EMPLOYMENT TRIBUNALS

Claimant: **Ms Bilyana Stoyanova**

Respondent: **NYS Stratford Limited (t/a NYS Collection)**

Heard at: **East London Hearing Centre**

On: **13 October 2021**

Before: **Employment Judge Barrett**

Representation
Claimant: Mr Max Lansman, Counsel
Respondent: Mr Gareth Price, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant was dismissed because she alleged the Respondent had infringed a right of hers which is a relevant statutory right. Her claim for unfair dismissal succeeds.**

2. **The Respondent made an unauthorised deduction from the Claimant's wages in the sum of £74.25.**

3. **A remedy hearing will be listed for the first available 3-hour hearing by CVP.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by videoconference (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Claimant, Ms Bilyana Stoyanova, worked for the Respondent, NYS Stratford Limited (t/a NYS Collection), from 1 July 2020 until her dismissal on 31 January 2021. On 23 April 2021 she presented an ET1 form bringing claims for automatic unfair dismissal and an unauthorised deduction from wages in the sum of £74.25. She says she must be regarded under s.104 of the Employment Rights Act 1996 ('ERA') as having been unfairly dismissed contrary to s.94 ERA because the reason or principal reason the Respondent dismissed her was because she alleged that the Respondent had infringed her right not to suffer unauthorised deductions from her wages.

2. The Respondent says it dismissed the Claimant because of redundancy and that her dismissal was fair. In its ET3, the Respondent stated, "*we agree to her claim for £74.25 and are willing to pay this once the claimant agrees, that this ends the matter*". In its Grounds of Resistance presented subsequently, the Respondent described this as *"a gesture of good will"* and denied that it had made any unauthorised deduction from the Claimant's wages.

The hearing

3. The hearing was conducted over CVP on 13 October 2021. The Claimant was represented by Mr Max Lansman of Counsel and the Respondent by Mr Gareth Price of Counsel.

4. The Tribunal was provided with an agreed bundle of evidence numbering 419 pages.

5. The Claimant gave evidence on her own behalf.

6. The following witnesses gave evidence on behalf of the Respondent:

    6.1. Mrs Talia Myers, General Manager and sole Director of the Respondent, who was the decision-maker in respect of her dismissal;

    6.2. Mr Asaf Oren, who is Mrs Myers' business partner and whom she consulted regarding aspects of the Claimant's employment;

    6.3. Ms Madelina Radu, Kiosk Manager of the Respondent's Westfield Stratford City shopping centre kiosk, where the Claimant worked.

7. The Respondent also provided a written statement by Mr Shmuel Abergel, an external sales trainer the Respondent had hired during the Claimant's employment. As the Respondent did not call him to give evidence in person, I have accorded limited weight to his written statement.

8. The evidence of the four witnesses who gave evidence in person was completed at approximately 5pm. Mr Lansman and Mr Price supplied helpful written closing submissions by email on 18 October 2021.

The issues

9. At the start of the hearing, Mr Lansman made an application to amend the claim to argue, in the alternative, that if the reason or principal reason for the Claimant's

dismissal was redundancy, then the dismissal was automatically unfair because the reason or principal reason for *selection* for redundancy was that the Claimant had alleged that the Respondent had infringed her right not to suffer unauthorised deductions from wages. Mr Price objected to the late amendment, of which he had only been given notice the previous evening. Despite the lateness of the application, I gave permission for the amendment, for reasons explained to the parties during the hearing.

10. Mr Lansman had drafted a list of issues which, subject to the disputed amendment, Mr Price agreed. The issues for determination were therefore:

Unauthorised deduction from wages contrary to s.13 ERA

10.1. Did the Claimant work on 7 December 2021?

10.2. Was the Claimant due wages of £74.25 for work done on 7 December 2021?

10.3. Did the Respondent make a deduction of £74.25 from the Claimant's wages?

** I note the Respondent did not argue that if the Claimant had worked on the relevant date, the deduction was authorised by virtue of a statutory provision, contractual provision, or prior written consent and have therefore omitted issues relating to these matters from the drafted list.*

Automatic unfair dismissal for asserting a statutory right contrary to s.104 or s.105(7) ERA

10.4. Did the Claimant allege that the Respondent had infringed her right not to suffer unauthorised deductions from her wages, by:

10.4.1. Specifying the right she claimed had been infringed; or

10.4.2. Making it reasonably clear to the Respondent what the right she claimed had been infringed was?

10.5. Was the Respondent's reason, or principal reason, for dismissing the Claimant that the Claimant had alleged that the Respondent had infringed her right not to suffer unauthorised deductions from her wages?

10.6. In the alternative, if the Respondent's reason, or principal reason, for dismissing the Claimant was that the Claimant was redundant:

10.6.1. Did the circumstances constituting the redundancy apply equally to one or more of the Claimant's fellow sales employees?

