**Case No: 3301005/2021**
**3312721/2021**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Maria Dutton

**Respondent:** HSBC UK Bank Plc

**Heard at:** Reading (by CVP) **On:** 14-16 November 2022

**Before:** Employment Judge Shastri-Hurst

**Representation**
Claimant: In person
Respondent: Mr B Randel (counsel)

# RESERVED JUDGMENT

**Preliminary applications**

1. The claimant's application for an anonymisation order is rejected.
2. The claimant's claim for a postponement is rejected.
3. Parts of the claimant's claims are struck out for lack of jurisdiction, as follows:
    a. the holiday pay claim regarding the 2019 leave year;
    b. the unlawful deduction of wages claims relating to 2019 and 2020 payslips.

**Judgment on the claims**

1. The claim of unfair dismissal fails. The claimant was fairly dismissed;
2. The claim of breach of contract fails. The claimant was paid her notice pay, and was not entitled to expenses of £129;
3. The claim of unauthorised deductions from wages fails. No unauthorised deductions had been made in the claimant's February and March 2021 payslips;
4. The claim for holiday pay fails. The respondent did not unlawfully refuse the claimant the right to take holiday.

# REASONS

## INTRODUCTION

1. The claimant, Mrs Dutton, was employed by the respondent from 3 January 2020 as a cashier, until her dismissal on 23 February 2021. She had previously worked for the Marks & Spencer branch of the respondent, from 9 April 2018.

2. The claimant presented two claims to the Tribunal; one on 6 February 2021, and another on 30 June 2021. The Early Conciliation process took place between 19 May 2021 and 30 June 2021. The first claim form raised claims of race discrimination, as well as pay claims under s23 of the **Employment Rights Act 1996** ("ERA"), and reg 30 of the **Working Time Regulations 1998** ("WTR") . The second related to the claimant's subsequent dismissal, which she claims was unfair under s98 ERA and notice pay.

3. On 22 January 2022, the claimant withdrew her race discrimination claims, for which judgment was entered on 29 March 2022 – [87/88].

4. The respondent denies the claims, stating that the reason for dismissal was capability, a potentially fair reason, and that dismissal was fair in all the circumstances. In terms of the pay claims, the respondent alleges that all sums due to the claimant have been paid.

5. The claimant represented herself throughout the course of these proceedings. Mr Randel represented the respondent. I am grateful to both for their assistance, and the manner in which they conducted the hearing.

6. In determining the claim, I heard evidence from the claimant, as well as the respondent's witnesses:

    6.1. Clare Sargent – Operational Support Manager – dismissing officer;

    6.2. Joanne Cross – Senior Sales and Service Manager at the relevant time , capability (attendance objective) appeal officer;

    6.3. Tom Henderson – Sales & Service Manager at the relevant time – disciplinary investigation officer;

    6.4. Robert Slade – HR Consultant – dismissal appeal officer.

7. I had a bundle of documents before me, initially totaling 708 pages; however, this was expanded to 808 pages in light of the claimant's pay claims being clarified on the first day of the hearing. I also heard helpful closing submissions from both parties, and received written submissions from both as well.

## PRELIMINARY ISSUES

8. Prior to commencing the hearing proper, there were three matters that required my attention:

   8.1. The claimant's application for an anonymisation order; and

   8.2. The claimant's application for a postponement of the hearing;

   8.3. The respondent's application to strike out some of the claimant's claims for being out of time.

**Anonymisation order**

9. On 10 November 2022, the claimant had written to the Tribunal requesting that her name be anonymised, given that she envisages she may have difficulty obtaining a new job, if a judgment with her name on was published.

10. The claimant renewed this application on the first morning of the hearing, stating that there was no public interest in knowing her name, and that the learning points from the case (whatever they turn out to be) can still be learnt, even if the case is anonymised.

11. Mr Randle, for the respondent, submitted that, although he had sympathy for the claimant, she was in no different position to any other ex-employee who came to the Tribunal. He said that every claimant is worried and nervous about a judgment impacting on their prospects of getting a new job. However, he said that this was not sufficient to engage Article 8 rights (the right to a private life), or to override the paramount principle of open justice.

12. At this stage we note that, following the final hearing in this matter, the email of 10 November 2022 was picked up again by the tribunal administration team on 10 December 2022, and the tribunal mistakenly read it as a renewed application post-dating the final hearing. Hence why parties were asked for written representations on the anonymisation point. Both parties dutifully complied. However, given that the application was made and heard at the final hearing, and there has been no change of circumstances since that hearing, the tribunal did not determine the application for an anonymisation order for a second time. Its decision as it was made at the final hearing is set out below.

<u>Law</u>

13. Rule 50 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("The Rules") provide that I may put in place an anonymisation order in certain situations. The relevant circumstances in which I can restrict the public disclosure of any aspect of proceedings are

   13.1. When it is in the interests of justice, or

   13.2. To protect the convention rights of any person

14. The competing convention rights are:

   14.1. The right to a private life;

14.2. The right to a fair trial for all parties; and,

14.3. The right to freedom of expression.

15. The default starting point is the principle of open justice. The burden is on the claimant to show that a move away from the principle of open justice should be made . The open justice principle is grounded in the public interest, regardless of any particular public interest relating to the particular facts of the case. It is not as easy as a claimant saying that no-one would be interested in their case, as this is not the issue.

16. There is a high threshold to move away from the principle of open justice. The risk of reputational damage to a business will not justify making an order under r50 – **Queensgate Investments v Millett 2021 ICR 863**.

Findings of fact

17. This is the type of case that the Tribunal hears day in day out. It centers on the claimant's allegation that she was unfairly dismissed, and the respondent relies on the reason of capability as being a fair reason. There are some pay claims involved as well, but the facts mainly relate to the claimant's sickness absences, the respondent's management of those absences, and the run up to her dismissal on 23 February 2021.

18. The claimant is yet to find a new job; she is still looking. She has concerns that any judgment published with her name in it will damage her chances of employment. I have seen or heard no evidence to support that assertion.

19. This case focuses on a cashier within a well-known bank. Although there may not be specific public interest in the claimant particularly, I consider that there is public interest in how banks such as the respondent treat their employees, and how employee capability issues are dealt with internally.

Conclusions

20. Although the claimant has my sympathy, her argument that she will find it difficult to get a job if the judgment on this case is made public do not, in my conclusion, reach the high threshold for the test I have to apply.

21. If the claimant's right to a private life in this case were enough to say that an anonymity order should be made, then this would open the floodgates for almost every case to have a similar order made.

22. As I have said, risk of reputation to a business is not sufficient to make an anonymity order, and I conclude that, similarly, risk of reputation to an individual is not sufficient either. This is essentially the claimant's concern here; damage to her reputation.

23. I find that there is public interest in matters such as this, and there is nothing on the facts in front of me that cause me to deviate from the default position of open justice.

24. I therefore reject the claimant's application for an anonymization order under r50.

**Jurisdiction – time point**

25. In light of clarification of the issues involved in the pay claims (see "Issues" below for more detail), Mr Randle invited me to deal with the issue as to whether some of the pay claims were out of time as a preliminary issue. The claimant was content to deal with this point at the outset of the hearing.

26. The claims to which this time point relates are as follows:

    26.1. Holiday pay (reg 30 WTR):

        26.1.1.1. 2019 leave year (Issue 77.2).

    26.2. Unlawful deductions of wages (s23 ERA):

        26.2.1.1. Statutory sickness pay 2019 (Issue 78.1.1);

        26.2.1.2. November 2019, no pay at all (Issue 78.1.2);

        26.2.1.3. December 2019, a deduction of £186.92 (Issue 78.1.3);

        26.2.1.4. January 2020, shortfall of £90 (Issue 78.1.4);

        26.2.1.5. August 2020, shortfall of £683.28 (Issue 78.1.5);

        26.2.1.6. September 2020, shortfall of £620.80 (Issue 78.1.6).

27. These pay claims were raised in the first ET1 claim form, dated 6 February 2021. Therefore, any claim that pre-dates 7 November 2020 (three months less a day from 6 February 2021) is outside the primary time limit set by ERA (for unlawful deductions) and reg 30 WTR (for holiday pay).

28. In dealing with this point I heard evidence from the claimant, as well as submissions from both parties.

Law

29. S23 ERA requires the unlawful deductions claims to be presented within three months of the date of payment of the wages that the deduction was made. There is an equivalent provision for holiday pay claims found at reg 30 WTR, where the primary limit is three months from the date when payment should have been made, or the right to holiday should have been permitted.

30. S23(4) ERA makes provision for an extension of time for unlawful deductions cases when the primary time limit is missed, as follows:

> Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three

months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

31. There is a similar provision at reg 30 WTR in relation to holiday pay claims.

32. This legislation therefore provides for a two-stage test for tribunals:

    32.1. Firstly, the tribunal must be satisfied that it was not reasonably practicable for the claimant to have presented her claim within that three-month period; and

    32.2. Secondly, if it was not reasonably practicable, the tribunal must be satisfied that the further period in which the claim was presented was reasonable.

33. The burden of proof regarding both limbs of this test falls to the claimant.

34. Looking at the claimant's claims:

    34.1. Holiday pay for leave year 2019 – the claimant says she is owed 35.5hrs for the leave year ending 31 Dec 2019. I understand C was paid monthly in arrears, so on her case she should have been paid for holiday by 31 January 2020.

    34.2. Unlawful deductions:

        34.2.1. The November and December 2019, and January 2020 claims arguably form a series of deductions, ending with the payment in the January 2020 payslip;

        34.2.2. The August and September 2020 claims again form a series of deductions, ending with the payment on the September 2020 payslip.

        34.2.3. I note at this stage that it cannot be said that all the payment complaints are a series of deductions ending with the March 2021 payslip, as there is a gap of greater than three months between the September 2020 and February 2021 payments, which therefore breaks the series – **Fulton and Another v Bear Scotland Ltd UKEATS/0010/16/JW**.

35. Therefore, the following primary time limits apply:

    35.1. The time limit for the holiday pay claim was 3 months less a day from 31 January 2020, namely 30 April 2020;

    35.2. The time limit for the first series of unlawful deductions claims was 3 months less a day from 31 January 2020, therefore also 30 April 2020;

    35.3. The time limit for the second series of unlawful deductions claims was 3 months less a day from 30 September 2020, namely 29 December 2020.

36. The claimant's first claim form, in which pay claims are indicated, was presented on 6 February 2021, although the detail did not come until later on. So, on the strict timings, all these claims were presented late to the tribunal. I therefore have to first consider whether it was not reasonably practicable for the claimant to have brought the claims before those dates

37. The first question must be why the primary time limit was missed. Then I must ask whether, notwithstanding those reasons, was the timely presentation of the claim still reasonably practicable.

38. The meaning of "reasonably practicable" has been held to mean "*reasonably feasible*"**– Palmer & Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945**. What is "*reasonably feasible*" has been held to sit somewhere between the two extremes of what is reasonable, and what is physically possible.

39. The reason given by the claimant for the late presentation of her claims is that she wanted to resolve matters internally and was waiting for the outcome of her grievance.

40. On that point, I set out the law here. The Employment Appeal Tribunal in **Bodha v Hampshire Area Health Authority 1982 ICR 200** held that the existence of ongoing internal proceedings will not in itself be sufficient to justify a finding that it was not reasonably practicable to present the claim in time (approved in **Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372 CA**).

41. The existence of internal proceedings is however a relevant factor to consider, and may tip the balance in a claimant's favour when there are other factors at play.

42. Another factor at play here could be said to be ignorance of time limits (certainly ignorance before the claimant started researching the ACAS and tribunal process). Where the reason for missing the primary time limit is said to be ignorance or mistake, the question remains whether, in all the circumstances, it was reasonably practicable for a litigant to have presented the claim in time.

43. Ignorance of rights is not a good excuse, unless the claimant could not reasonably be expected to have been aware of her rights. If she could reasonably have been expected to know, then a claimant will be stuck with the consequences – **Wall's Meat Co Ltd v Khan [1979] ICR 52.** The question becomes whether the mistake or ignorance is itself reasonable.

44. What is considered reasonable depends on the circumstances at the time. It is not just a question of the time period that has passed since the expiry of the limitation period. For example, a delay of almost five months has been found to be reasonable – **Locke v Tabfine Ltd t/a Hands Music Centre UKEAT/0517/10.** Having said that, the tribunal does not have unfettered discretion to permit claims to continue, regardless of the length of delay – **Westward Circuits Ltd v Read [1973] ICR 301**. The length of delay is one factor to be considered, but not to the exclusion of all other relevant factors in any given case – **Marley (UK) Ltd v Anderson [1994] IRLR 152**.

45. A claimant must present his claim as soon as possible once the impediment stopping him having presented the claim in the initial three-month period is removed. It is necessary to consider the relevant circumstances throughout the period of delay and, at each point, what knowledge the Claimant had, and what knowledge he should have had if he had acted reasonably in all the circumstances – **Northumberland County Council v Thompson UKEAT/209/07**.

Findings of fact

46. The claims can be split into two:

    46.1. The claims that the claimant included in her grievance on 16 October 2020 (holiday pay, and November/December 2019 unlawful deductions); and,

    46.2. The claims that she did not include in that grievance (January, August, September 2020 unlawful deductions).

47. In relation to category 1, the claimant says she was waiting for the outcome of the internal process, as she truly believed that Human Resources would be able to solve matters.

48. In relation to category 2, the claimant accepts that she did not raise these as grievances. She told me that at the time she thought that these discrepancies were unimportant, and so did not seek to pursue them. It was only when she was filling in the claim form for other matters that she thought she would include these three payments.

49. In terms of the claimant's knowledge, she was aware of the tribunal as a way of enforcing an employee's rights, and she was aware of ACAS. She was able to research ACAS and the tribunal process on the internet when she felt the need to find out more, at which stage she found out about the 3 month time limit.

50. So, why did the claimant not look up ACAS process and time limits etc earlier so as to enter her claim in time?

51. We come back to the fact that she was waiting for the internal process in respect of category 1, and regarding category 2 she made a choice not to pursue them until a later date.

52. The impediment to the claimant bringing the claims within the time limit was therefore a mixture of initial ignorance of time limits, coupled with wanting to conclude the internal process.

Conclusion

53. Having made those findings, I then have to consider whether the initial ignorance of time limits was reasonable in itself. I find it was not reasonable; the claimant was perfectly capable of looking up the time limits and ACAS information when she chose to do so. She chose to wait for the internal process to finish, and chose not to pursue some of her complaints internally at all. She accepted in cross-examination that, had she made internal complaints earlier,

or with her previous employer, Marks & Spencer, she would have presented her claims to the tribunal earlier.

54. Although I understand the claimant's argument that she was giving the respondent a chance to sort matters out internally, and she should not be penalised for that, that is not the legal test I have to apply. I have to apply the test of reasonable practicability.

55. In all the circumstances, I find that it was reasonably practicable for the claimant to have presented the claim within the 3 month time limits and therefore I cannot extend the time for presenting the claim.

56. I therefore struck out:

    56.1. the holiday pay (reg 30 WTR) claim regarding the 2019 leave year;

    56.2. the unlawful deductions of wages claims for 2019 and 2020.

57. For completeness, this meant that the holiday pay claim relating to 2020 is still live, as were the unlawful deductions claims for payments in February and March 2021.

**Postponement application**

58. At the end of the first day, having dealt with the two preliminary matters above, the claimant applied to postpone the case. She said that she had not presented all the evidence she had hoped, had not thoroughly checked the bundle and was not satisfied that her witness statement was as full as it should be. She also considered that she was at a disadvantage, having no legal representation.

