EMPLOYMENT TRIBUNALS

Claimant: Ms F Jenkins

Respondent: Interactive Resorts Ltd

Heard at: London Central (by video) **On:** 5, 7 July 2022

Before: Tribunal Judge A Jack, acting as an Employment Judge

Representation
Claimant: In person
Respondent: Mr T Morgan, director of the Respondent

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal succeeds.
2. The claim for a redundancy payment succeeds. The Respondent is ordered to pay the Claimant the sum of £5,984 gross.
3. The claim for wrongful dismissal succeeds. The Respondent is ordered to pay to the Claimant the sum of £7,615.30 gross, being damages for wrongful dismissal.
4. The Respondent made unauthorised deductions from the Claimant's wages. The Respondent is ordered to pay the sum of £12,727.40 gross in respect of the amount unlawfully deducted.
5. The claim under the Working Time Regulations 1998 for pay in lieu of untaken holiday succeeds. The Respondent is ordered to pay the Claimant the sum of £3,149.96 gross as compensation.
6. Each of the above awards is expressed as a gross figure. Provided that the Respondent accounts to HMRC for any tax and national insurance due, payment to the Claimant of the net sum will in each case amount to a valid discharge of this judgment.
7. The Respondent was in breach of contract by failing to pay pension contributions. The Respondent is ordered to pay to the Claimant the sum of £610.28 net, being damages for the breach of contract, and to account to HMRC for any tax and national insurance due in respect of this sum.
8. The Respondent's counterclaim for breach of contract in respect of commission fails and is dismissed.

REASONS

Claims

1. The Claimant's ET1 was received on 9 March 2022 and brought claims for:

    a. Unfair dismissal;

    b. Redundancy pay;

    c. Wrongful dismissal/notice pay;

    d. Unauthorised deduction from wages;

    e. Unpaid pension contributions; and

    f. Holiday pay.

2. The claimant's ET1 did not claim maternity discrimination and there was no application to amend her ET1. I therefore do not consider below what is said in her schedule of loss about potential maternity discrimination regarding her annual leave, and deal only with her claim under the Working Time Regulations 1998.

3. The Respondent's ET3 was received on 19 April 2022. This stated that the Claimant's employment had ended following dismissal for gross misconduct. It made a contract claim for overpay and the return of commission on holidays which had been cancelled due to the pandemic.

Procedure

4. The Claimant first notified ACAS on 16 January 2022, in respect of her claim for unlawful deduction from wages in October, November and December 2021. The Claimant notified ACAS in respect of her claim for unfair dismissal shortly after 22 February 2022. ACAS issued a certificate on 26 February 2022. The Claimant's ET1 was received on 9 March 2022. The Respondent's case in its evidence is that she was dismissed on 30 November 2021, in part because of her failure to return to work in October 2021 (although the ET3 stated in paragraph 4 that she was dismissed on 31 September 2021). The Claimant's case is that she was not dismissed until 22 February 2022. In either event the Tribunal has jurisdiction to hear these claims.

5. There were witness statements from: (i) the Claimant; (ii) Mr Edward Jenkins, the Claimant's father; (iii) Mr Theodore Morgan, director of the Respondent. There was a bundle of 160 pages, a supplementary bundle of additional documents from the Claimant, and the Claimant's Schedule of Loss. Mr Morgan disclosed to the Claimant two documents on the morning of the hearing: a letter from the Respondent's accountant dated 20 June 2022 which was referred to in Mr Morgan's witness statement of

the same date; and an email exchange on 14 June 2019. Taking account of the overriding objective of dealing with the case fairly and justly I considered it appropriate to allow the Respondent to rely on these documents, each of which is only one page long, so that the Respondent was able to present its case as fully as possible.

6. I asked the parties to refer me to any document which they wanted me to take into account.

7. Mr Morgan had applied on 11 April 2022 for the case to be adjourned on the basis that it should be heard together with another case against the same Respondent (2200556/2022) which is listed for a full merits hearing on 1 and 2 September 2022. His application was refused by REJ Wade on 6 May 2022. He renewed that application at the beginning of the hearing. He argued that there was a danger that the Respondent's position would not be clear if the two cases were heard separately. He further argued that the background to this case involves an improper relationship between the Respondent's former financial controlling officer, and the Respondent's former accountants. He said "How much knowledge, information, involvement the Claimant had, I do not know". There was litigation involving the former accountants and a potential criminal investigation and the Respondent's position would potentially be prejudiced if further information came to light as a result of the litigation or investigation only after the Claimant's case had been heard. The Claimant argued that the case should proceed. She said that she had not been aware of any allegations of gross misconduct against her until she received the ET3 and it would be fair to proceed with her case now. When I questioned him, Mr Morgan told me that the former accountants had obtained summary judgment against the Respondent but that he had applied for that to be set aside, and that he had notified Action Fraud who wanted him to collate his evidence before they decided whether or not to take any action.

8. Having regard to the overriding objective of dealing with cases fairly and justly, including the need to avoid delay so far as compatible with proper consideration of the issues, I refused the application for an adjournment. It was unclear whether or not the litigation involving the former accountants would result in new evidence coming to light regarding the context to the Claimant's dismissal, and unclear whether or not Action Fraud would decide whether to investigation. The allegations against the former chief financial officer and former accountant were unevidenced and Mr Morgan's suggestion that new evidence might come to light regarding the Claimant was entirely speculative. Mr Morgan had himself said that he did not know to what extent, if any, the Claimant had had any involvement in what he said was the improper relationship between the former accountants and the former chief financial officer. Allegations of gross misconduct had been made against the Claimant in the current proceedings and the Claimant was entitled to have her claim determined unless there was a good reason to delay. The Respondent would have the opportunity to make its position clear in these proceedings, and no reason had been given to think that that would be possible only if the two cases were heard together.

