THE INDUSTRIAL TRIBUNALS

CASE REF: 26179/20

CLAIMANT: **Maxi Fleming**

RESPONDENT: **Cuchulainn Teamware Ltd**

JUDGMENT

The unanimous decision of the tribunal is that:

(i) the claimant was unfairly dismissed and that her dismissal was both procedurally and substantively unfair;

(ii) the respondent also failed to provide a main statement of terms and conditions of employment; and

(iii) the claimant's claim in respect of accrued but untaken holiday leave is also well founded.

The tribunal awards the sum of **£3,244.58** to the claimant for unfair dismissal, as calculated at paragraph 35 below.

The tribunal makes an award of **two** weeks' pay to the claimant, in an amount of **£879.24** in respect of the failure to provide a main statement of terms and conditions of employment.

The tribunal makes an award of the sum of **£614.73** to the claimant, in respect of accrued but untaken holiday leave.

The claim of failure to provide itemised payslips was withdrawn at the hearing and is dismissed.

The claim in respect of failure to make pension contributions was not pursued at the hearing and is dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Gamble**

Members: **Mr N Jones**
Mrs F Cummins

Appearances:

The claimant was represented by Ms A Jennings, Barrister at Law, of the Bar of NI Pro Bono Unit, instructed by Paul Doran Law.

The respondent was represented by Ms R Connolly of Rosemary Connolly Solicitors.

BACKGROUND

1. The claimant was employed as a machinist in the respondent's business from 7 January 2019 until her dismissal on 31 July 2020.

2. Following the outbreak of the Covid-19 pandemic, the claimant did not attend work after 19 March 2020 and a claim for furlough payments was made in respect of her to the Coronavirus Job Retention Scheme. It is common case that on 14 May 2020, Mr Alan Murphy, the owner of the respondent business, sent an email to the Claimant in the following terms:

> *"Hi Maxi*
>
> *After reviewing our core business in Cuchulainn Teamwear, we have decide to let all staff go as of Friday May, 15th.*
>
> *We have two options available to us.*
>
> 1. *Issue P45 tomorrow.*
>
> 2. *We can do you a favour and keep you on the Furlough Payment until the scheme ends. In order for us to do this, I will require your Letter of Resignation, undated. Also, I require an email confirming that we will have no liabilities accruing to the Company, of any description when the scheme ceases.*
>
> 3. *If in the meantime, if you set up your own business, as you informed me via text in April, you cannot claim the Furlough Payment and run your own business at the same time. If you proceed with the latter, please notify me and I will cease your Furlough payment.* (Tribunal's emphasis.)
>
> *I will require your decision by 2pm tomorrow so I can finalise details with my Accountant by close of business. If I do not receive your decision by the allotted time, I will instruct my Accountant to proceed with issuing your P45.*
>
> *Regards,*
>
> *Alan"*

3. The Claimant replied on 15 May 2020 by email informing Mr Murphy that after seeking legal advice and for financial reasons she had no other option but to continue with the furlough scheme. She returned an undated resignation letter. and stated:

> *"As you requested, please find attached my Resignation Letter which you advised me to leave undated in your correspondence e-mail below.*
> *…*
> *I confirm that should I start my own business, I will contact you to cease furlough payments."*

4. The undated resignation letter was in the following terms:

"Dear Alan

With this letter I wish to inform you that I will be resigning from my position with Cuchulainn Teamware as machinist as of .

Yours sincerely

Maxi Fleming"

5. It is common case that the claimant's employment came to an end on 31 July 2020 when the respondent purported to activate that dismissal letter. This followed an email exchange between the parties, in which the claimant had queried receipt of her wages for July. Mr Murphy responded:

"Hi

PAYMENT WAS MADE 1631.40 that should have been in your account today.

Which brings you up to 31/07/20

Can you also make confirmation that you still have not received your machine.

Need an email with the Yes or No

So we can keep you on Furlough if no reply is received then we will cut off Furlough and assume you have received your machine

Alan"

The claimant replied *"No".*

Mr Murphy then wrote:

"Hi Maxi

Thank you for your prompt reply to my question below.

I am surprised to your answer which indicates that you have not received your machines, when in fact, you took delivery of one of the machines last week.

I was looking to purchase 2 more machines and I reliable informed that one of the machine has already being delivered and you are awaiting delivery of the second (sic).