10.6.2. Did those employees hold similar positions to the Claimant?

10.6.3. Were those employees dismissed?

10.6.4. Was the Respondent's reason, or principal reason, for selecting the Claimant for dismissal that the Claimant had alleged that the Respondent had infringed her right not to suffer unauthorised deductions from her wages?

Findings of fact

11. Where the evidence of the Respondent's witnesses differed from that of the Claimant, I have tended to prefer the Claimant's evidence. She gave her answers carefully and made appropriate concessions. I found her to be a credible witness.

12. Mrs Myers and Mr Oren on occasion gave answers that sought to fit their accounts with their case theory against the Claimant, even where that did not accord with the documentary evidence, and there were inconsistencies between their evidence. For example, to minimise the fact that the Claimant's performance was better than that of another Sales Assistant, Mr Oren said the other Sales Assistant, who was in training, was barely able to operate the point-of-sale system. In contrast, when justifying why the other Sales Assistant was retained instead of the Claimant, Mrs Myers emphasised that he was a promising employee.

13. I found that Ms Radu gave her evidence to the best of her ability but her memory of the events in question was not as clear as the Claimant's, and her perception of events may have been coloured by the subsequent legal proceedings.

The Respondent

14. The Respondent is a franchise of NYS Collection Eyewear, a New York based brand. Mrs Myers, as noted above, it the Respondent's General Manager and Director. She oversees two retail kiosks selling sunglasses, one in Westfield Stratford City shopping centre and one in Westfield London shopping centre. She employs a small staff of 2 or 3 (the numbers fluctuate) at each kiosk.

15. The Respondent's kiosks were closed during the first national lockdown from March 2020 to June 2020 and reopened on 1 July 2020. This was a stressful and destabilising time for the business.

The Claimant's employment

16. The Claimant was employed from 1 July 2020 as a Sales Assistant working in the Respondent's sales kiosk in the Westfield Stratford shopping centre. Her written terms of employment provided she would earn £8.50 per hour or 18% commission on personal sales, whichever was greater. She was also entitled to participate in the Company Bonus Scheme. She had no normal or minimum working hours and the relevant clause provided *"your hours will vary according to the needs of the Company".* Her probationary period was 6 months.

17. The Claimant was recruited and managed by Mrs Myers. Her daily work was supervised by Ms Radu, the Kiosk Manager. A second Sales Assistant was also recruited at the same time as her.

The sales trainer

18. Following the losses incurred during the first lockdown, Mrs Myers felt it was imperative to drive in improvement in sales. The Respondent engaged an external trainer, Mr Abergel, from 27 July to early September 2020 to work with kiosk staff with the aim of improving sales.

19. The Claimant had some concerns about the sales techniques Mr Abergel advocated. She objected to waylaying customers outside the kiosk (during the

pandemic) and to focussing on male customers. She spoke to Mrs Myers about her concerns. Mrs Myers felt the Claimant had failed to engage sufficiently with the trainer.

The Claimant's performance

20. The Respondent measures performance by 'output per hour' ('OPH') which calculates sales attributed to each employee divided by hours worked. The Tribunal was taken to OPH statistics for the duration of the Claimant's employment, July 2020 to January 2021.

21. During that period, the Claimant's OPH was consistently slightly lower than that of Ms Radu, as might be expected given Ms Radu's greater experience and more senior role. Both Ms Radu's and the Claimant's sales declined in September and October 2020, reflecting the lower demand for sunglasses in the autumn. There are no figures for November 2020 as the kiosk was closed during the second national lockdown. Both had a higher OPH during December 2020 due to pre-Christmas sales.

22. The second Sales Assistant, recruited at the same time as the Claimant, worked during July, August and September 2020. Her OPH was consistently lower than the Claimant's. The Respondent ceased to offer her shifts when the kiosk was quieter during October and November 2020, because she was the lowest performing employee. She was offered shifts again for the pre-Christmas period in December 2020, but by that time she was no longer available.

23. Instead, a new employee was engaged in December 2020. He worked from 10 to 19 December 2020, when the kiosk was closed again due to Tier 4 rules coming into effect. He also had a lower OPH than the Claimant. However, his record does not provide a good comparison for the Claimant's as he was still in his training period. He was described by Mr Oren as *"barely able to put through sales through the Brava system"* as the point when the kiosk closed on 19 December 2020.

24. There is no documented evidence of performance concerns relating the Claimant at any point during her employment. I accept the Claimant's evidence that the need to improve team sales was often discussed, but she was never told that her individual performance was lacking.