9. It was apparent from my prereading that Mr Morgan is a person with dyslexia, and we agreed at the start of the hearing that during the hearing

we would take regular short breaks. Mr Morgan also has diabetes. He monitors his blood sugar level and we agreed breaks and a suitable time for lunch accordingly. On the second day of the hearing the parties were scheduled to give closing submissions in the afternoon. The Claimant gave her closing submissions orally from a typed document which was not in a finished form and so was not suitable to send Mr Morgan. Mr Morgan responded with a number of points. However he also said that he had difficulty responding to the Claimant's closing submissions due to his dyslexia. I directed the Claimant to provide a written copy of her submissions by 4pm on Friday 8 July and the Respondent to provide its written submissions no later than 4pm on Tuesday 12 July 2022, making clear that this was not an opportunity for either party to seek to admit new evidence.

10. Each party provided full written closing submissions. The Claimant's written submissions were essentially the same as the oral submissions that she made at the hearing. The Respondent submitted an extensive and thorough response, which (as I note below) goes beyond what was in evidence at a couple of points. There is need to comment further on the complaints each party made in correspondence to the tribunal and to the other party, about the other party's submissions.

11. The purpose of the hearing was to consider both liability and remedy. Before the end of the hearing Mr Morgan asked when, if the Claimant were to succeed, the Respondent would need to make any payment that was ordered to be made.

Findings of Fact

12. The Respondent's case is that the decision to dismiss the Claimant was taken on 30 November 2021, the Claimant having failed to take part in an investigation and disciplinary procedure, and that a letter was sent to her on 6 December 2021 informing her that she was dismissed. The Claimant was also told in a phone call on 7 December 2021 that she had been dismissed. The Claimant's case is that she was not aware that she was no longer employed until 22 February 2022, when she received a copy of her P45 from the Respondent's accountant. Further, she was not aware that she had apparently been dismissed for gross misconduct until she received the ET3.

13. I begin by making findings on less contentious matters, findings which are whenever possible supported by documents which I have no reason to doubt are reliable guides to the truth.

14. The Respondent is a ski travel agent which specialised in the sale of catered chalet holidays.

15. The Claimant began working for the Respondent as a Sales Consultant on 24 August 2010 (contract in the bundle, p. 31). Her salary was £18,000, plus commission.

16. She became a team leader in 2015. Her salary at that time was £26,000 plus commission. Her salary was broken down into £22,500 basic salary for the working week, £1,500 salary for weekend hours and £2,000 for

management pay. This is evidenced by an unsigned contract between the Claimant and Mr Morgan: salary and its elements are dealt with at p. 41 of the bundle.

17. She became a Sales and Operator Manager in July 2018, and this was her role when her employment ended. There is an email in the bundle at p. 54, dated 31 July 2018, from a then Director of the Respondent. This states that her salary will be "£38k basic", and she will receive 8% on all personal sales and an additional 2 days holiday.

18. Her payslip for 31 January 2020 shows that she was paid salary of £2,500, Comms of £936.47 and MGR of £499.98. Comms refers to commission rather than salary. MGR refers to management pay. The amounts for 'salary' and 'management pay' together are equivalent to an annual salary of £35,999.76. She was effectively paid £36,000 (excluding commission) and not paid £38,000, as £2,000 of her salary was a performance allowance, the payment of which was dependent on sales, and the performance allowance was not paid in January 2020. It has not been paid since.

19. The Claimant was put on furlough on 27 March 2020 (bundle, p. 63). She went on maternity leave on 6 July 2020.

20. The Claimant emailed the Respondent on 3 February 2021 as she expected to return from maternity leave on 6 April 2021 (bundle, p. 68). Mr Morgan replied saying that staff had been asked if they would agree that their current employment contract would end when furlough finished, to be replaced by a consultancy contract to cover the time from the end of the furlough scheme to the arrival of revenue in the business. The email said "please understand this is just for consideration nothing is being demanded from you". On 12 February 2021 Mr Morgan emailed the Claimant and said that he would need to know once her maternity leave had ended whether she agreed to changing her current contract (p. 70). The Claimant returned from maternity leave on 4 April 2021 and was placed back on the government's furlough scheme until it ended on 30 September 2021. While on furlough, she emailed Mr Morgan on 26 July 2021, to say that she did not want to move to a consultant agreement and wanted to keep her current working arrangements (bundle, p. 72). She did not at any time agree to change her contract.

21. Prior to her return from maternity leave she emailed Mr Morgan on 22 March 2021 (p. 72), to say that she was being paid £2,500 on furlough before she went on maternity leave. In this email the Claimant also said that Mr Morgan had asked if she could "volunteer" to help out with a few bits. Her understanding was that she had been asked to do work on furlough without being paid. She did not accept this, saying that although she did want to help out, she did not feel able to commit to doing so "just now", due to her baby.

22. Mr Morgan and the Claimant agreed that she would remain on the furlough rate of £2,500 for October, November and December 2021, after the government's furlough scheme had ended. Mr Morgan agreed that this was the case in his evidence: he said that the only alteration to the Claimant's contract was that she would be paid £2,500 in October,

November and December 2021. Further, the ET3 states that the Claimant agreed a rate of pay equivalent to furlough with a view to the company's relaunching in January 2022. The Claimant's evidence, which I accept, is that Mr Morgan said that it was in his interest to keep her so that he had experienced staff available for when he began trading again.

23. The detailed terms of the Claimant's contract of employment are as set out in the unsigned contract which commenced on 1 July 2015 (bundle, p. 38 and following). The terms of this contract were varied in July 2018. The Claimant's salary was varied to £38,000 (p. 54), although this included a performance allowance of £2,000 which was dependant on sales and so was not guaranteed. The Claimant's leave entitlement was varied to 24 days plus bank holidays (p. 55, read with the unsigned contract). The contract was further varied when the Claimant and Mr Morgan agreed that the Claimant's salary in respect of October, November and December 2021 only would be reduced to £2,500.

