to alter working hours as necessary or on a temporary or permanent basis. <u>Any change to working hours will be subject to discussion and agreement by both parties.</u>*
>
> *7. Holiday and Holiday Pay*
>
> *7.2 From the commencement of your employment, your paid holiday entitlement will be at the rate of <u>145 and 36 minutes per calender year</u>. Please note your entitlement includes any bank holidays which fall on your normal working days, which must be taken out of that total.*

Consultation

43. When Ms Cullend was asked by the employment Tribunal when she actually made the decision to remove the claimant's role, Ms Cundell's evidence was that the day before the training day she had spoken to a husband about the claimant and expressed concerns including how difficult it was to let her go because they had worked together so long . The

day after the training day, she had spoken to her sister (or sister in-law) who had a business herself, and it became clearer to her after speaking with her sister, that she needed to make a difficult decision for not only health and safety reason, but financial reasons.

44. On the 3 July 2020 Ms Cundell sent a text to the claimant asking her not to go into work on Saturday 4 July 2020 (the day the salon was opening but not the claimant's normal day to work), but to come into the salon for a chat at 5:30pm [**46A**] to which the claimant replied;

    "*now you have cancelled my work tomorrow , we won't be around. See you Tuesday x*"

45. Ms Cundell asked if she could meet before Tuesday when the claimant was due in work, on Sunday 5 July or Monday 6 July 2020. The claimant informed her she was not available until Tuesday 7 July 2020. Therefore, before the claimant was due back into work, on the evening of Monday 6 July 2020, Ms Cundell telephoned the claimant and said that looking at things from a health and safety and financial point of view, it was possible that her role would be made redundant.

46. Given the proximity between raising concerns about the proposed new contract of employment and the decision to remove her role, the claimant felt the decision had been done in a fit of *"pique".*

4th July re-opening

47. The evidence of Ms Roper was the Salon was busy on 4 July and that although the following Saturday Ms Boyle carried out some shampooing and Ms Cundell on more than one occasion shampooed some of Ms Roper's clients for her, staff were informed by Ms Cundell that they had to shampoo their own clients now and she confirmed that this practice was still in place when she left in late August 2020.

48. Ms Roper gave evidence in chief that she had also queried the new contracts employment and after doing so there had been an unpleasant atmosphere and that this led to her resign. Under cross examination however, her evidence was very different. She conceded that she had not actually raised any issues with the contract until the day she resigned and that she had by that stage already decided she did not like the atmosphere in the salon, because she had returned after lockdown and "*it didn't seem the same".*

49. Ms Roper also accepted in cross examination that on leaving the respondent's employment there had been some tension between her and Ms Cundell because Ms Cundell had contacted Ms Roper's clients to rearrange their appointments and Ms Roper was not happy about that because considered them; "*my ladies, I owed it to them to explain to them".*

50. Ms Roper accepted under cross examination that up to her leaving the respondent's employment in late August, each stylist was shampooing their own client and that this was the "*idea"* albeit on a Saturday when Ms Boyle was working she would do it, and on re-examination she gave evidence that occasionally Ms Cundell shampooed some of her clients for her and Ms Roper occasionally shampooed Ms Cundell's. When this was put to Ms Cundell, she could not recall this but did not expressly deny that this never happened. On a balance of probabilities, the Tribunal find that although the general practice after the Salon re- opened was for each stylist to look after their own clients, there were occasions when this did not happen, but the new norm was for each stylist to shampoo their own client.

51. Ms Roper also accepted under cross examination that the respondent maintained a 2 metre distance between the client workstations after re-opening. This was consistent with the respondent's evidence and the claimant did not challenge this.

7 July 2020 letter

52. A letter dated 7 July 2020 was sent to the claimant [**48]** following their telephone call;

> " …as *we discussed during the call, a redundancy situation has arisen due to the Coronavirus pandemic and subsequent social distancing and hygiene measures, which have had a significant impact on the hairdressing industry"*

53. The letter referred to expecting a high volume of bookings during July, however the respondent did not know what the requirements were going to be over the longer term . It also referred to the respondent being in the process of reopening in line with government guidance and Public Health England requirements and anticipating having fewer clients in the Salon at a time with appointments spaced more widely to allow for cleaning and stylists shampooing their own clients to minimise interactions.

54. The claimant was invited to an individual consultation meeting on Thursday, 9 July. She was informed that the consultation would take place over a week; from the 7th to 14 July.

55. The claimant was expecting the letter but could not collect it from the post office until 9 July and the meeting was rearranged at her request.

10 July letter

56. A letter dated 10 July 2020, was sent to the claimant **[93]** setting out again the reasons for putting her at risk of redundancy and Informing the claimant that ;*" We initially propose a consultation period of one week from 7th July to 14th July however in the event that any issues or suggestions are raised during that time, this may be extended in order to allow proper consideration…"*

57. The time was extended because the first consultation was not arranged until 16 July 2020.

First Consultation meeting – 16 July 2020

58. A consultation meeting was held with the claimant on 16 July 2020. The claimant was accompanied by Ms Roper.

59. Ms Cundell's evidence is that there was discussion with the claimant around the respondent having to operate a one in one out system for each stylist hence there would be a third less clients, if not more, each day. The clients would be given longer time slots and social distancing would be observed.

60. It is not in dispute that the claimant asked during this consultation about Ms Boyle and Ms Cullend accepted that she had worked on Sunday and Monday when the Salon first re-opened and did shampoo a 'little bit' to keep things moving but she did not want to continue this practice and Ms Boyle worked an average of only about 4 to 5 hours on a Saturday only.

61. The claimant mentioned being prepared to work less hours and It was put to Ms Cundell in cross examination that she did not pay any attention to what the claimant had said about this however, Ms Cundall stated that she did listen to what she said but there was no role for her .

62. The notes taken by Ms Roper [**95]** of the meeting record that Ms Bishop helped out as a friend; "*she is. getting a wage and is on the pay roll*". Ms Cundell did not take any notes of the meeting but denies mentioning that Ms Bishop received any payment when she worked and denies that this is the case. The claimant's own notes also record this being mentioned. Ms Roper although called by the claimant to give evidence did not however give evidence about this alleged comment or the note she had allegedly made of it. The Tribunal have taken into account the credibility of Ms Roper's evidence in that she was prepared to give evidence in chief adverse to the respondent and supportive of the claimant, despite in cross examination conceding in effect, that this was wholly inaccurate and she did not comment on the accuracy of the notes presented in the bundle as notes which she had prepared. The claimant provides no other evidence in support of her contention that Ms Bishop received any remuneration for helping occasionally at the Salon. Ms Cullend wrote to the claimant after the meeting, referring to the claimant mentioning that Ms Bishop was an 'off the book worker' and denying this and that she has ever received any payment. The Tribunal accept on a balance of probabilities the evidence of the respondent, that Ms Bishop did this work occasionally on a voluntary basis to assist Ms Cullend who is a friend but she was not paid and that Ms Cullend had not said that she was. In any event, the Tribunal do not consider that this is material to its findings because even if Ms Bishop received some remuneration, she provided cover only as and when needed and was a stylist who could therefore assist with a much broader range of tasks which is different to the claimant's role .In any event the Tribunal accept the respondent's evidence that she was not paid.

