EMPLOYMENT TRIBUNALS

Claimant: **Miss C Fisher**

Respondent: **Gwanmesia Plastic Surgery Ltd**

Heard at: **East London Hearing Centre**

On: **5 & 6 February 2020 and**
16 & 17 March 2021 (the last day in chambers)

Before: **Employment Judge O'Brien**
Members: **Mr P Lush**
Ms L Conwell-Tillotson

Representation:

Claimant: Mr E MacDonald of Counsel

Respondent: Mr G Mahmood of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of unfair dismissal pursuant to s94 & 99 of the Employment Rights Act 1996 succeeds.**

2. **Pursuant to s122(2), s123(1) and s123(6) of the Employment Rights Act 1996, the claimant's basic and compensatory awards are reduced by 30%.**

3. **Pursuant to s207A of the Trade Union and Labour Relations (Consolidation Act 1992, the claimant's compensatory award is increased by 20%.**

4. **The claimant's complaint of direct sex discrimination fails and is dismissed.**

5. **The claimant's claim for damages for breach of contract (wrongful dismissal) succeeds.**

6. **The claimant's claim for an award pursuant to s38 of the Employment Act 2002 fails and is dismissed.**

7. **The respondent's counterclaim for damages for breach of contract succeeds.**

REASONS

1 On 15 January 2019, the claimant presented a complaint of direct sex discrimination, and a claim for damages for breach of contract (unpaid notice pay). The respondent resisted the claim in a response presented on 24 March 2019, at which time it brought a counter-claim against the claimant for damages for breach of contract (arising from paid leave taken beyond the claimant's entitlement and the balance of a debt connected to PAYE issues).

2 At the beginning of the second day of the hearing, the claimant applied to amend her claim to add a complaint of automatic unfair dismissal under s99 of the Employment Rights Act 1996 (ERA). For reasons given at the time, we allowed the amendment. In short, whilst the application had been made well outside the ordinary time limit for what was a new statutory head of claim, it was properly a new label to be added to the central allegation in the original claim (that the claimant was dismissed for taking time off to care for a sick child) and facts already pleaded. Moreover, the balance of prejudice overwhelmingly favoured the claimant. However, we subsequently agreed also to allow the parties to submit supplementary witness statements and a supplementary bundle dealing with this additional claim and also for the witnesses to be cross-examined further on the issues arising.

ISSUES

3 The issues which we had to decide in respect of the original claims were set out by Employment Judge Burgher in his note of the preliminary hearing he held with the parties on 15 April 2019 and need not be rehearsed here.

4 In respect of the s99 ERA claim, the issues to be decided are:

4.1 Was the reason or principal reason for the claimant's dismissal her asking to work from home and/or not attending work on 10 September 2018?

4.2 If so, was the claimant thereby taking time off or seeking to take time off under s57A ERA?

4.3 If so, how should the claimant's basic and/or compensatory awards be calculated?

EVIDENCE, SUBMISSIONS AND APPLICATIONS

5 Over the course of this hearing, the Tribunal took evidence on the basis of written witness statements. The claimant gave oral evidence on her own behalf. On behalf of the respondent we heard oral evidence from its principal, Dr Ivo Gwanmesia.

6 The Tribunal was also provided with a joint bundle comprising 198 pages, and a supplementary bundle comprising a further 84 pages.

7 The parties each made oral submissions, which we took into account when determining the issues before us. The parties also provided us with written submissions which we took into account when deliberating on our reserved decision.

FINDINGS OF FACT

8 In order to determine the issues as agreed between the parties, we made following findings of fact, resolving any disputes on the balance of probabilities.

9 The claimant is a 29-year-old woman, and mother to a young son born in or around August 2016. She has worked throughout her career in the health and social care sector. At the time she interviewed for a position with the respondent she had been on maternity leave since July 2016.

10 Her two most recent employers at that time were the Chelsea General Practice (from July 15 to July 16), at which she was Practice Manager and PA to Dr Carolyn Barshall, and Guys and St Thomas's Hospital (from Oct 11 to July 15) at which she was a maternity support worker until December 2014 and Junior Doctor Coordinator and PA to college tutor thereafter.

11 The claimant was interviewed by the respondent on 29 April 2017 for the role of PA to Dr Gwanmesia. She was asked by the respondent for references and provided the details of two individuals from Guys; however, the identity of her most recent employer was clear on the face of the CV she had provided to the respondent. As it was, the respondent did not take up the references until much later, as discussed below. Instead, the respondent offered the claimant the post on the day of the interview.

12 The respondent was aware from discussion at interview that the claimant was mother of an infant. In fact, the respondent asked the claimant how she was finding being a new mother and how long she had been with her partner. The claimant found the respondent to be warm at interview and she felt comfortable with him.

13 The claimant began her employment with the respondent on 8 May 2017. As Dr Gwanmesia's PA, her role revolved around administering his practice and included managing his clinic lists and completing hospital booking forms, and later creating patient profiles and booking operating theatres and anaesthetists. The job description for the claimant's role appears to have been emailed to her on 4 June 2017, around a month after she had started; however, we note that it makes no reference to the booking of anaesthetists. Moreover, whilst it confirms that the claimant would be given access to Highgate Hospital's 'APAS' system, the job description provided that access had been given so that the claimant could see which patients had been booked into Dr Gwanmesia's diary, and made no reference to APAS being a source of information about which anaesthetists had been booked.

14 The job description also confirms that the address into which website enquiries would arrive was enquiries@ivogwanmesia.com, a 'generic email address that will be used by both the Practice Director and the Personal Assistant.' It makes no mention of info@ivogwanmesia.com, the email address which had been used by the respondent

when corresponding with the claimant during recruitment and with Peninsula in the latter stages of the claimant's employment.

15 The claimant insists that she never had access to the info@ivogwanmesia.com inbox, and we accept that to be the case. The only evidence we have seen of the claimant using that address was of her sending emails, which the parties agreed could be done through the PPM (Private Practice Management) system. We find it utterly implausible that the respondent would send candid emails to his HR and employment law advisors, Peninsula, about the claimant on an address to which she had access. Dr Gwanmesia's evidence to us that the claimant had access to the info@ivogwanmesia.com inbox was also inconsistent with his witness statement which states only that he shared the enquiries@ivogwanmesia.com account with the claimant.