24. The Claimant was not paid in October 2021.

25. On 9 November 2021 the Claimant attempted to ring Mr Morgan at 9:57 but was only on the phone for 3 seconds (bundle, p. 86). Mr Morgan texted the Claimant at 9:58 to say that he was driving but would call her back in about half an hour (bundle, p. 83). He did ring her back. The Claimant wanted to speak to Mr Morgan as she was chasing him for her pay (Claimant's witness statement, paragraph 25). It is clear from the text that the Claimant sent Mr Morgan at 12:48 that they had discussed the Claimant's current contractual arrangements. In her text the Claimant provided Mr Morgan with her current home address in London (which is in SW16), and details of her current contract, stating that the salary that had been agreed at the time she became sales manager was £38,000, plus commission of 8% on all personal sales. The text asked Mr Morgan if he needed to see the email with details of what had been agreed. (That is a reference to the email of 31 July 2018 referred to at paragraph 17 above.) Her text also said that she had not had anything in writing confirming that she would be "furloughed" for October, November and December and that the Respondent would continue to pay her the furlough rate of £2,500. She asked for this in writing. Although Mr Morgan had sent a text on this chain earlier on 9 November 2021, he did not respond to this text. Taking account of the surrounding documentary evidence I am satisfied that during this conversation about the Claimant's pay and contract, Mr Morgan did not object that the Claimant had not made herself available for work or state that she was required to do so. Nor did he reply to the Claimant's texts regarding her contract to say that she had not made herself available for work, or to ask her to work.

26. The Claimant sent further texts to Mr Morgan on 17 November and 29 November 2021 chasing her October pay, saying that she had not been paid yet (bundle, p. 84). Those texts were not replied to.

27. The Claimant received payslips for October 2021 and November 2021 purporting to show that she was paid £3,166.67 gross in each of these months and that tax and National Insurance contributions had been deducted (bundle, p. 79 and 80). However it is not disputed that she was not paid in these months and has not received any payment subsequently.

28. The Claimant rang Mr Morgan and spoke to him for 29 minutes on the phone on 7 December 2021 (bundle, p. 86: this is a record of calls made *from* the Claimant's phone). There is a dispute as to what was said in that phone call. Mr Morgan's evidence was that he told the Claimant that she had been dismissed. He said in his evidence that "when you dismiss someone you communicate with them as well as in writing to make sure they have understood it". The Claimant denies she was told she was dismissed. For the reasons which I give below, I accept the Claimant's evidence.

29. The Claimant emailed Mr Morgan on 28 December 2021 to raise a grievance about the non-payment of her salary in the last two months and seeking confirmation that she would receive her December pay. This email said "I am a full-time member of staff" (p. 82). Mr Morgan did not reply to this email and did not deny that she was still an employee. He did not respond to her grievance.

30. The Claimant emailed the Respondent's accountants on 21 February 2022, saying that she was an employee of the Respondent and asking for her payslips. They emailed her on 22 February 2022, attaching a P45 which stated that she had left the respondent on 30 November 2021.

31. The Claimant applied for Jobseeker's Allowance on 23 February 2022 (bundle, p. 93).

32. The Claimant emailed the Respondent's accountants on 25 February 2022 expressing surprise at having received a P45 when she had not been told her employment had ended or resigned, and asking a number of questions (bundle, p. 75). The accountants replied on 4 March 2022 asking her to take up her queries with Mr Morgan and copying him in. The Claimant sent Mr Morgan an email on 5 March 2022 asking why she had received a P45 as, she said, he had not consulted her or followed any fair process. Mr Morgan did not reply to that email.

33. There is a stark dispute between the parties as to whether the Claimant was told in the phone call which she made to Mr Morgan on 7 December 2021 that she had been dismissed. The Claimant denies that she was told this. I find that Mr Morgan did not tell her that she was dismissed in this phone call, let alone that she had been dismissed for gross misconduct. I am satisfied that she did not become aware that she was no longer employed by the Respondent until 22 February 2022, when she was emailed her P45.

34. This is because:

    a. Her emails of 28 December 2021 and 21 February 2022 stated that she was an employee. I find that she still believed that she was an employee.

    b. She applied for Jobseeker's Allowance on 23 February 2022, the day after she received her P45, and not before. Had she known earlier that she was no longer an employee, she would have claimed Jobseeker's Allowance earlier.

c. Had the Claimant been told on 7 December 2021 that she had recently been dismissed on the grounds of gross misconduct, she would have sought to appeal that decision immediately.

d. The phone call on 7 December 2021 was made by the Claimant to Mr Morgan, so he did not call her to make sure that she understood her dismissal.

35. For these reasons, I am satisfied that Mr Morgan's evidence on an important point in this case, regarding what he said in the phone call of 7 December 2021, should not be accepted. I do not see how his very clear evidence about the phone call on 7 December 2021 can be explained either as a misunderstanding or as misremembering. The context that I have detailed above undermines his credibility on this important point.

36. There are four documents in the bundle regarding an investigation and a disciplinary meeting which Mr Morgan says took place. There is a letter dated 9 November 2021 informing the Claimant that she is required to attend an investigation meeting on 16 December (p. 149). There is a letter dated 10 November 2021 informing the Claimant that she is required to participate in an investigation interview on 16 November (p. 150). There is a letter dated 16 November 2021 stating that the Claimant is required to attend a disciplinary meeting on 30 November 2021. This states that details of the investigation which has been carried out are enclosed. That document is not in evidence. Finally, there is a letter dated 6 December 2020 stating that it had been decided that the Claimant was dismissed for gross misconduct and giving reasons for dismissal (p. 154). The reasons are stated to be:

    a. Unsavoury emails between the Claimant and a former director of the Respondent about a director of the company (i.e. Mr Morgan) which made the Claimant's position with the company untenable;

    b. The Claimant had received illicit payments from the company which had been paid without the agreement of the board of the company; and

    c. The Claimant had not returned to work after furlough and had not made herself available for work.

    Mr Morgan's evidence was that the typos in these four letters and incorrect dates (e.g. 2020 rather than 2021 in the fourth letter) were corrected before they were sent, and that these are not copies of the letters that were actually sent. The letter dated 6 December 2020 was, he says, in fact sent on 6 December 2021. The Respondent relies on these letters to evidence its case that an investigation was carried out and a disciplinary meeting held, a process in which the Claimant did not participate, and that it was decided to dismiss the Claimant, whose last day of service was 30 November 2021.

37. Mr Morgan's evidence was that all four of the letters were sent to an address in London (which is in W6).

38. The Claimant used to live at that address. She no longer lives there. However it is still occupied by her parents, who ensure that she receives

any mail that still arrives there for her. I find on the basis of Mr Jenkin's very clear evidence that none of these letters has ever arrived at that address. They did not arrive in November or December 2021 and they have not arrived since. I find that the reason that none of these letters arrived at this address is that they were not sent. Mr Morgan's evidence is that he signed these letters, and that his children who were aged 5, 7 and 9 in November 2021 posted them. He adds to this in his closing submission that his children were always accompanied by his wife when they went to the post box. I have found that none of these letters arrived. I find that it is more likely than not that the explanation for the failure of four separate letters to arrive is that they were not posted.

39. There is some confirmation that a disciplinary hearing took place at some point, in the form of the letter dated 20 June 2022 from the Respondent's accountant, Mark Jones, which was exhibited to Mr Morgan's witness statement (although, as I noted above, it was not disclosed to the Claimant until the first day of the hearing). This states that Mr Jones attended a disciplinary hearing which the Claimant did not attend, but does not say on what date the hearing took place. In deciding how much weight to place on this letter I have taken into account the fact that Mr Jones has not provided a witness statement and did not attend the hearing to give evidence.

40. In deciding how much weight to attach to the four letters, I take into account the fact that the bundle contains payslips for the Claimant for October, November and December 2021 even though it is accepted that she was not paid in any of these months. The letter from Mr Jones states that the December 2021 payslip was produced because a member of the team at the accountancy firm had not been told that the Claimant had left. The letter further states that this was corrected and the payslip for December 2021 was removed from the payroll run for December 2021. That cannot explain the October and November 2021 payslips. Those documents are not reliable guides to the truth, which leads me to doubt that the four letters are reliable guides to the truth of their contents.

41. In making my findings I have also taken into account the paucity of documents supporting the Respondent's case. Mr Morgan gave a number of explanations during the course of the hearing of why evidence which he said supported case was not available. He has not produced emails e.g. the emails which he says were sent to the Claimant's work email regarding the investigation and disciplinary process, because he is no longer able to access the back up of company emails now that payments are not being made to the company that kept the data. He still has access to his own work email account, but said that he is not able to retrieve emails he sent which are more than four months old. He said in his witness statement that "the only contract [between the Claimant and the Respondent] on file is dated 31 July 2013", but he said that he had not produced the contract as documents had been put into storage. He had not produced the minutes from the investigation meeting which the accountant Mr Jones attended, because although he had chased Mr Jones for the minutes, Mr Jones had been seriously ill and had not supplied them (although he had supplied the letter referred to above dated 20 June 2022). He had not produced the final corrected versions of the four letters because the final changes were not saved on his iPad. He did print off copies of the final letters for himself for his records, however this was done at home and he has since moved

house. Allowing for the difficulties that the Respondent has faced as a result of the pandemic, I consider it inherently unlikely that the Respondent conducted an investigation and disciplinary process which led to an immediate dismissal on the grounds of gross misconduct, but then failed to keep records of almost all of the relevant documents.

42. I consider it more likely than not that the fact (as I have found it) that Mr Morgan did not refer to the Claimant's dismissal when she rang him on 7 December 2021, in a call which lasted 29 minutes, is due to no decision having been taken to dismiss her prior to 7 December 2021. I also consider it to be more likely than not that the fact (as I have found it) that the four letters were not posted is due to their not having been drafted at the time. Had they been in existence at the time, they would have been sent. I find that, at some point after 7 December 2021, Mr Morgan did consider that he had dismissed the Claimant. A P45 was produced, and that can only have been on his instructions. However he did not tell the Claimant, either verbally or in writing, that she was dismissed.

43. The Respondent specialised in selling skiing holidays and is in significant financial difficulties as a result of the pandemic. In October, November and December 2021 it had no need of sales staff and therefore had no need for someone to manage sales staff or sales operations. I make this finding on the basis of Mr Morgan's oral evidence which was that "There was no requirement for someone managing staff" and that he was trying to ensure that the Claimant's job "existed again once the business picked up". However the Respondent did not relaunch in January 2022, and has not started to sell ski holidays again. It therefore had no need of someone to manage sales staff or sales operations in January or February 2022.

44. The Claimant was successful in finding new employment from 23 May 2022. She received Job Seekers Allowance for the period 23 Feb 2022 – 22 May 2022.

The Law

Unfair dismissal

45. An employee has the right not to be unfairly dismissed by her employer: s. 94(1) Employment Rights Act 1996 (ERA).

46. An employee is dismissed by her employer if the contract under which she is employed is terminated by the employer (whether with or without notice): s. 95(1)(a) ERA.

47. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal: s. 98(1) ERA.

48. The burden is also on the employer to show that the reason is a potentially fair reason, such as a reason that relates to the conduct of the employee: 98(2)(b) ERA.

49. Section 98(4) ERA provides that where an employer has shown the reason for the dismissal and that the reason is a potentially fair reason,

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.

50. It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct e.g. theft. The employer does not have to prove that the employee was in fact stealing (*Aldair Ltd v Taylor* 1978 ICR 445, CA).

51. *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17 is clear that in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. The tribunal is to determine whether, in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair.

52. For the purposes of establishing the effective date of termination under s.97(1)(b) ERA, where a dismissal is communicated to an employee in a letter, the contract of employment does not terminate until the employee has actually read the letter or has had a reasonable opportunity to read it: *Gisda Cyf v Barratt*, 2010 WL 3975647.

53. The amount of any basic award must be reduced by the amount of any redundancy payment awarded by the tribunal in respect of the same dismissal: s. 122(4)(a) ERA.

54. The amount of any compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the Claimant in consequence of the dismissal: s. 123(1) ERA. A reduction in the compensatory award may be made where the unfairly dismissed employee could have been dismissed fairly if a proper procedure had been followed: *Polkey v AE Dayton Services Ltd* 1988 ICR 142.

Redundancy Payment

55. An employer must pay a redundancy payment to an employee who is dismissed by reason of redundancy: s. 135(1)(a) ERA.

56. If the contract under which an employee is employed is terminated by the employer (whether with or without notice), then the employee is dismissed: s. 136(1)(a) ERA.

57. An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him, or the fact

that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished: s. 139(1) ERA.

58. When determining a claim for a redundancy payment, the tribunal must presume, unless the contrary is proved, that an employee who was dismissed was dismissed by reason of redundancy. s. 163(2) ERA.

59. However an employee is not entitled to a redundancy payment by reason of dismissal where his employer, being entitled to terminate his contract of employment without notice by reason of the employee's conduct, terminates it without notice: s. 140(1)(a). When considering s. 140(1)(a), the test is whether the employee was guilty of conduct which was a significant breach going to the root of the contract or which showed that the employee no longer intended to be bound by one or more of the essential terms of the contract. The burden is on the employer to show that this test, which is an objective one, is met (*Bonner v H Gilbert Ltd* [1989] IRLR 475).

Wrongful dismissal/notice pay

60. The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for more than two years but less than twelve years is not less than one week's notice for each year of continuous service: s. 86(1)(b) ERA. This does not affect any right of either party to treat the contract as terminable without notice by reason of the conduct of the other party: s. 86(6) ERA.

61. If an employer fails to give the notice required by s. 86, the rights conferred by section 88 (among others) must be taken into account in assessing his liability for breach of the contract: s. 91(5) ERA. Section 88(1)(a) ERA provides that a worker with normal working hours under the contract of employment is entitled to payment if she is ready and willing to work, but no work is provided for her by her employer.

Unauthorised deductions

62. A worker has a right not to suffer unauthorised deductions from her wages. The relevant part of s. 13 ERA reads:

> "(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."

63. There are exceptions to this right. In particular, s. 13 does not apply to a deduction made where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages made (for any reason) to the worker: s.14(1)(a) ERA.

64. The word "wages" is defined as meaning any sums payable to the worker in connection with her employment, including commission: s. 27(1)(a) ERA.

65. Where a payment of commission is made to which the worker is entitled at that time, the payment cannot retrospectively become an overpayment for the purposes of s. 14(1) ERA even if a duty to reimburse the payment arises later. "The fact that there may at a later date have arisen a duty to reimburse the employer would not retrospectively allow the original payment to be characterised as an overpayment", (*Key Recruitment UK Ltd v Mr J C Lear* EAT 0597/07, paragraph 11).

Annual Leave

66. Regulation 13(1) of the Working Time Regulations 1998 (WTR) provides that a worker is entitled to four weeks of annual leave in each leave year. Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which she was entitled under regulation 13 as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave: regulation 13(10) WTR.

67. Regulation 13A(1) and (2)(c) WTR provide that a worker is also entitled to another 1.6 weeks additional leave in any leave year beginning after 1 April 2009.

68. Where a worker's employment is terminated during the course of her leave year, she is entitled to a payment in lieu of any untaken leave to which she was entitled under regulations 13 and 13A: reg 14(2) WTR.

Conclusions

Unfair dismissal

69. The Claimant was employed by the Respondent. She was dismissed, as the contract under which she was employed was terminated by the Respondent. However the Claimant did not become aware that she was no longer employed until 22 February 2022, when she received her P45.

70. For the purposes of establishing the effective date of termination under s.97(1)(b) ERA, where a dismissal is communicated to an employee in a letter, the contract of employment does not terminate until the employee has actually read the letter or has had a reasonable opportunity to read it: *Gisda Cyf v Barratt*. The Respondent was not sent a letter informing her that she had been dismissed, and a P45 is a tax document rather than a letter of dismissal. However extending the principle in *Gisda* to this case, the contract of employment did not terminate until the Claimant read the P45, and became aware that the Respondent considered that her contract of employment had been terminated. The effective date of her termination is therefore 22 February 2022.

71. The Respondent says that the reason or principal reason for dismissal was conduct, and that its reasons were as stated in the letter a draft of which is dated 6 December 2020. In a claim for unfair dismissal, it is for the Respondent to prove the reason for the dismissal. I explained above (at paragraph 40) why I doubt that the four letters are reliable guides to the truth of their contents. Given my finding (at paragraph 42) that this letter was not drafted at the time, I do not accept that it shows that the reason for dismissal was conduct. I consider that the respondent has not discharged the burden of proving the reason for the dismissal.

72. The claim for unfair dismissal therefore succeeds.

Redundancy Payment

73. The Claimant was dismissed, as the contract under which she was employed was terminated by the Respondent.

74. In a claim for a redundancy payment, the tribunal must presume, unless the contrary is proved, that an employee who was dismissed was dismissed by reason of redundancy. Given my assessment of the Respondent's evidence, I consider that the contrary has not been proved.

75. The Respondent relies on the four letters to show that the reason for the dismissal was conduct. For the reasons given above, I have found that those letters were not in existence at the time at which the Respondent says that it decided to dismiss the Claimant for conduct reasons (paragraph 42). They therefore do not show that the reason for dismissal was conduct.

76. Indeed, I have found that in the period October 2021 – February 2022 the Respondent no longer needed someone to manage sales staff or sales operations, as there were no sales staff or sales operations to manage. The requirements of the business for employees to carry out the work of that particular kind had therefore ceased at the time that she was dismissed. The Respondent had no need for a Sales and Operator Manager. The Respondent did not relaunch in January 2022, and there was therefore no need for a Sales and Operator Manager at the start of 2022.

77. I conclude that the real reason for the dismissal was wholly or mainly attributable to the fact that the requirements of the business for a Sales and Operator Manager had ceased. In other words, the real reason for the Claimant's dismissal was redundancy.

78. The Claimant is therefore entitled to a redundancy payment unless the Respondent was entitled to terminate her contract without notice by reason of her conduct, and did terminate it without notice. The Respondent did terminate her contract of employment without notice. So I must consider whether the Claimant's conduct *entitled* the Respondent to dismiss the Claimant for gross misconduct even though it in fact dismissed her because of redundancy.

79. The first reason given by the Respondent said to entitle the Respondent to terminate the Claimant's contract without notice were two emails sent by the Claimant which Mr Morgan became aware of as a result of his investigation into a former director of the company, who was also the company's financial controlling officer and the Claimant's line manager. The first email is dated 4 October 2019 (p. 158). In it the Claimant says that Mr Morgan has asked for a job offer to be sent to a candidate for a job, and that Mr Morgan has said that the candidate is to be offered as little as possible in terms of salary because he is, in what are said to be Mr Morgan's words, "iglu scum". Iglu is an online travel agency, so the meaning of the email is that Mr Morgan had said that the candidate was to be offered as little as possible because he was "scum" who had worked for the rival travel agency. The Claimant says that she was merely reporting Mr Morgan's words. Mr Morgan says that he did not use the word "scum" and would never have used it: the Claimant was lying about him. Mr Morgan said in oral evidence that the email was also unacceptable because of the risk that the candidate, once hired, might have become aware of the words that the Claimant had used. He said that there was as a result of the email a breakdown of trust between him and the Claimant, sufficient to justify immediate dismissal. To put the Respondent's position in legal terms, it is said that the Claimant had breached the implied term of trust and confidence and that the breach was so serious as to justify immediate dismissal.

80. I must consider this issue objectively. The email was some two years old when Mr Morgan became aware of it. There is no evidence that the candidate ever became aware of the words used once he became an employee. The email says on its face that the words are the words of Mr Morgan i.e. the Claimant was quoting these words rather than using them herself. The Claimant had eleven years of service by the time that Mr Morgan became aware of the email. Mr Morgan says that the email is a lie. The Claimant says that she was merely reporting his words. It is clear from the face of the email that she believed that she was reporting his words and that she was not approving of them. Having had the opportunity to assess the credibility of both the Claimant and Mr Morgan I am not satisfied that the Claimant was lying rather than reporting words Mr Morgan had used. As noted above, the burden is on the employer to show that the employee was guilty of conduct which was a significant breach going to the root of the contract or which showed that the employee no longer intended to be bound by one or more of the essential terms of the contract. Given that I am not satisfied that what was said in this email was

a lie, I am not satisfied that that this email was a breach of the implied term of trust and confidence that was so serious as to justify immediate dismissal.

81. The second email is dated 14 June 2019. In it the Claimant says that Mr Morgan has rung and wants to have a catch up. She asks her then line manager what she wants her to do and say. Her then line manager replies that she will ring Mr Morgan. The Respondent gave no context to this email, so it is difficult to see it as any more than the Claimant responding to a request for a catch up by one director of the company by asking her own line manager, who was also a director of the company, how she should respond. This could not justify immediate dismissal.

82. The second reason given by the Respondent said to entitle the Respondent to terminate the Claimant's contract without notice was that she had received illicit payments from the company which had not been properly authorised. It is said that the Claimant is unable to produce a contract justifying the payment of the salary which she in fact received. But it is within the knowledge of the tribunal that employers do not always provide employees with written contracts, but do pay the salary that has been agreed. That there is no written contract for the level of salary agreed in July 2018 is not a ground of complaint against the employee: she was not provided one when she became Sales and Operator Manager. There is an email exchange between the Claimant and the former director of the company, who was also its financial controlling officer, evidencing that her salary had increased. I have found that her salary was agreed to be £38,000 including a performance allowance of £2,000 which was dependant on sales. The Respondent has itself failed to keep a record of this exchange, but that is not a ground of complaint against the Claimant. It is also said that the Claimant improperly benefited from holidays provided by clients of the firm, but when Mr Morgan was asked to be specific about the trips he was alleging were improper, he was unable to do so. Viewed objectively, the second reason given could not justify immediate dismissal.

83. The third reason relied on by the Respondent was that the Claimant did not return to work after furlough and had not made herself available for work. There is however no evidence of the Claimant being asked to work or of her refusing to do so. The Claimant did refuse to work voluntarily while she was on furlough. In her email of 22 March 2021 she said that Mr Morgan had asked if she could "volunteer" to help out with a few bits, and she refused. I have found that her understanding was that she had been asked to do work on furlough without being paid. Mr Morgan's evidence was that if this was her understanding then it was a misunderstanding. Refusing to do unpaid work while on furlough is not evidence of an unwillingness to work, and if this was a misunderstanding such a misunderstanding, viewed objectively, could not help justify immediate dismissal. The Claimant believed that she did not need to work in October, November and December 2021 while she remained on her furlough rate of pay. I am satisfied that this is the case on the basis of her text of 9 November 2022 at 12:48, asking for written confirmation that she would be "furloughed" for October, November and December (after the end of the government's furlough scheme) and that the Respondent would continue to pay her the furlough rate of £2,500. As I have found, Mr Morgan did not

respond to this text, he did not object that the Claimant had not made herself available for work, or state that she was required to do so. There is no evidence of the claimant being asked to work after the end of the government's furlough scheme, or of her refusing to do so. If the Respondent wanted the Claimant to work, it should have asked her to do so, although after the end of the government's furlough scheme it had no need for someone to manage sales staff or sales operations. Viewed objectively, this reason could not justify immediate dismissal.

84. To conclude, I am not satisfied that the Respondent would have been entitled to terminate the Claimant's contract without notice by reason of her conduct. Her claim for a redundancy payment therefore succeeds.

Wrongful dismissal/notice pay

85. The parties agree that the Claimant was not paid notice pay. Under clause 11.2 of her contract, she was entitled to 2 weeks written notice unless she was dismissed for gross misconduct. I have found that the real reason for her dismissal was redundancy. She was not in fact dismissed for gross misconduct.

86. The Claimant had eleven years of continuous service by 23 August 2021. She was therefore entitled to a minimum of eleven weeks' notice: s. 86(10(b) ERA. The effective date of the Claimant's termination was 22 February 2022. She started work with another employer on 23 May 2023 and received Job Seeker Allowance in respect of the period 23 February 2022 to 22 May 2022. I find that she was ready and willing to work during her notice period, but no work was provided for her by her employer. For the reasons given above, I am not satisfied that the claimant did something so serious that the respondent was entitled to dismiss her without notice.

87. She is therefore entitled to eleven weeks' notice pay.

Unauthorised deductions

88. The effective date of the Claimant's termination was 22 February 2022. It is not disputed that she did not receive any salary after 1 October 2021. I have found that she was entitled to £2,500 gross in respect of October, November and December 2021, and that her then salary reverted to £36,000. In addition to her salary of £36,000 she was also entitled to a sales dependant performance allowance, but she would not have been able to earn this in early 2022, given that the Respondent was not selling ski holidays.

89. The Respondent says that it was entitled to make deductions to correct for commission which was overpaid as a result of the subsequent cancellation of the holidays for which the commission was initially paid. That raises the question of whether the Claimant is entitled to rely on the protection of s. 13 ERA at all, as s. 13 does not apply to a deduction made where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages: s. 14(1)(a) ERA. However *Key Recruitment* is clear that a payment of commission to which an employee is entitled when it is made does not become an overpayment even if a duty to

reimburse the commission subsequently arises. The claimant is therefore entitled to the protection of s. 13.

90. The Respondent relies on clause 5.3.1 (bundle, p. 42) of the unsigned contract which commenced on 1 July 2015 as authorising the deductions made. This provides that when the employee leaves the employer, the employer will deduct any overpayments, advances and holiday pay taken in excess of the employee's pro rata allowance. Clause 5 concerns remuneration. Clause 5.1.2(a) provides that in season commission is based on each booking. There is however no written term that the employee must reimburse commission if a booking is cancelled, or that commission that has been paid will be treated as an overpayment for the purposes of clause 5.3.1 if it was paid in respect of a booking that has since been cancelled. I conclude that there is not a relevant provision comprised in one or more written terms of the contract which authorises the deduction of commission which was properly paid, but which relates to a booking that has since been cancelled.

91. Mr Morgan's evidence suggested that the Respondent may have had a custom and practice of recovering commission from the final salary payment made to employees who were leaving the company. That suggests that there may have been an implied term of the Respondent's contract of employments that the employee must reimburse commission if a booking is cancelled, or that commission that has been paid will be treated as an overpayment for the purposes of clause 5.3.1 if it was paid in respect of a booking that has since been cancelled. However there was no suggestion that the existence and effect of any such term, or of its combined effect with the written terms of the contract, was ever notified to the Claimant in writing prior to the deductions which have been made.

92. There is in any event no evidence as to the amount of commission that was paid to the Claimant in respect of holidays which were subsequently cancelled due to the pandemic. The Respondent's closing submissions quantified this figure for the first time, saying that the Respondent has calculated commission owed by the Claimant to the Respondent in respect of cancelled holidays at £5,703. There is however no evidence before the tribunal as to the amount of commission that was paid to the Claimant in respect of holidays which were subsequently cancelled due to the pandemic.

93. I conclude that the Claimant was entitled to payments of her salary in respect of the period 1 October 2021 to 22 February 2022, and that the failures to make those payments are deductions for the purposes of s. 13 ERA. Those deductions were not authorised by a relevant provision of the Claimant's contract. They were not authorised by a statutory provision, and the Claimant did not agree to them in writing before they were made. They were therefore unauthorised, and the claim for unauthorised deductions succeeds.

Unpaid pension contributions

94. There is no dispute that the Respondent did not pay employer pension contributions in respect of the Claimant for the period 1 October 2021 to 22 February 2022. The Claimant's undisputed evidence was that she

ordinarily received employer contributions at the rate of 0.03%. Her entitlement to join a stakeholder pension scheme was dealt with at clause 8.1 of her contract (bundle, p. 44). The Respondent therefore breached her contract by failing to pay employer contributions, and the claim for breach of contract arose or was outstanding when her employment ended.

95. Her claim for breach of contract in respect of unpaid employer contributions therefore succeeds.

Annual Leave

96. The Claimant's leave year ran from 1 May to 30 April. The effective date of her termination was 22 February 2022. So 9.75 months of her leave year had passed when her employment ended. She did not take any leave in the period 1 May 2021 to 22 February 2022. There is no dispute that the Claimant was not paid in lieu of accrued leave outstanding when her contract of employment was ended.

97. Her contractual entitlement was to 24 days plus bank holidays. The Claimant's contract provided at clause 6.5.5 that, on termination of her employment, she would lose her entitlement to payment of accrued holiday in lieu of leave outstanding if her employment was terminated on the grounds of gross misconduct or where the full contractual notice period was not served by the employee. The contract did not permit the carry-over of leave from a previous leave year without prior agreement.

98. However the Claimant's claim for unpaid accrued leave, including for leave carried over from a previous leave year, is brought under the Working Time Regulations 1998 (WTR). She argues that she did not take her leave in the year 1 May 2020 to 30 April 2021 as a result of the effects of coronavirus, and so was entitled to carry over her untaken leave into her final leave year. On the basis of paragraph 19 of her witness statement I am satisfied that she did not take annual leave for much of her 2020-2021 leave year because she was on maternity leave, and not because of the effects of coronavirus. On the basis of paragraph 19 of her witness statement I am also satisfied that when she returned from maternity leave and went onto furlough, she did not take annual leave because Mr Morgan said that he would not pay more than the furlough amount. I am aware of the government guidance that furlough was consistent with taking annual leave, although employers should top up the amount employees received on furlough to the amount that they are entitled to while on annual leave, if the furlough amount they were receiving was less than that amount. That guidance says that "If, due to the impact of COVID-19 on operations, the employer was unable to fund the difference, this *may* have meant it was not reasonably practicable for the worker to take their leave, enabling the worker to carry most or all of their annual leave forwards" (my emphasis). However on the basis of the Claimant's evidence I am not satisfied that it was not reasonably practicable for her to take annual leave as a result of the effects of coronavirus. When she returned from maternity leave and was not on furlough she was receiving the maximum sum permitted i.e. £2,500. I am not satisfied that it was not reasonably practicable for her to take annual leave due to coronavirus, although it may of course not have been reasonably practicable for her to travel. She is therefore not entitled

to carry over leave from her 2020-2021 leave year under the Working Time Regulations 1998.

99. The Respondent was however required to make a payment in lieu of the untaken leave to which the Claimant was entitled under regulation 13 and 13A WTR in respect of the period 1 May 2021 to 22 February 2022: reg 14(2) WTR. It did not do so, and the claim under the Working Time Regulations 1998 therefore succeeds.

Respondent's counterclaim for breach of contract

100. The Respondent made a contract claim for overpay and the return of commission on holidays which had been cancelled due to the pandemic. However the Claimant's contract does not include an express term to the effect that, at the termination of employment, the employee must pay the employer an amount equivalent to commission paid which relates to holidays which have since been cancelled. That is in contrast to the position in respect of excess holiday taken at the termination of employment. Here, clause 6.5.5 expressly provides that if an employee has taken more leave than has accrued, the balance will be deducted from any outstanding pay, and if no pay is outstanding the employee must pay the employer an amount equivalent to the excess leave taken. There is not a similar clause in respect of commission paid in respect of holidays which have since cancelled, and I see no basis on which such a clause could be implied.

101. In any event, as noted above, there is no evidence before the tribunal as to the amount of commission that was paid to the Claimant in respect of holidays which were subsequently cancelled.

102. The counterclaim therefore fails.

Remedy - redundancy payment

103. The Claimant is entitled to a redundancy payment. The effective date of the termination of the Claimant's employment was 22 February 2022, at which time she was entitled to a salary of £36,000 and had been employed for over eleven years. Her age at the time was 37. Her gross week's pay was £692.30. As the termination of her contract of employment took effect on 22 February 2022, her weekly pay is capped for these purposes at £544. She is therefore entitled to a total of £5,984, to be paid gross.

Remedy – wrongful dismissal/notice pay

104. The Claimant was entitled to eleven weeks' notice. A week's gross pay at the time of her dismissal was £692.30. I am satisfied that the Claimant took reasonable steps to replace her lost earnings, by looking for another job. She was successful in finding new employment from 23 May 2022. I therefore make an award of damages in the sum of £7,615.30 gross**.**

Remedy – unauthorised deductions

105. The Respondent made unauthorised deductions from the Claimant's wages in breach of s. 13 of the Employment Rights Act 1996. She received no pay at all in respect of the period 1 October 2021 to 22 February 2022. Deductions were made at the rate of £2,500 gross in respect of each of October, November and December 2021. Deductions were made in 2022, when her annual salary was £36,000 gross, in respect of 53 days. The total deductions were therefore £12,727.40, and I therefore order the Respondent to pay the sum of £12,727.40 gross in respect of the amount unlawfully deducted.

Remedy – pension contributions

106. The Respondent was in breach of contract by failing to pay pension contributions for the period from 1 October 2021 to the end of her statutory notice period, which expired on 10 May 2022. Employer contributions should have been paid at the rate of 0.03% of her gross pay for this period i.e. 0.03% of £20,342.70. Her contributions should therefore have totalled £610.28. The Respondent is therefore ordered to pay to the Claimant the sum of £610.28 net, being damages for the breach of contract, and to account to HMRC for any tax and national insurance due in respect of this sum.

Remedy – pay in lieu of accrued but untaken annual leave

107. In her final leave year, 1 May 2021 to 30 April 2022, the Claimant's annual leave entitlement under regulation 13(1) of the Working Time Regulations 1998 (WTR) was to four weeks and her annual leave entitlement under regulation 13A(1) and (2)(c) WTR was to 1.6 weeks. Her aggregate entitlement in her final leave year was therefore 5.6 weeks. 9.75 months of the leave year had passed when her employment ended, and she took no leave in 1 May 2021 to 30 April 2022. Applying the formula in regulation 14 WTR, she was therefore entitled to payment in lieu for 4.55 weeks. Her gross weekly pay of £692.30 multiplied by 4.55 is £3,149.96. I therefore order the Respondent to pay the Claimant the sum of £3,149.96 gross as compensation.

Remedy – unfair dismissal

108. The amount of the basic award must be reduced by the amount of any redundancy payment awarded by the tribunal in respect of the same dismissal: s. 122(4)(a) Employment Rights Act 1996 (ERA). I therefore do not make a basic award.

109. The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal: s. 123(1) ERA. The circumstances include the award made above for eleven weeks of statutory notice pay (the statutory notice period expiring on 10 May 2022), and the fact that the Claimant was successful in finding new employment from 23 May 2022 and seeks no award of compensation in respect of the period after that.

110. The Claimant claims compensation for the loss of statutory employment rights, however the reality of the situation was that she was dismissed by reason of redundancy. Had the Respondent followed a fair

procedure in respect of redundancy she would have lost her statutory rights fairly. I do not accept the Respondent's submission that a *Polkey* reduction should be made to any compensatory award made because, the Respondent says, she would inevitably have been dismissed for gross misconduct had a fair process been followed (for reasons which will be clear from my conclusions above). However the Claimant would have been dismissed by reason of redundancy by the end of the notice period had a fair process been followed, and in all the circumstances I consider that it is just and equitable not to make a compensatory award in respect of her unfair dismissal.

111. I therefore make no award for unfair dismissal.

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Judge A Jack
Date 3 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.04/08/2022

FOR EMPLOYMENT TRIBUNALS