63. In response to questions from the Tribunal, Ms Cullend gave evidence that she had thought about dismissing Ms Boyle and offering her work to the claimant but that Ms Boyle was very flexible, sometimes she would come in just for an hour or if they were not busy simply cancel but she did not feel that she could do that with the claimant. This was not however an option she accepted she had discussed with the claimant.

17 July 2020 – letter

64. Ms Cundell wrote a lengthy letter to the claimant on 17 July 2020 [**118 -122**].

65. Ms Cundall's evidence is that the letter was posted by first class post on 17 July. The claimant has produced a diary of events in which she records the letter as received on 20 July. The other entries within that record are not disputed in terms of the dates and on the balance of probabilities the Tribunal accepts the claimant's evidence that the letter was received on 20 July. There were however text messages between the claimant and Ms Cundall and it was conceded by the claimant that she did not alert the respondent to the fact that the letter had not been received until 20 July. Ms Cundall gave evidence that she had not been made aware at the time, that the letter not been received until 20 July, which is not in dispute**.**

66. The letter confirmed that the consultation period had been extended to Friday, 24 July 2020 to allow proper consideration of these issues and it stated; "*this can be extended again if needed…"*

67. The letter addresses a number of points raised by the claimant including why a new stylist had been hired when the claimant was put at risk of redundancy. It was explained in the letter that the appointment was to replace the stylist who had left the business shortly before lockdown. The respondent felt retaining this role was vital to respond to client demand and keep employees to a minimum because a stylist can carry out a broad range of duties. Ms Cullend also confirmed that staff had worked a small amount of overtime in order to manage booking volumes during the first week of reopening but that the

respondent did not know what client demand would be over the longer term and the opening hours had not changed.

68. After re- opening on 4 July 2020, the undisputed evidence of Ms Cundell under cross examination was that they were extra busy for about 2 weeks so Ms Bishop came in to help shampoo some clients, as did Ms Boyle who worked two extra days on Sunday 5th and Monday 6th July, however these were the only extra days she worked and that level of business fell away after that first 2 week period.

69. The claimant was informed that the respondent could not see a way to restructure the stylists' working patterns to accommodate a change to the claimant's working pattern whilst also complying with safety standards and invited the claimant to let her know if she had a particular working pattern in mind which she felt could achieve this.

70. The letter also addressed the claimant's queries over why she had been told there would be a role for her when the Salon re-opened and Ms Cullend explained that the respondent wanted the communication during lockdown to be positive and supportive and that the respondent utilised the coronavirus job retention scheme to provide stability for the business but had this government support not been available, she would have made made redundancies at an earlier stage.

71. The letter also addressed why the claimant was issued with a new contract if her role was to be made redundant stating that the respondent had not considered redundancies until the team training session and that all staff were issued with employment contracts to ensure that the respondent was complying with the law.

72. The letter ended as follows;

> *"I would very much like to work with you during the consultation period to answer your questions and consider any alternatives you wish to put forward. Please let me know when you have an opportunity to consider my responses above, and if you would like to schedule a consultation meeting. Equally, if you feel any of the objections raised during yesterday's meeting have not been answered, please let me know so I can answer any of the points accordingly.*
>
> *I will be grateful if you could get back to me with your thoughts by no later than 5 pm on Tuesday,* ***21 July****…"*
>
> *[Tribunal stress]*

Text messages

73. 22 July the claimant sent a text to Ms Cundall;

> *"Thank you for the letter Alli.*
>
> *Diane and I are free to attend a meeting either Monday 27th or Tuesday 28th of July 5:15 pm"*

74. Ms Cundall sent a text claimant 22 July;

> *"Hi Lynne, thanks for getting back to me. Can you and Diane meet us tomorrow or Fri? As per my letter of 17th July we've extended the consultation period till Fri 24th. If I could ask what you would like to discuss further, we can keep this moving forward. Alli"*

75. Claimant responded on 22 July;

> *"Hi Alli, I'm coming to the meeting at your invitation. I really can't make it until Monday or Tuesday next week. We're away at the moment"*

76. *Ms Cundell then responded on 22 July;*

> *"Hi Lynne, I'm very surprised to hear that you've chosen to go away. Last week's letter was clear that the consultation period been extended until Friday the 24th. I also asked you to get back to me with questions by 5 p.m. yesterday.*
>
> *I have been clear about the company's situation and my proposed course of action, and have responded to the points you have raised so far. Scheduling another meeting is entirely optional. If you are unable to attend a second face-to-face consultation meeting due to your holiday arrangements, please feel free to ask any additional questions (or raise any alternatives or challenges) by phone or email instead. I will of course respond to any questions within the consultation period.*
>
> *I don't hear from you beforehand; I will be in touch again on Friday"*

77. The claimant accepted during this period she was still on furlough and her undisputed evidence is that although she had said 'we are away' in the text, she was not actually on holiday but only away for the day for a birthday celebration. The claimant accepted however that this was not explained to Ms Cullend in the exchange of messages and that saying she 'was away' was, the claimant conceded; " *a poor choice of words"* . The claimant accepted that it was not surprising that the respondent believed she had gone away on holiday during the consultation period.

78. The claimant had been given the option to provide any further feedback by phone or email and confirmed under cross examination, she had not wanted to do that because; *"There was no witness with me"*

79. The claimant confirmed that she did not reply within the timescale because; "*I am very short-sighted, and I need Allen to help me research and I get tension headaches"*

80. The claimant's evidence is that Ms Cullend had stated that she would be in touch and she thought Ms Cullend meant to arrange a further meeting.

Letter of termination - 24th of July 2020

81. Ms Cundell wrote to the claimant on 24 July 2020 after taking further HR advice. The claimant was informed that her employment was being terminated on the grounds of redundancy with the termination date being 24 July 2020. The claimant received a payment in lieu of notice and a statutory redundancy entitlement.

82. The claimant was also paid 46 hours holiday accrued from 1 April to 24 July and ;

> " *..as per your May and June payslips, **have used 29 hours**. Payment for your unused balance of 17 hours at £153 will therefore be included with your final pay on the last working day of the month".*

83. The letter informed the claimant that if she wished to appeal, she must do so in writing within one week from the date of the letter, to Ms Rogers, HR consultant.

84. The Tribunal accept that the claimant however only received the first page of the letter [**123**] . The second page contained the appeal details . The draft provided to the respondent by the HR consultant [**123A**] contains the full content of the proposed letter with some amendments, including the appeal details which provide for the appeal to be sent direct to Ms Rodgers. Ms Cundell's undisputed evidence is that she did not receive that amended draft from Ms Rodgers before she sent out the letter of termination . In support of the claimant's position that she did not get the second page with the appeal details, is the fact that when she appealed, she wrote direct to Ms Cundell . In any event we find that the letter did not include appeal information but accept the undisputed evidence of Ms Cundell that she was not aware of this and it was an error.