59. I asked the claimant what steps she had taken since the April 2022 preliminary hearing to find representation. She said she had faced an unexpected problem that had arisen in her life, and so she had not been able to dedicate the time to this litigation as she would have liked.

60. I asked the claimant whether this problem was something she was willing to tell us about, as the nature of it may affect her application. The only details that the claim gave were that her father was suffering with cancer, which has returned with more force, and that her good friend of more than 25 years is also suffering with cancer. She however stated that these factors were only part of the issue.

61. Mr Randle quite rightly pointed out that, given that we were now at Day One of the hearing, the claimant's application fell within r30A of The Rules, which restricts the circumstances within which a postponement will be granted within seven days of the start of a hearing (set out below). Mr Randle said the relevant circumstance here was whether there were "exceptional circumstances": in short, he said there were not. Mr Randle pointed out that the claimant did seek some legal assistance in January 2022 ([87]) and that this hearing had been listed since April 2022. He also argued that to adjourn now would not be in line with the overriding objective.

Law

62. The application to adjourn arose at just before 1600hrs on Day One, and therefore the application was made less than seven days before the hearing. As such, I have to consider rule 30A of The Rules, which states:

> (1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.
>
> (2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where –
>
> (a) all other parties consent to the postponement and –
> (i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or,
> (ii) it is otherwise in accordance with the overriding objective;
> (b) the application was necessitated by an act or omission of another party or the Tribunal; or,
> (c) there are exceptional circumstances.

63. This is not a case to which sub-rule 30A(2)(a) or (b) applies as it is not said that the adjournment is the fault of the respondent or tribunal, and the respondent does not agree to the adjournment. Therefore, the only possible way for an adjournment in this case is for the claimant to demonstrate that there are "exceptional circumstances". I note that, under r30a(4), "exceptional circumstances" can include ill health relating to an existing long term health condition or disability

64. I therefore have to consider whether the application arises due to exceptional circumstances. In making this decision, I take account of the overriding objective, and specifically note the following factors:

    64.1. Ensuring both parties are on an equal footing;

    64.2. Dealing with cases in ways that are proportionate to the complexity and importance of the issues;

    64.3. Avoiding unnecessary formality and seeking flexibility in proceedings;

    64.4. Avoiding delay, so far as compatible with proper consideration of the issues; and,

    64.5. Saving expense.

65. I must also consider the prejudice to both sides if the adjournment is allowed or refused.

Findings of fact

66. The prejudice to the respondent could be addressed by way of a costs order, if appropriate. However, a costs order would not meet all the prejudice the respondent would face. We are now looking at listing a hearing in summer

2024, by which time it will be over 3 years since the claimant's dismissal. There is a real possibility that memories will fade, or people may move on from the employment of the respondent, both of which would prejudice the respondent in its defence of the claims. A delay would also prejudice the claimant in that her memory would fade too.

67. There is also a need for justice to be dispensed in a timely manner; it does no-one, least of all the claimant, any good for litigation to drag on for years on end.

68. If the hearing goes ahead, I accept there is some prejudice to the claimant. She is not represented and has not had as much time as she would have liked to have prepared. Taking both those points in turn:

    68.1. Legal representation. This hearing has been listed since April 2022, seven months ago. The claimant has had plenty of time to seek out legal advice and representation if she had wanted to do so. I notice that the claimant has had some advice from a solicitor, this was around the time of deciding to withdraw her race discrimination claim in January 2022 - [87]. Any disadvantage the claimant has in not being legally represented she could have remedied at an earlier date. Also, I note that the tribunal is designed for people to be able to represent themselves. Every day, up and down the country, litigants in person present their cases: although they may not know the law as lawyers do, that is the purpose of the tribunal, to ensure that the law is applied correctly, and that litigants in person understand each stage of the process.

    68.2. Lack of time to prepare. The claimant has told me part of what has been occupying her time: both her father and her close friend are suffering with cancer. The claimant tells me that there is more to the situation than that, but that is all the detail that she has given us in support of her application to adjourn. We do not have any more specifics. Although it may well be that the claimant would have ideally wanted more time to prepare, she had produced a nineteen page witness statement that covers all the issues in the case. I had a bundle of 708 pages (at the point of making this decision), which encompasses all of the documents relating to the internal grievance and capability procedures. I understand that the claimant says she has more documents, however, again, she has had the orders regarding disclosure and documents since April, and so has had months to look through her documents, or get advice on what documents to disclose.

69. I find the following:

    69.1. The claimant has known about this hearing since April 2022 and could have taken steps to find a representative;

    69.2. She has known what issues are to be decided since April 2022, and so could have sought advice on the relevance of any documents in her possession;

69.3. If we adjourn now, we cannot guarantee a hearing until summer 2024 by which time there is a very real risk of all witnesses' memories fading, which could lead us to question whether, that far down the line, a fair hearing would even be possible

69.4. More costs would be incurred by both parties if this matter was adjourned off. I note that where late applications to adjourn are made I am obliged to consider making a costs order: in other words, if the case were to be adjourned, I would have to consider making the claimant pay something towards the respondent's costs of adjourning;

69.5. It is in the interests of all involved for this matter to be concluded sooner rather than later, and certainly not have it hanging over them for another two years.

Conclusions

70. I do not doubt at all what the claimant has told us, and I feel huge sympathy for her. However, I. do not have enough information to enable me to find that this case has exceptional circumstances. I have no further detail or evidence of the matters that have prevented the claimant from spending time preparing this case. Although she has my sympathy, on the limited information and evidence she has provided I am not satisfied that she has discharged the burden to demonstrate that we find ourselves in exceptional circumstances.

71. I will ensure she has time throughout the hearing, at various intervals, and ensure that she has time to prepare for cross-examination of each witness

72. I find that the claimant can still have a fair hearing now: the issues are clear, I understand her case, she will be given time if she needs it.

73. Taking all relevant factors into account, I am not satisfied that any of the requirements under rule 30A are met. Therefore, I refuse the application to adjourn the hearing. I realise the claimant will be disappointed, however the conclusion of this matter will enable her to focus on the other matters in her life, like the health of her father and friend, and to move on without this hanging over her.

## ISSUES

74. At the commencement of the hearing, I went through the issues with the parties to ensure that all were clear on the issues we were to deal with during the hearing.

75. **Unfair dismissal – s98 Employment Rights Act 1996**

75.1. The issues relating to the unfair dismissal claim were set out following the preliminary hearing on 19 April 2022, and are as follows:

75.2. What was the reason for the claimant's dismissal?

75.3. Was the claimant dismissed for a fair reason, namely capability?

75.4. Was the dismissal of the claimant fair and reasonable in all the circumstances of the case? In particular:

75.4.1. Was it unfair to dismiss when the claimant's absences were supported by medical certificates?

75.4.2. Was the process adopted by the respondent unfair to the claimant by holding meetings shortly after the claimant's return to work and by holding meetings in the claimant's absence?

75.4.3. Did the respondent's process comply with ACAS guidance/code of practice?

75.4.4. Did the respondent's decision to dismiss fall outside the band of reasonable responses open to an employer?

75.5. If the dismissal was unfair, what is the appropriate remedy? Including consideration of:

75.5.1. The claimant's efforts to mitigate her loss;

75.5.2. The likelihood that the claimant would have been fairly dismissed if a fair procedure had been followed; and,

75.5.3. The likelihood that the claimant would have been fairly dismissed in any event at a later date by reason of her conduct.

76. **Breach of contract: notice pay**

76.1. The claimant was unclear as to what precisely she was saying she had not been paid in terms of her notice pay claim. However, the respondent argued that the claimant had been paid the entirety of her notice pay, as seen on [584].

77. **Breach of contract: expenses – s23 Employment Rights Act 1996**

77.1. The claimant clarified that this was a claim for around £129. This sum was made up of journeys taken in December 2019 to and from Camberley and Oxford. The claimant said that this was the fault of her manager at Marks & Spencer.

77.2. The respondent argued that (a) this claim should have been brought against Marks & Spencer, and (b) it was out of time in any event.

78. **Holiday pay – Working Time Regulations 1998**

78.1. The claimant set out that there were claims relating to holiday in 2019, and in 2020, as set out below:

78.2. 2019 leave year:

78.2.1. The claimant said she was owed 35.5 hours, or 7 days, of holiday.

78.2.2. The respondent argued (a) that this was when the claimant was employed by a different entity, Marks & Spencer, and (b) that this claim was out of time.

78.3. 2020 leave year:

78.3.1. The claimant said she was off sick over four bank holidays, which she should therefore be able to claim back in lieu as holiday days, which she tried to claim in December 2020, but that request was denied; and

78.3.2. She also said she had 42 hours' holiday that were taken away from her in November 2020; 35 hours of which she had "bought" at the beginning of the year.

78.3.3. The respondent says that it lawfully exercised its discretion to reduce the claimant's holiday.

78.3.4. It transpired that, in fact, the claimant was not arguing that the respondent did not have this discretion, but that it removed the holiday entitlement without consulting her first.

79. **Unauthorised deduction of wages: arrears of pay – s23 Employment Rights Act 1996**

79.1. The claimant was claiming various sums as set out below:

79.1.1. Statutory sickness pay ("SSP") 2019 – the claimant said she did not accept that her SSP allowance had been exhausted as the respondent had not sent her the relevant paperwork to check this;

79.1.2. November 2019 – the claimant said that she received zero payment in November 2019;

79.1.3. December 2019 – the claimant claimed that £186.92 was taken from her payslip, marked as "Retro" (meaning retrospective);

79.1.4. January 2020 – the claimant says that she was £90 short on her payslip, which was the difference in day rate between her pay with Marks & Spencer and that with the respondent. In other words, the claimant says she was paid incorrectly for one day, 1 January 2020;

79.1.5. August 2020 – the claimant says her payslip was short by £683.28;

79.1.6. September 2020 – the claimant argued that her payslip was short by £620.80;

79.1.7. February 2021 – the claimant says her payslip was short by £560;

79.1.8. March 2021 – the claimant says her payslip was short by £1077.58

79.1.9. The respondent's case, broadly, is that several of these claims are out of time, and should have been brought against Marks & Spencer. In terms of the other claims, the respondent's case is that all sums owing to the claimant have been paid.

## LAW

### Unfair dismissal

80. The relevant legislation for the Claimant's unfair dismissal claim is found at s98(1), (2) and (4) ERA.

Reason for dismissal

81. The Respondent relies upon capability (ill-health), as being the potentially fair reason for dismissal. The burden of proof is on the respondent to show that the reason for dismissal was ill-health, on the balance of probabilities.

Fairness

82. Ultimately, the consideration is whether the process, and the decision to dismiss, fell within the band of reasonable responses available to a reasonable employer.

83. When absence is caused by unconnected illnesses, and there is no underlying health condition, then it may be fair to dismiss an employee for such absences without first obtaining a medical report – **Lynock v Cereal Packaging Ltd 1988 ICR 670,EAT**.

84. The EAT in **Lynock** cited the case of **International Sports Co Ltd v Thomson 1980 IRLR 340, EAT**, in which the EAT set out guidelines for a fair capability process:

84.1. Consider the pattern of the employee's absences, and the reason(s) for them;

84.2. Give the employee a warning, setting out the required improvement, and give them the opportunity to make representations;

84.3. Consider whether the required improvement has been met. If not, it is likely that dismissal will be reasonable.

85. It has been held that there will come a stage, in cases of short-term intermittent ill-health, when a reasonable employer is fair in saying "enough is enough". Provided that warnings have been given, it is likely that dismissal for such a reason is likely to be fair, and fall within the band of reasonable responses – **Post Office v Jones 1977 IRLR 422, EAT**.

86. If, after warnings have been given, there is no sign of improvement, various factors should be taken into account, including:

86.1. The employee's length of service;

86.2. The employee's performance;

86.3. The likelihood of change in attendance;

86.4. The availability of suitable alternative work where appropriate

86.5. The effect of absences, both past and future, on the respondent's business.

87. Further, in considering fairness, the EAT in **Lynock** held that it is important to weigh up all the circumstances including, for example:

87.1. The nature of the illness(es);

87.2. The likelihood of recurrence;

87.3. The length of periods of absence compared to the length of periods of attendance;

87.4. The need for that particular employee;

87.5. The impact the absences have on the rest of the workforce;

87.6. The adoption of and adherence to any relevant capability policy;

87.7. Whether the employee has been made aware that the risk of dismissal is a very real risk.

88. In **Davis v Tibbett and Britten Group plc EAT 460/99**, it was held that, in the specific circumstances of that case, given the claimant's history of absenteeism, it was reasonable of the respondent to conclude that it was unlikely that the claimant would reach an acceptable attendance level in the future.

89. The case of **Davis** also tells us that, once the stage has been reached when an employer can reasonably say "enough is enough", given the number of absences to date, it will be unnecessary to investigation the likelihood of an upsurge in attendance.

**Limited unfair dismissal remedy issues – Polkey reduction**

90. The decision in **Polkey v AE Dayton Services Ltd [1987] UKHL 8** permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.

91. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed

dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

92. The Tribunal has to consider what difference a fair procedure would have made, if any. It is for the respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation – **Software 2000 Ltd v Andrews [2007] ICR 825**.

**Limited unfair dismissal remedy issues – misconduct**

93. The respondent argues, as a subheading of the Polkey argument, that the claimant would have been fairly dismissed in any event had the disciplinary process come to a conclusion.

94. Firstly, it is necessary to consider whether, on the face of it, conduct would have been a fair reason to dismiss. The relevant test is set out in **British Home Stores Ltd v Burchell [1978] IRLR 379** encompasses the relevant test for fairness:

    94.1. Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged by the respondent?

    94.2. If so, were there reasonable grounds for the respondent in reaching that genuine belief? and,

    94.3. Was this following an investigation that was reasonable in all the circumstances?

95. It is then also necessary to consider the procedural fairness of the case, and whether dismissal was the appropriate sanction.

96. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) **ERA**, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563**.

97. Then, it would be necessary to go back to the standard **Polkey** issues:

    97.1. Consideration of the percentage chance of dismissal being the penalty inflicted; and,

97.2. Consideration of the length of time it would have taken to fairly conclude the disciplinary process.

98. Any compensatory award is capable of being adjusted to reflect the findings stemming from these two issues.

**Breach of contract/notice pay**

99. In this case, the question is simply one of fact; whether the claimant was paid for her 4 week notice period, from 23 February 2021 to 23 March 2021.

100. If she was not paid for that period, then the respondent will be in breach of her employment contract.

**Unauthorised deductions of wages**

101. S27(1) **Employment Rights Act 1996** defines wages as:

> "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

102. The Claimant's claim relates to her salary, and expenses, both of which fall squarely within this section, and are not excluded payments under s27(2) **Employment Rights Act 1996**.

103. S13(3) **Employment Rights Act 1996** provides as follows:

> "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."

104. The question of what is properly payable generally requires the Tribunal to determine what payment the worker is entitled to receive by way of wages. This is an issue to be decided in line with the approach of the civil courts in contractual actions – **Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT**.

105. In other words, the Tribunal must decide, on ordinary contractual and common law principles, the total amount of wages that was properly payable to the worker at the relevant time.

106. In determining the terms of the contract in question, it is necessary to take into account all the relevant terms of the contract, including implied terms – **Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA**.

**Holiday pay**

107. Reg 13 WTR provides that a worker is entitled to 4 weeks' leave ("basic leave").

108. Reg 13A WTR provides that a worker is entitled to an additional 1.6 weeks' leave ("additional leave").

109. Under reg 30(1)(a) WTR, a claimant has the right to pursue a claim where their employer has refused to permit them to exercise their right to statutory leave.

## FINDINGS OF FACT

110. The claimant commenced employment with Marks & Spencer as a cashier on 9 April 2018. From 2019 onwards, she had significant intermittent sickness absence.