In light of this, I now accept your letter of Resignation and your P45 will be issue with leaving date of 31/07/20.

I would like to take this opportunity to wish you every success with your business venture and to thank you for all your work with Cuchulainn Sportswear.

Regards,

Alan"

6. The claimant presented a claim to the industrial tribunal dated 11 September 2020. She brought a claim for unfair dismissal, asserting that the dismissal was automatically unfair on grounds of failure to comply with the statutory dismissal procedure and substantively unfair. In the alternative, the claimant claimed constructive unfair dismissal. She also claimed that she had not been provided with a statement of employment particulars, she had not been provided with itemised pay slips, that her employer had failed to make pension contributions, and that there had been unauthorised deductions from wages or a breach of contract in respect of notice pay and holiday pay.

7. The respondent resisted those claims in a response presented on 18 January 2021.

8. The claimant's representative confirmed at the beginning of her oral submissions that the claimant was no longer pursuing the claim in respect of failure to provide itemised pay statements and, accordingly, that claim is dismissed. No claim in respect of pension contributions was pursued at hearing and that claim is therefore dismissed.

9. Mr Murphy, during his oral evidence given under cross examination, conceded that he had not provided the claimant with a contract or other employment booklets.

SOURCES OF EVIDENCE

10. The claimant gave direct evidence by way of her witness statement, was cross examined and re-examined.

11. Mr Murphy gave direct evidence on behalf of the respondent by way of a witness statement and was cross examined.

12. The tribunal was also provided with an agreed bundle of documents.

SUBMISSIONS

13. The tribunal received written submissions from both parties which were opened to the tribunal on the second day of hearing. The tribunal is grateful to both representatives for their concise and helpful submissions.

CREDIBILITY

14. There were issues in respect of credibility of the evidence given by both the claimant and Mr Murphy. The tribunal agrees with the respondent's representative's characterisation of the claimant's evidence as "vague, contradictory, inconsistent and lacking credibility". On a number of occasions during her cross examination, she had a very poor recall for material matters and at other times her answers seemed evasive – repeatedly telling the tribunal "I don't know how to answer that." She accepted that she had told Mr Murphy she had not received the embroidery machine when this was untrue. The tribunal was entirely unimpressed by her evidence that she had created false Facebook posts for a page she created for her

business “Buzzcat Embroidery” to suggest that she had received business orders from customers, when, according to her, no such orders had been placed, and that she had done so “to make [herself] look good”. The tribunal was unimpressed that she apparently failed to discover these Facebook posts which were put in evidence by the respondent and she did not deny in cross examination that she had then deleted this Facebook page. These posts suggested that she had received repeat business from customers who she asked the tribunal to accept had only received a sample from her and had never in fact placed any orders for business. The tribunal is satisfied that the plain and natural meaning of these posts, which the claimant did not dispute had not been provided by her on discovery, was that she was trading on her own account to a greater extent than she has disclosed to the tribunal. The tribunal also found her evidence about her record keeping for her new business venture to be unconvincing. That is because these records appeared to be very incomplete and her approach to record keeping appeared chaotic. The tribunal has no assurance that she has discovered all of the invoices generated from her business and notes that the invoice number sequencing suggests that up to 50 invoices have not been discovered by the claimant.

15. There were also issues in relation to the credibility of Mr Murphy’s evidence. In the ET3 response document, the respondent pleaded that *“Contrary to the claimant’s contention, she was furnished with a Statement of Employment Particulars.”* However, during cross examination he conceded that the claimant was not provided with employment particulars. Mr Murphy’s evidence about the economic pressures facing embroidery businesses due to the pandemic was also inconsistent. At paragraph 7 of his witness statement, he was asserting that due to the pandemic, work was effectively grinding to a halt. Despite this, at paragraph 10 of his witness statement, he advertised for an additional embroidery assistant in or around the middle of April 2020. He later gave evidence that during cross examination that September to December would be the busiest time for the claimant’s new competitor business. He also was adamant in his evidence that if he had followed through with the first option in his email of 14 May 2020 (see paragraph 2 above), he would have followed the statutory dismissal procedures. However, he was unable to outline to the tribunal what this would have involved.