85. Under cross-examination, Ms Cundell gave evidence when asked why she had 'rushed' to confirm termination. That she was trying to follow the advice of the HR consultant and assumed there was a 'protocol' about dates and appeals she should follow.

86. Ms Cundall did not provide any reason why the respondent could not have extended the consultation period. She accepted she had extended the consultation previously.

Appeal

87. The claimant sent in an appeal letter but not until 25 August 2020, which according to the undisputed evidence of Ms Cundell was not received until 28 August 2020 [**130**].

88. The respondent notified the claimant by letter of the 28 August **[130]** that the appeal was out of time and quoted from an extract from the dismissal letter setting out the timescales. The claimant did not alert the respondent to the fact she had not received the appeal information Ms Cullend had quoted, to enable the respondent to take that into account.

89. The claimant's appeal letter she accepted, was a repeat of previous points she had raised with Ms Cullend during the consultation meeting. In answer to a question from the Tribunal about what she had put in the appeal letter that she had not had an answer to during the consultation already, she stated only that ; " *I never got a reply to risk assessment – she said only 4 people in at a time and I asked what document she used to calculate – she said the government guidance* " and that she would have been prepared to work different days.

90. In answer to a question from the Tribunal about how flexible the claimant would have been prepared to be and whether she would have been prepared to accept Ms Boyle's Saturday job of only 5 hours per week her first reply was;" *It would have been nice to have been asked"* . Only when asked a second time whether she would have accepted the 'Saturday job' did she reply; *"it would have kept me in work for the time being".*

91. The implication from her answers the Tribunal find, is that the 'Saturday job' would not have been an attractive proposition to the claimant but that she may have done it on a temporary basis while she found other work.

92. Ms Cullend's evidence is that there was nothing in the appeal letter which would have altered her decision. Her decision the Tribunal accept, was about new ways of working in the Salon to reduce the health and safety risks but it was also about reducing cost.

Position following dismissal

93. The undisputed evidence of Ms Cullend is that there has been a downturn in business as a result of the pandemic . The salon was open seven days a week for only the first two weeks after lockdown ended in July 2020, but that level of custom has never happened

again since. The Salon was open until December 2020 and then shut down again. As at the date of the hearing, the Salon is only open four days a week instead of 5 . Ms Roper has not been replaced and the respondent now has only 2 stylists and Ms Boyle is still only working at the weekend and '*that is the way it looks likely to stay for the 'foreseeable future*' . The business still operates on the same model, namely that the stylist has one client who they also shampoo and they space out the appointments to give them time to clean after each client. None of this was disputed by the client.

Notice pay

94. The claimant did not sign the contract of employment which included a clause permitting the respondent to terminate her employment by making a payment in lieu of notice. The claimant denies that she was therefore bound by its terms and thus the respondent had no contractual right to make a payment in lieu of notice and claims the holiday entitlement which would have accrued during the notice period, employers pension contributions pension rights and additional national insurance liability.

95. The schedule of loss however has been calculated on the basis of an increase in salary to £9 per hour.

96. The respondent does not allege that there was any express or implied acceptance of the proposed contract of employment. The respondent amended the contract to reflect the claimant's concerns, however the amended version was not provided to the claimant and she did not ultimately sign it or otherwise indicate that she was prepared to accept the new terms. The claimant did not return to work and therefore there is no issue that by working she gave implied consent. The Tribunal find that the contract of employment was not enforceable and the payment in lieu of notice was a breach of contract. The respondent does not seek to rely upon another other form of agreement or practice in support of any contractual right to make the payment in lieu of notice.

The legal Principles

97. The applicable legal principles to be applied are as set out below.

Unfair dismissal : section 94 and 98 Employment Rights Act1 996 (ERA)

98. The law relating to unfair dismissal is contained in section 98 ERA 1996.

99. In order to show that a dismissal was fair, the respondent must show that the dismissal was for a potentially fair reason in accordance with the meaning within section .98(1) and (2) ERA 1996.

Unfair Dismissal

100. The starting point is the statute itself;

Section 98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, ***it is for the employer to show—***

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within ***subsection (2) or some other substantial reason*** *of a kind such as to justify the dismissal of an employee holding the position*

which the employee held.

(2)A reason falls within this subsection if it—

…..

(c) is that the employee was ***redundant****…*

…..

(3)In subsection (2)(a)—

(4)[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

[Tribunal stress]

Summary of statutory requirements

101. Section 98 of the ERA therefore, sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The second stage is concerned with reasonableness.

The reason for dismissal: Stage 1

102. The respondent relies on the potential fair reason of redundancy pursuant to section 98 (2)(c) ERA and in the alternative, *some other substantial reason* of a kind such as to justify dismissal, namely a business reorganisation in light of the impact of the Covid pandemic.

103. It is up to the employer to show the reason for dismissal and that it was a potentially fair one i.e. one that fell within the scope of S.98(1) and (2) and was capable of justifying the dismissal of the employee.

104. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' :***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*****.**

105. The burden of proof is on the employer at this stage however, it is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal at this first stage because that is a matter for the Tribunal to assess when considering the question of reasonableness at the second stage.

106. As Lord Justice Griffiths put it in ***Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA***: '*The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to S.98(4)] and the question of reasonableness*.'

107. If the Tribunal rejects an employer's asserted potentially fair reason for dismissal, finding that the reason could not have been the one operating on the employer's mind at the relevant time, the Tribunal is not obliged to go on and ascertain the real reason for dismissal if there is insufficient evidence to do so — ***Hertz (UK) Ltd v Ferrao EAT 0570/05*****. In these circumstances, the dismissal will be unfair.**

Reason: Redundancy

108. Redundancy' is defined under section 139 (1) ERA;

139.— Redundancy .

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind*, or*

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason

109. ***Safeway Stores plc v Burrell 1997 ICR 523, EAT*** His Honour Judge Peter Clark set out a simple three-stage test. A Tribunal must decide:

(i)*was the employee dismissed?*

(ii)if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

(iii)if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

110. HHJ Peter Clark in Burrell stated that there are no grounds for importing into the statutory wording a requirement that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The only question to be asked when determining stage (ii) of the three-stage test is whether there was a diminution in the employer's requirement for *employees* (rather than the individual claimant) to carry out work of a particular kind. It is irrelevant at this stage to consider the terms of the claimant's contract. The terms of the contract are only relevant at stage (iii) when determining, as a matter of causation, whether the redundancy situation was the operative reason for the

employee's dismissal.

111. House of Lords in ***Murray and anor v Foyle Meats Ltd 1999 ICR 827, HL***.: section 139 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section and the second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

Reason: Some other substantial reason

112. Section 98(1)(b) provides a residual potentially fair reason for dismissal that employers may be able to rely on if the reason for dismissal does not fall within the four specific categories in section 98(2). The reason relied on under S.98(1)(b) must be of a kind such as to justify the dismissal of *an employee holding the job in question*: ***Cobley v Forward Technology Industries plc 2003 ICR 1050, CA*.**

113. While the reason for dismissal needs to be substantial, it need not be sophisticated, merely *genuine*: ***Harper v National Coal Board 1980 IRLR 260, EAT*:** The EAT said that an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no ordinary person would entertain. Where, however, the belief is 'one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation'.