25. This is reflected by a 'To Whom It May Concern' letter Mrs Myers wrote on 30 October 2020, setting out the details of the Claimant's employment to support her application to rent a property. She said:

> **"We are very happy with Bilyana's contribution to the Company and will be pleased to keep her in the business for the next 12 months."**

The Claimant's leave in September 2020

26. The Respondent has an annual leave policy which states:

> **"All Annual Leave requests must be approved by your line manager. Staff are required to complete an Annual Leave Request Form and present this to their Line Manager for approval."**

27. In practice, staff are not allowed to take holiday during the busy summer months of July and August.

28. The Respondent organises staff shifts on a 'Weekly Rota' template which is filled out in advance by Ms Radu and approved by Mrs Myers. In August 2020, the Claimant discussed with Ms Radu and Mrs Myers that she wanted to take holiday leave in September. She did not complete an annual leave request form.

29. The Weekly Rota for the week of 7 to 13 September 2020 was completed by Ms Radu. I accept the Claimant's evidence that this was done on 25 August 2020. It showed the Claimant was booked to work on Monday 7 and Tuesday 8 September then booked off for the remainder of the week. The Claimant on seeing the rota assumed her holiday request had been approved by Mrs Myers.

30. The Claimant went on holiday to Greece on 9 September 2020 and was due to return on 21 September 2020. At that time Greece was on the 'green list' of countries, visiting which did not require a period of self-isolation on return.

31. On 15 September 2020, Mrs Myers sent a WhatsApp message to the Claimant saying:

> **"Hi Bilyana I'm sorry to disturb you while you are on holiday. When you have a moment can you please call me?"**

32. The Claimant immediately called her. Mrs Myers informed her that changing Government guidance meant that she would need to self-isolate on her return from abroad. The Claimant took the view that only parts of Greece were on the red list, and not where she was staying, but she accepted Mrs Myers' instructions to self-isolate.

33. On 16 September 2020, Mr Oren also sent the Claimant a WhatsApp message saying:

> **"Hello Bilyana,**
>
> **Talia updated me with everything about your holiday in Europe. I thought to clarify with you the rules & regulations, which are Government order:**
>
> **If you traveled to any "Red" country or area, you must self-isolate for 14 days at a declared address. If you wish to avoid the 14 days of self isolation, the only ways you can do it are: (1) Not to travel outside the UK, or (2) Return to the UK from a "Green" country or area, provided you remained in that "Green" country or area for at least 14 days.**
>
> **Therefore, if you travel from a "Red" country or area to a "Green" country or area in order to avoid the 14 days of self-isolation in the UK, you must show proof you spent at least 14 days in the declared "Green" country or area you are returning from back in the UK.**
>
> **We look forward to have you back at work with the team once you have passed the 14 days of self isolation or alternatively, remained at least 14 days in another "Green" area or country and traveled straight back to the UK."**

34. In his witness statement, Mr Oren suggested he sent that message after the Claimant was seen in the Stratford Westfield Centre in what the Respondent considered to be a of self-isolation rules. However, that cannot be right because the Claimant was still on holiday when he sent it.

35. The end of the Claimant's holiday and beginning of the self-isolation period after her holiday coincided with Ms Radu also needing to self-isolate. This posed a problem for the Respondent's staffing levels.

36. Mrs Myers and Mr Oren took the decision to close the Westfield London kiosk to free up a staff member to cover the more profitable Stratford kiosk. On 16 September 2020, Mr Oren wrote to his contact at Westfield London:

> **"I'd like to inform you that we will have to temporarily close down our NYS kiosk in Westfield London (K1005) between 17th -30th Sep. 2020. This is due to the fact that 2 of our staff members from the same kiosk have been told they need to self-isolate, with immediate effect."**

37. This episode caused stress to Mrs Myers and financial loss to the Respondent.

38. When the Claimant returned from her holiday, she did not attend work for a 14-day self-isolation period, as directed by Mrs Myers and Mr Oren. On one occasion she attended the Westfield Stratford shopping centre to do grocery shopping; her understanding was that this did not breach any rules. She was seen there by nearby kiosk staff, who notified Mrs Myers.

39. When the Claimant returned to work, Mrs Myers challenged the Claimant about her trip to Westfield. The Claimant felt this was an unjustified interference in her personal life and said words to the effect that it wasn't Mrs Myers' business where she had been. I accept the Claimant's evidence that Mrs Myers did not suggest to her that her holiday had been unauthorised. No disciplinary issues were raised.

The Claimant's second job and tax

40. During September 2020 the Claimant told Mrs Myers that she was looking for a second job to supplement the approximately 30 hours of work per week available from the Respondent.

41. On 2 October 2020, the Claimant sent Mrs Myers a WhatsApp message saying:

> **"It would be great if I can stay with you and do 4 days a week. Madalina says it is ok, but I wanted to check with you as well. If it is ok with you. Do you mind which days of the week I will be off?"**

42. Mrs Myers replied:

> **"Hi Bilyana, thanks for the message, yes 4 days is fine for you to have no problem [thumbs up emoji]. I will do the rota with Madalina later when I'm in Stratford. What days do you wish to have off?"**

43. The Claimant's answer was:

> **"I plan to try and work part time in a coffee shop and see how much taxes I will pay. And they wanted me to do the weekend or Sunday and Monday. I know that you prefer two people on the weekend so I already told them I can not do both weekend days. So if Sunday and Monday works I can take those and Thursday (I still have a class in Thursday from 10 to 12:30 and can't do all day shift). But if those days don't work I can change it probably"**

44. The Claimant started working shifts in the coffee shop in November 2020. The Respondent knew about and agreed to this arrangement.