The claimant’s case:

16. The claimant’s representative contended that the claimant was dismissed and that it is for the respondent to show the reason for the dismissal. The claimant’s representative made reference to the Notice for Information served on behalf of the claimant which included the following:

> *“Please confirm whether, as per email of 14 May 2020, that in saying ‘we have decided to let all staff go as of Friday, May 15’, the respondent meant that the claimant’s position was to be made redundant.”*

The claimant’s representative made reference to the reply given on behalf of the respondent:

> *“Yes.”*

The claimant’s representative contended that the dismissal was automatically unfair because the statutory dismissal procedures were not followed and sought an uplift.

The claimant's representative queried whether a redundancy situation in fact existed given the nature of Mr Murphy's evidence regarding the period September to December being the busy season for businesses of that type.

The respondent's case:

17. The respondent's representative contended that the claimant's employment was terminated pursuant to an *"entirely consensual agreement between the parties that the Claimant's employment and her participation in the furlough scheme would end when she had established her business."*

Having considered the terms of the response, Mr Murphy's witness statement and his oral evidence given during cross examination, the respondent also advanced an alternative case, as set out at paragraph 35 of the response, namely:

> *"In the event that the tribunal should determine, contrary to these contentions that the claimant was dismissed, then the respondent asserts that the claimant had fundamentally undermined the trust and confidence which should underpin the employment relationship by embarking upon a rival competitive business whilst in the employ of the respondent…"*

The respondent's representative further relied on **Polkey v AE Dayton Services Limited (1987) IRLR 503,** asserting that in circumstances where procedural errors on the employer's part would have made no difference to the outcome, any compensatory award should be reduced or limited to reflect that fact. Applying this doctrine, she contended that in the event that the tribunal concluded that the respondent erred in activating the claimant's resignation and not engaging in the relevant statutory procedures the respondent submits that engagement of those procedures would have made absolutely no difference, as the claimant's position was redundant (per the oral submission on behalf of the respondent) and that the claimant would in any event have been dismissed given that she had been kept on merely as a facility to allow her to set up her own business, which she had by then done (per the written submission on behalf of the respondent). She further asserted there could have been no issue over the identification of the pool for redundancy as the claimant was the sole employee.

RELEVANT LAW

18. **FAIRNESS OF THE DISMISSAL**

PART XI UNFAIR DISMISSAL

RIGHT NOT TO BE UNFAIRLY DISMISSED

The right

126.—(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Paragraph (1) has effect subject to the following provisions of this Part (in particular Articles 140 to 144).

…

Fairness

General

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

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

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

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

…

(b) relates to the conduct of the employee,

(c) is that the employee was redundant

…

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

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

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

(6) Paragraph (4) is subject to Articles 130A to 139

…

Procedural fairness

130A.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) one of the procedures set out in Part I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

(2) Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

…

General

152.—(1) . . . Where a tribunal makes an award of compensation for unfair dismissal under Article 146(4) or 151(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with Articles 153 to 156,160 and 161), and

(b) a compensatory award (calculated in accordance with Articles 157, 158, 158A, 160 and 161. . .).

Basic Award

153.—(1) Subject to the provisions of this Article, Articles 154 to 156 and Articles 160 and 161, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In paragraph (1)(c) “the appropriate amount” means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within sub-paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within sub-paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under paragraph (1), no account shall be taken under that paragraph of any year of employment earlier than those twenty years.

154 (1A) Where—

(a) an employee is regarded as unfairly dismissed by virtue of Article . . . 130A(1) (whether or not his dismissal is unfair or regarded as unfair for any other reason),

(b) an award of compensation falls to be made under Article 146(4), and

(c) the amount of the award under Article 152(1)(a), before any reduction under Article 156(3A) or (4), is less than the amount of four weeks' pay,

the industrial tribunal shall, subject to paragraph (1B), increase the award under Article 152(1)(a) to the amount of four weeks' pay.

(1B) An industrial tribunal shall not be required by paragraph (1A) to increase the amount of an award if it considers that the increase would result in injustice to the employer.

…

Compensatory award

157.—(1) Subject to the provisions of this Article and Articles 158, 158A, 160 and 161, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

19. **NON COMPLETION OF STATUTORY PROCEDURES**

Employment (Northern Ireland) Order 2003

17 (3) If, in the case of proceedings to which this Article applies, it appears to the industrial tribunal
that—

(a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,

(b) the statutory procedure was not completed before the proceedings were begun, and

(c) the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure,

it shall, subject to paragraph (4), increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50 per cent.