114. ***Hollister v National Farmers' Union 1979 ICR 542, CA*,** the Court of Appeal said that a 'sound, good business reason' for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions.

115. This reason is not one the tribunal considers sound but one 'which management thinks on reasonable grounds is sound' : ***Scott and Co v Richardson EAT 0074/04*.**

116. The employer does not need to show any particular 'quantum of improvement' achieved *Kerry* ***Foods Ltd v Lynch 2005 IRLR 680, EAT*.**

Reasonableness : stage 2

Redundancy

Acas

117. The reasonableness of an employer's dismissal procedure will normally be assessed by reference to the Acas Code of Practice on Disciplinary and Grievance Procedures. However, the Code makes it clear that it does *not* extend to redundancy dismissals. The respondent does not have a redundancy policy

Pool for Selection

118. When carrying out a redundancy exercise, an employer needs to start by considering which group of employees who are to form the pool from which to select those for redundancy. Where there is no customary arrangement or agreed procedure relating to the appropriate pools for selection to be applied in a redundancy situation, employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal — **Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA.** They need only show that they have applied their minds to the problem and acted from genuine motives.

119. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the *range of reasonable responses* available to an employer in the circumstances: ***Kvaerner Oil and Gas Ltd v Parker and ors EAT 0444/02***, 'different people can quite legitimately have different views about what is or is not a fair response to a particular situation… In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band and tribunals must take care not to substitute their own view for that of the employer.

Transferred redundancy (Bumping)

120. The employer may need to consider making a more junior employee redundant even if not directly affected by the redundancy situation and offering their junior role to a more experienced employee ***Murray and anor v Foyle Meats Ltd 1999 ICR 827, HL*.** However, the duty to act reasonably does not impose an absolute obligation to consider bumping as an option but that, in particular circumstances, the failure to do so may fall outside the band of reasonable responses :***Byrne v Arvin Meritor LVS (UK) Ltd EAT 239/02*.**

Consultation

121. ***De Grasse v Stockwell Tools Ltd 1992 IRLR 269, EAT***: EAT acknowledged that S.98(4) ERA specifically referred to these factors as relevant to the determination of reasonableness. It accepted that size could affect the nature and formality of the consultation process but refused to accept that it could excuse a total absence of consultation.

122. ***Duffy v Yeomans and Partners Ltd 1995 ICR 1, CA***: It was what a reasonable employer could have done which had to be tested, so the tribunal must ask whether an employer, acting reasonably, could have failed to consult in the given circumstances .

123. ***Pinewood Repro Ltd t/a County Print v Page 2011 ICR 508, EAT*,** the EAT underlined the importance of providing an employee with adequate information in order to give him or her the opportunity to challenge a selection for redundancy.

124. The extent and length of consultation necessary will depend on the facts. In ***Hilton v BAT Building Products Ltd EAT 787/87*.**

125. ***Taskforce (Finishing & Handling) Ltd v Love EATS 0001/05*:** the absence of an appeal is just one factor to be considered in determining fairness under S.98(4).

126. ***Gwynedd Council v Barratt and anor 2021 EWCA Civ 1322, CA*.** In redundancy cases the absence of an appeal an does not of itself make the dismissal unfair. The correct test of fairness is whether the employer's decision to deny the claimants an appeal fell outside the band of reasonable responses.

127. The House of Lords' decision in ***Polkey vAE Dayton Services Ltd 1988 ICR 142, HL*** establishes procedural fairness as an integral part of the reasonableness test under S.98(4). Their Lordships decided that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'. With regard to redundancy dismissals, this meant, in the words of Lord Bridge, that ;'*the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation'.*

Some other substantial reason (SOSR)

128. Whether it was fair to dismiss is subject to an overall assessment of reasonableness under S.98(4).

Acas

129. The Code does not expressly exclude all types of some other substantial reason dismissals however it is the substance of the reason for dismissal that is important in determining whether the Code applies. In ***Lund v St Edmund's School, Canterbury 2013 ICR D26, EAT*.** In the EAT's view, the Code applies not only in circumstances where *disciplinary proceedings* are invoked against an employee but also in circumstances where they should have been.

130. It is for the Tribunal to decide whether the employer acted reasonably under S.98(4) in dismissing for that reason, deciding the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt. This may include whether the employee was consulted, warned and was given a hearing, and/or whether the employer searched for suitable alternative employment.

131. The tribunal must also consider the reasonableness of the change and of the dismissal. This involves considering whether, in all the circumstances, including the employer's size and administrative resources, the employer acted reasonably in treating the business reason as a sufficient reason to dismiss.

132. ***Richmond Precision Engineering Ltd v Pearce 1985 IRLR 179, EAT*:** It did not follow that just because there were disadvantages to the employee, the employer had acted unreasonably in treating his refusal to accept the terms as sufficient reason to dismiss. In deciding whether the employer acted reasonably may include a consideration of whether it has explored all alternatives to dismissal, whether there has been meaningful consultation, assessment of the impact on employees and consideration of alternatives.

Automatic unfair dismissal

133. Under section 104 of the Employment Rights Act 1996 (ERA), an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal was that the employee alleged that the employer had infringed a relevant statutory right.

Section 104 provides as follows;

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

..

*(b) alleged that the employer **had** infringed a right of his which is a relevant statutory right.*

(2) It is immaterial for the purposes of subsection (1) –

(a) Whether or not the employee has the right, or
(b) Whether or not the right has been infringed.

[Tribunal stress]

134. There is a burden on the claimant where the claimant alleges that the reason put forward by the respondent is not the real reason, to adduce evidence in support. **Maund v Penwith District Council [1984] IRLR 24**

135. It is immaterial whether the employee actually had the statutory right in question or whether the right had been infringed, but the employee's claim to the right and its infringement must have been made in good faith:S.104(2).

136. It is sufficient that the employee made it reasonably clear to the employer what the right claimed to have been infringed was; it is not necessary actually to specify the right:S.104(3)**.** Further, the assertion must have been the reason or principal reason for the dismissal.

137. The leading case is ***Mennell v Newell and Wright (Transport Contractors) Ltd 1997 ICR 1039, CA*****,** the Court of Appeal confirmed that what is now section 104 is not confined to cases where a statutory right has actually been infringed. It is sufficient if the employee alleges that the employer **has** infringed a statutory right and that the making of that allegation was the **reason or the principal reason** for the dismissal. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed. Furthermore, the allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided that the claim was made in good faith.

138. The wording of S.104, which requires the employee to have alleged that the employer has *actually infringed* a statutory right. If read literally, this means that an allegation that the employer has merely *proposed or threatened* to infringe such a right is not sufficient.