16 The claimant was required to work 40 hours per week. Most of the time she could work from home; however, she was required to attend clinics with Dr Gwanmesia on Mondays from 9:30am to 1pm at Highgate Hospital and Thursday from 10am to 2pm at his premises on Harley Street.

17 The respondent had not registered with HMRC for PAYE purposes at the beginning of the claimant's employment nor, it would appear, for some considerable time. The respondent paid the claimant £1,749.49 for May 2017 and £2,000 per month until around January 2018. The respondent claims that this was a gross payment and that it had been agreed with the claimant that she would be responsible for accounting to HMRC for this money. The claimant instead claims to have been reassured by the respondent that this was an approximate net payment. We prefer the latter's evidence on this issue because £2,000 per month was clearly less that the claimant's monthly gross pay, given her agreed annual salary of £28,000.

18 As it is, Dr Gwanmesia had underestimated the deductions he should make from the claimant's pay and, in or around February 1208, he told her she owed him a significant amount of money as a result. They agreed verbally that he could recover the overpayment via an agreed schedule of repayments. Indeed, on 30 August 2018, the claimant texted Dr Gwanmesia thanking him for getting his accountant to speak to her, and confirming that she had understood the situation.

19 By that time, the claimant had communicated with HMRC regarding consequent changes to her tax code, to Dr Gwanmesia's annoyance (evident from a recording of their conversation on 13 September 2018). Otherwise, the employment relationship was entirely cordial until mid-September 2018. Indeed, despite the respondent's evidence of repeated mistakes having been made by the claimant from as early as 20 October 2017, he raised no criticisms with her at the time. The respondent's complaint to this Tribunal that the claimant repeatedly failed to book anaesthetists in a timely fashion was never raised with her until these proceedings, even when he challenged her on 13 September 2018 about booking an anaesthetist for 21 September 18. Furthermore, he paid her an (extra-contractual) Christmas bonus in December 2017.

20 The respondent provided the claimant with a contract of employment late in March 2018. The claimant did not sign it until July 2018. However, neither delay appears at the time to have effected the parties' good will towards each other. The contract provided amongst other things that the claimant was entitled to one month's notice of termination after successful completion of her probationary period (the first three months of her employment), although the respondent could make payment in lieu of notice.

21 On 19 July 2018, the respondent agreed that the claimant could start work hour later than normal at 10am the following day (a Friday) so that she could attend her son's end-of-term assembly. On 6 August 2018, the claimant asked permission to change her hours to accommodate her son's settling-in days at nursery: for Tuesday 21, Friday 24 and Tuesday 28 August, the claimant offered to make up the hours by starting earlier or finishing later; for Thursday 30 August, she asked to work from home or to have annual leave. It would appear from the claimant's leave record that the respondent required her to take annual leave on the latter date.

22 On 5 September 2018 at 15:29, a patient contacted the respondent on info@ivogwanmesia.com asking when her 12-month follow-up appointment was. The respondent responded himself at 10:18 on 10 September confirming that the appointment was on that day's list at 11am and telling the patient that she should have received a text. The claimant told us that patients occasionally denied having received reminders when in fact they had. Whether or not that was the case for this patient, it is clear that the respondent did not expressly raise this with the claimant at the time.

23 The claimant's son became unwell on the night of 9/10 September having developed a high temperature. He would not have been able to attend nursery even if the claimant had wanted him to. Consequently, she texted the respondent at 5:42am on 10 September saying:

> 'Morning Ivo, apologies for it being so early but my sons been really unwell over night. I won't be able to come in today but happy to work from home if needed, please let me know. So sorry to do this, Cherise'

24 Dr Gwanmesia did not respond to this email and so the claimant tried to phone him at 9am, but the call went to voicemail. She thought he was still on his way to work and so she rang again just before 9:30am.

25 What was said on this call and how it was said is disputed. The claimant says that Dr Gwanmesia shouted, 'Where are you?' and, when she explained again her son's circumstances, said, 'You can't decide you want to be off. Do you even want this job?'. She says that he put the phone down during her reply.

26 Dr Gwanmesia denies shouting, and in evidence denied asking the claimant if she wanted her job (albeit that this particular allegation is not dealt with at all in the ET3 or original witness statement) or putting the phone down on her. However, we are satisfied that Dr Gwanmesia was very annoyed by the claimant's failure to attend and the fact that he was learning about it for the first time mid-consultation. In his evidence to us, Dr Gwanmesia would become forceful and raise his voice when annoyed, and we are satisfied therefore that, when he asked where the claimant was, although it was a natural question, he did so with a raised voice.

27 Immediately after the call, the claimant emailed Dr Gwanmesia, amongst other things saying:

> 'As confirmed with you on the telephone, I have made a doctor's appointment for my son.

> Furthermore, I have checked on the government website and legally this is not a reason for you to ask me if I still want my job, or deny me the time off if my child has fallen ill.'

28 Moreover, at their meeting on 13 September, Dr Gwanmesia put to the claimant that she had 'taken the day off'. Consequently, we find on balance that he did in fact say, 'You can't decide you want to be off. Do you even want this job?'. Additionally, given that Dr Gwanmesia was holding a clinic we accept that he did put the phone down after he made his point.

29 During the call, Dr Gwanmesia asked the claimant if she was going to take her son to A&E. She said not, because she did not think that her son's condition was that serious. She said that she would arrange a GP appointment. Dr Gwanmesia did not ask at the time if the claimant's partner was at home, although it would appear that he was, at least at the time of this call.

30 The respondent did not communicate at all with the claimant after the call on 10 September until she attended Highgate Hospital on Thursday 13 September. He did, however, call Peninsula almost immediately after the claimant's call, and Peninsula responded by email at 10:03am on 10 September recommending an investigation after which he should send all materials to Peninsula. Amongst other things, Dr Gwanmesia was advised that 'fair and best practice would denote each stage of the disciplinary process is completed by a different person.'

31 On 11 September 2019, Dr Gwanmesia operated on a patient who in ordinary circumstances would have been transferred to a ward after the necessary period in the recovery room. However, the claimant had not apparently created a profile for that patient on the respondent's practice software, and so Dr Gwanmesia was unable to enter his notes on the operation until the matter was resolved. The patient's move from recovery to the post-operative ward was consequently was delayed as well and placing of another patient into the recovery room.

32 On 12 September 2018, the claimant emailed the respondent noting that he had not responded to her texts or calls but that, in the meantime, she had been responding to calls and would be in at Highgate Hospital the following day.

33 Dr Gwanmesia replied to Peninsula by email at 7:50am on 13 September. The email said:

> 'I will be seeing my secretary today for the first time since last week and I will conduct an interview as advised. I am sorry if I sounded rather stressed on the phone on Monday morning but this girl is just not doing her job. She does not answer the clinic phone even though I have given her a mobile phone, she does not put patients' details on the Practice software system and this is essential for the generation of notes and invoices, she fails to book anaesthetists for surgical procedures even though I have spoken to her about the importance of doing so, she fails to send out consent forms and other important forms that the patients need to sign before undergoing surgery in the practice etc etc and I am just getting to the end of my patience with her.

> She had similar problems in her last employment in a GP's practice. I do not have any references from her previous employer, so I will be informing her today that I will seek references from her previous employer in order to complete her file.'

34 We note that Dr Gwanmesia admitted in his subsequent meeting with the claimant that he had not in fact spoken to the claimant before about any of the issues he raised in that meeting. He opened that meeting by telling the claimant that, 'over the course of the last few weeks and months, I've seen your enthusiasm for the job go down, down, down…'.

35 At the meeting, Dr Gwanmesia asked about forms and an anaesthetist for a coming operation. The claimant told the respondent that she had tried to call him to discuss the anaesthetist but that he had not answered her calls. She said she was sure that she had the forms in question but said that she would double-check. HMRC issues were discussed, as well as the claimant's non-attendance at work on the Monday and the steps she took to notify him. Dr Gwanmesia said, 'I can't be doing your job, okay. The wellbeing of patients. The other day it was pandemonium. However, he gave no specifics about how the wellbeing of patients had been affected. He mentioned that a claimant had attended that day whose address was not on the Highgate Hospital computer system, but again did not give the claimant any specifics or press her for an explanation or substantive response. Dr Gwanmesia then mentioned the money outstanding in respect of his not initially paying the claimant via PAYE, and also asked for details of referees.

36 He told the claimant, '…if I don't see a change, I'm really sorry but I can't keep you on' and, at the end of the meeting. '…I need to see a change over the course of the next four weeks.'

37 Whilst neither of the parties actually shouted at each other at the meeting, they repeatedly talked over each other.

38 The claimant had secretly recorded that meeting. The recording began as Dr Gwanmesia was saying his goodbyes to a consultee. However, no medically confidential information appears to have been recorded. In any event, the respondent was unaware that the claimant had taken a recording until these proceedings.

39 Following the meeting, at 1:10pm, the claimant had the following text exchange with Dr Gwanmesia:

> C: 'Ivo, I have sent the documents to [PW]. Who would you like me to contact in regards to your anaesthetist next week? Also please let me know when you have done the documents for hair transplant and I can send these to [L].'
>
> R: 'Thank you. I will take the documents to [L] tomorrow for him to sign. For next week do send an email to Denise Lim and Dr Prabahar. Will take who comes back first. I've just got home and I'll do the clinic letters for this week.'
>
> C: 'Thank you. Please also see the email I have just sent you . I will contact the anaesthetists now. I await the dictations. Please let me know when you've sent them and I will get started.'

40 The email that the claimant was referring to was sent at 1:41pm, confirming her account of events on the morning of 10 September, addressing the issue of references, acknowledging the verbal warning she had been given, and giving further details of her dealings with HMRC. She asked if he could respond to her email 'at your earliest convenience'.

41 The respondent replied at 7:20pm, concentrating solely on the issue of the claimant's references.

42 Despite apparently giving the claimant four weeks to improve her performance, Dr Gwanmesia instructed the company which administered his practice software to change the claimant's password 'for now till we can (if we can) find a resolution.' He informed Peninsula that he had done so in an email at 1:47 on 14 September 2021. If fact, it appears that he had changed the claimant's password some time before 9:23am that morning, when the claimant sent him the following texts:

> 'Morning Ivo, sorry I tried to call your phone is going to voicemail. Are there any other anaesthetists in particular you'd like me to contact. Denise is away next week. Cherise'
>
> 'Ivo, ppm is not allowing me to log in has the password been changed?'

43 The respondent simply replied, 'I'm busy and I can't take your call.' In fact, the respondent appears not to have engaged with the claimant's subsequent correspondence, both related to work in general and also giving him the reference details requested, other than to arrange a meeting with the claimant at 3pm on 18 September. The texts made repeated reference to the claimant being unable to access PPM. One of which (which appears to have been sent on Monday 17 September at 9:16am) said:

> 'Ivo, is there anything you need me to do from home? Just wondering if you sorted an anaesthetist for Friday? I still cannot get into PPM. Cherise'

44 The claimant had contacted Dr Lim and Dr Prabhahar on 13 September as instructed by the respondent that day, as well as Dr Odulan.

45 The respondent claims that he was told by Highgate Hospital on the afternoon of 17 September 2018 that there was still no anaesthetist booked for the operation he was due to perform on Friday 21 September 2018. In fact, we find on balance that the claimant had notified him of this in any event at 9:16am that morning.

46 In the invitation to the meeting, sent at 7:22am on 18 September, the respondent told the claimant, 'Please bring the laptop to download work related documents.' In fact, Dr Gwanmesia did not need the claimant to download any documents. Rather, he had instructed Peninsula to meet with the claimant and retrieve her work laptop.

47 He did not, incidentally, mention at that stage the issue of the anaesthetist for 21 September 2018. The respondent arranged himself for an anaesthetist, Dr Sarang, to assist him on 21 September 2019 and Highgate Hospital granted Dr Sarang temporary practising privileges to do so.

48 Whether or not the respondent had expressly asked Peninsula to give the claimant notice of dismissal at the meeting, they did not. Instead, the individual in question, Mark Silvey, told her that the respondent was looking to terminate her

employment by way of a settlement agreement, that she would be forwarded a draft, which she would have 10 days to consider, and that she should not attend work until agreement had been reached.

49 Negotiations over the terms of the settlement agreement appear to have continued into October 2018. In respect of one aspect, a reference, Peninsula, provided a draft for Dr Gwanmesia's approval, which apparently included some comment on how well the claimant had done in her role. This prompted him to respond on 28 September 2018 amongst other things thus:

> 'I have read the sample reference. I cannot say that this girl's honesty and integrity are not questionable. For example, when she started with me in May 2017, she deliberately misled me by giving me the names of two employers three employments down the line when I had asked her for her immediate past employer. That is why her file remained incomplete. This has really thought [sic] me a good lesson never to assume or take anything about anyone in good faith.
>
> 'I will be at home this morning till around midday. I will speak to my solicitors because if this girl is going to drag this, then we will serve her with an immediate notice of termination of duties. I have acted in good faith through all out this. I saw other patients in clinic yesterday who were telling me they could never get through as the phone was never answered.'

50 Eventually, the claimant emailed the respondent on 24 October 2018. In the email, she asked, 'Without Prejudice, I am emailing to inquire if I am still under your employment. Please could you respond at your earliest convenience.' At 8:42pm on 26 October 2019, the respondent replied by email with a letter attached notifying her that she had last worked for his practise on 13 September 2018, that she had met with Mr Silvey on 18 September 2018 and that Mr Silvey had confirmed at that meeting that her employment would be terminated as of 30 September 2018.

51 He notified the claimant that she had been paid to that date and that, while she was entitled to one month's pay in lieu of notice her remaining debt to the practise for overpaid tax National Insurance and student loan stood at £1,265, that she had taken more annual leave than her entitlement, and that the total sum to be recovered stood at £1,890. Dr Gwanmesia concluded that he had deducted that sum from the claimant's notice pay and reserved the right to recover the additional monies owed. No right of appeal was offered.

52 Nevertheless, the claimant appealed against her dismissal by letter dated 8 November 2018. She complained of sex discrimination, an unfair disciplinary process and a breach of the national minimum wage regulations, and refuted the suggestion that she had been given notice by Mr Silvey on 18 September 2018. The respondent himself did not ever acknowledge the claimant's appeal even after she sent hastening emails and sent the letter again by post on 16 November 2018. Certainly, she was never invited to an appeal hearing.

Additional Findings Relevant to Contribution/Wrongful Dismissal/Contractual Counterclaim

53 The respondent has produced a variety of emails and other documents to show the following.

54 On 6 December 2017, the claimant emailed anaesthetists (Dr Prabhahar and Dr Watt) to see if they were available on 8 December 2017.

55 On 7 March 2018, the claimant emailed anaesthetists (Dr Prabhahar, Dr West and Dr Bouline) to see if they were available on 9 March 2019.

56 On 12 March 2018, the claimant emailed an anaesthetist (Dr Lim) to see if she was available on Friday 16 March 2018.

57 On 5 March and 8 March 2018, the claimant sent bookings forms to Highgate Hospital at the email address: reservations@highgatehospital.com. On 8 March, the reservations personnel to whom she had copied the emails, notified her that she was using an incorrect email address, and should use reservations@highgatehospital.co.uk. There is no evidence that she failed to act on this advice.

58 On 19 March 2018, Dr Gwanmesia agreed at a consultation to perform further corrective surgery on a patient on 6 April 2018, and the booking form sent by the claimant to Highgate Hospital on 19 March gave that date for the procedure. However, the letter sent by the claimant to the patient on 21 March 2018 confirming the arrangements gave a date of 10 April 2018. The mistake came to light when the patient was contacted by Highgate Hospital on 30 March.

59 On 12 April 2018, the claimant emailed an anaesthetist (Dr West) to see if they were available on 13 April 2018.

60 On 16 April 2018, the claimant sent booking forms to the Harley Health Village giving a procedure date of 13 April 2018 rather than 20 April 2018. On 19 April, Harley Health Village asked the claimant to confirm which anaesthetist would be attending for the procedure booked to be performed under a general anaesthetic.

61 The claimant emailed anaesthetists on 1 May 2018, (Dr Lim and Dr Das) and on 2 May (Dr Mohan and Dr Ziyad) to see if they were available on 4 May.

62 On 8 May 2018, the claimant emailed anaesthetists (Dr Dulan and Dr Lim) to see if they were available on 11 May 2018.

63 In respect of the claimant's pay, the following appears to be uncontroversial. PAYE deductions did not commence until April 2018. By that time, a significant sum (said by the respondent to total £1,948.46, albeit without any clear basis) should have been deducted from the claimant's pay, in respect of tax, national insurance and student loan payments. The respondent was obliged to account to HMRC for that sum and so the parties agreed that he could recover the overpayment via a series of deductions from the claimant's pay.

64 On 2 March 2018, the respondent paid the claimant £1,500 in respect of her February salary, which the respondent says represented recovery of £284.13 of the debt. On 31 March 3018, she was paid £1,744 in respect of her March salary, which the respondent says represents the recovery of a further £28.93. It is unclear to us how these figures were calculated. The total recovered in tax year 2017/18 was, according to the respondent, £313.06.

65 From April 2018 onwards, the amount recovered against the debt each month was itemised on the claimant's pay slip. On 30 April 2018, the respondent recovered £72.86.

On 30 May 2018, £147.86 was recovered. Between 30 June and 30 September 2018, a further £75 was recovered each month. To that point in tax year 2018/19, a total of £520.72 had been recovered through itemised deductions.

66 A payslip dated 17 October 2018 shows amongst other things the following details: payment in lieu of notice of £1,400 gross; a deduction of £646.15 for 6 days' holiday taken beyond the claimant's entitlement, and a further deduction of £758.23 in respect of the debt. It is unclear to us whether the £7.15 due to the claimant according to the payslip was paid.

67 It does not appear to be in issue that the claimant took annual leave on the following days in 2018: 10-12 January, 15-19 January, 22-25 January, 20 March, 29 May, 25-29 June, 2-6 July, 30 August, and 10 September. Similarly, it does not appear to be in issue that, in addition to these 26 days' paid holiday, the claimant was also paid for but not required to work on the 6 bank holidays in 2018 prior to the claimant's termination date. Together these make a total of 32 days' paid holiday taken by the claimant.

68 The claimant's employment contract provided that her leave year coincided with the calendar year. Each year she was entitled to 20 days' paid holiday in addition to 8 public/bank holidays (New Year's Day, Good Friday, Easter Monday, the first and last Monday's in May, the last Monday in August, Christmas Day and Boxing Day. The contract provided that:

> 'In the event of termination of employment holiday entitlement will be calculated as 1/2th of the annual entitlement for each completed month of service during that holiday year and any holidays accrued but untaken will be paid for. However, in the event of you having taken any holidays in the current holiday year, which have not been accrued pro-rata, then the appropriate payments will be deducted from your final pay.'

69 The claimant complained in her letter of appeal dated 8 November 2018 amongst other things that she was given insufficient notice (paragraph 4). The respondent did not invite the claimant to a meeting to discuss either her appeal or any of the individual allegations within it.

THE LAW

Unfair Dismissal

70 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

71 Section 99 ERA provides:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances.
> (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
> (3) A reason or set of circumstances prescribed under this section must relate to—
> …
> (d) time off under section 57A;
> …

72 Amongst the regulations made under s99ERA prescribing reasons and circumstances for dismissal prohibited under that section include the Maternity and Parental Leave etc Regulations 1999. Regulation 20(1) & (3)(iii) provide that an employee is entitled to be regarded as unfairly dismissed under s99 ERA if the reason for their dismissal is connected to their taking or seeking to take time off under s57A ERA.

73 Section 57A ERA provides:

> (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
>
> (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
> (b) to make arrangements for the provision of care for a dependant who is ill or injured,
> (c) in consequence of the death of a dependant,
> (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
> (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.
>
> (2) Subsection (1) does not apply unless the employee—
>
> (a) tells his employer the reason for his absence as soon as reasonably practicable, and
> (b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.
>
> …

74 An employee's child is a dependent of that employee pursuant to s57A(3)(b) ERA.

75 Where the claimant does not have sufficient continuous service otherwise to claim unfair dismissal, it is for her to prove the respondent's reason for dismissing her and that it was a reason for which the 2-year qualification period does not apply.

76 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

77 In respect of the right to time off under s57A ERA, the EAT in **Qua v John Ford Morrison Solicitors [2003] ICR 42** said the following at paragraphs 15-18:

> '15. … The statutory right is, in our view, a right given to all employees to be permitted to take a reasonable amount of time off work during working hours in order to deal with a variety of unexpected or sudden events affecting their dependants, as defined, and in order to make any necessary longer-term arrangements for their care.
>
> 16. The right to time off to "…provide assistance" etc. in subsection (1)(a) does not in our view enable employees to take time off in order themselves to provide care for a sick child, beyond the reasonable amount necessary to enable them to deal with the immediate crisis. Leave to provide longer-term care for a child would be covered by parental leave entitlement if the employee has responsibility for the child and is entitled to parental leave (that is, has at least one year's service). That does not arise in the present case because the Appellant had only been employed for 9 months at the time of her dismissal. Section 57A(1)(a) envisages some temporary assistance to be

> provided by the employee, on an occasion when it is necessary in the circumstances specified. Under subsection (1)(b) time off is to be permitted to enable an employee to make longer-term arrangements for the care of a dependant, for example by employing a temporary carer or making appropriate arrangements with friends or relatives. Subsection (1)(d) would include, for example, time off to deal with problems caused by a child-minder failing to arrive or a nursery or playgroup closing unexpectedly.
>
> 17. The right is a right to a "reasonable" amount of time off, in order to take action which is "necessary". In determining whether action was necessary, factors to be taken into account will include, for example, the nature of the incident which has occurred, the closeness of the relationship between the employee and the particular dependant and the extent to which anyone else was available to help out.
>
> 18. We consider that, in determining what is a reasonable amount of time off work, an employer should always take account of the individual circumstances of the employee seeking to exercise the right. It may be that, in the vast majority of cases, no more than a few hours or, at most, one or possibly two days would be regarded as reasonable to deal with the particular problem which has arisen. Parliament chose not to limit the entitlement to a certain amount of time per year and/or per case, as they could have done pursuant to Clause 3.2 of the Directive. It is not possible to specify maximum periods of time which are reasonable in any particular circumstances. This will depend on the individual circumstances in each case and it will always be a question of fact for a tribunal as to what was reasonable in every situation.'

78 Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

79 The Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA).

80 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that she would have been dismissed in any event, pursuant to s123(1) ERA and the authority of **Polkey v AE Dayton Services Ltd [1987] IRLR 503**.

81 When making an assessment under **Polkey**, a Tribunal may have to take into account matters which, whilst not known to the employer at the time of dismissal, would have come to the employer's attention had it acted fairly (paragraph 70 of **Phoenix House v Stockman [2019] IRLR 960**). However, when assessing whether to make a broader just and equitable reduction unders123(1) and/or s122(2) ERA, the Tribunal may take into account behaviour about which the respondent did not know and would not have found out about (per **Devis v Atkins [1977] AC 931**). Nevertheless, the Tribunal must make both a subjective and objective assessment: what employer in question would have done had it become aware of the behaviour, and whether and to what extent it is just and equitable in all of the circumstances to make a reduction under those sections (paragraphs 72 and 72 of **Phoenix House**).

82 Regarding the making of covert recordings, the EAT in **Phoenix house** said the following at paragraph 78:

> We do not think that an ET is bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. An ET is entitled to make an assessment of the circumstances. The purpose of the recording will be relevant: and in our experience the purpose may vary widely from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation. There may, as Mr Milsom recognised, be rare cases where pressing circumstances completely justified the recording. The extent of the employee's blameworthiness may also be relevant; it may vary from an employee who has specifically been told that a recording must not be kept, or has lied about making a recording, to the inexperienced or distressed employee who has scarcely thought about the blameworthiness of making such a recording. What is recorded may also be relevant: it may vary between a meeting concerned with the employee of which a record would normally be kept and shared in any event, and a meeting where highly confidential business or personal information relating to the employer or another employee is discussed (in which case the recording may involve a serious breach of the rights of one or more others). Any evidence of the attitude of the employer to such conduct may also be relevant. It is in our experience still relatively rare for covert recording to appear on a list of instances of gross misconduct in a disciplinary procedure; but this may soon change.

83 Where an employee brings a claim within a jurisdiction listed in Schedule A2 to the Trade Union and Labour Relations (Consolidation) Act 1992, it appears to the Tribunal that an ACAS Code of Conduct applies, and a party had unreasonably failed to comply with that Code, then any award in respect of that particular claim can be increased or decreased by a factor which is just and equitable in the circumstances up to 25% (per s207A).

Discrimination

84 An employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment (ss39(2)(c)&(d) of the Equality Act 2010 (EA)).

85 A person directly discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat other people (section 13 EA). Sex is such a protected characteristic. Section 23 EA provides that 'on a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to the case.'

86 Pursuant to s136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

87 The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). However, as observed in the case of **Madarassy v Nomura International plc [2007] IRLR 246**, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two. Similarly, unfair or unreasonable treatment of itself is insufficient to shift the burden of proof onto the respondent **Bahl v Law Society [2003] IRLR 640** per Elias J at para 100, approved by the Court of Appeal at **[2004] IRLR 799**).

Breach of Contract

88 Pursuant to art 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim may be brought in the Employment Tribunal for damages in respect of a breach of contract arising or outstanding on termination of employment.

89 An employer is only entitled to dismiss an employee without sufficient contractual notice (or pay in lieu, the contract so permits) if dismissing in acceptance of a repudiatory breach on the part of the employee.

90 Whether misconduct is sufficient to justify summary dismissal is a question of fact; conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment (**Neary v the Dean of Westminster [1999] IRLR 288**).

91 The burden lies on the employer to prove that the employee was in fundamental breach of contract.

92 Pursuant to art 4 of the 1994 Order, an employer can, if any employee has brought a claim under the Order, bring a counterclaim for damages for breach of contract.

Written Statement of Particulars of Employment

93 Pursuant to s1(1) ERA, where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment. The law prior to 6 April 2020 required the statement to be given within 2 months of commencement of employment.

94 Where an employee succeeds in respect of certain claims before the Employment Tribunal and, when the proceedings were begun, the employer was in breach of its duty under s1(1) ERA or s4(1) ERA (duty to give a statement of changes of particulars of employment), then the Tribunal must increase the award by a certain amount dependant on the circumstances (per s38 of the Employment Act 2002). However, it is clear from the wording of s38 that such an increase can only be made if the employer remains in default on the day the proceedings were commenced (see also **Govdata Ltd v Denton UKEAT/0237/18/BA**).

CONCLUSIONS

Unfair Dismissal

95 Consequent to our findings of fact above, we have reached the following conclusions on the agreed list of issues.

96 The respondent argues that he dismissed the claimant because of her failings in the role (be they related to conduct and/or capability). The claimant insists that the reason was instead her decision to take time off on 10 September 2018 because her son was unwell.

97 Each of them invite us to look at the relationship between the parties before a certain critical moment, to ask ourselves 'what changed?' and to conclude that the critical moment was the reason for the dismissal. In the claimant's case, she says that all was

well between them until 10 September 2018 and that her dismissal was inevitable thereafter. In the respondent's case, he points to a failure by the claimant to book an anaesthetist for a procedure on 17 September 2018 as being the last straw for him. Prior to that point, he was dissatisfied with her performance and commitment but was prepared to allow her an opportunity to improve.

98 It is correct to say that, on a number of occasions, the claimant had booked anaesthetists only shortly before the surgical procedure in which they would be participating. However, we have heard no evidence of the circumstances in each case which gave led to them being booked late. The date of the procedure may have moved or it may (although less likely given the preliminary matters which need to be completed before a surgical procedure) have been that the procedure was arranged equally at short notice. It may well, of course, be evidence of the claimant's occasional failure to book anaesthetists in good time. However, it is clear that the respondent had made no issue at the time of any such occasional failures to the claimant.

99 We also bear in mind that we have flatly rejected the respondent's evidence on certain matters as simply untrue (such as his denial of asking the claimant on 13 September 2018, 'Do you even want this job?'), find that he unequivocally lied to the claimant on at least one occasion (when he told her she was required on 18 September 2018 to bring her laptop to work to download work documents) and was occasionally confrontational and evasive in his evidence. The claimant on the other hand was measured, calm and, by and large, consistent in her evidence.

100 There is evidence of the claimant occasionally making mistakes in the letters she sent to patients, or failing to remind them of appointments. These are matters which we are satisfied could properly be criticised (and return to this issue below). However, it is again clear that the respondent made no big issue of these mistakes at the time.

101 Other matters appear to have exercised the respondent around the time of their meeting on 13 September 2018, such as the claimant's dealings with HMRC and the fact that she had not nominated her most recent previous employer as a referee. However, the former issue had caused only minimal disagreement at the time and the latter had to that point been inconsequential to the respondent.

102 The claimant did tell the respondent on 13 September 2018 that she was sure she had sent certain documents to a patient when she had not in fact done so. However, she also told the respondent that she would check and, when she discovered she had not, did so and told the respondent by text that she had done so. Whilst this oversight was worthy of some small criticism, it is nonsensical to say that the claimant's actions were dishonest in this regard or even in respect of her dealings with HMRC.

103 As for the claimant's failure to book an anaesthetist for the procedure on 21 September 2018, the fact that she had not done so since Highgate Hospital had raised the issue on 7 September might again be a minor matter of criticism. However, she did exactly what she said she would do at the 13 September meeting: she asked the respondent who he would like her to contact and did so (as well as another anaesthetist that the respondent had used recently before). When unsuccessful, she notified the respondent and make clear that the matter was still not resolved. The respondent had by then removed her access to his practise software, and so her evidence that she could not thereby access his diary to see if he had obtained an anaesthetist himself has some force. The claimant notified the respondent herself on the morning of 17 September that she had

still not been able to secure an anaesthetist. These are hardly circumstances suggesting that Dr Gwanmesia being told by Highgate Hospital in the afternoon of 17 September 2018 that they would cancel the procedure he planned to undertake on 21 September unless he found an anaesthetist was really the last straw which led to the claimant's dismissal.

104 Instead, we note the almost entirely cordial relations between the parties prior to 10 September 2018. Even the points of dispute between them such as the recovery of overpayments and the claimant's contact with HMRC appear not to have caused much serious disharmony. Certainly, Dr Gwanmesia made no attempt to take the claimant to task over the matters he now makes great criticism of her for.

105 On 10 September 2018, the claimant failed to attend his clinic at Highgate Hospital. It is true that the respondent had allowed the claimant to change her working hours over the preceding month or two to accommodate her childcare responsibilities. However, she had given Dr Gwanmesia at least two weeks' notice in respect of each of the dates in August; moreover, on all but one of the day she would have been working from home in any event. For the one date which fell on a clinic day, he had not allowed her to work from home but rather had required her to take a day's leave. On 10 September 2018, however, Dr Gwanmesia was angry with the claimant for not attending, suggested she had decided to take the day off and asked her if she wanted her job.

106 It is suggested that Dr Gwanmesia had decided only to give her a warning. However, his actions demonstrated to us that her fate was sealed. First, he ceased responding to the claimant's communications until the meeting on 13 September. Second, the morning after that meeting he removed her access to his practise software, thereby preventing her from performing much of her role. Third, and most significantly, the respondent appears to have learned even before the meeting on 13 September 2018 that the claimant had had problems in her immediately preceding employment and had resolved to seek references from her previous employer. He intended to and did tell the claimant that he needed the reference in order to complete her file. However, we find instead that he thought he had found the ideal pretext to dismiss her.

107 If there was one thing that did change on 17 September 2018, it was that the respondent thought that he had found an even better and more immediate pretext for dispensing with the claimant.

108 Therefore, when we ask ourselves what changed and when, we find on balance that the change occurred on 10 September 2018 and that the change was the claimant's notification that she would not attend the clinic that day because her son was unwell.

109 It has been argued by the respondent that the claimant was not in any event seeking to nor did take the time off. It is true that the claimant did offer to work from home; however, her work that morning was supposed to be with Dr Gwanmesia at his clinic. In any event, the respondent recorded the claimant as having taken annual leave that day. Therefore, the claimant did in fact take the day off because her son was unwell.

110 The respondent also argued that the claimant's time off was not for a purpose which engaged s57A. It was argued that the claimant's partner was home and so it was not necessary for the claimant to take any steps herself in respect of her son. We note first from **Qua** that the extent to which anyone else was available to help out is only a factor to be taken into account when deciding whether action was 'necessary' for the

purposes of s57A and so is not fatal to the claim (as appears to be suggested by the respondent). Second, we note that the claimant's son was still very young, at that time little more than 2 years old. Third, we are entitled to bring our real world experience to bear as an industrial jury and are aware that primary childcare responsibility, particularly for young infants, continues to fall predominantly to the mother. That was widely accepted to be the case at the end of the 20th century (see for instance **London Underground v Edwards (No 2) [1999] ICR 494**) a decade later (see for instance Shackletons Garden Centre Ltd v Lowe [2010] EqLR 139) and, we consider, remains the case, albeit that the question of consequential disadvantage for the purposes of discrimination claims does not automatically follow (see for instance **Sinclair Roche & Temperley v Heard [2004] IRLR 763**).

111 It was not, we understand, in issue that it was necessary for someone to take action under one of the categories in s57A(1). In any event, we are satisfied that the claimant's son was ill, could not attend nursery in his condition, and that action was necessary: to provide assistance to him (s57A(1)(a)) and/or to make arrangements for the provision to him of care s57A(1)(b) and/or because of an unexpected disruption of arrangements for his care that day.

112 All in all, we are satisfied that as a matter of fact it was necessary for the claimant to take that action. We note that she did not propose to take more than the day in question, which we accept was a reasonable amount of time in all of the circumstances.

113 It was argued that the claimant did not comply with her obligations under s57A(2) because she did not tell the respondent as soon as reasonably practicable. It was argued that she was obliged under the terms of her contract to notify Dr Gwanmesia by telephone of any sickness absences and that notification by text was insufficient. However, s57A(2) imports no requirement that notification musty be made in accordance with the employee's contract of employment. As it is, the claimant notified the respondent of her situation at 5:42am; the respondent's submissions in this regard are entirely without merit.

114 Ultimately, we considered all of the respondent's submissions on whether the claimant's actions on 10 September 2018 engaged s57A ERA and are satisfied that they did. Consequentially, we find that the respondent's principal reason for dismissing the claimant was that she took or sought to take time off under s57A and that she was unfairly dismissed pursuant to s99.

Sex Discrimination

115 It is argued by the claimant that she was also thereby discriminated against on the grounds of her sex. She alleges that other, connected matters, also constituted sex discrimination. However, we can deal with those complaints together thus.

116 As we note above, it does not automatically follow from the fact that primary childcare responsibilities fall primarily to mothers that women are thereby disproportionately disadvantaged or that dismissal or detriment because of time off to look after a child is prima facie sex discrimination. On the contrary, it is unfavourable treatment on the grounds of being a parent (irrespective of gender). There is not even any evidence of a man having been treated differently by the respondent.

117 The only fact from which we could properly infer that the respondent acted in the way he did because she was a woman (and thereby infer that he would not have treated a

man that way) is his use in two separate emails of the phrase 'this girl'. We accept that the respondent was thereby using a gender-related pejorative phrase about the claimant. However, we are satisfied that the respondent would have been equally off-hand and insulting about any male subordinate who had prioritised their own family's needs over his requirements.

118 We were asked by the claimant to infer discrimination from the fact that the respondent had been, frankly, dishonest about his reason for dismissing the claimant. However, that dishonesty we find is explained by the fact that he knew or must have known (if for no other reason having been told by the claimant herself) that it was unlawful for him to dismiss her for taking time off to look after her sick child.

119 We do not find therefore that the claimant has shifted the burden of proof to the respondent. Even if we had, and despite the respondent's claims to the contrary, we have found that his principal reason for dismissing her was the mere fact, unconnected to her gender, that she had taken time off on 10 September 2018. As for the remaining matters affecting his mind when Dr Gwanmesia decided to dismiss the claimant, we find that they were (as we discuss below) her actual or perceived shortcomings in her role, unconnected to her gender. Consequently, the claimant's direct sex discrimination claim fails.

Reductions to the Basic and/or Compensatory Awards

120 Turning to the question of contribution, **Polkey** and other just and equitable reductions, we accept that the claimant has made some mistakes in letters sent to patients, that she might have left the booking of some anaesthetists until rather late in the day (although we do not accept that she was routinely performing in this regard other than the respondent expected her to) and that she had not entered the details of a patient undergoing a surgical procedure under local anaesthetic on 13 September 2018 onto the Highgate Hospital system. We do not accept that claimant was significantly at fault in respect of the issue over the anaesthetist for 21 September 2018 given the respondent's steps to deny her access to PPS and her clear attempts to keep him informed of her progress and issues.

121 The claimant recorded her meeting with the respondent on 13 September 2018. She did so using her mobile phone, and did not inform the respondent that she was doing so. We accept that the respondent had spoken to her on 10 September 2018 in an aggressive and threatening way which she reasonably understood to mean that her employment was in jeopardy. She recorded the meeting, we accept, to protect herself in a situation in which the authority gradient clearly favoured the respondent and in case direct evidence was necessary of what happened at the meeting. She probably did not trust the respondent to give a truthful account of events and, indeed, we have found that he cannot always be relied upon to do so.

122 We accept that the respondent would have dismissed the claimant had he discovered she was recording their meeting. However, he was of course already looking for a pretext to dismiss her. He might even have been entitled to dismiss her for recording the meeting had he been acting fairly throughout, although we are not convinced he certainly would have done so. As it is, the fact remains that the respondent had decided to dismiss the claimant for taking time off to look after her sick son and had been bullish and threatening when she made direct contact with him about it. We do not believe that justice and equity requires a particularly high reduction for this misconduct, although we do not intend anything we say to be an encouragement to others to act in this way.

123 All in all, taking into account the claimant's failings as recorded above and her conduct in making the covert recording, we apply a 30% reduction to the claimant's basic and compensatory awards.

124 We do not accept that the respondent could in any circumstances have fairly dismissed the claimant for the conduct and or capability issues about which he was or could reasonably have become aware had he acted fairly. In particular we note that the respondent would not have discovered that the claimant had made a covert recording if he had not dismissed the claimant and so these proceedings had not been commenced. We do not therefore, make any further reduction to the claimant's compensatory award under **Polkey**.

Uplift to Compensatory Award in Respect of the ACAS Code of Practice

125 The respondent conducted an investigation meeting, and arranged a further meeting with the claimant again prior to dismissing her but did not notify the claimant in writing of the disciplinary case against her (paragraph 9 of the ACAS Code of Practice on Disciplinary and Grievance Procedures). He does not appear to have allowed the claimant to ask questions, present evidence or raise points at the meeting with Mark Silvey (paragraph 12 of the CoP). In any event, the dismissal letter did not notify the claimant of her right of appeal (paragraph 22 of the CoP) and the respondent did not arrange an appeal hearing after the claimant submitted her grounds of appeal in writing (paragraph 26 of the CoP). The only explanation for any of these failures is that the claimant appealed outside the time limit given in her contract and subsequently agreed not to pursue her appeal if an adequate reference was given. However, the dismissal letter did not even notify her of those provisions or of a right of appeal at all. All in all, we find that a 20% uplift to the claimant's compensatory award is appropriate in the circumstances.

Wrongful Dismissal

126 The claimant was notified of her dismissal on 26 October 2018. She had been told on 18 September 2018 that she did not need to attend work until a settlement had been agreed between the parties. She was entitled to be paid until 26 October 2018. We do not accept (if indeed it is seriously argued) that the respondent was entitled to dismiss the claimant without notice at that point and so we find that she was contractually entitled to be paid in lieu of the month thereafter.

127 The claimant was instead paid to 17 October 2018, albeit that certain deductions were made to her pay for October, to which we return below, and that it is unclear whether the claimant was paid the balance (on the respondent's case) of £7.15 due from that payslip. It follows that the claimant was wrongfully dismissed, and the exact compensation will be calculated at a remedy hearing to be listed.

Uplift to Claimant's Damages for Breach of Contract

128 The claimant complained in writing to the respondent on 8 November 2018 that she had been given inadequate notice. That was a post-termination grievance which went unanswered. Whilst this point has not been expressly dealt with by either party, we note that the claimant had submitted her appeal outside the timeframe prescribed in her employment contract (which incidentally is the same timeframe given in the grievance procedure for submitting a grievance). Consequently, we are satisfied that justice and equity require no increase or decrease to the claimant's damages for breach of contract.

The Respondent's Counterclaim

129 The respondent deducted from that final pay packet 6 days' pay in respect of paid holiday in excess of the claimant's accrued entitlement. It appears to be agreed that she was paid for 26 days' on leave and 6 bank holidays. According to her contract, she had by her termination date accrued 9 x 1/12ths of her 20 days' holiday entitlement, or 15 days, in addition to the 6 bank holidays she had been paid for. Incidentally, even if the entitlement to pay for bank holidays accrued pro-rata (although we are not so sure it did), then should would have been entitled in any event to 6 paid days. Consequently, the claimant had taken 9 days more than her entitlement. It follows that the respondent is entitled to recover from the claimant a further 3 days' pay. That amount will, of course be set against any sums owing to the claimant in respect of her unfair dismissal and wrongful dismissal claims.

130 The claimant agreed in or around January 2018 to repay to the respondent sums he owed HMRC in respect of PAYE which he had not taken from her. Subject to confirmation at the remedy hearing of the respondent's figures, it would appear that those sums by January 2018 totalled £1,948.96. Subject again to confirmation of the respondent's calculations, by March 2018, the claimant had repaid £313.06 and by September 2019 a further £520.72. In October 2018, the respondent recovered a further £758.23, making a total sum recovered (again subject to confirmation of the basis of the respondent's figures) of £1,592.01, leaving a further £356.95 owing to the respondent by the claimant.

131 The respondent provided to the claimant a written statement of particulars of employment compliant with s1 ERA by March 2018, long before these proceedings were commenced. She is not therefore entitled to an award under s38 of the Employment Act 2002.

Employment Judge O'Brien
Date: 24 May 2021