(4) The duty under paragraph (2) or (3) to make a reduction or increase of 10 per cent does not apply if there are exceptional circumstances which would make a

reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase or a reduction or increase of such lesser percentage as it considers just and equitable in all the circumstances

Failure to give statement of employment particulars, etc.: industrial tribunals

27.—(1) This Article applies to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4.

(2) If in the case of proceedings to which this Article applies—

(a) the industrial tribunal finds in favour of the employee, …., and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order (duty to give a written statement of initial employment particulars or of particulars of change), the tribunal shall, subject to paragraph (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

…

(4) In paragraphs (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under paragraph (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that paragraph unjust or inequitable.

HOLIDAY PAY

20. **Working Time Regulations (Northern Ireland) 2016**

Entitlement to annual leave

15.—(1) Subject to paragraph (4), a worker is entitled to four weeks' annual leave in each leave year.

…

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

(a) it may only be taken in the leave year in respect of which it is due, and

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

Entitlement to additional annual leave

16.—(1) Subject to regulation 33 and paragraphs (2) and (4), a worker is entitled to a period of 1.6 weeks additional leave in each leave year.

(2) The aggregate entitlement provided for in paragraph (1) and regulation 15(1) is subject to a maximum of 28 days.

…

(5) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where the worker's employment is terminated.

RELEVANT FINDINGS OF FACT

21. In this case, the tribunal has had to resolve the question of who ended the employment relationship. The claimant says that she was dismissed. The respondent says that the claimant was not dismissed and resigned pursuant to a resignation letter which she had provided to him in furtherance of an agreement between them.

22. The tribunal finds that the contract of employment was terminated by the respondent and that the claimant was dismissed by him. The email sent on 1 August 2020 is in effect a dismissal by the employer. The tribunal makes this finding for a number of reasons:

    i. the resignation letter was initiated, prepared and furnished by the respondent to the claimant;

    ii. the claimant could not have been said to have offered it freely, of her own volition in light of the unreasonable ultimatum offered by the respondent in his email of 14 May 2020 (see paragraph 2 above); and

    iii. the decision to give effect to the resignation letter and to insert a resignation date was taken by the respondent, without consultation.

23. Even if the tribunal is in error in making this finding, neither the signed nor the unsigned version of the resignation letter identify the effective date of the resignation. The tribunal would have found that the resignation letter was therefore void by reason of uncertainty in light of the omission of this material date.

24. The tribunal finds that the dismissal was automatically unfair because the statutory dismissal procedures were not followed. The claimant's case of unfair dismissal is therefore well founded.

21. The onus is on the respondent to prove the reason for the dismissal and if he fails to do so, the dismissal is ordinarily unfair. In this case, the respondent maintained that there was no dismissal but rather that the employment terminated on foot of a consensual arrangement. Even taking account of the alternative case advanced by

the respondent, in circumstances where the respondent "resigned" the claimant instead of following any semblance of a redundancy consultation or investigation and disciplinary process, the tribunal finds that the dismissal is also ordinarily unfair.

25. Notwithstanding the finding of unfair dismissal, having considered all of the evidence before it, the tribunal is satisfied for the purposes of the application of the **Polkey** principles that:

    i) as a result of the pandemic, the respondent did not have work for the claimant to do. The claimant was still furloughed at the time of her dismissal; and

    ii) the respondent knew the claimant was untruthful when she replied "No" (see paragraph 5 above) to confirm that she had not taken delivery of an embroidery machine. Mr Murphy believed that the claimant, on having taken delivery of an embroidery machine, was or would imminently be trading on her own account and was therefore, as a self-employed person, no longer able to meet the conditions to avail of furlough scheme.

26. In relation to i) above, the **Coronavirus Job Retention Scheme** [furlough scheme] was introduced in March 2020 to help employers avoid the need to lay people off or make redundancies due to the impact of COVID-19. The tribunal pauses to reflect that had the respondent followed a fair procedure to effect a redundancy either in May 2020 or in July 2020, the claimant did not have qualifying service for a redundancy payment. On the basis that the claimant was furloughed at the time of her dismissal, the tribunal finds that the respondent had no work for the claimant. This finding is not displaced by Mr Murphy's confusing and contradictory evidence that he was seeking to recruit additional staff in April 2020 and that the claimant's rival business ought to have been successful in the period September to December 2020 because it was normally the busiest time of the year. The tribunal also accepts Mr Murphy's evidence of his understanding that the claimant could not be in receipt of furlough payments whilst trading as a self-employed person on her own account. The tribunal does not accept the evidence of the claimant that she did not commence trading in her new business venture until January 2021.