139. The literal interpretation has been confirmed by the EAT in ***Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) 2019 ICR 687, EAT*****.** A copy of this was provided to the claimant prior to submissions. In this case His Honour Judge David Richardson put it this way;

> "*An allegation that there may be a breach in the future is not sufficient. The thrust of the allegation must be, " you have infringed my right", not merely you will infringe my right."*

Section 105 (7) ERA

140. Section 105 (7) confers a right on employees not to be dismissed for redundancy if the reason or principal reason for selection was that the employee had alleged that the employer had infringed a relevant statutory right.

> *Section 105*
>
> *" (1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if-*
>
> *(a) The reason (of, if more than one, the principal reason) for the dismissal is that the employee was redundant,*
> *(b) It is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer; and*

(c) It is shown that any of subsections (2A) to (7N) applies

(7) This subsection applies, if the reason (or if more than one the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 104…"

141. For a redundancy dismissal to be rendered automatically unfair by virtue of S.105(6A), the sole or *principal* reason for the employee's selection for redundancy must be the fact that she alleged that the employer has infringed a statutory right under section 104 ERA. This means that an employer can evade liability if the protected disclosure was one of the reasons, but not the principal reason, for the employee's selection for redundancy.

Polkey

142. ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL:*** when assessing the compensatory award payable in respect of the unfair dismissal, the Tribunal is to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

Working Time Regulations 1998 (WTR)

143. The basic entitlement to 4 weeks leave is set out in regulation 13;

13. Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins–

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply–

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–

(a) [subject to the exception in paragraphs (10) and (11),]it may only be taken in the leave year in respect of which it is due, and

*(b**) it may not be replaced by a payment in lieu except where the worker's employment is terminated.***

130. The entitlement to the additional leave is set out in regulation 13A;

13A.— Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) ***Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—***

(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

130. Regulation 14 deals with the entitlement to a payment in lieu of outstanding annual leave on termination and regulation 15 with the dates when leave is to be taken ;

14.*— Compensation related to entitlement to leave*

(1) This regulation applies where

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

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13][2][and regulation 13A][3] differs from the proportion of the leave year which has expired.

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

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

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

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

determined according to the formula–…

15 Dates on which leave is to be taken

(2)*A worker's employer may require the worker –*

(a) to take leave to which the worker is entitled under regulation 12 or regulation 13A …

On particular days, by giving notice to the worker in accordance with paragraph (3)

(3) A notice under paragraph (1) or (2) –

(a) May relate to all or part of the leave to which the worker is entitled in a leave year.

(b) Shall specify the days on which leave is …or is not to be taken …

(c) Shall be given to the …worker before the relevant date

Unlawful deduction from wages: section 13 ERA

131. Section 13 deals with the right not to suffer unauthorised deductions;

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages ***properly payable*** *by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

What is properly payable

132. ***New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA*****:** majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition.

Breach of contract

133. Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994;

Article 3

"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or nay other sum… if

(c) the claim arises or is outstanding on the termination of the employee's employment"

Payment in Lieu of notice/ breach of contract

134. Unless there is a term in the contract allowing for the employee to receive a payment in lieu of working their notice, the employer will be breaking the contractual notice obligation by not allowing the employee to work out his or her notice. The employee will be entitled to their loss of all contractual benefits during the notice period, but the employee is absent a contractual payment in lieu of notice clause, under a duty to mitigate losses or to give credit for any earnings received from other employment during the notice period.

Submissions

135. The submissions have been considered in full. The claimant made oral submissions and the respondent had prepared written submissions which have been considered and which were augmented by oral submissions. The below is a summary only;

Claimant Submissions

136. The claimant submits that 'it all started' when the respondent decided to change the claimant's contract of employment the claimant would not sign it. The draft contract was amended but not issued to the claimant because it is submitted, the respondent decided to make the claimant redundant.

137. The claimant is a long-standing employee and could work flexible hours

138. It is submitted that the respondent has fabricated rules and laws and the respondent has not shown any calculations in terms of working out the social distancing requirements and that the five workstations could have been used in compliance with the social distancing rules.

139. The redundancy it is submitted, has not saved the respondent any money and the claimant complains that the respondent did not offer other types of work, different days or reduced hours.

Respondent submissions

140. The respondent submits that the genuine reason for dismissal was redundancy however if Tribunal consider the statutory definition of redundancy is not being met then the requirements around social distancing, could fall within some other substantial reason

141. The backdrop to this situation is Covid, and that the respondent suffered significantly and a new way of operating was required serving fewer clients and

considering safer ways of working. The respondent had to consider what was essential and how they could minimise contact.

142. The government guidance is about reducing contact. The duties performed by the claimant could be carried out by a stylist, especially as they were now having one client at a time. That is not to say the respondent did not on occasion shampoo other clients or vice versa but they were doing what they could to reduce the contact.

143. The work the claimant was employed to reduced and it is not for the Tribunal to determine whether it could be done another way.

144. In terms of automatic unfair dismissal; it is submitted that the closest the claimant gets is that she had rights under TUPE and the National Minimum Wage, however what the claimant was communicating to the respondent were concerns. The point has to be resolved whether what she was alleged was a breach or threatened breach.

145. The claimant's case is the contract was not in force (so the PILON clause could not be relied upon), therefore it was merely a threat to make an infringement and the requirements under section 104 (1) (b) are restrictive.

146. The claimant relies on the proximity of time to suggest the respondent decided to make her redundant because of the issues over the contract but Ms Cullend's behaviour does not support that, in that she remained friendly and changed the contract terms and did so for everyone else.

147. Whilst Ms Cullend accepted that she was upset about the points raised by the claimant counsel argues it is a big leap to find that that was the reason. Ms Cullend is a genuine and credible witness.

148. Ms Roper accepted that she did not raise queries about the contract until she resigned under cross examination, although that is not what she said in evidence in chief.

149. Under section 105 the claimant is required to show the unfair selection applies equally to one or more employees; Ms Boyle was not in a position similar to the claimant, she was more junior and working less hours. The claimant worked 36 hours. There is nothing to suggest the claimant was selected over Ms Boyle because she asserted a breach of a statutory right.

150. In terms of fairness of the process, it was reasonable to place the claimant in a pool of one because she was in a unique position.

151. The Tribunal needs to consider the size and administrative resources of the respondent. This is a small employer who nonetheless engaged an external HR consultant to help it through the process.

152. In terms of the appeal; it is submitted that nothing new was raised, the appeal letter raised the same issues. There was nothing to lead Ms Culland to believe she would not have dismissed her in any event. Even if there has been an error in procedure it would not render it unfair and it did, Polkey would apply, nothing has been raised which would reasonably have changed the outcome

Holiday pay

153. It is submitted that the claimant is only entitled to holiday pay if the Tribunal find that as a matter of contract law she was entitled to the 100 %uplift. Counsel argues that even if Tribunal find that that offer was made by Ms Cundell, the Tribunal need to find that there was acceptance by the claimant. Counsel accepts that it is difficult to argue that the respondent did not make an offer to uplift pay by 100% based on the evidence of Ms Cundell .