45. After the Claimant started working shifts in two jobs, a problem arose with her tax code, resulting in too much tax mistakenly being deducted through the PAYE system.

46. On 16 November 2020, Mrs Myers sent a WhatsApp message to the Claimant offering the assistance of the Respondent's accountant in addressing the issue. The Claimant also continued to pursue the issue herself, making repeated calls to HMRC. She received a tax rebate in the December 2020 payroll.

Shift on 7 December 2020

47. On 6 December 2020, the Claimant and Ms Radu worked a shift together at the Stratford kiosk. At the end of the shift, the Respondent's Brava point-of-sale system was not closed down correctly.

48. The Claimant attended the kiosk for a lone shift on 7 December 2020. The Weekly Rota for 7 to 13 December 2020 shows that the Claimant was the only employee scheduled to work in the kiosk that day. When she arrived, she found that she and Ms Radu had not been clocked out the evening before, and the Brava system had recorded them working all night. She informed Mrs Myers of the problem.

49. Mrs Myers sought to address the problem by manually adjusting the hours recorded on Brava. She deleted the additional hours wrongly recorded for the Claimant and Ms Radu overnight between 6 and 7 December 2020. However, she also mistakenly deleted the record of the Claimant's shift on 7 December 2020.

50. The Respondent's Brava system therefore did not retain a record of the Claimant – or any employee - having logged in or out on 7 December 2020. However, the recordings of takings that day show net sales of £285.86. It can be inferred that there was somebody present making those sales.

Closure of the kiosk in December 2020

51. In December 2020 a change in restrictions under Tier 4 was announced so the Respondent's business had to close again. The last day the kiosk was open was 19 December 2020.

52. Before closing the kiosk, the Claimant took photographs on her phone of the records on the Respondent's Brava system of the daily shifts and takings for that month. She did so because her usual practice was to check her monthly payslip against the system to ensure they were calculated correctly. Knowing that she would not be able to access the system during lockdown, she took the photographs instead.

53. Mrs Myers gave each of the kiosk staff a discretionary bonus and a bottle of champagne as a goodwill gesture to reflect their support during a difficult time for the business. The Claimant also received a pay rise to £9 per hour to ensure that her pay was in line with that of newly recruited staff.

54. Staff who were eligible, including the Claimant, were placed on furlough and paid at 80% of full wages. The Respondent recouped that money from the Government but did continue to incur lesser costs associated with their continued

employment including National Insurance contributions and accrued holiday entitlement.

Payslip messages

55. On 14 January 2021, staff received their pay in respect of December 2020. The Claimant checked her December payslip against her record of shifts worked and realised there was a discrepancy. On 19 January 2021, she sent Mrs Myers a message asking to check whether her December payslip included her bonus. Mrs Myers replied that it did. The Claimant then messaged again:

> **"Can you somehow double check it, please. I try to calculate and I had 108 hours (with the brakes [sic] taken out) until the 19th and there was still 10 days of the month left. So I think the 144 hours on the payslip should be just the working hours"**

56. Mrs Myers replied:

> **"Hi Bilyana I have checked and it is included. You worked 102 hours not 108 so you have miscalculated**
>
> **There were 10 days of the month left but you wouldn't have worked 10 more days"**

57. The Claimant responded with a picture of her handwritten calculations showing the shifts and hours she had worked in December 2020. She asked Mrs Myers to check.

58. Mrs Myers replied that all the hours were taken from Brava, and that perhaps the Claimant had miscalculated by failing to take into account that furloughed hours were paid at 80%. The Claimant promised to check her calculations again and added:

> **"All the hours I have written down. But I think all should be in the system except one they when we hadn't close and I couldn't clock in and out. You sayd [sic] you will fix it but I am not sure what happened."**

59. Mrs Myers replied:

> **"Ok that's fine you can check again. I can assure you the salaries are very accurate. It was the hardest salary to do because you worked and then there's also the days you didn't work at 80% and the bonus. You got extra lucky because of the tax refund. In your mind how much do you believe you are missing, because I really don't understand. Thanks."**

60. She also added in relation to the Claimant's previous message that she had fixed those hours (i.e. the hours affected by the clocking out problem).