27. In relation to ii) above, the tribunal finds that the respondent reasonably believed that the claimant was intending to set up business on her own account. In this regard, the tribunal accepts Mr Murphy's evidence that the claimant had texted him in or around mid-April 2020 to tell him that she was setting up her own business. Although this text was not discovered by either party, the tribunal accepts that the claimant had informed Mr Murphy of this, in light of his reference to it in his email of 14 May 2020 (see paragraph 2 above) and the claimant's replying confirmation on 15 May 2020 that she would notify the respondent should she start her own business (see paragraph 3 above.) The tribunal finds that by the date of the dismissal the claimant had taken steps to enter into business on her own account as evidenced by the delivery of two embroidery machines, one on 24 July 2020 and one in August 2020 (at a cost of £6,500 and £7,500). The tribunal finds, as accepted by the claimant in cross examination, that the claimant had ordered these machines by May/June 2020. The tribunal notes the evidence of the claimant that the second machine was faulty and was returned. However, no corroboratory documentary evidence was produced by the claimant to show the return of the faulty machine. In any event, whether the claimant had one machine or two machines, she was still in a position to trade on her own account. The tribunal also

finds on the balance of probabilities that the claimant's business would have been competing with the respondent's business, given that both undertook workwear.

28. The provision of untruthful information by the claimant was in and of itself misconduct, which the tribunal, as an industrial jury, find would normally serve to undermine the trust and confidence in an employment relationship. However, no specific argument of contributory conduct was advanced on behalf of the respondent. The tribunal is not in a position, in the absence of specific evidence from Mr Murphy to establish whether the lie contributed to the dismissal over and above the other circumstances, namely that Mr Murphy believed that the claimant had started her own business in competition to his and that she was no longer eligible for furlough payment on the basis that as a person trading on her own account, she no longer met the conditions for the scheme.

Consideration of the Polkey defence

29. Having considered all of the evidence, the tribunal must consider whether the claimant's employment would have come to an end in any event, and whether the respondent would have dismissed the claimant had fair procedures been followed. Reason i) was a potentially fair reason, namely redundancy and reason ii) was a potentially fair reason for misconduct or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

30. The tribunal, having considered all of the evidence before it, is satisfied that the respondent would have dismissed the claimant for the reasons set out at paragraph 26 above had a fair procedure been followed. The tribunal is satisfied that as a result of the pandemic, the respondent had no work for the claimant to do and that she could not have continued in his employment or on furlough whilst operating a competitor business. The question therefore for the tribunal is how long would she have remained in employment had the respondent followed a fair procedure. This requires a degree of speculation on the part of the tribunal. If the claimant was to have been made redundant, there would have been some degree of individual consultation required, even though she was effectively in a pool of one and there would have been the need to inform her of the contemplated dismissal and conduct a meeting, communicate the outcome and conduct any appeal. Alternatively, if the respondent had wanted to proceed on the basis that the claimant was operating a rival business whilst on furlough, the claimant should have been given the chance to respond to the allegation (which was well founded) that she had taken delivery of a machine. In either case, the tribunal is satisfied that the claimant's employment would have come to an end within 3 weeks, i.e. by 22 August 2020.

31. For the avoidance of any doubt, the tribunal did not accept the claimant's evidence that she did not commence trading on her own account until January 2021. The tribunal found the claimant's evidence regarding her earnings from and the establishment of her business to entirely lack credibility. The tribunal also accepted Mr Murphy's assertion that she was in a position to trade immediately upon delivery of the machine. The tribunal did not find it credible that the claimant would outlay £14,000 on machines to have them sit idle. The tribunal did not accept the claimant's evidence during cross examination that she ordered these machines for a hobby outside of work. The tribunal does not accept the claimant's evidence that she had received only £505 for a full year of trading and that she did not receive any income from the business until March 2021.