Pilon

154. Counsel submits that if there is no contractual right to make a payment in lieu of notice, the claimant cannot pursue losses based on £9 per hour.

155. Counsel referred to the cases of :
James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386;
Spaceman v ISS Mediclean Ltd UKEAT/0142/18 (19 October 2018, unreported).
Maund v Penwith District Council [1984] IRLR 24)
Kuzel v Roche Products Limited [2008] EWCA Civ 380; [2008] IRLR 530
Polkey v A E Dayton Services Ltd).

Analysis

Stage 1: Reason for dismissal

Redundancy

156. Applying the Burrell criteria; the claimant was dismissed, the requirements the Tribunal is satisfied, of the respondent's business for employees to carry out the type of work which the claimant performed i.e. principally shampooing and receptionist work, had or was expected to diminish. The decision to remove the claimant's role, of a shampoo-ist/receptionist, was the Tribunal is therefore satisfied, a reason which falls within the definition of redundancy as set out at section 139.

157. The need to carry out the shampooing work had not ceased because the stylists were doing it (and on Saturday's Ms Boyle would also do some), but it had diminished. The claimant does not contend that someone else was recruited to fill her role. While Ms Bishop may have on occasion the Tribunal find, provided some cover, she was not an 'employee' and section 139 is concerned with the employer's requirement for *employees*. Ms Bishop was only providing cover on a voluntary basis now and again and in any event, when she helped this included doing the work of a stylist, which was not the particular kind of work the claimant performed.

158. Not only was the respondent facing unprecedented times and returning to business after a fairly significant closure but it needed to adjust to new ways of working to protect its clients and staff. Even if Ms Cullinan had misunderstood the government guidance and the Tribunal does not find that she did (because the guidance is not prescriptive in setting out that limiting contact should involve more people for a shorter period of time in preference to limiting the number of people someone is exposed to), that does not mean that the reason is not a genuine redundancy.

159. It is not for this Tribunal to look behind the respondent's decision or require the respondent to justify how or why the diminished requirements had arisen when looking at whether there was a potentially fair reason.

160. What the claimant complains about in essence, is the failure to consider alternatives, and that is an issue the Tribunal needs to consider when looking at stage

2 and reasonableness, not the reason at stage 1.

161. The Tribunal find however, that the respondent has shown a potentially fair reason for dismissal 'namely redundancy within the meaning in section 139 ERA.

Some other substantial reason (SOSR)

162. In the alternative, the decision to restructure the business and combine the duties of a shampoo-ist with that of the stylist and change the working practices such that each stylist has one client at a time, would amount to a fair reason on the grounds that it is a dismissal for *some other substantial reason.* The reasons for making these changes cannot be described as capricious or whimsical. There were sound commercial reasons for it; the health and safety precaution of limiting contact to reduce the risk of infection of coronavirus, putting elderly patients more at ease and putting the business on a better financial footing to withstand the ongoing and future financial uncertainties.

163. While the claimant spent most of the cross examination of Ms Cundell, undermining the soundness of her reasons for making the changes, the test for SOSR purposes is not what the claimant or Tribunal considers a sound reason but whether is one made on objectively reasonable grounds. It is not for this Tribunal to substitute its view on whether the business decision to change the working practice gave the respondent a discernible advantage. Part of the reason was to make the business more commercially viable and that profit motive alone was a sound commercial reason. Further, there may have been other ways to mitigate the risk of the coronavirus and indeed the scientific evidence may support a different way of working, however that was not established on the evidence but in any event, the Tribunal find the decision to keep in place 2 metre social distancing particularly where the clients are elderly, and limit contact in the way the employer chose to do, was not a decision which no ordinary person on those circumstances would entertain.

164. The employer need only show that there were 'clear advantages' in introducing a particular change to pass the low hurdle of showing SOSR as a potentially fair reason for dismissal and there is no requirement to show any particular financial benefit.

165. The reason for the decision to change the working practice and remove the need for a shampoo-ist/receptionist, was for a potentially fair reason, namely redundancy or in any event, SOSR.

Breach of a Statutory Right : section 104 / 105 ERA

Assertion of a statutory right

166. The Claimant maintains that the reasons put forward by the respondent are not the real reason for her dismissal. Her claim is that she was dismissed for an automatically unfair reason pursuant to sections 104(1)(b) or section 105 (7) ERA 1996.

167. The Respondent has produced as set out above, evidence to the Tribunal that the potentially fair reason for dismissal is redundancy or some other substantial reason and thus the the burden passes to the Claimant to show that there is a real issue as to whether that was the true reason.

168. The claimant was issued with a contract and it is not in dispute that the respondent asked for comments and that the respondent listened to the claimant's feedback even engaging with her husband's comments, referred back to the HR consultant for advice and informed her that she was making changes to the contract, (albeit the revised contract in the event was not presented to the claimant).

169. The claimant relies only on what was said at the meeting on the 30 June 2020. Her evidence is set out in her witness statement.

170. With respect to clause 7.2 and holiday, the claimant's evidence is that she "*queried"* the calculation. To 'query' a calculation or clause is not alleging that the respondent *had infringed a relevant statutory right.* The statutory right although not explicitly identified by the claimant would be her right the Tribunal find, to annual leave and how that should be calculated under the Working Time Regulations 1998. However, the words she used in her evidence in chief are not consistent with an allegation that the respondent had infringed her rights. The claimant's case is that the contract was not enforceable because she had not signed it (hence why she argues that there was no right to make a payment in lieu of notice).

171. The respondent actively engaged with the claimant over what the calculation should be and promptly checked and amended.

172. With respect to clause 6.3; the claimant's evidence is that in 'future' she would have to be paid overtime to avoid a breach of the National Minimum Wage Regulations. .That is not an assertion that the Regulations and her rights thereunder had been infringed but rather at its highest, the claimant was informing the respondent that the right to the national minimum wage would be infringed **if** the contract terms were introduced as drafted and further, **if** she worked without additional pay; neither of which had yet happened.

173. With respect to clause 6.2; the claimant's evidence is that she raised that this would give the respondent the right to change the claimant's hours at any time and she raised what the consequences of agreeing to this would be i.e. it would be non-negotiable once she accepted those terms and she would have to accept revised hours. It is not clear what statutory right it is being relied upon however, in any event this does not amount to an allegation of infringement, it is expressing a concern about how the clause may operate **if** she signed the contract.

174. Stating that she has rights i.e. has rights under TUPE, is not the same as alleging those rights *had* been breached.

175. The provisions of section 104 ERA are not intended to cover contract negotiations but protect employees who have alleged an infringement of their rights.

176. The claimant and Mr McKeown were warning the respondent off breaching her rights and indeed that was taken on board and the claimant accepted that the revised contract terms addressed all of her concerns. There was no threat to impose the contract terms.

177. The facts of this case do not support a finding that the claimant had alleged that the employer ***had*** infringed a statutory right. At most the claimant was saying that her rights would be infringed if the contract was not changed: ***Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) 2019 ICR 687, EAT*****.**

178. The Tribunal find that section 104 ERA does not apply.

179. Even if what the claimant had done was make such an allegation (which the Tribunal do not find that she did), the Tribunal do not accept that this was the reason or if more than one, the principal reason for the decision to remove her role.

180. Ms Cundell was candid in her evidence and presented as a credible witness who admitted that she was upset by the response from the claimant to the proposed new contract of employment. The Tribunal has taken into account all the evidence, including the fact the plan was for the claimant to return to work and it was only after the training day and thus the discussion about the contract of employment on 30 June 2020, that Ms Cundell decided to remove her role. However, the Tribunal accept the evidence of Ms Cundell that she had spoken with her sister after the training session about her business (and with her husband the evening before). The Tribunal has considered whether it is reasonable to draw an inference from those facts around timing, that the reason or principal reason to dismiss the claimant was 'pique' over the response to the proposed contract terms. The Tribunal have also taken into account however, the evidence of Ms Roper that the new practice on re-opening was for stylists to shampoo their own clients. The undisputed evidence of Ms Cundell was that the number of staff in the salon has reduced since and the claimant's role has not been replaced. The Tribunal have also considered that the salon had been closed, that these were fluctuating, uncertain and unprecedented times and the respondent was a small business which had managed to continue only with the assistance of the Furlough scheme.

181. Ms Cundell explained how concerned she was about upsetting the claimant in light of their friendship, although she could no longer see a need for her role. It may be that after the challenges over the contract, Ms Cullend was less inclined to put the claimant's feelings over and above the needs of the business and to adopt a more hard headed approach to what the business needed, however the Tribunal also take into account that Ms Roper did not sign the new contract and she was not subject to any unfavourable treatment. The Tribunal also take into account how Ms Cundell reacted to the challenges to the new contract and how amenable she was to amending the contract and responding to the claimant's feedback promptly, with no reticence. The changes were made to all other contracts and the Tribunal accept the respondent's submission that this is not behaviour consistent with an employer punishing an employee for asserting their statutory rights.

182. The Tribunal do not find that it would be reasonable to draw an inference on the evidence available, that the reason or principal reason for making the changes was because the claimant negotiated over the contract terms.

183. **The claim that the claimant was dismissed in contravention of section 104 ERA is not well founded and is dismissed.**

Section 105 (7) ERA

184. As set out above the Tribunal do not accept that the claimant alleged that the respondent had infringed a relevant statutory right and therefore section 105 (7) is not engaged. In any event, the only person employed as a shampoo-ist/receptionist was Ms Boyle and the Tribunal find that the redundancy situation did not apply *equally* to her and/or that her position was similar. Ms Boyle was employed to only work 4 to 5 hours on average one day per week on a Saturday. She was not pooled with the claimant because of her very limited hours and the extent to which the respondent had

a very flexible working arrangement with her, whereby they could cancel her at short notice. That working arrangement that the respondent had with Ms Boyle was not the same type of working arrangement the respondent had with the claimant and thus the Tribunal find that even if the claimant had alleged that the respondent had infringed a right of hers (which was a relevant statutory right), the circumstances constituting the redundancy did not apply *equally* to Ms Boyle and/or she did not hold a *similar position.*

185. **The claim that the claimant was dismissed in contravention of section 105 (7) ERA is not well founded and is dismissed.**

Stage 2 : reasonableness – ordinary unfair dismissal

186. The Tribunal is satisfied that dismissal was for a potentially fair reason and must now therefore turn to consider the question of fairness by reference to the matters set out in s.98(4) ERA 1996.

Pool

187. The claimant was the only shampoo-ist/receptionist working multiple days. Ms Boyle only worked very part time and flexibly, on Saturdays. The respondent applied its mind to who to select for redundancy . Ms Cullend thought about but decided against removing Ms Boyle's role because removing her role would not achieve the same cost saving and she worked under a much more flexible arrangement. The motives for treating the claimant as unique and not putting Ms Boyle into a pool with her, were the Tribunal find genuine and fell within the band of reasonable responses available to an employer in those circumstances. The respondent did not require a receptionist/shampoo-ist working 36 hours per week. The claimant does not assert that she could have carried out the job of a stylist.

Consultation and alternative employment

188. The claimant was put at risk of redundancy during the telephone call on 6 July 2020. The reasons for the proposed redundancy were set out in writing and there was a consultation meeting where the claimant was able to bring a colleague. The claimant was given the opportunity to respond to the proposals in full. It was not minuted by the respondent however, the formality of the consultation process has to be considered in light of the size and administrative resources of the employer. This is a very small employer however, the respondent took the step of incurring the costs of an HR consultant to assist it with the process, which indicates an intention to carry out a fair process.

189. Although the consultation process was planned initially to take place over the week ending 14 July, it was extended with the first consultation meeting taking place on 16 July. There is no complaint from the claimant that she was not able to challenge the respondent's reasons for changing the working practices and removing her role. She does not allege that the reasons were not explained to her.

Alternative Work

190. The claimant argues that she should have been offered Ms Boyle's part time Saturday work and it is accepted that this was not offered to her.

191. When the claimant was asked by the Tribunal whether this was a role she would have considered accepting, given that her role was 36 hours 4 days per week and the Saturday job was only 4 to 5 hours Saturday job; her immediate answer was that it would have been nice to have been asked. The Tribunal believe it is reasonable to infer from her answers to the questions particularly her immediate response, that this was not in fact a job she really wanted but she may have accepted it only while she found other work. However, there was no discussion with the claimant at the time about whether she would accept Ms Boyle's role were it offered to her. The Tribunal find that in the circumstances however, Ms Cullend's reasons for not dismissing Ms Boyle and offering her the 'Saturday job', was within the band of reasonable responses. Ms Cullend considered that the flexible arrangement she had with Ms Boyle was more suited to the arrangement she would need going forward. The reasonableness and genuineness of that belief the Tribunal conclude, is supported by the claimant's evidence when asked by the Tribunal whether she would have been prepared to accept the 'Saturday job' . It was clearly not an particularly attractive proposition to the claimant.

Further consultation

192. The respondent then sent the claimant a lengthy letter addressing the points raised in the consultation meeting [**118-122**].

193. The claimant did not receive the letter until 20 July. The letter asked the claimant to let the respondent know whether she wanted a further consultation meeting. The respondent was not informed by the claimant that the letter had not been received until the 20 July. The claimant proposed a meeting after the date the respondent had stated the consultation would end i.e. after 24 July. The claimant gave the respondent to understand she could not attend because she had gone on holiday during the consultation period. However, the last message from Ms Cundell on 22 July did give the impression that she would be in contact on Friday 24 July 2020 and it did not make it clear that the respondent would confirm the termination by that date. The letter had stated that the consultation period could be extended beyond the 24 July if needed and therefore it was reasonable for the claimant to assume that the process would not conclude on the 24 July.

194. While mindful that the respondent is a small business and it needed to reduce its costs and implement this new way of working, Ms Cundell was candid in telling the Tribunal that there was no reason why she could not have waited and held another meeting, she was acting on advice from her HR consultant but she did not identify any difficulties in extending the consultation period again. The decision to proceed to confirm termination was outside the band of reasonable responses in those circumstances, when the claimant had been informed that the consultation could be extended again and when the claimant had been lead to understand that the respondent would be arranging another meeting.

Appeal

195. The respondent intended to give the claimant a right of appeal. However, the letter failed to set out the right and the time limit. When the claimant submitted the appeal, the respondent refused to hear it. The error was due a failing by the respondent to enclose both pages of the letter however, the claimant could have but failed on receipt of the letter of the 28 August 2020 [**130**] to explain that she had not received the appeal details and time limit. This was not a deliberate act on behalf of the respondent and by the date the appeal was received, it was one month after the implementation of the redundancy decision.

196. Taking into account all the circumstances however, the Tribunal find that the failure to agree to extend the consultation meeting to allow the claimant to attend and voice any further questions or concerns she had was outside the band of reasonable responses and this was aggravated by the absence of an appeal which deprived the claimant of a further chance to put forward her representations and meant the respondent was not able to remedy the earlier defect in the process.

197. There was no good reason why the consultation could not have been extended a little longer and indeed the claimant had been told it could be if necessary and left the claimant to understand a further meeting would be arranged.

198. The Tribunal conclude that the failure to allow a further consultation meeting in the particular circumstances, was not remedied by an appeal, rendered the process unfair and outside the band of reasonable responses. The Tribunal find that for those reasons only, the claim of ordinary unfair dismissal is well founded and succeeds. However, the Tribunal must now consider the application of the 'Polkey' principle.

The claim of unfair dismissal pursuant to section 98 ERA is well founded and succeeds.

Polkey

199. There was a genuine redundancy situation. The requirements of the business for employees to carry out work of a receptionist/shampoo-ist had or was going to diminish. The business was facing significant economic challenges and the respondent considered that removing the role would assist with making the necessary adaptations to address health and safety issues arising due to the coronavirus pandemic.

200. The Respondent acted fairly in selecting the claimant for redundancy. She was in a unique position and was reasonably placed into a pool of one.

201. The claimant admitted in her evidence before the Tribunal that the grounds of appeal were largely a repeat of what had been raised by her previously and that in terms of what she felt she had not got answers to, she informed the Tribunal that it was how the respondent had worked out the number of people who could work safely in the salon and that she was prepared to be flexible about when she was prepared to work.

202. Ms Cullend's reasons for removing her role were not only the Tribunal accept about responding to the health and safety issues however but were economic. The stylists would be washing hair and the respondent simply did not require her role anymore, regardless of how many days or hours she would be prepared to work. The Tribunal accept the respondent's evidence on a balance of probabilities, that the matters the claimant would have raised during the second consultation or on appeal would not have changed the decision. The Tribunal conclude that had the respondent followed a fair process, which included a second consultation meeting and an appeal, the claimant would have still been dismissed but remained employed for another at most, 2 weeks (with her wages topped up by the respondent to 100%).

203. The claimant received a statutory redundancy payment and thus is not entitled to a basic award in those circumstances. She is however entitled to an award for the loss of statutory rights for which the Tribunal makes an award of £500 . In terms of a compensatory award, this is limited to compensation to the period she would have remained employed had a fair process been followed, namely to 7 August 2020, and

she is therefore entitled to compensation equating to two weeks' pay and benefits.

Holiday pay

204. The claimant is seeking a payment for the accrued holiday entitlement which the respondent did not pay on termination, because it 'used' that holiday entitlement to top up her salary to 100% (after her leave had been exhausted for the leave year 2019/2020). The claimant accepts she had agreed to using her leave entitlement to top up her pay in respect of the holiday year 2019/2020 but not 2020/2021 and does not pursue any claim in respect of that earlier leave period.

205. The respondent accepts that it did not have the claimant's agreement to use her annual leave entitlement from the leave year 2020/2021 and Ms Culland accepted that she had agreed to 'top up' the claimant's salary herself to 100%. Ms Culland's did not assert that she did not understand that to be a legally enforceable agreement. She did not assert she had merely offered this and nor did she required the claimant to indicate her acceptance.

206. If what the respondent was doing by topping up the claimant's salary was to make a payment in lieu of accrued holiday, then regulation 13 and 13A of the Working Time Regulations does not permit a payment in lieu of annual leave to be made, apart from in limited circumstances including on termination of employment. The claimant did not agree to treat any period while the Salon was closed during the furlough period as a period of holiday for the purposes of the Working Time Regulations (specifically in respect of holiday year 2020/2021) and nor as the respondent alleged this. Pursuant to regulation 15, if she was required to treat a period of absence as holiday, the respondent was required to serve the appropriate notices, which they do not assert they did.

207. Pursuant to regulation 14, the claimant was entitled to be paid a payment in lieu in respect of the accrued leave up to the termination date less what was paid on termination.

208. The respondent's pleaded case as set out in its response (there having been no amendment application), is that the claimant agreed to take and be paid for her leave during her absence and this would be used to top up/augment her wages however,, Ms Culland accepted only during cross examination, this was not correct.

209. Ms Culland agreed to top up the payments and her evidence was not that she did not intend this to be legally enforceable or that she had not understood the claimant to be in agreement . The respondent does not plead a failure to provide acceptance or that this agreement was otherwise not legally enforceable between the parties.

210. The claimant is entitled to payment of unpaid but accrued annual leave.

The claimant's claim to unpaid holiday pay is well founded and succeeds

Payment in lieu of notice (PILON)

211. The respondent proposed a new contract to the claimant in June 2020. The claimant raised no objections to the clause in respect of PILON however, she did raise concerns in respect of other provisions. It was left on the basis that the respondent would consult further with her HR advisor. The claimant was not provided with the amended contract and had not signed it and nor had she agreed to accept the contract

subject to the specific terms she was querying. The claimant was negotiating the contract terms and was waiting to receive an amended contract. The term in the contract providing for a payment in lieu of notice was not therefore enforceable and the respondent acted in breach of the existing (implied) contract terms, when it made a payment in lieu of notice.

212. The claimant is entitled to the losses flowing from that breach which include loss of accrued holiday during that period and loss of any benefits or additional national insurance payments which the claimant was required to make over and above what she would have paid had she worked her notice.

213. **The claim for breach of contract is well founded and succeeds**

Right to written particulars: section 38 Employment Rights Act 2002

214. The claimant includes within the schedule of loss a sum for failure to provide written particulars. The parties did not make specific submissions on remedy outside of the application of Polkey, and this will be addressed in the separate Order.

Order: name of the respondent

215. It is not in dispute that Cut n Curl is a trading name and Allison Cundell is the sole owner. Pursuant to rule 29 an Order is made amending the respondent's name to Allison Cundell trading as Cut n Curl.

Remedy

216. A separate Order has been made in respect of remedy.

21 September 2021

Employment Judge Broughton

Sent to the parties on:

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For the Tribunal:

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