111. In July 2019, the claimant had key-hole surgery, which led to a period of absence.

112. Her manager at Marks & Spencer, Gareth Crane, completed an occupational health ("OH") referral form on 30 August 2019 – [163]. The ensuing report is at [165], dated 13 September 2019. At that stage, the claimant's main cause of absence was work related stress; she told OH that Mr Crane's conduct was causing her stress - [165].

113. The claimant's company sick pay was exhausted on 2 September 2019 – [755].

114. The claimant returned to work on 21 October 2019, at which point, OH closed their case on the claimant – [167].

115. On 3 January 2020, the claimant's employment moved to the respondent, and from May 2020 the respondent sought to manage her absences. Her new contract is at [559]. Upon joining the respondent, she was able to benefit from the My Choice scheme, which allows employees to sign up to certain benefits, for which the cost is taken monthly from their gross salary – [186].

116. In terms of holiday leave, the claimant's contract sets out that the holiday year runs from 1 January to 31 December each year. The claimant was entitled to 25 days' annual leave each year, exclusive of public and bank holidays – [563].

### Policies

117. The respondent has a capability policy covering cases of ill-health, at [651]. This policy sets out the informal process, which is simply that the respondent will attempt to resolve matters informally. However, where this is not possible, the formal procedure will come into play. The internal procedure sets out that a capability meeting will be called when the employee's absence is a cause for concern – [652]. The process is that there is a capability meeting at which various options may be considered (the list on [653] is not exhaustive, following which the employee may appeal if they choose. The policy does clearly state that "[i]n some cases, the outcome of

the capability hearing may result in the employee being given notice to end their employment" – [653].

118. The respondent's expenses policy is at [656]. The procedure for claiming expenses of over £15 is set out at [664]:

> Expenses over £15 will be reimbursed if a copy of the original VAT (item) invoice is scanned and attached to your expense claim in Fusion. (Credit card counterfoils are not acceptable as receipts). If a receipt cannot be provided, then the claimant must provide a valid justification.
> …
> For expenses in excess of £15 and less than £250 – a standard receipt is sufficient.

119. The claimant explained that Fusion is the respondent's computer platform that is used to make claims for expenses.

**Attendance Management**

120. The claimant went on sick leave in spring 2020, with possible Covid-19, however she never received a positive test, or a confirmed diagnosis. The claimant had a telephone conversation with Occupational Health in May 2020 following her line manager, Isla Henson, completing a referral – [231]. This referral led to the report at [234], followed with an updated report in June 2020 – [236]. It is noted in the update that the claimant was, at that stage, refusing to sign a consent form until her 26th week of absence; this was due to a misunderstanding around how Group Income Protection ("GIP") allowance functions – the GIP policy is at [767]. This was the claimant's twelfth week of absence – [236].

121. In cross-examination, the claimant accepted that Ms Henson and she had had many informal discussions about her sickness absences in May/June 2020. She then received a letter dated 23 June 2020 inviting her to a formal capability meeting – [569].

122. Ms Henson scheduled an informal meeting with the claimant for 14 July 2020: the claimant contacted her to say that she was not well enough to attend – [242]. This meeting was therefore rearranged for 21 July 2020: the claimant did not attend – [241]. It was therefore rescheduled for the third and final time to 28 July 2020: the claimant failed to attend again, and sought and adjournment due to side effects from her medication – [261]. On 29 July 2020, Ms Henson spoke to the claimant, enquiring as to the name and dosage of her medication: this was on HR's request, in order to refer the matter to OH again to see if her medication would affect the claimant's ability to attend an informal meeting – [260]. The claimant refused to provide those details – [259]. At this stage, Ms Henson sought advice from HR as to whether she could commence the Absence Attendance Objective process. Ms Henson also updated PH, who stated that ultimately, in light of the lack of medical evidence, any decision would have to be made on the information currently available – [262].

123. On 3 August 2020, the respondent sent the claimant a letter, commencing an Absence Attendance Plan ("AAP"). The AAP was to last three months, from 7 August 2020, during which time the claimant needed to show a "substantial improvement" in her attendance – [268]. At this point, the

claimant's absence was 44.7%, compared with the respondent's benchmark of 4%. In this letter, Ms Henson warned the claimant that "if [her] absence continues to exceed the 4%, [Ms Henson] may need to consider the options available to [her]".

124. By the end of August 2020, the claimant had gone over the set benchmark of 4% in terms of her level of absence at work. In the bundle we have various fit notes; the ones relevant to the AAP are as follows:

    124.1. 7 August 2020 – 17 August 2020 – anxiety – [276]

    124.2. 18 August 2020 – 25 August 2020 – anxiety – [277]

125. On 24 August 2020, OH became involved again. Laura Kenyon, the OH Team Manager, explained that, with the claimant's lack of engagement, she was unable to assess whether 4% was a reasonable benchmark, or whether the claimant was fit enough to attend a capability meeting – [278].

126. The claimant returned to work on 26 August 2020 – [283]. At this stage, the claimant's level of absence over a rolling 12 month period was 40%.

127. The claimant was invited to a capability meeting on 3 September 2020 – [300]. She was not able to attend that meeting, and so it was rearranged again.

128. The capability meeting took place on 8 September 2020, chaired by Kathy Neville, however the claimant did not attend – [328/330]. The decision from that meeting was that the claimant was encouraged to engage with OH and seek advice from Bupa and Open Line via her employer – [328]. A new attendance objective was set in this meeting: for a period of six months, from 9 September 2020 to 9 March 2021, the claimant was set the target of her absence not exceeding 4%. The outcome letter from this meeting was sent to the claimant by email at 1624hrs on 8 September 2020 – [351/352]. The claimant was warned at this point that, if her absence levels did not improve, dismissal may be a potential outcome of the next capability meeting – [330].

129. On the morning of 8 September 2020, the claimant sent an email to the respondent seeking clarification as to her SSP payments – [332].

130. On 14 September 2020 the claimant indicated her intention to appeal the implementation of the attendance objective – [351]. This was followed by a detailed appeal letter dated 15 September 2020 – [401]. She was invited to an appeal hearing by letter dated 19 October 2020, however was unable to attend that meeting, and so it was rescheduled to take place on 13 November – [399/446]. Once again, the claimant was unable to attend, and so the meeting was rescheduled again to 25 November 2020 – [452].

131. On 18 November 2020, there was an email exchange between Ms Kenyon of OH and Ms Henson, following a conversation between the claimant and OH, in which it was agreed that the claimant would be supported in her request to undertake non-customer facing tasks – [454].

132. The appeal hearing was rearranged one final time, due to the claimant's inability to attend, for 1 December 2020 – [461]. On 30 November 2020, Ms Kenyon confirmed that there appeared to be no clinical reason why the claimant was unable to attend an appeal hearing by Zoom, in light of her indications that she would not be well enough to attend in person – [460].

133. The appeal hearing went ahead in the claimant's absence on 1 December 2020 and was chaired by Joanne Cross; the outcome letter was dated 3 December 2020, and upheld the decision to put in place the attendance objective from 9 September 2020 to 9 March 2021 – [462].

134. The claimant returned to work on 24 December 2020, however she was off sick again as of 4 January 2021, returning on 18 January 2021 – [505]. Unfortunately, she was off sick on 19 January 2021 – [503]. As at 19 January 2021, the claimant level of sickness absence was at 15.3% - [503].

135. By letter of 26 January 2021, the claimant was invited to a formal capability hearing to discuss the following – [511]:

- Your failure to achieve the formal attendance objective as set out following your Capability Hearing on 9th September 2020 – the target was 4% or below.
- Your ongoing high level of sickness absence – from the beginning of the attendance objective until the 15th January your level was 15.3% and for a rolling 12-month period you have been absent from work for 650 hours which is 36%.
- Your current state of health in relation to your ability to perform your substantive job role of Cashier on a regular and sustained basis.
- What, if any, steps we might be able to take to facilitate your return to work and/or to support you on your return.

136. Various outcomes were listed in the invitation letter, including the possibility of dismissal. The claimant was also warned that, if she did not attend the meeting without good reason, then the decision-maker would base her decision on the evidence available to her without the benefit of hearing from the claimant.

137. The capability hearing was rescheduled to 8 February 2021, at the claimant's request, to give her time to arrangement for a union representative – [525]. The claimant did not attend that meeting as she said she felt uncomfortable attending without any support as she had not had the time to arrange for a union representative – [522]. On this point, I note that the meeting was rearranged on 4 February 2021, a Thursday, and rescheduled for 8 February, the following Monday. The claimant therefore had one full working day to make enquiries into whether a union representative would be able to support her. The claimant's evidence was that she had no time at all during that day in which she could send an email or telephone her union; not even time in a lunch break, or before work. The claimant's shift times were 1000-1600hrs, although cashiers are required to attend work at 0920hrs – [535]. I find that there was time at the beginning and end of her working day, and in her standard breaks, to make enquiries. I also accept that the claimant was not on cashiering duties all of her working day on Friday 5 February 2021; I note the summary in the outcome letter at [531] in which it is recorded that the claimant was released from cashiering

duties at 1430hrs – [532]. This evidence is contemporaneous, and was not challenged by the claimant. I therefore find that the claimant did have sufficient time to make enquiries with her union, but did not do so.

138. The claimant did not send in written submissions, having been given the opportunity to do so [521]. The meeting notes are at [517].

139. The capability hearing decision was sent to the claimant by letter of 23 February 2021 – [531]. This letter informed the claimant that she was to be dismissed, given she was "no longer able to perform [her] substantive job role on a regular and sustained basis due to ill-health reasons" – [532]. The claimant was to be paid her notice pay, but was not required to work out her notice.

140. The decision-maker, Clare Sargent, decided not to seek further OH advice prior to making her decision – [532]. She determined that, given the claimant's history of lack of engagement with OH, there was no point in referring the claimant back to OH.

141. I have considered whether this was an action that was within the band of reasonable responses of a reasonable employer. I find that it was. The claimant had failed historically to engage with OH, in not sharing details of her medication, and not signing the consent form for release of GP records. The respondent and OH were therefore attempting to make decisions with limited information throughout the period that I have set out above. Further, the respondent's capability policy states at [654] that "[r]easonable attempts will be made to obtain up-to-date medical information and this requires the employee's co-operation". Further, in cases of short-term intermittent absence, it is often difficult for medical practitioners to predict whether attendance may improve over time, given the intermittent and unrelated nature of the various illnesses leading to absences. I refer back to **Lynock** above.

142. I also note that the claimant did not engage in the capability process: she did not take steps to find a union representative, nor did she respond to the enquiry as to whether she would provide written submissions. Although a counsel of perfection may have required Ms Sargent to refer the claimant back to OH, that is not the test I have to deal with. In the circumstances, I find that it was reasonable of Ms Sargent not to re-engage OH at the time of making her decision.

143. Ms Sargent set out in her letter that she had no evidence that there was an underlying health condition from which the claimant suffered, and that her absences were for varying reasons – [532]. She also recorded that she had seen no evidence to demonstrate that a change in the claimant's attendance may occur in the future, she had nothing to suggest that the claimant would be able to maintain regular and reliable attendance at work. Ms Sargent therefore decided that dismissal was appropriate.

144. The claimant appealed the dismissal decision by letter of 8 March 2021 – [534]. The respondent, specifically David Harris (Senior Employee Relations Manager), summarised the claimant's appeal into five points set out in the invitation letter – [539].

145. The appeal hearing took place on 22 April 2021, and was chaired by Rob Slade. The claimant was in attendance with her union representative, Steve Philips. The notes are at [541]. The claimant provided "corrections" to those minutes at [698]; some of those corrections are in fact further comment from the claimant. At the beginning of the meeting, Mr Harris asked the claimant if she was content that the summarised five points accurately reflected her appeal. The claimant stated that her main issue was that she considered that procedures had not been followed – [541]. The claimant was given every opportunity to expand on the points in her appeal, with Mr Slade asking open questions, including whether the claimant had anything else to add in relation to each of the five summarised points. Mr Slade also asked what the claimant felt that the respondent could have done to support her in trying to decrease her absence levels. The claimant did not suggest any specific steps that the respondent could try in order to reduce her level of absences. The claimant's union representative was permitted to ask questions: he also raised the point that some companies had the practice of discounting from absence calculations any Covid-related sickness absence, or at least recognized that awaiting a test result put people in a difficult position. The appeal hearing lasted two hours.

146. Mr Slade sent his appeal decision to the claimant on 29 April 2021: the decision letter, stating that the appeal was not upheld, is at [555]. Ultimately, Mr Slade concluded that there had been an informal process, during which there had been no sign of improvement in the claimant's sickness absence; this lack of indication of any improvement continued through the formal process also – [556]. Mr Slade concluded that the claimant had been "unable to perform the substantive duties of the role for which [she was] employed, for a sustained period and this absence [had] significantly impacted the Bank operationally" – [557].

**Disciplinary process**

147. Meanwhile, on 4 September 2020, Ms Henson received a notification that one of her staff (which transpired to be the claimant) had triggered a policy or security violation in the global Data Leakage Prevention (DLP) system – [354].

148. This led to an investigation meeting, conducted by Ms Henson, on 14 September 2020 – [356]. In that meeting, the claimant stated that "I only send [emails from HSBC account] to myself, never to anyone else. Not family, not friends, nobody, only myself. And the purpose of doing that is only because I want to have my own records" – [358].

149. Later on 14 September 2020, Ms Henson asked Tom Henderson to hold a 121 with the claimant, in order to discuss her language and tone in emails, and the manner in which she conducted herself in a conversation with Ms Henson on the same date – [361]. In the email to Mr Henderson, Ms Henson records a couple of relevant points:

    149.1. The claimant had asked Ms Henson about her annual leave entitlement, to which Ms Henson had responded that there is a

discretion to reduce annual leave for someone who has had high levels of sickness absence; and,

149.2. The claimant made it clear she was not happy that some of her expenses had not been approved.

150. Mr Henderson held the 121 with the claimant on 6 October 2020, to consider values and behaviours – [382/383].

151. Following this, on 22 October 2020, an investigation meeting took place into another allegation of misconduct, namely the claimant's allegedly inappropriate manner towards Ms Henson in a telephone conversation on 14 October 2020 – [417]. A note of the telephone conversation, made by Ms Henson, is on [484].

152. By letter of 8 December 2020, the claimant was invited to a disciplinary hearing to consider two allegations, set out on [463]:

> 1. it is alleged that you sent a large amount of emails (some labelled restricted) from your HSBC work email address to your personal email account.
>
> 2. it is alleged that you have not demonstrated the behaviours expected of those employed by HSBC in that you can come across rude and aggressive, an example being that during a call with your line manager Isla Henson on 14th December [sic] you were rude and disrespectful.

153. That hearing was rescheduled for 15 January 2021; the letter of invitation recorded the same two allegations as set out above – [492]. In the event, the decision was taken to postpone the disciplinary hearing until the claimant returned to work – [501].

**Grievance**

154. The claimant lodged a grievance regarding holiday entitlement and expenses on 16 October 2020 – [575]. This was acknowledged by the respondent on 20 October 2020 – [438].

155. She was scheduled to have a grievance hearing on 8 January 2021, however she was on sickness absence at this time, and did not to attend the hearing – [494/497]. The grievance hearing went ahead in her absence, and was chaired by Mike Green – [497].

156. The claimant's grievance raised the following complaints:

156.1. She was treated unfairly by Ms Henson, who reduced her annual leave entitlement by 42 hours – [577];

156.2. Her previous manager (Mr Crane) did not approve certain expenses, to the value of around £150. Ms Henson failed to support the claimant in her attempts to recover this money – [577/578];

156.3. She was treated unfairly by Daniel Stiles, who refused her request to complete her training from home – [580];

156.4. Mr Henderson wrongly accused her of clenching her fists in the 22 October meeting.

157. The outcome of the grievance was sent to the claimant under cover 13 January 2021. The allegations were not upheld, as Mr Green held that there was no evidence to support the claimant's allegations – [499].

158. The claimant appealed by letter of 26 January 2021 – [506]. The appeal hearing was held on 4 May 2021, chaired by Philip Rixon (Local Director HSBC UK). The claimant was accompanied by a union representative. The outcome of the appeal was communicated to the claimant by letter dated 5 July 2021 – [709].

159. Of relevance to these proceedings are the following appeal findings:

159.1. The decision of Ms Henson to deduct 42 hours of holiday was taken in consultation with HR and having considered the number of days the claimant had been absent from work;

159.2. The claimant was found to have failed to provide receipts for her claimed expenses of £150 in the required format. She also did not send to Rachael Prandle (at M&S) the required expenses spreadsheet, attach the receipts and submit them for approval.

159.3. In terms of Ms Henson supporting the claimant with her expenses claim, she contacted Hogg Robinson in order to request the required proof of purchase, when the claimant failed to do this herself. Ms Henson then supported the claimant in resubmitting the claim.

**Payment of wages**

160. The claimant received monthly pay slips, setting out base pay, any deductions made for My Choice benefits, and any alterations/corrections following the previous month's payslip (referred to as "retro"), amongst other matters.

161. Regarding My Choice deductions, the claimant explained that the amount deducted each month may vary throughout the year, as employees can change the benefits they wish to purchase. For example, one may start off wanting a certain type of insurance offered by My Choice, but then part way through the year, change one's mind and stop paying for the benefit.

<u>February 2021 payslip</u>

162. The claimant's February 2021 payslip is at [751].

163. For February, she was paid:

163.1. Base pay of £1410.50;

163.2. Territorial allowance (the equivalent of London weighting) of £166.67.

164. There were retrospective payments regarding the claimant's January pay, as follows:

164.1. Deduction in base pay of £1236.90. This was because the claimant had been paid full pay for January, when in fact she was only entitled to SSP;

164.2. Deduction in territorial allowance of £166.67;

164.3. An addition of statutory top-up of £28.08;

164.4. An addition of SSP of £301.25 for January 2021.

165. There was also a deduction for the claimant's contribution to her My Choice benefits of £38.88.

March 2021 payslip

166. The claimant's final payslip, for March 2021, is at [584]. She received payment for March on 19 March 2021, and was paid up to and including 23 March 2021, the expiry of her 4 week notice period – [587].

167. In March, the claimant received:

167.1. Base pay of £1069.01;

167.2. Territorial allowance of £123.66; and,

167.3. Holiday adjustment of £693.50.

168. There were some deductions too, as follows:

168.1. A total retro figure for February 2021 of -£59.09, made up of:

168.1.1. A deduction in base pay of £65.10;

168.1.2. A deduction for Territorial Allowance of £7.69; and,

168.1.3. An addition of £13.70 for SSP.

168.2. A My Choice payment of £87.75.

169. There was also an "after-tax" deduction of £196.97, labelled as "My Choice Net".

170. Five days of the claimant's notice pay was received in her February payslip, given that her notice commenced on 23 February 2021 – [587].

## CONCLUSIONS

### Unfair dismissal

Reason

171. It is a low threshold for an employer to prove the reason for dismissal. I note that the claimant remains convinced that her dismissal was pre-determined, and the capability process was a sham. In fact, the claimant still believes that the reason for dismissal was discriminatory; however she has withdrawn her discrimination claim.

172. I am satisfied, on the balance of probabilities, that the reason for dismissal was the claimant's capability. I found the respondent's witnesses to be credible in the manner in which they gave their evidence. They were consistent across the evidence they gave orally, in their written statement, as well as in the contemporaneous documentation. I find that there is no good evidence to rebut the respondent's evidence on this point. The claimant has not produced any good evidence to undermine the evidence of the respondent on this point.

Fairness generally

173. In light of the case-law I have cited above, I consider it was reasonable for the respondent to go ahead with the capability meeting and decision without advice or a report from OH, or indeed any other medical expert.

174. Turning to the three-stage test in **Thompson**, I find as follows:

175. Stage 1 – consideration of attendance record. The respondent spent much time reviewing the claimant's absence record, and reasons for those absences. Ms Henson undertook informal discussions with the claimant in spring 2020, at which stage there was some OH input. This developed into consideration of the AAP in August 2020, then the attendance objective in September 2020, before reaching the formal capability process. At each stage, I find that the respondent managers gave genuine thought to the claimant's absences and reasons for those absences. This is clear from the evidence of Ms Cross and Ms Sargent which, on this point, was unchallenged.

176. Stage 2 – warnings. The respondent set down various markers in the sand for the claimant, making it clear at each stage what expected improvement was sought from the claimant. First there was the AAP, which set the clear target of getting the claimant's absence down to 4% from 7 August 2020 for a period of three months. Then, the attendance objective of 4% absence over six months was set from 9 September 2020, with a warning that, if there was no improvement, the process may result in dismissal – [330]. This target remained in place following the appeal process – [462]. In each letter inviting the claimant to a formal capability meeting, she was warned that the process may lead to her dismissal – see for example [514].

177. Stage 3 – improvement. Unfortunately, the claimant's absence record did not improve, and did not get anywhere near the benchmark of 4% set by the respondent.

178. Taking into account other relevant factors from the case-law set out above, I find the following:

178.1. The claimant had nearly three years of service, the majority of which had been plagued by periods of ill health;

178.2. Generally there was no criticism of the claimant's performance of which I am aware (I consider the misconduct matters to be separate to performance);

178.3. There was no evidence at the time at which the respondent terminated the claimant's contract to suggest that there would be a change in her attendance:

178.4. I have set out my findings on suitable alternative work below, in consideration of sanction;

178.5. There was a disruptive effect on the claimant's team in having to frequently manage the absence of a trainee cashier;

178.6. The nature of the illnesses suffered were unconnected and disparate in nature, meaning that it was difficult to predict the claimant's attendance levels in the future;

178.7. The respondent followed its own sickness absence policy;

178.8. The claimant was made aware that the possibility of dismissal was a real risk for her.

179. Considering alternative suitable work in relation to the sanction of dismissal, Ms Sargent was stuck with the evidence in front of her, and did not have the benefit of hearing from the claimant on this matter. At the time of Ms Sargent making her decision, there was no medical evidence to suggest that the claimant would be able to undertake a relocation or phased return, or that such adjustments would make any difference to her attendance. The claimant's fit notes only ever said "unfit to work" and did not make any other suggestions about amendments or phased returns.

180. In any event, the claimant was a (trainee) cashier: she evidently could not perform her contractual duties from home, away from the cash desk. During the pandemic and associated restrictions, cashiers of the respondent remained office based, performing specific customer-facing roles albeit on a reduced timetable. This was the respondent's evidence on this subject; this evidence was unchallenged, and I accept it.

<u>Claimant's specific points on fairness</u>

181. The claimant raised the following specific points on fairness of dismissal:

181.1. Was it unfair to dismiss when the claimant's absences were supported by medical certificates?

181.2. Was the process adopted by the respondent unfair to the claimant by holding meetings shortly after the claimant's return to work and by holding meetings in the claimant's absence?

181.3. Did the respondent's process comply with ACAS guidance/code of practice?

181.4. Did the respondent's decision to dismiss fall outside the band of reasonable responses open to an employer?

182. Taking each of these points in turn:

182.1. Absences supported by medical notes. The respondent has never questioned the genuine nature of the claimant's illnesses, but has accepted the medical notes on face value: there is no good evidence to the contrary. In principle, an employer is entitled to dismiss an employee for short-term intermittent genuine sickness absences. Therefore, the existence of medical notes does not have an effect on the fairness of the dismissal.

182.2. Holding meetings shortly after the claimant's return to work, and holding meetings in the claimant's absence. I have been through the chronology of this matter in my findings above. I am satisfied that the respondent took reasonable steps to support the claimant in attending various meetings, however it is not reasonable for the respondent to continue adjourning hearings indefinitely: the respondent gave the claimant a reasonable number of opportunities to attend hearings. In terms of holding meetings shortly after the claimant's return to work, it is not clear to me how this is said to have impacted negatively on the claimant. In any event, I find that it was reasonable to hold meetings with the claimant once back at work: by returning to work, she was indicating that she was ready to perform her role and, by extrapolation, ready to attend any meeting that fell within her remit.

182.3. Compliance with the ACAS Guidance/Code of Practice. No specific point was made in relation to the ACAS Code/Guidance, or what part is said to have been breached by the respondent. Having assessed the process undertaken by the respondent, I find that there is no failure to comply as alleged by the claimant.

182.4. Sanction of dismissal. Given my findings above, I conclude that dismissal fell within the band of reasonable responses.

183. It appears from the claimant's evidence that she considers that the respondent should have discounted her absences that she says were related to Covid-19. I understand that the claimant says that her absences recorded on [466] between 12 February and 13 July 2020 may have been Covid-19 related. The problem the claimant has here is that she was never diagnosed with Covid-19, and never had a positive test result. I am therefore not satisfied that the claimant had Covid-19, and

therefore I do not find that the respondent acted outside the band of reasonable responses in taking these absences into account.

184. In any event, even if one were to exclude the absences that the claimant says were Covid-19 related, her absence record still demonstrates many absences from summer 2020 through to her dismissal – [466]. As such, I find that the claimant's attendance level was so poor at the time of dismissal, that the decision to dismiss would still have been fair: the claimant's absences are clearly set out at [466] and [520].

185. Further, the claimant argued that it was not fair to start the AAP on 7 August 2020, when she did not return to work until 26 August 2020. I note that, at the time of setting the AAP, the respondent was under the impression that the claimant's current fit note expired on 6 August, and therefore anticipated her to be returning on 7 August.

186. In any event, the AAP commencing on 7 August 2020 is swiftly overtaken by the attendance objective set from 9 September 2020. I accept that this objective was imposed in part due to the claimant's level of absence up to that time. However, the other consideration was the claimant's absence over a rolling period of 12 months, which would have been the same regardless of the start date of the AAP – [330].

187. I therefore conclude that none of the specific points the claimant raised in relation to fairness render the dismissal unfair.

188. In light of my conclusions above, I find that dismissal was within the band of reasonable responses available to a reasonable employer. As such, the claimant's claim for unfair dismissal is rejected.

**Breach of contract – notice pay**

189. The claimant was paid 5 days (23-28 February) of notice pay in her February 2021 payslip, and the balance of her notice pay in her March payslip.

190. The claimant's annual gross pay is £16,926, as recorded (for example) on [751]. The base pay is recorded as £1410.50 on [751], which equates to gross pay for the whole month of February. This therefore means that the claimant was paid for the five days of her notice, 23-28 February 2021, in that payslip.

191. The March payslip sets out a base pay of £1069.01. This represents the claimant's gross pay from 1 – 23 March 2021, and is the balance of her notice pay.

192. I am satisfied that the claimant was paid her notice pay. As such, this breach of contract claim fails.

**Breach of contract – expenses**

193. The claimant claims the figure of £129 for train journeys to Camberley and Oxford in 2019.

194. In its expenses policy, the respondent sets out a process which is necessary for employees to follow should they wish to be reimbursed for their expenses – [664]. In cross-examination, the claimant agreed that compliance with the process was a pre-condition of being reimbursed.

195. It is the respondent's case, as set out in the grievance appeal outcome at [710], that the claimant failed to follow the process, and failed to provide the requisite documentation. In her evidence, the claimant initially stated that she had followed procedure. However, it transpired on further questions that, although the claimant had provided the train tickets and taxi receipts, she was not sure whether she then used the Fusion system to submit her expenses claim, as required under the policy.

196. I am not satisfied that the claimant ever did provide an excel spreadsheet with receipts and upload them as required by the respondent under its expenses policy. As such I am not satisfied that the respondent's contractual obligation to pay expenses had been triggered.

197. This breach of contract claim for expenses of £129 is therefore rejected.

**Holiday pay**

198. Following the jurisdiction time point, the only issues left under this heading are:

198.1. Whether the respondent unlawfully prevented the claimant from taking off in lieu four bank holidays, on which she had been ill. She made this request in December 2020; and,

198.2. Whether the respondent unlawfully took away 42 hours of holiday leave in November 2020.

<u>December 2020</u>

199. Dealing first with the bank holidays, the claimant's contract makes a distinction between annual leave of 25 days, and the additional bank/public holidays.

200. At [144], the sickness absence policy provides:

> Employees who have been off work long term are eligible to carry up to 20 days leave over to the following year on return to work if they have been unable to take their leave in the current year due to operational needs.

201. However, I find that the term "annual leave" does not include bank/public holidays, otherwise clause 11.1 of the claimant's contract would provide for 33 days inclusive of bank/public holiday. Instead, clause 11.1 expressly excludes bank and public holidays from the definition of annual leave in the way that clause is worded.

202. On the strict reading of the contract, therefore, I conclude that the claimant was not entitled to take any bank/public holidays off in lieu. I also note that I have seen no evidence that the respondent has a practice of departing from the strict interpretation. There are no examples before me of the claimant or other employees being permitted to take bank/public holidays off in lieu.

203. This claim is therefore rejected.

November 2020

204. In terms of the claimant's 42 hours of holiday leave, the respondent's right to deduct holiday is set out in its sickness absence policy. At [144] it states:

> Annual leave entitlement may be subject to a reduction for long-term or high absence.
>
> Annual leave may be reduced during the holiday year after 20 days of absence for employees with less than five years' service and after 40 days of absence for those with above five years' service.

205. The claimant accepted in cross-examination that the respondent had the discretion in November 2020 to reduce/remove those 42 hours. This is fact transpired to be a complaint that the respondent did not inform the claimant that this reduction was going to happen.

206. The claimant therefore effectively conceded that the respondent did not act unlawfully in reducing her holiday hours in November 2020.

207. This claim is therefore rejected.

**Unauthorised deductions of wages – arrears of pay**

208. The claims that survived the jurisdiction time point are as follows:

208.1. February 2021 – the claimant alleged that her payslip was short by £560;

208.2. March 2021 – the claimant alleged that her payslip was short by £1077.58.

209. During cross-examination, the claimant conceded that, in fact, the February pay slip looked correct. I therefore need not consider this point any further.

210. In terms of the March 2021 payslip, I have already found that the claimant was paid her notice pay. In cross-examination, the issues on this pay slip became clearer: the claimant disputed the deduction of £196.97 (My Choice Net), and sought clarification around the deduction of £65.10 (a correction to the February 2021 payslip).

211. Regarding the £196.97 deduction, Mr Slade gave evidence that in the My Choice scheme there are some benefits that are taken before tax, meaning that there is an additional bonus wrapped up in this type of payment. However, there are limits to the amount of tax-free benefits one can have over the course of a year. If that limit is reached at the point of termination, the remaining balance of My Choice money has to be taken net, rather than gross. Mr Slade surmised that this is what happened to the claimant's payments in March 2021.

212. Although the claimant did not go so far as to accept Mr Slade's explanation, she was unable to put forward a reason why she says the figure in the March payslip is wrong. Neither was Mr Slade challenged on his explanation of the March payslip details. I therefore accept his account, and find that there was no unauthorized deduction from that payslip.

213. Therefore the unlawful deduction of wages claim relating to arrears of pay is rejected.

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Employment Judge **Shastri-Hurst**

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Date: 21 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 February 2023

FOR EMPLOYMENT TRIBUNALS