Holiday Pay Claim

32. The claimant also pursued a claim for outstanding holiday pay pursuant to unpaid statutory entitlement. In her witness statement, she referred to and adopted her schedule of loss. A revised schedule of loss was provided at the beginning of the second day of hearing. The revised schedule of loss stated:

> "*The Claimant's holiday year runs from January to December each year. The Claimant did not take any holidays in 2020 apart from holidays taken in January during the Christmas/New Year period. As the claimant has not been provided with her contract or holiday records she is basing her calculation on her statutory entitlement less days taken as holidays on the 1st and 2nd January 2020 (20 hours) up until she was dismissed on 31 July 2020. The claimant worked 40 hours per week 4 days a week, therefore her yearly entitlement would be 224 hours (40 x 5.6 weeks). She was employed until 31 July 2020 so her holiday entitlement up until this date would have been approx. 130.7hours (224 divided by 12 x7). She had already taken 20 hours of this.*
>
> *Therefore, the Claimant has 110.7 hours outstanding.*
> *6.7 days x £91.75 (net daily pay) £614.73"*

33. The schedule of loss originally served by the claimant sought 11.7 days. The claimant was referred during cross examination to pages 111 and 112 of the bundle, where she referred to having been paid a week's holiday pay for the week ending 27 March 2020. This week's payment appears to be reflected in the revised total of 6.7 days sought by the claimant. The respondent's representative did not challenge the claimant's evidence on holiday pay through adoption of her schedule of loss beyond referring her to the bundle pages which established that she had been paid for one week's annual leave for the week ending 27 March 2020. The respondent's representative in closing submissions asserted *"It is understood that the claim in respect of holiday pay has now been withdrawn as indeed the Claimant acknowledged that she had received same in an e-mail exchange with the Respondent, page 97."* The tribunal did not understand the claimant acknowledging that the issue of an overpayment of wages arising from her being paid holiday pay and being on furlough had been resolved as equating to her withdrawing her holiday pay claim altogether, especially as the revised schedule of loss, which apparently took account of this week, was provided to the tribunal on the second day of the hearing, when the tribunal was considering closing submissions. This revised schedule of loss and revised holiday pay calculation was referred to by the claimant's representative in oral closing submissions.

34. Accordingly, the tribunal is satisfied that annual leave continued to accrue during the time the claimant was on furlough and the revised payment sought by her remained outstanding on the termination of her employment and awards the sum of **£614.73** sought by the claimant.

REMEDY

35. The tribunal therefore makes the following award:

A. **Basic Award** - **£1,758.48 gross**

The tribunal awards 4 weeks' gross pay under article 154(1A) because the respondent admitted that he had the advice of his accountant available to him and therefore ought to have been in a position to follow the statutory dismissal procedures. The tribunal also disapproves of the machinations by Mr Murphy in extracting a resignation letter from the claimant in the face of an unreasonable ultimatum, as set out in his email of 14 May 2020.

B. **Loss of statutory rights** - **£250.00.** The tribunal is satisfied that this sum is appropriate in light of the claimant's length of service.

C. **Compensatory Award - £1,101.00**

The tribunal makes an award of compensation of 3 weeks' net pay for the period from 1 August 2020 to 22 August 2020 - 3 x £367.00 per week- **£1,101.00**

D. **Uplift sought under Article 17** – the tribunal awards the minimum uplift of 10% in recognition that the respondent had access to advice from an accountant and ought to have followed the statutory dismissal procedures. Any greater uplift would not be just and equitable.

£1,101.00 + £250.00= £1,351.00 x 10%

= **£135.10**

E. **Failure to provide written statement of terms and conditions** – Having found in favour of the claimant and the respondent having conceded that no written statement of terms and conditions had been provided to the claimant, the tribunal awards two weeks' gross pay - **£879.24**

The tribunal declines to make a higher award of four weeks' gross pay in this case because it considers that given the small size of the respondent's business and the circumstances that gave rise to the claimant's dismissal it would be unjust and inequitable.

F. **Holiday Pay -** 6.7 days x £91.75 (net daily pay) **= £614.73.**

36. As the claimant did not receive any recoupable benefits until 27 August 2020, when she claimed Universal Credit, no question of recoupment arises under the provisions of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996.

37. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990

Employment Judge:

Date and place of hearing: 2 and 3 December 2021, Belfast.

Date decision recorded in register and issued to parties: