Case No: 1302636/2016

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Van Den Berg

Respondent: Handsam Ltd

Heard at: **Birmingham** **On:** **27 & 28 February 2017**
10 & 11 April 2017 &
In chambers on 12 May 2017

Before: Employment Judge Kelly

Representation
Claimant: In person
Respondent: In person

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.
2. The respondent made an unauthorised deduction from the claimant's wages.
3. The respondent has breached the contract of the claimant.
4. The claimant is entitled to a statutory redundancy payment.

Reasons

1. By a claim presented on 30 September 2016, the claimant claimed unfair dismissal and various monetary sums as particularised below under the heading "Financial Claims".

2. Prior to the third day of the Hearing, the claimant returned to the respondent its property which she still retained and it was agreed that the issue of whether the respondent could make a deduction from sums owed to the claimant a figure in respect of these items was therefore no longer current.

3. We were presented with 4 bundles of documents in 4 files, of 950 pages. Further pages were added during the hearing, taking the bundle to 1014 pages. The respondent presented written submissions and three cases: *Spink v Express Foods Group Ltd EAT, Quinn v CC Automotive Group Ltd CA 2010/0443/B2* and *Capita Hartshead Ltd v Byard UKEAT/0445/11/RN.*

4. We heard evidence for the respondent from Simon Lowe (Mr Lowe), Managing Director. He adopted as his own evidence a written statement of Christopher Lowe, the respondent's founder and major investor, who was acting as the respondent's representative.

5. We heard evidence for the claimant from the claimant, her daughter, Bobby Frasier, and a former employee of the respondent, Christopher Bash. The claimant also submitted signed and dated witness statements of Odessa Partridge, a former apprentice at the respondent, and Kristie Lombardi, a former employee of the respondent. They did not attend to be cross examined and so we do not place weight on this evidence. When the respondent did not argue that the claimant failed to mitigate her loss, the claimant withdrew a statement of Clair Davies, a friend of the claimant, as being irrelevant.

6. The claimant presented a schedule of loss. The respondent did not dispute the pay calculations made by the claimant on this, but the principle that the sums were due.

7. We further considered written submissions from the claimant of 12 April 2017 and the respondent's comments on these of 11 May 2017.

8. References to page numbers below are to pages of the bundle.

Issues

9. The issues in the case were as follows:

    9.1. When did the claimant's employment end? The claimant said it was 6 May 2016, the day after she received a summary notice of termination with provision for pay in lieu of notice. The respondent said it was 9 June 2016 on the grounds the original date of termination did not stand because the claimant appealed the dismissal and therefore did not accept the summary dismissal and offer of payment in lieu of notice.

    9.2. What was the reason for the termination of the claimant's employment?

        9.2.1. The respondent initially relied on the sole reason of redundancy. On 9 March 2017, by an email to the tribunal, it added an alternative reason of some other substantial reason. On the third day of the Hearing, the respondent clarified that it was actually seeking to rely the claimant's alleged misconduct as the "other substantial reason". As no evidence had been presented on misconduct, we refused to allow the respondent to amend its case in this way. However, the respondent still relied on an alternative other substantial reason for dismissal which was its poor financial situation, and we allowed this as it was closely connected to the argument for a redundancy.

        9.2.2. The claimant disputed that there was a redundancy situation. She said that her job was still existing and that the situation did not meet the statutory definition of redundancy. The claimant contested that the real reason for dismissal was redundancy. The claimant did not accept that there was the financial imperative for a dismissal. She alleged that she was dismissed because of (1) a statement she made in a case which the respondent had brought against a former employee, David Bash, and (2) because of her daughter, Bobby Frasier's, complaints to the respondent.

    9.3. The claimant said that the dismissal was procedurally as well as substantively unfair. The claimant made the following complaints about the process followed by the respondent to dismiss her:

9.3.1. The lack of consultation

9.3.2. The speed of the process

9.3.3. The inadequate information provided to her as part of the consultation process IE she was not told that she was at risk of redundancy nor the selection criteria to be applied, as identified at a Board Meeting in April 2016

9.3.4. The failure to provide a statement of what her redundancy pay would be if she were made redundant at the start of the process

9.3.5. The selection criteria adopted based on pay level was unfair

9.3.6. The decision to dismiss had been irrevocably taken prior to the start of the consultation.

9.3.7. The failure to have an appeal meeting

9.3.8. The respondent's failure to consider all the claimant's points at the appeal meeting and the failure to properly consider the points which were considered

9.3.9. The respondent's failure to answer the claimant's questions during the redundancy process and facilitate the process for the claimant.

9.4. The respondent argued that any procedural issues at the initial stage were rectified on appeal.

10. On the quantum of the unfair dismissal claim:

10.1. The respondent argued that the claimant's dismissal was inevitable even had a different process been followed;

10.2. The respondent did not assert that the claimant had failed to mitigate her loss. The claimant said it would take her at least 12 months to find new employment. The respondent accepted this.

What happened

11. We find the following as the primary facts in this case.

12. The respondent provides guidance on compliance issues for schools, academies and colleges.

13. The claimant began employment with the respondent on 9 September 2013 as Editorial and Marketing Manager. At the time of her dismissal, she was deputy Managing Director, had responsibility for HR internally and headed up the respondent's Editorial Department, as "Editor in Chief". Her remuneration package was in the region of £55,000 per annum. She was not an officer in the respondent company.

14. In February 2016, Mr Lowe, instructed key managers to write down relevant observations about a former employee, David Bash. David Bash was the brother of the witness for the claimant, Christopher Bash. David Bash had left the respondent's employment at short notice and had left it in difficulty, and had also made allegations of bullying. The claimant did not send her observations to Mr Lowe. The respondent began a legal action against David Bash. The claimant informed Mr Lowe in April that she did not agree with this legal action because she did not feel it a good use of time and resources.

15. By 4 May 2016, the claimant had still not provided a statement in relation to Mr Bash and she was off sick. The respondent's statements were due in to the court the following day. Mr Lowe accessed the claimant's work laptop and found her statement and sent it unsigned to the court in its action against David Bash. The claimant asserted that the version of her statement sent to the court by Mr Lowe was different from her final version and that Mr Lowe had amended her statement to make it more favourable to the respondent's case against David Bash. She asserted that her failure to cooperate over producing the statement which Mr Lowe wanted from her was a motivation for her dismissal. Mr Lowe denied making any changes to the statement and said that he simply sent to the court the version of the claimant's statement which he found on her laptop on 4 May, without making any changes. He said he had no concerns about the statement when he found it.

16. In the Hearing, the claimant was asked to explain what was in her statement for the Bash case to which the respondent would have so objected that it would be a motive for dismissing her. She responded:

    16.1. Her original statement contained references to a private detective being sourced which Mr Lowe had not wanted her to mention, and she also references to tax fraud. We note that both the references to a private detective and to tax fraud are in the version of the statement sent by Mr Lowe to the court;

    16.2. She alleged that Mr Lowe had inserted into the version of her statement sent to the court a statement that she had asked David Bash to send her an audiofile of Mr Lowe allegedly shouting at David Bash. She said this was untrue. She said that Mr Lowe had never indicated to her that this should be included in her statement.

    16.3. She alleged that Mr Lowe had changed her statement so that it implied that Mr Bash had not done a thorough hand over on leaving.

    16.4. She alleged that Mr Lowe had changed her statement so that it read that Mr Bash had decided not to continue his claim against any staff at the respondent. She said she was unaware of this decision.

17. The claimant's daughter, Bobby Frazier, was also an employee and headed the client support department. Ms Frasier challenged Mr Lowe over a pay increase she said he had promised to her, whereas Mr Lowe told her he had merely indicated what might be possible. He offered a compromise pay increase which she rejected.

18. On or around 24 April 2016, the respondent was notified by a Welsh client that it was pulling out of its contract with the respondent, which would end on 31 August. The respondent had been expecting a payment from this client of £42,000 at the end of May 2016 which would now not arrive. At about the same time, the respondent was also notified by another client that it would be putting its contract with the respondent out to tender, so that the respondent anticipated losing the contract. This contract was worth about £32,000 per annum to the respondent. The combination of work from these two clients represented about 17% of the respondent's turnover. The respondent was alarmed that it may not be able to continue trading in the circumstances, unless it took urgent action. It was unclear whether it would be able to meet the May payroll.

19. In April 2016, the respondent had the following staff: In the Editorial department: the Editor in Chief (the claimant), the Editor (earning £24,000 per annum) and the Editorial Assistant (Daisy Whittingham) earning £18,500 per annum). In the client services department: Head of client support (Bobby Frasier earning £25,000 per annum) and a full time client support executive (Shelly Newcombe earning £21,000 per annum), a part time client support executive (earning £13,800 per annum) and an apprentice client support executive (earning £10,000 per annum). There were

also two employees in finance both working part time, the Finance Director (earning £26,000 per annum) and finance executive (earning £16,500 per annum). A marketing employee had already left. The two directors were already not taking a salary because of financial constraints.

20. The directors of the respondent met on 25 April to discuss the financial situation. There appeared to be no alternative but redundancies as the directors had already stopped taking a salary and had no funds to invest and the respondent was at its overdraft limit. The directors decided that a redundancy decision should be based on the following criteria: to maintain the viability of their 3 departments which were client support, finance and editorial; to ensure that clients continued to receive proper service; to make as few redundancies as possible; to ensure that this was a one off process to secure the business. It was agreed that, to be viable, the respondent needed to be left with at least 2 employees in client support, 2 in editorial, 1 in systems development, 1 in marketing and 2 in finance. It was agreed that the respondent could withstand losing 2 employees ideally or 3 at a pinch. At that time, there were 3 employees in editorial, 4 in client support, 1 in systems development, 2 in finance (in addition to the MD) and none in marketing.

21. The directors discussed what the selection criteria should be to be fair and achieve their objective. They decided that the "last in first out" selection method would not work for them because new recruits were not paid enough to create the savings required. They felt they could not differentiate between staff on grounds of performance or conduct or sickness absence as they considered all their employees were excellent. They agreed that the only fair and objective criterion would be to select the highest paid posts for redundancy. They agreed to have a further meeting on 3 May, after reworking the budget, to discuss where they were and make a decision. They did not invite the claimant to this meeting because she was not a director and they considered it too sensitive, but they planned to invite her to the 3 May meeting.

22. In the Hearing, Mr Lowe confirmed that the selection process followed was not to select positions to be made redundant but to select from the pools of the employees in each department. He confirmed that selection was on the basis of: What would involve making the fewest redundancies? This meant selecting those who earned the most.

23. Mr Lowe subsequently explored any other options for avoiding redundancies but found that the respondent could not get a loan and that printer contracts etc were too long term to be cancelled to save money.

24. On 29 April, the respondent informed an employee in the client support department, Shelly Newcombe, whose probationary period expired that day, that it would not be continuing her employment due to financial issues which were nothing to do with her. This decision was made because the respondent knew that it had to save money and this seemed an obvious way of doing so. However, it only saved Ms Newcombe's salary of £18,000 plus the recruitment agency fee for recruiting Ms Newcombe.

25. Bobby Frazier heard about this dismissal and was very angry with Mr Lowe about it. She wanted to know if she was going to get paid and, although Mr Lowe could reassure her about the April payroll, he said he did not know about May. This was the "last straw" for Ms Frasier leading her to leave the respondent. Ms Frazier did not attend for work on her next working day which was 3 May, or thereafter. Ms Frasier's position was that she had resigned. The respondent initially did not accept this and treated this as absence without leave.

26. The claimant did not attend for work on 29 April and did not notify the reason. On 2 May, she emailed the respondent reporting that she had been ill that day, had pulled

a muscle in her back and that her daughter was ill. She said she would not be in the next day.

27. On 3 May, the directors' meeting therefore went ahead without the claimant but with Kathryn Lowe, "Finance Director" (but not a board position), attending. Since the previous meeting on 25 April, another client had informed the respondent that it was ending part of its service, worth £30,000 per annum and reviewing another part, worth £5000 per annum, so the financial situation had worsened with a total now of £95,000 lost income. Mr Lowe had not been able to find a way of dealing with the financial shortfall without redundancies. The directors therefore resolved to move ahead with the planned redundancy process.

28. The directors met with the employees later that morning. Two staff were absent, one due to child care issues, and the claimant, due to sickness. The respondent had a policy (originally suggested by the claimant) that it did not call employees who were off sick about work issues. It did not call the claimant about the directors' meeting or the staff meeting. It called the staff member off with child care issues to give her the information given to employees at the meeting.

29. At the staff meeting, employees were informed about the loss of business and that this meant that there would be a redundancy process. The respondent informed staff that it was considering redundancies in the editorial and client support departments based on the following criteria: to ensure it all happened quickly; to maintain client service; and to minimise the number of redundancies. No other information was provided about what positions were at risk and the selection criteria chosen. Later that day, the employees had a chance to ask questions in one to one meetings.

30. On 3 May, Mr Lowe emailed The claimant (p863) to notify her of the three clients who had cancelled or were reviewing their contracts and that the respondent had decided to cut its expenditure; they had let Ms Newcombe go; they were considering redundancies in the editorial and client support departments based on the following criteria: to ensure it all happened quickly, to maintain client service and to minimise the number of redundancies. Mr Lowe said that the claimant was the only employee who had not participated in the consultation process that day and invited her to a meeting, on 4 May, to discuss the potential redundancies. By mistake, this email went to the claimant's work email address so she did not receive it. In the Hearing, Mr Lowe accepted that he did not inform the claimant that the redundancy selection criterion to be applied was: who costs the most to employ. He considered that this was self evident if the number of redundancies was to be minimised. He accepted that he did not point out to the claimant that she was the one being considered for redundancy.

31. Shortly after this the same day, Mr Lowe picked up an email from the claimant to say that she had a back condition which meant could not sit or stand and she was on very strong drugs for the pain. The claimant submitted a statement of fitness for work saying she was signed off to 17 May. She said she would contact the respondent again at the end of this period. Mr Lowe concluded that he would not be able to consult with the claimant until 18 May at the earliest.

32. On the same day, Mr Lowe realised that he had sent his earlier email that day to the claimant to the wrong email address; and he re-sent his email to the claimant to her home email address at 14.05. He added to the email that he realised that she could not attend the proposed consultation meeting in person and that he proposed to conduct the meeting by phone. He stressed that if this was not possible, the financial imperative of the company was such that it did not allow them to delay making any decisions. He also asked her where he could find the draft witness statement in relation to the David Bash issue as he needed to submit it to the court the following day.

33. On 3 May, the respondent cut off the claimant's access to its server by changing the login. This was partly to comply with its standard practice when employees were sick, and partly because Mr Lowe needed to get access to the claimant's documents to find the David Bash statement.

34. On 4 May, the directors and Kathryn Lowe met to decide what to do about the redundancies. With the dismissal of Ms Newcombe and the resignation of Ms Frasier, that left the desired number of 2 employees in the client support department. The claimant was the highest paid employee in editorial and so, according to the policy determined by the Board on 25 April, she would be the one to be made redundant from that department. If the respondent dismissed the other two members of the editorial team, that would only save less than £40,000 and leave only one person in the department, not two. The directors felt they had to make the claimant redundant in order to make the substantial contribution needed to plug what they calculated to be the £95,000 hole in the respondent's finances due to the contracts lost or at risk of loss. The directors were uncomfortable about making the decision without having consulted with the claimant. During their meeting, an email arrived from the claimant at 14.55.

35. In this email (p799), the claimant complained about being cut off from the server and saying that, due to being on very strong painkillers, she considered it unwise to discuss something as important as her future and the future of others at the respondent whilst under the influence of the drugs. She asked Mr Lowe to correspond with her in writing until she felt well enough to hold phone conversations. In dispassionate terms, she set out arguments why there should be no redundancies from the editorial department, and questioned why the Board was only looking at the editorial and client support departments for redundancies. She considered that cuts would mean that those remaining could not cover the work.

36. In the Hearing, the claimant was asked what she would have said to Mr Lowe had a telephone consultation taken place. She responded that she would have said that the editorial department was not the department to look at. She said that she would have suggested that someone from accounts was made redundant. She was asked how the respondent would save £55,000 without making all the finance department redundant and responded that others would have to be made redundant.

37. Later in the Hearing, we asked the claimant what she would have suggested to the respondent as way of avoiding her dismissal, had she been consulted. She responded that she would have proposed that the respondent marketed itself to attract new clients, and make the Finance Director redundant. She said she would have offered to take a reduction in salary back to her starting salary of £30,000, or become self employed.

38. At this time, the claimant spoke on the phone to various staff at the respondent. She explained that this was different to having a telephone consultation about the redundancy situation because it did not involve participating in challenging discussions about proposed redundancy.

39. The directors were concerned that every day they delayed making redundancies was costing the respondent money it did not have. This was their over-riding concern. They considered that a delay of 2 weeks (until the end of the claimant's statement of fitness for work) would cost a further £3200 on the basis of £320 per day in salaries and would mean a further redundancy, or the respondent being unable to pay the May and June salaries. They were also concerned that there was no guarantee that the claimant would return to work after 2 weeks. They had now had some comments from her by way of consultation (in her email of 4 May). They were concerned that staff morale required a decision to be taken immediately and they were concerned

that staff they wanted to keep would get jobs elsewhere if they delayed. They saw it as delicate to balance the inability to consult with the claimant against the other factors suggesting an immediate decision.

40. The respondent conceded in the hearing that the above cost of £320 per day included the costs of Ms Newcombe, who had already been made redundant, and Ms Frasier whom it was not paying because she was not attending work and whom it believed had resigned. The cost of delaying the decision to dismiss the claimant was therefore in fact £220 per day IE just the claimant's salary. Mr Lowe said that, if they had left the decision to the Friday, at a cost of £880, this would have made a difference to other staff who were anxious about their positions. (In her submissions, the claimant made the point that her daily cost was not £220 per day, as she was being paid statutory sick pay. However, this was not put to Mr Lowe in the Hearing and so we ignore that point.)

41. It was Mr Lowe's evidence to the tribunal that it was not worth delaying the decision over the claimant's redundancy to allow for consultation because the directors did not believe that anything would change, and their decision would not be changed by consultation.

42. The directors concluded to go for the claimant's immediate redundancy. They agreed to select the claimant for redundancy on the grounds that: the salary saving of £55,000 per annum would mean the company would avoid having to make two or three other employees redundant (as the others were far lower paid) and the respondent would be able to meet its May and June salary obligations; the respondent no longer needed an chief editor and Deputy MD; and the claimant's responsibility for HR could be shared between Mr Lowe and Kathryn Lowe, Finance Director. A retired director of a predecessor company, Christopher Lowe, would take over the claimant's technical duties without payment. The respondent conceded that Christopher Lowe's technical knowledge was 18 months out of date, but considered that he would be able to rectify this in a short space of time.

43. Later that afternoon, Mr Lowe emailed the claimant (p796) informing her that her role had been selected as the one to be made redundant and that she was being made redundant with immediate effect (except that she would be required to do a handover). He wrote: "Your notice period of 5 weeks according to clause 18.1 of your employment contract (significantly more than if you were to be paid as per the statutory redundancy scale) will be paid in full on receipt of all company goods and vehicles in acceptable condition". The respondent also reserved the right to deduct the cost of training from final pay. The claimant could appeal within 10 days.

44. The email explained the criteria for selecting the claimant for redundancy as follows: To maintain the viability of the editorial and client support departments; to maintain service to clients; to minimise the number of redundancies; to ensure that this was a one off process. The letter stated that the Board had also considered company closure, reducing staff numbers from 9 to 4, redeployment and creation of new roles, but that these options did not meet the selection criteria. It was decided to maintain a team of 2 in the editorial and client departments as sufficient to deliver work. It was decided that the role of editor in chief and Deputy Managing Director was not required to achieve the objectives.

45. The claimant received the email on 5 May.

46. At the end of 4 May, Mr Lowe found the claimant's draft statement in relation to David Bash on the claimant's computer system. Mr Lowe's evidence was that there was nothing in it to give him any cause for concern and he was just relieved to have found it. He said he sent it to the court without making changes.

47. Mr Lowe's evidence to the tribunal was that they decided to make Ms Frasier redundant from the client support department because she was evidently unhappy about things. The bundle documents show that the respondent did not notify Ms Frazier that she was being made redundant until 16 May, by which point she had already resigned, claimed that this was a constructive dismissal and refused to sign a settlement agreement offered by the respondent.

48. Christopher Bash's evidence was that, on 13 May 2016, he met Mr Lowe at a service station on the M42 to be given his P11 form. He stated that Mr Lowe informed him that the claimant had been let go due to her position becoming untenable due to ongoing issues between Bobby Frasier and the respondent. Christopher Bash had left the respondent's employment in 2015 under a settlement agreement. The respondent sued Christopher Bash's brother, David Bash, another former employee. Christopher Bash denied that this made him partial in his evidence, saying that he hardly spoke to his brother.

49. The respondent contended it was absurd to suggest that its MD would inform a former employee in a service station of its motivations for dismissing the claimant and denied that this happened.

50. On 16 May, the claimant appealed the dismissal in a 14 page document (p878). This document mainly dealt with her making the point that loss of clients did not affect her role, that the same number of staff were still needed in the editorial department, that her roles still existed and that she was the best person to fill them. It also addressed issues around payments due to her. She did not allege that she had been selected for redundancy because of the dispute with Bobby Frasier or because she had not cooperated over a statement for David Bash. At this point, the claimant assumed that Mr Lowe had accessed her statement for the David Bash case on her computer, although she had not seen the version submitted by him to the court. Nor did she make any suggestions for avoiding her redundancy. She did not suggest that she would take a pay cut or that the respondent should use marketing to replace the lost turnover. She did query why accounts staff were not included in the redundancies, when there were two people in that department and the respondent would be losing clients and have less invoices to process. She suggested that, had the respondent selected on a "last in, first out" method, it would have selected Daisy Whittingham in the editorial department who had only a month's service.

51. In her letter of 16 May and also her cover email, the claimant also notified the respondent that she would return to work the following day.

52. By email of 16 May (p893), the claimant wrote "It would appear that there is still some confusion over redundancy and payment in lieu of notice? Initially you were offering 5 weeks redundancy, now you are saying payment in lieu of notice, I presume you have looked into this area and this is confirmation that the notice period will be payment in lieu of notice and then I will receive 5 weeks redundancy?" She stated her understanding that she was not to attend work or work from home for the 3 months notice period. She asked the respondent to ensure that its HR system recognised that the (7 days) holiday she had booked (from 19 May) would not be required as she was not required to work. She asked for clarification in regard to deductions from pay for training, what her final payments would be, that her wage slip would posted and collection of her belongings. She said she had no access to her Perk Box benefits.

53. By email of 16 May (p762), Mr Lowe acknowledged the grounds of appeal, arranged an appeal meeting for 2 June and stated that the claimant was no longer required to attend work, and accordingly, her access to the respondent's servers had been removed.

54. When cross examined about the claimant's request for the respondent to ensure its system did not show her taking holiday in May, Mr Lowe's response was that the respondent's return to work procedure from sickness absence was that there should be a return to work interview and the claimant never replied to set this up. He said she was Head of HR and should have known about the process. At no point in correspondence did Mr Lowe say to the claimant that she had to attend a return to work interview in order to return to work. When it was put to Mr Lowe that the claimant could not set up her own return to return to work interview and that Mr Lowe's email of 16 May said that the claimant was no longer required to attend work, Mr Lowe's answer was that the claimant could have worked at home.

55. On 16 May, the respondent dismissed Ms Frasier by reason of redundancy. It explained the delay in doing so as that she had not been costing the respondent any money because she was absent and it took time to come to the conclusion that her resignation was ineffective.

56. On 17 May 2016, Mr Lowe responded (p720) to the claimant's email of 16 May (p893), saying "your lack of understanding of the situation is something which we cannot help with. You must take formal professional advice" Our responses have been very clear..." He stated that the appeal would only address whether the respondent had acted against statute or its own policy in selecting her roles for redundancy. He said that all financial matters could only be discussed as a result of the outcome of the hearing. He said that until the outcome of the appeal hearing, the claimant remained an employee of the respondent.

57. The claimant replied on 17 May (p719) that Mr Lowe's tone was not conducive to aid this difficult situation. She asked again whether she was redundant with immediate effect or whether she was in a 3 month notice period. She said she should have been allowed to attend a training course she was booked on that day, so as not to prejudge her appeal. She complained that the respondent packing up her belongings appeared to prejudge the appeal. She complained about Mr Lowe's failure to confirm details of payments and redundancy figures or deductions he had said they were looking to make for training fees.

58. Mr Lowe responded on 17 May 2016 that any relevant points would be dealt with at the appeal hearing. (As below, issues of termination payments were excluded from the scope of the appeal hearing by the respondent.)

59. Mr Lowe gave evidence that he did not have chance to deal with the claimant's request to cancel her May holiday issue prior to the claimant actually going on holiday on 19 May.

60. Mr Lowe sent the claimant a letter dated 3 May 2016, but in fact sent on 20 May 2016, (p896) inviting the claimant to an appeal meeting on 2 June 2016 and setting out the respondent's understanding of the grounds of appeal which were set out in 11 points. The letter asked the claimant to confirm that this set out her case or otherwise confirm what her case was. The letter stated that the appeal would only consider the process to make the claimant's role redundant and not any submissions regarding the decision itself which was a matter for the directors or any matters relating to the redundancy pay. The letter stated that the scope of the appeal was limited solely to whether the respondent acted unlawfully in making the claimant's roles redundant.

61. The claimant replied on 26 May (p898). She said that she offered to come into work the previous week and forego the holiday but the respondent refused the request. The claimant noted that the respondent had asked her to confirm what the grounds of her appeal were and she referred them back to her appeal letter without providing a response. She said it was wholly unfair that the respondent has still not told her

what the intended redundancy package was. She said she could not agree the appeal date until she had this information.

62. On 27 May, Mr Lowe emailed the claimant that they would need time to respond and that they would come back with an alternative hearing date.

63. On 30 May, Mr Lowe informed the claimant that the effective date of redundancy would be 9 June 2016 unless the appeal was successful.

64. On 30 May, Mr Lowe proposed that the appeal hearing take place on 8 June.

65. On 1 June (p903), the claimant emailed Mr Lowe noting that for the first time, he was saying that the date of redundancy was 9 June 2016. She noted that other questions about her 3 month notice period, holiday, hours owed in lieu and redundancy period had not been answered. She said that she could not make the appeal time suggested, due to child care issues and lack of transport, and she proposed three other times.

66. Mr Lowe ignored those dates proposed by the claimant and responded that, further to her rejection of a second date of appeal, it offered one final date of 9 June. It stated that the hearing would take place then regardless of whether the claimant attended.

67. On 2 June (p906), Mr Lowe informed the claimant that the respondent would honour her contractual notice period of 5 weeks and pay her statutory redundancy. He said that the respondent offered her the chance to take redundancy with immediate effect, but that she chose to remain employed and appealed. He said no bonus was payable and their accountants were calculating outstanding sums.

68. On 7 June, the claimant wrote to Mr Lowe saying that Mr Miller, the former Board Chair, confirmed her 3 month notice period by email in December 2015 (should be 2014) when she took on the role of Deputy MD. She said that this formed part of the agreement to take on the role of Deputy MD.

69. The claimant intended to attend the appeal on 9 June, but on 8 June, Mr Lowe cancelled it due to his illness and changed the date to 15 June. The claimant rejected this date as she had a funeral to attend and, in an email of 13 June, proposed 4 new dates.

70. Mr Lowe responded that the appeal would go ahead on 15 June.

71. The appeal hearing took place on 15 June in the claimant's absence. On 15 June, the respondent wrote to the claimant with the outcome sending her an audio file of the appeal hearing. In the Hearing, the claimant was asked to explain what aspects of her appeal she considered the respondent had not addressed in the appeal outcome letter or meeting. She responded with the following aspects of her appeal:

    71.1. *The respondent pre-judged the appeal as shown by it withholding monies* (p891): The appeal hearing notes show that the respondent addressed this by saying there was no evidence of pre judging.

    71.2. *The claimant's complaints about not being given a statement of redundancy terms and about payments*: The appeal notes state that many of the claimant's points are not germane to her appeal and cover financial issues (p958). It is true that the respondent did not deal with her complaints about these matters in the appeal.

71.3. *The respondent did not address the decision to make her redundant as opposed to explaining why there was a redundancy situation*: In her appeal letter, she said that the loss of the three client contracts did not affect her. The appeal outcome letter addressed the complaint that there was no reduction in work in the editorial department by stating that there would be a forthcoming reduction in work as there would be no necessity to update documents for Welsh clients.

72. In the appeal notes (p957), the respondent dealt with the claimant's suggestion that the finance department should have been included in the redundancy process, saying that it decided that the business could not be viable without a finance team to issue invoices and chase up debts. It also made clear that the respondent had not made the role of Head of HR, held by the claimant, redundant, but had given it to the Finance Director, and that it had made redundant the roles of Deputy Managing Director and Editor in Chief, held by the claimant. It addressed the claimant's argument that a different member of staff should have been selected for redundancy, saying that was not possible using their selection criteria of reducing staff by the fewest number of people.

73. On 6 July 2016, the respondent emailed the claimant with a calculation of the final payment due to her (p641). Deducting for course fees it said that the claimant owed, the final sum calculated as due was £330.55. It asked the claimant to agree the payment, at which point it would be made to her.

74. The claimant responded on 7 July (p945) saying she was not in agreement with the figures, putting her viewpoint, and asking for clarification. Mr Lowe responded with comments on 14 July. The respondent did not make any payment to the claimant because she still retained some of its property, until the payment referred to above.

75. In August 2016, after the termination of the claimant's employment, the respondent lost a client support team member, an apprentice. In February 2017, it replaced this person. It also employed a technical coder in September 2016 and a marketing person to replace David Bash in January 2017. These were the only new hires.

76. When cross examined, Mr Lowe said that the respondent did not produce a redundancy calculation for The claimant because she was disputing the notice period.

Financial claims

Notice pay

77. The respondent notified the claimant of the termination of her employment on 5 May 2016. It paid her salary to 31 May 2016 and for no further period.

78. The respondent said that the claimant was entitled to 5 weeks notice on the basis of the terms of her written contract of employment. Under the claimant's contract of employment (p921), the notice period which the respondent was required to give the claimant was one month plus one additional week.

79. On 4 December 2014, the claimant, Simon Lowe and Nigel Miller, the then Chairperson of the Board and non executive director, met to discuss changes to the claimant's contract. This was in the context of the respondent negotiating the retraction of notice of termination which the claimant had given and her taking on a more senior role, as Deputy Managing Director. On 4 December 2014, it was agreed that the claimant would get an increased salary and, for the first time, a car package. Simon Lowe emailed the claimant with the outcome of the discussion. She forwarded this email to Nigel Miller. There was an emailed discussion between the claimant and Mr Miller about the car benefit. The claimant said her concern over

taking out a 3 year car lease was that her existing contract only gave her one month's notice and she gave 3 months. Mr Miller responded on 9 Dec 2015 by email "That will change. We will give three and you give three."

80. The claimant claimed she was entitled to 3 months notice on the basis of this email exchange with, Nigel Miller, on 9 December 2014.

81. When there were changes to contractual terms, it was not the respondent's practice to issue a new contract.

82. There was also an email in the bundle from Mr Miller to "whom it may concern" of 6 Dec 2016 confirming that the respondent agreed to a notice period of 3 months with the claimant.

83. There was no written confirmation of the contractual changes given to the claimant in December 2014, but her salary increase and car package were implemented.

84. It was the respondent's position that Mr Miller had no authority to agree a longer notice entitlement with the claimant as he was a non executive director and this had not been discussed at a board meeting. The respondent asserted that the email of 9 Dec 2015 was ambiguous and it was not clear what Mr Millar was referring to when he referred to "three". The claimant asserted that Mr Miller had the authority to negotiate contractual terms with staff and, as at that point, she had only attended one board meeting, she did not know if there would customarily be board discussions about changes to staff contract terms.

Claim in relation to sick pay

85. Although the claimant was paid for the month of May, The respondent paid statutory sick pay for the period 3 May to 17 May 2016 (12 days SSP at £17.69 per day). The claimant said that she should be paid full pay for her sickness period and, in particular, for 17 May.

86. The claimant said that she offered to come into work on 17 May which was declined. In any event, she was always paid at full pay for sickness absence (and had previously had more than 5 non consecutive days sickness absence) and that the general manager (who was off work for an extended period) and sales director were always paid at full pay for sickness absence. The respondent said that the operations manager was only paid SSP, that the sales director was not off sick more than 5 days and that the claimant had never been off sick for two weeks before.

87. The claimant's contract of employment (p931) stated that the claimant would be paid normal salary for 5 days absence. The respondent's records show that the claimant had taken one day sick on 29 April 2016. The claimant disputed this. She said that this day was a Friday when she only worked mornings and she worked on the David Bash statement in the morning.

Redundancy pay

88. Subsequent to the claimant's return of the respondent's property after the adjourned Tribunal Hearing, the respondent paid to the claimant a £1437.00 statutory redundancy payment, less a deduction for training fees. The respondent deducted £80 as 50% of the training fees for one course attended by the claimant during her employment and £95 as 100% of the training fees of another course attended by the claimant. The total payment to the claimant after deduction was therefore £1262.00.

89. The claimant argued that she was entitled to a higher redundancy payment because, in the dismissal letter of 4 May, the respondent informed her (p796) that her notice

period to be paid would be "significantly more than if you were to be paid as per the statutory redundancy scale". She said that she took this reference as being to the statutory redundancy payment. She said she was due five weeks' pay at actual pay rate as a redundancy payment because of this. The respondent denied that the claimant was due anything other than a statutory redundancy payment.

90. The claimant accepted that the correct figure for the statutory redundancy payment would be £1437, if only the statutory redundancy payment (not an enhanced payment) were due.

91. In the Hearing, Mr Lowe explained the reference to "Your notice period of 5 weeks according to clause 18.1 of your employment contract (significantly more than if you were to be paid as per the statutory redundancy scale) will be paid" as being a misunderstanding by the respondent. He also stated that the claimant rejected this offer and appealed against it.

Deduction of training fees

92. In the claimant's contract (p925), in the event that the claimant resigned or was dismissed within a period of one year from the date she successfully completed the course, the respondent could recover, by way of deduction or otherwise 100% of the training fee if the claimant left within 6 months of the end of the course and 50% of the training free if the claimant left between 6 and 12 months of the end of the course.

93. On 6 July 2016, Mr Lowe sent the claimant a final payment calculation email. It listed sums which The respondent was proposing to deduct for training fees being:

    93.1. £1726.78 for a business safety qualification (partly 50% of fees and partly 100% of fees)

    93.2. £80 for an ACAS course (50% of fee)

    93.3. £95 for an ACAS course (100% of fee).

94. The claimant accepted that she attended two ACAS courses. She argued that the fees should not be deducted because it was not good employment practice to make such deductions on a redundancy.

95. She said that she did not start and certainly did not complete a business safety course because she was instructed by the respondent to concentrate on her Ormiston contract work. In any event, the course did not finish until after the end of her employment. She argued that she should not be required to repay the course fees because she did not successfully complete the course, as was required under the contractual term for repayment of training fees. The respondent's position was that it did not stop the claimant from completing the course. Mr Lowe denied in evidence that he instructed the claimant to prioritise the Ormiston contract work.

Holiday pay

96. In the Hearing, the parties agreed that on the quantum of the holiday pay claim: If the Tribunal decided that the claimant's employment ended on 5/6 May 2016, the claimant would be due £574.61 in holiday pay. The parties agreed that, if the Tribunal decided that the claimant's employment ended on 9 June 2016, the claimant would have overtaken holiday pro rata to her entitlement in the sum of £623.12.

97. However, the claimant argued that the 7 days holiday which the respondent deemed she took in May should not be taken into account because she offered to come into the office.

Company bonus

98. The claimant claimed £500 bonus for the period March to May 2016, payable at the end of June 2016. She estimated this figure.

99. The respondent stated that, although it had informed employees in April that the turnover bonus target was met, this calculation took into account the £42,000 which it assumed it would receive from a client in May, which client then notified the respondent of the termination of its contract, so that the £42,000 was not received. Once this figure was discounted, the respondent had not met its bonus target and no bonuses were paid in June.

Ormiston bonus

100. The claimant's evidence was that she was verbally promised a bonus in return for working extra hours to draft a suite of policies for the client, Ormiston. She said she was told that the bonus was in the form of a holiday for which she would need a passport. She said that it was due to her in April, May or June 2016. She understood that she would get additional paid holiday to use the bonus.

101. Mr Lowe said that the respondent did offer a reward for the Ormiston work, and it was the intent that the claimant would get an extra week's holiday. It said that the budget for the reward was never discussed and it was all discretionary. It said that it would only have paid for flights and offered the claimant use of the family holiday home. Mr Lowe said that there had been an alternative discussion of giving the claimant money for a special meal.

Claim for pay in lieu of overtime

102. The claimant claimed a payment in lieu of overtime worked of 30 hours spent completing the Ormiston policies. The claimant's evidence was that Mr Lowe and she discussed how she would get the policies completed and that it would not be possible unless the claimant worked extra hours. She said that Mr Lowe told her to keep a note of the extra hours worked. She said that she did so by recording them on a wipe board by her desk. She put a screen shot of it in the bundle (p472) showing a heading of "Lieu hours" and a total of 30.

103. The respondent said that any overtime worked had to be notified to Mr Lowe by email, when she could take time off in lieu, and that it did not recognise the claimant's claim because she did not email her request for overtime pay.

104. The respondent said it was aware of a claim for 28.5 hours overtime and the claimant had taken this in lieu, but it was not aware of anything further. Mr Lowe's evidence was that the agreement about the 28.5 hours overtime recognised by the respondent must have been verbal.

105. The claimant said she was unaware of any policy of emailing overtime notifications, even though she was Head of HR, and that in any event, she was the only staff member who worked paid overtime.

Claimant's benefits

106. It was agreed that the claimant received a pension contribution from the respondent of £40.78 per month.

107. The respondent operated a scheme called "Perk Box" which gave employees the opportunity to get discounts on goods and services from third parties. It was agreed

that this benefit was worth £83.00 per month to the claimant. The respondent said that the benefit came to an end on 25 May 2016. The claimant said that an email at p719 showed that she had no access to the scheme from 17 May 2016. The email from the claimant to Mr Lowe stated "I am still an employee but you have stopped all benefits eg Perk box".

The law

Date of dismissal

108. Under Section 95 (1) Employment Rights Act 1996 (ERA),an employee is dismissed by his employer if …(a) the contract under which he is employed is terminated by the employer (whether with or without notice)… or (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Unfair dismissal

109. Under section 94(1) ERA an employee has the right not to be unfairly dismissed by his employer.

110. Under section 98(1) ERA, 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 sub-section (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.

111. Under section 98(1) ERA, the potentially fair reasons for dismissal include redundancy.

112. Under section 98(4) ERA, 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.

113. Under s105(1) ERA, there are listed reasons for selection for redundancy which will be automatically unfair if the circumstances for the redundancy applied equally to one or more other employees holding similar positions to that held by the employee and who were not dismissed. The list does not include that the reason for selection for redundancy was the employee's pay level.

114. In *Williams v Compair Maxam Ltd [1982] ICR 156*, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stated that it was not for the tribunal to impose its own standards and decide whether the employer should have acted differently. Instead, it should ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors which a reasonable employer might be expected to consider were

114.1. Whether the selection criteria were objectively chosen and fairly applied

114.2. Whether employees were earned and consulted about the redundancy

114.3. Whether, if there was a union, the union's view was sought

114.4. Whether any alternative work was available

115. In *Polkey v AE Dayton Services Ltd 1988 ICR 142*, their lordships decided that a failure to follow correct procedures was likely to make the ensuing dismissal unfair unless the employer could reasonably have concluded that doing so would be futile. This meant that the employer would not normally act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment. Further, on the issue of quantum, the decision holds that whether procedural irregularities actually made any difference to the decision can be taken into account when calculating compensation.

Redundancy

116. Under s139 ERA, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to

116.1. the fact that his employer has ceased or intends to cease

116.1.1. to carry on the business for the purposes of which the employee was so employed, or

116.1.2. to carry on the business in the place where the employee was so employed, or

116.2. the fact that the requirements of the business

116.2.1. for employees to carry out work of a particular kind, or

116.2.2. 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.

Breach of contract

117. Under rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131 (2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine, (b) the claim is not one to which article 5 applies and, (c) the claim arises or is outstanding on the termination of the employee's employment.

Unauthorised deduction from wages

118. Under Part II ERA, an employer shall not make an unauthorised deduction from the wages of a worker employed by him.

Conclusions

Date of termination

119. We first consider when the dismissal took effect. By letter of 4 May, received by the claimant on 5 May, the respondent notified the claimant of the termination of her employment with immediate effect. However, on 16 May, the claimant proposed to

return to work the following day. Mr Lowe's response confirmed that the claimant was not required to attend work, but not that her employment had already ended as notified in the letter of 4 May. On 17 May 2016, Mr Lowe notified the claimant that, until the outcome of the appeal hearing, the claimant remained an employee of the respondent. On 30 May, Mr Lowe stated that the effective date of redundancy would be 9 June 2016.

120. We find that, although the claimant was dismissed with immediate effect, there followed a mutual agreement to withdraw the dismissal and for the claimant to work on until a new date for the end of her employment was notified by the respondent, that being 9 June. This date was notified to the claimant by Mr Lowe in his email of 17 May.

121. We find that the claimant's employment ended on 9 June.

Reason for dismissal

122. We find that the reason for the claimant's dismissal was redundancy. As per the definition in s139 ERA, the requirements of the business for a Deputy Managing Director and Editor in Chief had ceased or diminished. We acknowledge that the claimant disputed this because she argued that the same number of documents needed editing. However, s139 does not relate to work of a particular kind but to employees to carry out work of a particular kind. It is irrelevant whether or not the work itself has ceased or diminished. It was the respondent's prerogative to decide that the work in question could be performed by fewer employees.

123. There was in fact a reduction in the number of employees required.

124. The redundancy situation arose because the respondent had lost or was under threat of losing three key contracts with a combined turnover of almost £100,000. Therefore, it needed to cut costs to avoid the risk of going out of business.

125. We do not accept that the claimant was dismissed because of the respondent's dispute with her daughter, Bobby Frasier. The claimant did not allege this in her appeal and so she cannot have thought that this was the reason at the time. We do not place credence on Christopher Bash's evidence about what Mr Lowe allegedly said to him about the reason for the claimant's dismissal. We do not consider him an impartial witness. He had left the employment under a settlement agreement, which does not imply amicable circumstances of end of employment, and his brother was being sued by the respondent. We find it wholly incredible that that Mr Lowe would have commented to Christopher Bash on the reason for dismissing the claimant in a post employment meeting to hand over documents.

126. We do not accept that the claimant was dismissed because of what she wrote in a statement in the David Bash claim.

126.1. Mr Lowe did not find the statement written by the claimant until after the decision to make her redundant had been taken.

126.2. Further, when she wrote her appeal, the claimant assumed that Mr Lowe had accessed her statement and she considered that he would not approve of it, yet she did not allege in her appeal that this was the reason for her selection for redundancy, indicating that she did not believe this at the time.

126.3. Further, when we consider the differences highlighted by the claimant in the version of the statement submitted to the court by Mr Lowe, as compared to the version which the claimant says was her final version, we cannot find any differences indicating that Mr Lowe would find the claimant's version so offensive that he would wish to dismiss her because of it. Two of the key issues

which the claimant said Mr Lowe would object to, mentioning a private detective and tax fraud, were retained in the version filed at the court which, according to the claimant's case, Mr Lowe had edited to make it better for the respondent. If Mr Lowe had taken such exception to them, he would, on the claimant's case, have deleted those references.

Whether dismissal unfair

127. However, we consider that the dismissal was procedurally unfair as follows:

Consultation – inadequate information provided and lack of consultation

128. The respondent did not adequately consult with the claimant. In its email of 3 May, the respondent did not inform the claimant that the selection criteria to be adopted was to choose staff with the highest salary. We do not agree that, by informing her that it wished to minimise the number of redundancies, this would make the claimant aware that this was the criterion to be adopted. The respondent did not inform the claimant that she was therefore the redundancy target. Had the claimant been aware of the criterion to be used and that this made her the redundancy target, she would have been properly informed whether she should take the stance that the respondent should only contact her in writing. She could have also made written submissions on the actual criterion to be adopted and her selection. For example, she could have, as she did in the appeal, propose that a member of the finance team be selected instead. We consider that no reasonable employer would dismiss an employee without making the employee aware that she, specifically, was at risk, and then giving her chance to input on the decision.

129. Had the respondent provided the claimant with the information which needed to respond properly, she could have responded in writing, which indeed she did, but to inadequate information.

130. This renders the dismissal unfair.

Speed of process

131. There was insufficient time allowed between giving the claimant the information on the redundancy situation which was supplied and then dismissing the claimant. Such information as was provided was provided on 3 May at 14.05. The directors made the decision to dismiss the claimant in a meeting which was taking place on 4 May when the claimant's email arrived at 14.55. On 3 May, there had been no warning to the claimant that the decision would be made the following day, merely a general point that there would not be a delay in making the decision. As in fact happened, the claimant was not given enough time to make her submissions before the decision meeting started.

132. This renders the dismissal unfair.

Failure to provide a statement of redundancy pay at start of process

133. Although it is good practice to provide a statement of redundancy pay at the start of the process, we do not consider that the failure to provide one will render a dismissal unfair.

The selection criteria adopted based on pay level was unfair

134. In her submissions, the claimant said that using pay as a selection criteria would make a redundancy dismissal automatically unfair and referred to ERA. She was unable to inform us what provision of the ERA she was relying on and did not provide any case law authority in support of this proposition. As set out above, although

there are circumstances in the ERA when a redundancy dismissal will automatically be unfair, selecting because of pay level is not one of them.

135. It would be unfair to select a person for redundancy because the employer wants to replace them in the same job with someone whom it pays less. In that case, there would not be a redundancy situation. However, that was not the case here. Here, the respondent decided to make redundant the role which cost it the most and not to replace someone in that role. There was a redundancy situation.

136. We do not find the dismissal unfair on this ground.

The decision to dismiss had been irrevocably taken prior to the start of the consultation

137. We consider this to be true given Mr Lowe's statement in evidence that it was not worth delaying the decision over the claimant's redundancy to allow for consultation because they did not believe that anything would change, and their decision would not be changed by consultation.

138. This renders the dismissal unfair.

Failure *to have an appeal meeting*

139. Given that the respondent had rushed ahead with the dismissal decision without consulting the claimant in person, any reasonable employer in this situation would have bent over backwards to ensure that the employee could attend an appeal meeting in person. We consider that the claimant was reasonable to refuse to attend the first meeting date proposed because she had not been given all information about the termination terms, as these are matters which would usually be addressed in an appeal, as well as the reasons for the dismissal. The respondent evidently thought the claimant was reasonable in wanting to reschedule the second meeting, because it agreed to reschedule it. The respondent then ignored the dates proposed by the claimant in proposing a third date. Mr Lowe was the one to cancel this meeting and so should have been careful to ensure that the claimant could attend the rearranged meeting. It was reasonable for the claimant not to attend it because of a funeral. We consider that the respondent acted outside the scope of a reasonable employer in insisting on having the meeting without the claimant present, instead of arranging a time when she could attend, having cancelled the previous date itself and where the claimant had a genuine reason for non attendance and proposed alternative dates.

140. This renders the dismissal unfair.

The respondent's failure to consider all the claimant's points at the appeal meeting and the failure to properly consider the points which were considered

141. As we have set out above, of the specific appeal complaints made by the claimant, the respondent did consider the claimant's points, other than those relating to the dismissal payments. We do not find that failing to answer appeal points about the dismissal payments would of itself render an otherwise fair dismissal unfair as this does not relate to the decision to dismiss.

The respondent's failure to answer the claimant's questions during the redundancy process and facilitate the process for the claimant

142. We find that the respondent did fail to answer the claimant's questions and facilitate the process for her.

143. It was perfectly reasonable for the claimant to set out questions about the end of her employment in her email of 16 May. Mr Lowe's response that "your lack of

understanding of the situation is something which we cannot help with. You must take formal professional advice" Our responses have been very clear..." was insulting and high handed. The respondent's failure to confirm the termination date until 30 May was an appalling delay. It is extraordinary that the respondent did not confirm the termination payments it considered due until 6 July. The respondent compounded the issue by failing to address them in the appeal hearing.

144. The respondent excused its conduct on the grounds that the claimant was challenging the dismissal. We consider this entirely irrelevant. The respondent chose to dismiss and it was in the position to determine what it considered the legal position to be and inform the claimant of this. The respondent also blamed its accountants for delay. Again, this is not an excuse as the respondent should have been in control of its professional service providers and, if not, could have written in conciliatory and apologetic terms to the claimant explaining the delay.

145. We would not normally consider the post dismissal decision actions of an employer (apart from the appeal process) to be relevant to the issue of whether a dismissal is fair or unfair, but in this case, the respondent's actions were so extreme and left the claimant in such confusion that we consider they are such as to render the dismissal unfair.

Did the appeal rectify these issues?

146. We do not consider that the appeal rectified these issues. The fact that, unreasonably, the claimant was effectively barred from attending the meeting meant that it was not a reasonable appeal process. It could not rectify the failure to answer questions and facilitate the process because the respondent refused to consider issues about date of dismissal and payments to be made as part of the appeal. It could not rectify the failure to provide adequate information and consult fully because the respondent did not inform the claimant of the actual selection criterion used of pay level.

147. We therefore conclude that the dismissal was unfair.

Notice pay

148. We first note that, following our decision that the employment ended on 9 June, further to an email from the respondent to the claimant of 30 May, the legal position may be that the respondent gave notice of termination on 30 May and any notice pay issues should run from this date. However, this point was not argued by the claimant and the parties did not have chance to make submissions on it. Therefore, we will proceed on the basis argued in the Hearing that notice was set running by the respondent's dismissal notification of 5 May.

149. Although the claimant stated that this written notice did not take effect until 6 May, she provided no authority for this. We find the notice took effect on the date of receipt, 5 May.

150. We consider that the claimant was entitled to 3 months notice of termination of employment, further to the email sent to her by Mr Miller on 9 November stating that "We will give three and you give three". This clearly referred to notice in the context of the emails and the emails were sent in the context of negotiation of terms for the claimant to return to the respondent's employment. We consider that Mr Miller had ostensible authority to negotiate terms as he was chair of the Board and attended a meeting to discuss terms with the claimant and the Managing Director. We accept the claimant's evidence that Mr Miller had the authority to negotiate contractual terms with staff. Arrangements between Mr Miller and the Board as to the extent of his authority, unknown to the claimant, are not relevant.

151. Therefore, the claimant is entitled to the damages for pay and benefits for balance of her notice period for the three months starting on 5 May 2016.

Claim in relation to sick pay

152. The claimant's contract entitled her to full pay for only the first 5 days of sickness. We consider that the respondent was entitled to rely on this and pay SSP thereafter.

153. However, we accept that the claimant should have been paid full pay for 17 May when she offered to come into work and this was declined. At that point, her absence ceased to be due to sickness and was instead due to the respondent's preference for her not to be attending work.

Redundancy pay

154. We do not interpret the respondent's letter of 4 May, as relied on by the claimant, as giving her a right to a contractual redundancy payment of 5 weeks full pay. The section on which the claimant relies starts "Your notice period." Therefore, it clearly refers to her notice period and not the redundancy payment, even if there is a reference to the statutory redundancy scale later in the sentence.

155. Even if, which we do not accept, the letter did state an intention to pay a redundancy payment of 5 weeks actual pay, the letter did not establish a contractual obligation. There was no consideration for the offer. The claimant did not accept the proposal because she appealed.

156. Therefore, we find that the redundancy payment due to the claimant is the statutory sum, agreed as being £1437.00.

Deduction of training fees

157. We find that the respondent is entitled to deduct from the claimant's pay the sums of £80 and £95 in respect of ACAS training. The claimant did not present any legal argument why these sums would not be due.

158. We find that the respondent is not entitled to deduct the fees for the business safety course because the claimant did not successfully complete the course. Under the wording of the claimant's contract, this was a pre requisite of the right to deduct. The respondent was in control of this contract wording and must take the consequences if the circumstances do not fit its wording.

Holiday pay

159. With regards to the seven days holiday in May 2016, we note that the claimant asked to come into the office rather than take the holiday and that the respondent did not deal with this request prior to the holiday dates.

160. There is no entitlement of an employee to unilaterally cancel holiday once the request has been approved by the employer. As the respondent did not concede to the claimant's request to cancel the holiday, we find that the holiday stood and that the claimant took that holiday and it must be taken into account when determining whether she overtook holiday pro rata and to what extent.

161. There were no arguments made to us about the entitlement of the respondent to deduct for overtaken holiday from pay and the claimant agreed that, if she was found to have taken this holiday, she would have overtaken the holiday by 7 days. Both parties agreed that the appropriate deduction would be £623.12. Therefore, we find that this is the sum due from the claimant to the respondent as set off against other sums due from the respondent to the claimant.

Company bonus

162. We find that there was no entitlement to company bonus because the respondent did not meet its financial target for bonus to be paid after it lost a contract. The claimant is not entitled to a bonus payment.

Ormiston bonus

163. The claimant's evidence was that she was verbally promised a bonus in return for working extra hours to draft a suite of policies for the client, Ormiston. She said she was told that the bonus was in the form of a holiday for which she would need a passport. She said that it was due to her in April, May or June 2016. She understood that she would get additional paid holiday to use the bonus.

164. The respondent said that it did offer a reward and it was the intent that the claimant would get an extra week's holiday. It said that the budget was never discussed and it was all discretionary. It said that it would only have paid for flights and offered the claimant use of the family holiday home. The respondent said that there had been an alternative discussion of giving the claimant money for a special meal.

165. In these circumstances, we find that the details of what the Ormiston bonus would be were too vague for any contractual entitlement to have come into place. The claimant has no entitlement to damages for loss of an Ormiston bonus.

Claim for pay in lieu of overtime

166. We find that the claimant worked 30 hours of overtime which were not recompensed, as evidenced by the record on her wipeboard. Mr Lowe's evidence was that the 28.5 hours overtime, which the respondent recognised, was agreed verbally. We therefore find that there was no requirement for the claimant to email her overtime claim to Mr Lowe, as he claimed. No argument was put forward by the respondent that it only gave time in lieu of overtime and not payments. Accordingly, the respondent owes the claimant a payment for this overtime.

Unfair dismissal quantum

167. The respondent argued, on the basis of *Polkey*, that the claimant would have been dismissed in any event even had a fair procedure been followed.

168. We agree with this. The respondent was in a severe financial difficulties facing the loss or prospective loss of turnover of almost £100,000 at a time when the business was already not sufficiently healthy for the directors to be paid a salary. We accept that the respondent may not have been able to meet the May and June payroll had it not made urgent cuts, and that the business was at risk. We accept that the respondent was entitled to make the business decision that, to remain viable, it required to retain at least 2 people in the editorial department, 2 people in the client support department and two part timers in finance. It is not for us to attempt to second guess the employer's business decisions unless there was something manifestly absurd about them which mean they lacked credibility. That is not the case here. Given that the claimant was earning £55,000, which was more than twice as much as the next highest earning employee, making her redundant was the only way to make the savings identified as required without reducing the workforce to a level which was unviable.

169. With respect to the claimant's suggestions for avoiding her redundancy:

169.1. In her lengthy grounds of appeal, the claimant did not suggest she could take a pay cut. Therefore, we do not find that the claimant would have made this offer, even if a fair procedure had been followed.

169.2. In her lengthy grounds of appeal, the claimant did not suggest that the respondent use marketing to replace the lost turnover. Therefore, we do not find that the claimant would have made this offer, even if a fair procedure had been followed. Even if she had done so, we do not find that the respondent would have adopted this proposal to avoid her redundancy because it needed to make immediate savings; marketing for new clients in a medium to long term exercise.

169.3. The claimant did suggest that someone from the finance department be made redundant, and this suggestion was not adopted by the respondent, which was within its management discretion.

169.4. The claimant did suggest that the junior employee in the editorial department, Daisy Whittingham, be made redundant. This suggestion was not adopted by the respondent, which was within its management discretion. It would not have generated the required savings as Ms Whittingham was only paid a salary of £18,500.

170. Therefore, we do not consider that a proper consultation would have resulted in a solution to avoid the claimant's redundancy dismissal.

171. Therefore, the calculation of the compensatory award for unfair dismissal will be limited to:

171.1. pay and benefits for the period of time which we consider would have been reasonable to go through a proper redundancy consultation with the claimant, that is to 20 May 2016 as we now explain. The claimant was signed off to 17 May and the respondent was paying statutory sick pay only for this period. It could reasonably have awaited the claimant's return to work on 17 May and then had a short period of consultation from 18 – 20 May at the manageable cost to it of £220 per day for 3 days prior to termination of employment on 20 May2016. The period of consultation to dismissal would therefore have ended on 20 May. (The notice pay period would then start on 21 May); and

171.2. compensation for loss of statutory rights in the sum claimed by the claimant of £250.

172. The claimant is not entitled to a basic award for unfair dismissal in addition to the statutory redundancy payment payable above.

173. In her schedule of loss, the claimant claimed that an uplift should be applied to the award for failure to follow "the ACAS CODE in several areas". Otherwise, this issue was not raised at the Hearing or argued in the claimant's final submissions and we do not consider it. (If we are wrong on this, we note that the ACAS Code of Practice on disciplinary and grievance procedures does not apply to redundancy dismissals, as stated in its Forward. Therefore, it would not apply to the claimant's dismissal.)

174. We ask the parties to agree the payment due to the claimant on the basis of the findings above. In doing so, we urge the parties, and in particular the respondent, to take a more conciliatory approach than has been shown to this point in the proceedings, and to bear in mind the proportionality of contesting small sums.

175. However, if the parties are unable to agree the sum payable to the claimant, the parties should apply to the Tribunal for a remedy hearing to be listed.

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Employment Judge Kelly

Date 17 May 2017

JUDGMENT SENT TO THE PARTIES ON

17 May 2017

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FOR THE TRIBUNAL OFFICE