61. Later that afternoon, the Claimant checked back over her photographs of the Brava system and sent another picture of her handwritten calculations with the following explanation:

> **"Hire [sic] is my full calculation. I checked the hour again and I think don1 make mistake with the hours up until 20th so when you have time please compare it with the system.**
>
> **For the hours after 20th I put the rota as it was planned until 27th and 2 days off and 2 days work from 28th to 31st, then took 80 % of it for the total**

> **in pink. Honestly I don't know how you calculate that so it may be different from your calculation.**
>
> **So in total I have 153.75 hours without the bonus.**
>
> **But please check everything when you have time because as I said I haven't calculate it before and just when I checked with you today and you asked I calculated."**

62. On 25 January 2021, the Claimant sent a message asking Mrs Myers if she had had read her message and had a chance to check. In response, Mrs Myers sent the Claimant screenshots from the Brava system showing that the total hours attributed to the Claimant for December 2020 were 102.18.

63. The Claimant replied with a screenshot of the Brava system showing that for 7 December 2020, net sales of £285.86 had been recorded but no employee was logged as having clocked in or out. She wrote:

> **"This is the reason why it is different hours in the system."**

64. The exchanged then continued as follows (with Mrs Myers messages on the left and side and the Claimant's on the right:

> **"No Bilyana I fixed that.**
>
> **Well it looks you didn't**
>
> **The system had you signed in for nearly 24 hours so I changed it.**
>
> **Because the till wasn't closed you stayed signed in the entire time.**
>
> **Yes you changer [sic] the Saturday and my shift next day doesn't exist**
>
> **And the picture is from right before we close**
>
> **So please check it**
>
> **The system shows that you did not work on the 7th December. If you forgot to sign in/out then it is your error. I simply fixed the problem that was from the Saturday. It is your responsibility to sign in and out as stated in the contract.**
>
> **I call you in the morning to tell you that it is still showing me on shift and I can't click in.**
>
> **You sayd [si] you will check**
>
> **Yes and I fixed the Saturday.**

It is your responsibility to sign in / out.

Then we is me [sic] problems and mistake.

That you fixed only what was important for you

When I could not sign in

It is your responsibility to sign in / out

How am I supposed to sign out

[voice message]

Not sure

[voice message]

I am currently on furlough and not allowed to work. If you want to have further checks with our accountant he charges £80 per hour. I can put your request forward and then deduct this charge from your next wages. Please let me know how to proceed.

[voice message]

Alternatively we can discuss this face to face when we open as it is difficult like that over messages.

Sure we can discuss it further latter [sic] and I agree it is difficult by message.

But I am still not paying for any accountant when it is not my mistake

I will also tell you when we meet face to face that you should learn how to be more grateful. The Company made a tremendous effort to pay your FULL months [sic] wages as we lost our Christmas trade. PLUS to pay you a bonus that we didn't have but chose to as a good will. We also INCREASED your wage from £8.72 to £9.00 (I apologised at the time for forgetting to tell you this) lucky for you an extra bonus came when you received a tax refund which only happened because

> **we asked our accountant to check this for you, which you requested.**
>
> **Thanks."**

65. By this point, Mrs Myers had lost her temper with the Claimant. She was stressed and frustrated by the lockdown situation and the strain it was placing on her business, and due to those stressors had limited patience for what she (wrongly) perceived to be the Claimant's mistake. She felt the Claimant was being ungrateful.

66. The Claimant and Mrs Myers exchanged a further few messages regarding calculation of breaks and the Claimant re-worked her handwritten calculations to show breaks in minutes rather than fractions of an hour.

The Claimant's dismissal

67. Mrs Myers discussed the Claimant's payslip issue with Mr Oren. Mr Oren stated in cross-examination that he could not remember the content of that discussion. However, he also said in reply to an earlier question about the Claimant shopping during self-isolation in September 2020 that, "*the disciplinary procedure would be talking with Talia, advising her what to do. I did tell her I think she should let her go. Bilyana is trouble I have seen many employees in my career and I can smell it".* In his witness statement, he dated this advice as having been given in September 2020.

68. I find that to be an accurate description of the decision-making process followed in relation to the Claimant's dismissal. However, I find that the conversation took place in January 2021 not September 2020, given that no disciplinary concerns were recorded or raised with the Claimant at that earlier time.

69. There was no further communication with the Claimant until 31 January 2021, when Mrs Myers sent the Claimant a WhatsApp message stating:

> **"Good morning Bilyana, hope you are well and safe.**
>
> **The reason for my message today is to inform you, that I have made a decision on behalf of the Company.**
>
> **I will be terminating your contract today (3101/2021) with NYS Stratford Ltd as unfortunately you are not suitable for the business.**
>
> **An email from the Company will follow in the next few days confirming the above.**
>
> **I would like to thank you for your short time with the Company, and I wish you good luck in your future career.**
>
> **Best,**
>
> **Talia."**

70. Mrs Myers completed a 'Termination of Employment Form' in relation to the Claimant that same day. In the box for 'Reason for Termination' she entered, *"Unsuitable for the business".*

71. The Tribunal was shown a similar form relating to the earlier dismissal of an employee at the Westfield London kiosk which contained the same wording. Mrs Myers explained in evidence that she thought it was the right of the company to dismiss for any reason during the first two years of service and she was not required to give a reason.

72. As promised, Mrs Myers followed this message with an email on 1 February 2021, titled 'Notice of Termination of Employment, NYS Collection', which stated:

> **"Following the message that I sent you over WhatsApp on Sunday, 31/01/2021.**
>
> **This email is to inform you that unfortunately you have been made redundant on 31/01/2021. The reason for your redundancy is unsuitability for the business.**
>
> **In accordance with your contract of employment, you will be entitled to receive January furlough pay. In addition, you will also receive your two weeks' notice and any other outstanding monies owed to you…"**

73. The Claimant replied on the same day seeking to appeal the dismissal decision. She stated that she had not been given any notice that the Respondent was unhappy with her performance prior to lockdown, and she did not see how she had become 'unsuitable' while she was furloughed. She said she felt she had been unfairly selected because of her request for her hours for December to be checked and paid.

74. Mrs Myers replied on 2 February 2021:

> **"Unfortunately, under the terms and conditions of your contract I have used the Company's rights to take the decision to terminate your contract of employment.**
>
> **I am therefore not accepting your request for an appeal and no further action will be taken."**

75. After her dismissal, the Claimant continued to correspond with Mr Oren and the Respondent's payroll department seeking to have her wages for the shift on 7 December 2020 paid to her.

Staffing following the Claimant's departure

76. The employee who had commenced training in December 2020 was not offered shifts during the time the kiosk was closed due to Tier 4 restrictions and the subsequent third national lockdown. Given his date of employment he was not eligible for furlough pay. When the Stratford kiosk reopened on 12 April 2021, he returned to work, along with Ms Radu. A third member of staff was recruited in June 2021.

The law

Unauthorised deduction from wages

77. Part 2, Ss.13 to 27B of the Employment Rights Act 1996 Act ('ERA') set out the statutory basis for a claim of unauthorised deduction from wages.

78. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required

or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction.

79. 'Wages' for the purposes of Part II ERA is widely defined. It includes any fee, bonus, commission, holiday pay or other emolument referable to employment, and to statutory sick pay. A non-payment of wages is a 'deduction from wages' for the purposes of s.13: *Delaney v Staples* [1991] IRLR 112.

Automatic unfair dismissal

80. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by her employer.

81. Section 104 ERA provides so far as relevant:

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—**
>
> **(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
>
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **(2) It is immaterial for the purposes of subsection (1)—**
>
> **(a) whether or not the employee has the right, or**
>
> **(b) whether or not the right has been infringed;**
>
> **but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.**
>
> **(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.**
>
> **(4) The following are relevant statutory rights for the purposes of this section—**
>
> **(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal…**

82. The relevant statutory rights at s.104(4)(a) ERA include the right not to suffer an unauthorised deduction from wages, as provided by s.13 ERA.

83. Section 105 ERA further provides:

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

> **(c) it is shown that any of subsections (2A) to (7N) applies.**
>
> **…**
>
> **(7) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 104 (read with subsections (2) and (3) of that section).**

84. The reason for a dismissal is "*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*": *Abernethy v Mott, Hay and Anderson* [1974] ICR 323.

85. The parties referred to two authorities:

85.1. *Mennell v Newell & Wright (Transport Contractors) Ltd* [1997] ICR 1039, in which Mummery LJ gave guidance on the application of the provision now contained at s.104 ERA, as follows (p.1048H):

> **"It is sufficient if the employee has alleged that his employer has infringed his statutory right and that the making of that allegation was the reason or the principal reason for his dismissal. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed. The allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided that the claim was made in good faith."**

85.2. *Jones v Cutting Edge Services Ltd* EAT/204/97, in which an employee was dismissed following a dispute about undertaking overtime hours, which he declined to do unless his employer paid him a higher overtime rate or increased his bonus. It was found that he had not alleged the infringement of a statutory right, and therefore his claim under s.104 ERA failed. The EAT agreed, commenting:

> **"It may be that, in the light of what Mummery LJ said in Mennell, the Industrial Tribunal was wrong in suggesting that some mention of the words "statutory right" or a reference to the relevant parts of the Employment Rights Act 1996 was required from the employee to the employer for s 101 to take effect, if that is an accurate interpretation of what the Industrial Tribunal said. It seems to us that it might well be sufficient for the employee, in this case Mr Jones, to say for instance "I have a right in law to be paid 100% bonus or time and a half for overtime and a right in law not to have it withheld". However that may be, we agree with the submission of Mr West for the respondent, that to bring his case within the words of s 104(1)(b) "the employee- ... (b) alleged that the employer had infringed a right of his which is a relevant statutory right.", there must be more than just a dispute about how much the employer** [sic] **is entitled to be paid and the employee must say more than "I am entitled to be paid 100% bonus or time and a half" or some words to that effect. There was no evidence that Mr Jones went further than that in this case. So, in our view, his claim under s 104 was bound to fail on that basis."**

86. The Claimant additionally referred to *Elizabeth Claire Care Management Ltd v Francis* [2005] IRLR 859, as an example where a complaint about non-payment of wages (in that case, late payment) gave rise to a successful claim under s.104 ERA. Silber J held at §33 and §35:

> **"… s.104(3) of the 1996 Act makes it clear that all the employee has to do in order to allege that his employer has infringed his right was to make 'it reasonably clear to the employer what the right alleged to have been**

> **infringed was'. What is important was for the employment tribunal to set out the gist of the words used by the [employee] and as we have explained that is precisely what the employment tribunal did when it explained that there was ample evidence that the [employee] was complaining to the**
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> **…the position is that by complaining that she had not been paid, the [employee] was asserting 'a relevant statutory right' which was not to have deductions made from her pay when the [employer] failed to pay her from 1 March 2004 until 4 March 2004."**

Submissions

87. I have carefully considered but will not attempt to summarise each party's cogent written submissions.

Conclusions

Unauthorised deduction from wages

88. The core issue in this claim is whether the disputed wages were 'properly payable', which turns on whether the Claimant worked a shift on 7 December 2020.

89. The Respondent's counsel put to the Claimant in cross-examination "*You worked on 7 December*", to which the Claimant replied "*yes*". Mrs Myers also said she accepted the Claimant worked on 7 December 2020. I therefore have no hesitation in finding that the Claimant did work a shift that day.

90. Due to the record of the Claimant's attendance for that shift having mistakenly been wiped from the Respondent's Brava system, she was not paid for it.

91. The Respondent does not dispute the Claimant's calculation that the pay in respect of that shift amounts to £74.25. I accordingly find the Respondent made an unauthorised deduction in that amount from the Claimant's wages.

Automatic unfair dismissal

92. The first question to address is whether the Claimant alleged that the Respondent had infringed her right not to suffer unauthorised deductions from her wages, by specifying the right she claimed had been infringed; or making it reasonably clear to the Respondent what the right she claimed had been infringed was.

93. The Claimant never specified that she was relying on the right at s.13 ERA not to suffer unauthorised deductions from wages. However, in the chain of WhatsApp messages to Mrs Myers on 19 and 25 January 2019, she did make reasonably clear to the Respondent what the right she claimed had been infringed was. She told Mrs Myers that her payslip did not contain all of the hours she had worked. She explained that all her hours were in the system apart from the shift when she could not clock in and out, and that was the reason why the hours were different from the hours she had worked.

94. It was put to the Claimant in cross-examination that at no time had she asserted that Mrs Myers was unfairly deducting her wages. The Claimant replied, "*It should be clear from the messages she is deducting money I should be paid otherwise why would I be asking".* That is a fair summary of the situation.

95. It was put to Mrs Myers that it was in general clear what the Claimant was suggesting was that she had the right to be paid for all the hours worked, and the Respondent had failed to do that. Mrs Myers accepted that was the case, saying *"Yes, she was querying her pay and believed she had been underpaid by one day."* It was further put, *"It's clear to anybody reading [the messages] that the Claimant was saying she had not been paid what she had a right to be paid".* Her reply was, *"Yes, it was clear that's what the Claimant was saying at the time."*

96. These facts are distinguishable from the case of *Jones v Cutting Edge Services Ltd* EAT/204/97, where Mr Jones wanted to be paid at a higher rate. It does not appear that he alleged he had a contractual entitlement to the higher rate such that a failure to pay it would engage that statutory protection against unauthorised deductions from wages. By contrast, the Claimant was simply asserting that she had not been paid her basic wages for all the hours she had worked, as she was entitled to be. The facts of this case are more akin to *Elizabeth Claire Care Management Ltd v Francis,* in which the claim succeeded.

97. Was the Respondent's reason, or principal reason, for dismissing the Claimant that the Claimant had alleged that the Respondent had infringed her right not to suffer unauthorised deductions from her wages? I conclude it was, on the following three grounds.

98. First, the alternative reasons put forward for dismissing the Claimant are, on the evidence heard by the Tribunal, unconvincing and insufficient. The Respondent's Amended Grounds of Resistance say the Claimant was selected for redundancy because she was the poorest performing employee at the Stratford kiosk and because of the Respondent's concerns about her difficult attitude, lack of commitment, and taking unauthorised leave. Taking each aspect in turn:

    98.1. While the business was under severe financial strain due to the pandemic, I do not accept that the Respondent decided to make a member of staff redundant in January 2021 for that reason, and went on to select the Claimant. Eligible employees were receiving furlough pay and those not eligible were not offered shifts. The cost to the business of retaining the Claimant in employment during the lockdown period was low. When asked if the Claimant had been an exemplary member of staff whether she would have needed to make someone redundant, Mrs Myers response was "*of course I would not have made her redundant*". Redundancy was not mentioned in the dismissal message but only in subsequent correspondence.

    98.2. The Claimant was not the poorest performing employee at the Stratford kiosk. She was the middle performing employee, and the best performing Sales Assistant. No performance concerns had been raised with her, and her probationary period had recently ended on 1 January 2021. If a decision to let go one member of staff was made on performance grounds, it would be expected that the new employee whom Mr Oren described as *"barely able to put through sales through the Brava system"* would be the person selected.

    98.3. There is no contemporaneous evidence that the Respondent perceived the Claimant to have a difficult attitude, until the payslip messages in January 2021. The parties agree that there was a difference of opinion regarding Mr Abergel's sales techniques in July or August 2020, but that was a historic issue by the time of the Claimant's dismissal in January 2020. There was also a

difference of opinion in late September 2020 over whether the Claimant was allowed to go shopping in the period after she returned from holiday. However, that does not appear to have soured relations given that Mrs Myers wrote a favourable 'To Whom It May Concern' letter in October 2020, gave the Claimant a pay rise and a bonus in December 2020, and raised no concerns prior to the end of her probationary period on 1 January 2021. I do not accept the Respondent's witness evidence that there were weekly discussions between Mr Oren and Mrs Myers throughout the Claimant's employment about her poor attitude and unwillingness to improve. It is implausible that such serious longstanding concerns were held, given that they were not documented or raised with the Claimant.

98.4. Neither is there any contemporaneous evidence that the Respondent perceived the Claimant to lack commitment. The Claimant was transparent about her wish to obtain extra shifts at a second job and the Respondent had no objection to this; indeed, Mrs Myers' messages on this topic were supportive in tone.

98.5. The Claimant did not take unauthorised leave. She took leave without filling in the correct holiday request form. However, she discussed her intention to take holiday and the proposed dates with Ms Radu and Mrs Myers. Ms Radu entered the Claimant's holiday dates into the Weekly Rotas which Mrs Myers approved. Mrs Myers knew the Claimant was on holiday, which is why when she made contact on 15 September 2020 she wrote "*I'm sorry to disturb you while you are on holiday".* The problem with staffing levels was caused by shifting Government guidance on self-isolation which affected the attendance of both the Claimant and Ms Radu. It was not caused by the Claimant taking unauthorised leave. If the Respondent had believed at the time that the Claimant's leave was unauthorised and had caused the closure of the Westfield London kiosk, that would inevitably have resulted in disciplinary concerns being raised with her. This did not happen. I therefore reject the Respondent's evidence that Mrs Myers and Mr Oren believed at the time that the Claimant had taken unauthorised leave.

99. Secondly, I consider the content and tone of the WhatsApp messages sent by Mrs Myers on 25 January 2021 show that the Claimant disputing her payslip made Mrs Myers angry with the Claimant. Her message, "*If you want to have further checks with our accountant he charges £80 per hour*" was an unusual response to a payslip issue and suggested that Mrs Myers wished to stop the Claimant from pursuing the matter. Saying to the Claimant "*I will also tell you when we meet face to face that you should learn how to be more grateful*" showed her frustration with what she perceived to be the Claimant's ingratitude in persisting in alleging her pay was short. Her repeated use of capitalisation in the same message also shows Mrs Myers' strength of feeling.

100. Thirdly, the timing of the dismissal is suggestive of a causal link between the payslip correspondence and the decision to dismiss. There was no further interaction between the Claimant and Respondent after the messages on 25 January 2021 until the message informing her of her dismissal on 31 January 2021, just six days later. I reject the suggestion made by Mrs Myers during the hearing that the decision to dismiss the Claimant had been made in early January 2020, before the payslip issue arose. Had that been the case, there would have

been no reason why the Claimant could not have been dismissed on notice. It is also inconsistent with the evidence given in her witness statement that the decision was made at the end of January 2021.

101. I conclude that the Respondent's attitude towards the Claimant changed in late January 2021, when the Claimant raising the underpayment in her December payslip caused Mrs Myers and Mr Oren to think she was a troublemaker and ungrateful. As Mr Oren stated in evidence, he felt that "*Bilyana is trouble".* They conferred and decided that Mrs Myers should dismiss the Claimant. The reason for dismissal was that the Claimant had alleged that the Respondent had infringed her right not to suffer unauthorised deductions from her wages. Therefore, the Claimant's dismissal was automatically unfair, and her claim succeeds.

102. Given that conclusion, it is unnecessary to go on to consider the Claimant's alternative case on unfair selection for redundancy.

103. I apologise to the parties for the length of time it has taken me to issue this judgment and reasons.

Employment Judge Barrett
Date: 14 February 2022