EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: 4107935/2020 (V)**

Held on 20, 21, 22 and 23 September and 2 December 2021

10 **Employment Judge N M Hosie**
Members A H Perriam
J Copland

15 **Mr X Wang** **Claimant**
Represented by
Ms C Rowat &
Ms J Raskin,
Student Advisors

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25 **McMillan Leisure Limited** **1st Respondent**
Represented by
Ms J Theobald,
Director

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Mrs H McMillan **2nd Respondent**
Represented by
Mr S McMillan

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45 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Tribunal is that:-

5 (1) the claim under s.23 of the Employment Rights Act is well-founded and the first respondent shall pay to the claimant the sum of Six Thousand, Six Hundred and Fifty-Six Pounds and Twenty Pence (£6,656.20), as an unlawful deduction from wages;

10 (2) the first respondent shall pay to the claimant the sum of Four Hundred and Twenty-Three Pounds and Ten Pence (£423.10), being the balance of the redundancy payment due to him;

(3) the first respondent shall pay to the claimant the sum of Three Hundred and
15 Forty-Four Pounds (£344), as damages for breach of contract (failure to give full notice of termination of employment); and

(4) the claimant's remaining claims are dismissed.

20 **REASONS**

Introduction

1. In the Note which he issued, following a case management preliminary
25 hearing on 24 March 2021, Employment Judge Kemp detailed the following "exhaustive list of the claims made":-

"*(i) for unfair dismissal under section 94 of the Employment Rights Act 1996 ("the 1996 Act"), in respect of which the respondent alleges that the employment was not for a continuous period of two years,*
30 *and the claimant alleges that there was;*

(ii) for direct discrimination under section 13 of the Equality Act 2010, the claimant relying on the protected characteristic of race. He is Chinese;

(iii) *for the balance of a statutory redundancy payment, one week's pay having been paid and the claimant claiming that he has two years' service and therefore entitled to a payment on that basis;*

(iv) *for notice pay on the basis of two years' continuous employment, which is a claim for breach of contract;*

(v) *for what is alleged to be outstanding holiday pay, which is a claim for unlawful deduction from wages;*

(vi) *for what are alleged to be unlawful deduction from wages in relation to alleged underpayments of wages under s. 13 of the 1996 Act;*

(vii) *for what are said to be unlawful payments made to the employer under s.15 of the 1996 Act;*

(viii) *for what is an alleged breach of Regulation 11 of the Working Time Regulations 1998.*"

2. The respondents admitted the dismissal but claimed that the reason was redundancy and that it was fair. Otherwise, the claims were denied in their entirety.

The evidence

3. We heard evidence at the Final Hearing by video conference, using the Cloud Video Platform, on 20,21, 22,and 23 September 2021. The Tribunal then reconvened on its own, also by video conference, on 2 December to finalise its decision.

4. We heard evidence at the Hearing from a number of witnesses, each of whom spoke to witness statements. We first heard from the claimant and then on his behalf from:-

- Yiking Su (also known as "Cimmie"), the claimant's fiancée.
- Huawei Sun (also known as "Damon Sun"), Manager of the Star Hotel, Kingussie. (The respondents also submitted a statement from Mr Sun).

5. We then heard evidence on behalf of the respondents from:-

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- Jan–Kirsty Theobald, the second respondent's daughter and a Director and Secretary of the respondent Company.
- Stan McMillan, husband of the second respondent and one time Secretary of the respondent Company.

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- James Bennett, Handyman/Chef, employed by the respondent Company at the Strathpeffer Hotel.
- Sarah Barker, General Assistant, employed by the respondent Company at the Strathpeffer Hotel.

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- Gang Fang, Director of the respondent Company (witness statement only).
- Peter Palombo, Inverness based business man (witness statement only).

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6. A Joint Bundle of documentary productions was also lodged by the parties
25 ("P"). This included a witness statement from Mrs Hui-Lin McMillan, the second respondent (P184). Mrs McMillan was unable to give evidence orally due to ill health.

The facts

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7. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following findings in fact. The respondent Company, McMillan Leisure Limited, is owned 50% by a Chinese Tour Operator (Smart Guide Travel) which is based in London and Beijing. The
35 rest of the Company is owned by the McMillan family who have run hotels in the Scottish Highlands for over 35 years.

8. The respondent Company has run the Strathpeffer Hotel ("the Hotel"), for many years. In 2018 it purchased the Star Hotel, Kingussie; in 2019 it purchased the Dreadnought Hotel in Callander. Both these Hotels were derelict. The respondent Company made a substantial investment to re-furbish and re-open them.

9. In order to promote the Hotel to the Chinese "tourist market", it was decided to recruit a Chinese national to liaise with the Chinese Tour Operators and clients. The respondent Company advertised the position of "Campaign Manager" at the Hotel in the summer of 2018. The claimant applied and he was offered the position on a trial basis. He was about to finish his studies at University, was fluent in English and Chinese, "social, media savvy" and had a Degree (Martial Arts).

10. He started to work at the Hotel in September 2018 as an "Intern", while in the United Kingdom on a student visa. He also worked at the same time as a part-time tour guide for another employer. He was offered the position of Campaign Manager in mid-October, pending him successfully gaining a "Tier 2 Sponsorship Visa". He did not begin his new role full time until December, after he had secured a Visa, finished his studies and moved to Strathpeffer. The claimant's "Sponsorship Form" was one of the documentary productions (P.98-100). His "Intern" working timesheets and a payslip were also produced (P.93-96).

Contract of employment/written statement of employment particulars

11. The claimant maintained that he had not received a written statement of his terms and conditions of employment and none was produced. However, the Tribunal had corroborative evidence from Ms Theobald and Mr McMillan that he was provided with a written statement and that a written contract, such as this, would be required in connection with his Visa application. Further, there was included with the documentary productions a style of contract which had been issued to the "Campaign Manager" for the Dreadnought Hotel. Ms

Theobald and Mr McMillan gave evidence that one in similar terms was issued to the claimant (P.157-160).

12. Both Ms Theobald and Mr McMillan presented as credible and reliable in this regard and, albeit with some hesitation, in the absence of a copy of the claimant's contract, we were of the unanimous view that he had been issued with a written statement of his terms and conditions of employment and we so find in fact.

Accommodation charges ?

13. The claimant also maintained that he was required to live in the Hotel during his employment. However, this was disputed by Ms Theobald who maintained that the Campaign Manager position was not advertised as a live-in position and nor was it a requirement of the job. She claimed that the claimant wanted to stay in the Hotel and it was agreed between him and Mrs McMillan that he would pay £10 per day for his accommodation. The claimant's position was that a charge for his accommodation at the Hotel was raised with him by Mrs McMillan but it was agreed that rather than making a payment he would work one extra hour each day. We decided, unanimously, that, on balance, the claimant's evidence was to be preferred; his evidence in this regard was consistent and convincing; it was not disputed by Mrs McMillan; there was nothing in writing to the effect that the claimant would pay for his accommodation; there was no cotemporaneous evidence of regular payments being made by the claimant for his accommodation from the time he started to live in the Hotel; the Campaign Manager at the Dreadnought Hotel was not charged for accommodation; the claimant did make a payment subsequently of £7,000 to Mrs McMillan and the respondents claimed this was for his accommodation, but, as we record below, we were not persuaded that was so. In our view, it was something of an afterthought on the respondents' part to claim that payment was for his accommodation. As we explain, it was a payment which related to his wages and his Visa conditions, not for his accommodation. We also wish to record that we arrived at that

view mindful of the letter from the respondents' Accountants (P223/224). The letter is undated but we understand that it was prepared some time after the claimant's employment ended, as was the respondents' production with details of the alleged "accommodation charge" (P178); the £7,000 had to be vouched in some way and it was allocated to "accommodation" in the 2021 Accounts; there was no evidence of any provision for accommodation charges in the previous year's Accounts (P224).

Claimant's hours of work

14. Although we were satisfied that it was agreed that the claimant would work one extra hour each day, in lieu of accommodation charges, we were also of the unanimous view, on the evidence, that there was never a requirement for the claimant or indeed any staff member, for that matter, "to be available 24 hours a day" as the claimant maintained. This was disputed, not just by Ms Theobald and Mr McMillan, but also by the claimant's colleagues at the Hotel, James Bennett and Sarah Barker. Their evidence in this regard was corroborative, convincing, credible and reliable.

£7,000 payment

15. At the beginning of March 2020, the Hotel was closed due to the Covid-19 Pandemic and, as there were no guests staying in the Hotel, on or about 5 March the claimant asked Mrs McMillan if he could take holidays to visit his girlfriend in Holland. She agreed and subsequently when he was in Holland she also agreed to him going home to China to see his family. However, she advised him that he had to continue receiving a wage, or else he would be in breach of the terms of his "Tier 2 working Visa". She proposed, therefore, that he pay her a lump sum of money and she would make weekly payments from that sum to his bank. Accordingly, on 13 March 2020, he transferred £7,000 to the respondent Company while he was in Holland (P121/122). Mrs McMillan advised him that this was necessary to ensure that he would be able

to return to the UK when the Hotel was allowed to re-open. She provided her calculations when he returned to the Hotel in July 2020 (P.119).

16. However, not long after, on 26 March, Mrs McMillan sent an e-mail to the claimant to advise him that he had been placed on furlough, that 80% of his wages would be paid by the Government, backdated to 16 March (P.123). The claimant assumed that in light of this the second respondent would return the £7,000 payment which he had made but she never did.

17. On or around 16 July, the second respondent advised the claimant that she had miscalculated the payment of the £7,000 and that he was required to pay an additional £615.80 (P.119). However, there was no evidence that that sum was ever paid.

Accommodation charges for the claimant and his girlfriend

18. The claimant returned to the UK towards the end of June 2020 as the Hotel was re-opening. After two weeks in isolation, he started working at the Hotel again on 5 July. The claimant's girlfriend returned to the UK with him from China and they both stayed at the Hotel in a larger room than the one the claimant had occupied previously. The claimant maintained that he had been advised by Mrs McMillan, that his girlfriend could, *"stay free and waive her accommodation fee".* However, this was disputed by the respondents and, although we did not have the benefit of evidence from Mrs McMillan, we preferred the respondents' evidence and in particular that of Mrs Theobald, a credible and reliable witness in this regard, in our view. Significantly, on 7 October 2020, the day he left the Hotel, he paid the sum of £1,575 to the respondent Company which according to the respondents' documentary evidence, bore to be in respect of accommodation for him and his girlfriend (P148/149). We find in fact, therefore, that it was agreed that the claimant would pay £25 per day for accommodation for himself and his girlfriend and that this was paid by him.

19. We also find in fact that at the same time the claimant paid the respondent Company the sum of £615.57 (P148/149). This was in respect of an overpayment of wages due to shortfall in the claimant's contracted hours of work and an agreement that he would repay his wages for the hours not worked. This is also dealt with below in our "Discussion and Decision".

Redundancy

20. On 27 September, Mrs McMillan met the claimant and his girlfriend and told them that due to the financial difficulties caused by the Pandemic, the lack of guests and in particular the complete absence of Chinese guests, the Hotel would be closing, indefinitely and his position as Campaign Manager was redundant.

21. On 30 September, Ms Theobald wrote to the claimant to confirm that he was being made redundant. Her letter was in the following terms (P.140):-

"*Unfortunately due to the Corona situation affecting the Hotel industry, we have had to make the difficult decision and give you notice on you* (sic) *employment with McMillan Leisure Ltd which will end in one week (07.10.20).*

Your position as Campaign Manager will now be terminated as it is no longer a viable position due to the business struggling as the impact of the Corona Epidemic has had very serious effects in the tourism industry and as you are aware, the Hotel business has lost main revenue and can no longer sustain your position. We are very sorry to have to let you go. However, I'm sure you understand this difficult position the company is in and unfortunately we do not have the choice now.

We wish you well in your future endeavours and of course I am happy to write you a reference."

22. We were satisfied that the respondent Company was experiencing significant financial difficulties due to the Pandemic. The Hotel closed immediately thereafter and did not re-open until the summer of 2021.

23. After the claimant had been given notice of his dismissal, he and his girlfriend tried to purchase the Star Hotel in Kingussie but ultimately that was unsuccessful (P.143/144).

5 **Submissions**

24. The following is a basic summary of the submissions given on behalf of the parties.

10 **Claimant's submissions**

25. The claimant's representative spoke to written submissions which are referred to for their terms. She first set out the "background"; she then referred to the evidence and invited the Tribunal to make certain findings in 15 fact.

Unfair dismissal

26. The claimant's representative submitted that the claimant had the requisite 20 two years' qualifying service in terms of s.108 of the Employment Rights Act 1996 to bring an unfair dismissal claim. She claimed he started to work for the respondent on 5 September 2018 and his employment terminated on 7 October 2020. In support of her submissions in this regard, she referred to the following cases:-

25 ***Secretary of State for Employment v. Globe Elastic Thread Co. Ltd*** [1979] ICR 706;
O'Sullivan v. DSM Demolition Ltd UKEAT/0257/19

30 27. She further submitted that the reason for the claimant's dismissal was, *"the failure to complete the purchase of the Star Hotel"* which is not a potentially fair reason and rendered the dismissal unfair. She disputed` that redundancy was the "genuine reason".

28. In any event, even if there was a genuine redundancy situation, it was submitted, with reference to ***Polkey v. AE Dayton Services Ltd*** [1987] IRLR 503, that the respondents had not followed a fair procedure and did not act reasonably. It was submitted that, "*a period of further furlough* would have *been a reasonable alternative to redundancy but this was never considered."* The claimant's representative submitted, with reference to ***Mhindurwa v. Lovingangels Care*** ET/3311636/20, that an employer has a duty to actively consider furlough when making someone redundant and the absence of a reasonable explanation for not furloughing makes the dismissal unfair.

29. Further, Damon Sun who lived and worked at the Star Hotel was kept on furlough and the Hotel where he worked was shut indefinitely and was up for sale.

30. She further submitted that a pool for selection should have been created with "*at least one other employee*" who was in a similar role to the claimant namely Zhaoliang Lui, who was the Campaign Manager at the Dreadnought Hotel.

Notice

31. As the claimant was employed by the respondent Company for two complete years he should have received two weeks' notice or pay in lieu of notice instead of the one week which he received.

Redundancy payment

32. As the claimant had two years' complete service he was entitled to two weeks' statutory redundancy pay, instead of the one week he received.

Unauthorised deduction from wages

33. The claimant's representative submitted that the claimant did not agree to being paid one week's annual leave at the beginning of July 2020, instead of furlough pay and that this constituted an unlawful deduction.

34. She also claimed that the respondent had failed to pay the claimant the national minimum wage as he "*worked 48 hours minimum per week and was only paid for 39 hours*".

35. She also submitted, with reference to ***Ahl–E–Hadith v. Ehsan*** UKEAT/0311/19 that, "*the payments he made back to his employer were also unlawful deductions as they were "imposed on him*".

36. Further, in support of her submission that his claim was timeous she referred to the following cases:-

Reid v. Camphill Engravers [1990] IRLR 268;
Bear Scotland Ltd v. Fulton & Another UKEATS/0047/13

"**Inadequate rest periods**"

37. This claim was brought under Regulation 11 of the Working Time Regulations 1988. It was submitted that, "*effectively no adequate rest period can be seen to be made. The claimant maintains that at periods he did have time to rest such as during the night, he was often woken from his sleep to deal with matters in the Hotel, mainly issues with Chinese tourist guests as he would be required to translate. These interruptions did not allow the claimant to receive 11 consecutive hours of rest in a 24 hour period contrary to regulation 10(1)*".

Race discrimination

38. This was complaint of direct discrimination, in terms of s.13 of the 2010 Act. The respondent's solicitor submitted that, "*the claimant was treated less favourably than local non-Chinese staff, meaning the less favourable treatment was due to his race. A hypothetical comparator was relied upon and the claimant's representative referred to* ***Balamoody v. UK Central Council for Nursing Midwifery & Health Visiting*** [2002] ICR 646.

39. The less favourable treatment alleged was as follows:-

"*a. unlawful deductions from wages each time he requested rest periods or leave;*
b. a requirement to live in the Hotel and be available at all hours of the day and night;
c. being required to work whilst placed on furlough in contravention of the Corona Virus Job Retention Scheme."

40. In further support of her submissions she referred to the following cases:-

Glasgow City Council v. Zafir [1998] IRLR 36;
Mcleod v. City Academy Bristol ET/1400297/13

41. Finally, the claimant's representative said this by way of conclusion:-

"*In the circumstances the claimant seeks:*

- *A finding that he was unfairly dismissed; that he suffered unlawful deductions of wages and unlawful payments, that he was not provided adequate rest periods, that he was not provided with a statement of particulars of employment, that he did not receive the correct holiday, notice and redundancy pay and that he suffered race discrimination in the form of direct discrimination.*
- *A financial award in respect of all claims made including an award for injury to feelings for the discrimination suffered within interest thereon all as detailed in the claimant's schedule of loss.*"

First respondent's submissions

42. The first respondent's representative, Ms Theobald, spoke to a written "Closing Statement" which is referred to for its terms. She said that the claimant was employed as a Campaign Manager at the Hotel to liaise with Chinese guests. However, the Pandemic had an immediate, devastating, effect not just on the Hotel but on all hotel businesses.

43. She submitted that by March 2020 it was clear there was a redundancy situation. The claimant was well aware of this as the second respondent, Mrs McMillan, spoke daily with him on the telephone as she was abroad. This was confirmed by Mr Bennett when he gave evidence.

44. Ms Theobald also said that she spoke with the claimant on the telephone when he was in China and it was agreed that when he returned he would be made redundant. That was why he received his accrued holiday pay.

45. She claimed that there was a "redundancy consultation meeting" between Mrs McMillan and the claimant and his partner on 26 September when she explained why the claimant was being made redundant.

46. She submitted that the claimant did not oppose his redundancy and she confirmed his dismissal for that reason, in writing on 30 September (P140).

47. No work was possible for the claimant after 7 October 2020 when he was dismissed as the Hotel closed down then and did not open again until mid-July 2021.

48. Further, the claimant and his girlfriend wrote on 4 October proposing to buy the Star Hotel and "thanked the Company…..". She submitted that it was evident from this that he accepted his redundancy. She submitted that this e-mail was "contrary to his unfair dismissal and discrimination complaints" (P143/144).

49. In the alternative, with reference to ***Polkey***, even if a fair procedure was not followed, she submitted that this would not have made any difference for the following reasons:-

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- *"The respondent Company was struggling financially.*
- *The Hotel shut down indefinitely.*
- *The claimant's position as Campaign Manager was no longer viable and to date there have been no Asian or Chinese guests at the Hotel since the start of the Pandemic.*

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- *Two thirds of the staff were made redundant."*

50. She submitted that of the 13 total staff working at the respondent Company's Hotels (5 of whom were Chinese), 8 were not on furlough (3 of whom were Chinese). It was inconsistent, therefore, for the claimant to maintain that he
15 was required to work when others received furlough and were able to stay at home.

51. Further, the claimant said in evidence that he was happy with his employment up to July 2020 when he returned to work at the Hotel.

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52. The first respondent's representative also disputed that the claimant had two years' service. She submitted that when he was engaged initially he was an "intern"; he could take days off as and when required; he continued with his
25 tour guide work for a significant period of time and only gave this up when he got the job at the Hotel as Campaign Manager from 12 October 2018. This meant that he had less than two years' service.

30 **Holiday pay**

53. The first respondent's representative submitted that the claimant had received all the holiday pay which was due to him (P.66). The claimant

alleged first of all that he did not receive holiday pay then retracted that and accepted that he had received holiday pay.

54. The first respondent's representative also referred to the document (P.131) and submitted that the respondent Company's accountant ensured that he received all monies due to him when his employment ended.

Notice

55. As the claimant had only one year's continuous service he received one week's notice.

Unlawful deduction from wages

56. Ms Theobald also submitted that the claimant had received all the wages which were due to him. She submitted that the £615.80 was never paid or deducted from his wages.

57. The claimant agreed to pay for his accommodation and that of his girlfriend at the rate of £25 per day.

58. So far as the payment of £7,000 was concerned (P.199), this was for accommodation charges. It had nothing to do with wages. If it was "*why would he pay such a large amount?; why entrust Mrs McMillan with such a large amount of money?; we didn't know when he would be back and no one knew when he would be able to return to work at the Hotel; why not just transfer his wages back as he was paid fortnightly?.*"

59. The first respondent's representative also submitted that the claimant's evidence was not credible due to a number of inconsistencies :-

- Originally the discrimination claim related to the entire period of his employment. It now only relates to the period from July 2020.
- The holiday pay claim was retracted.
- The claimant accepted that he had discussed redundancy.
- He claimed at first he wasn't given the reason for his dismissal but accepted this subsequently in his further and better particulars.
- His witness Damon Sun withdrew his evidence that supported the claimant.

Second respondent's submissions

60. The second respondent's representative, her husband, Stan McMillan, made oral submissions at the Hearing and spoke to a written "Closing Statement" which is referred to for its terms.

61. He said that after one month the claimant was permitted to return to China and was often allowed to go to Holland to see his girlfriend.

62. He disputed that the claimant was required to be available 24 hours a day; this was confirmed by the respondents' witnesses and co-workers, James Bennett and Sarah Barker.

63. He submitted that the claimant had a good working relationship with Mrs McMillan, and indeed he said he was happy in his work place until the summer of 2020. The text messages between them reveal *"a very close relationship".* For example, whilst in China on 5 May 2020, Mother's Day, the claimant sent her a text message to say she was like a mother to him (P54).

64. On 1 October, the day after the claimant received notice of his redundancy, Mrs McMillan sent the following text message to the claimant (P55): "*Happy Moon festival, Since not there, I can't buy you mooncakes this year. Have a*

nice day, Lyn (Heart emoji!). And he replied: ”*Thank you (Smiley emoji) Happy Moon festival to you, Stan and Mimi* (Ms Theobald) *as well !*

65. It was not possible for the claimant to continue to work as a Campaign Manager and stay in the Hotel as his job no longer existed. The Hotel was "mothballed and boarded up the day after he left". Nor was there a position at the Dreadnought Hotel as it was being closed down too. The claimant's visa did not permit him to work there in any event.

66. So far as the redundancy procedure was concerned, there could only have been one outcome as his position had ceased to exist.

67. Although the claimant maintained the reason for his dismissal was his failure to buy the Star Hotel, he was still trying to buy the Hotel on 4 October after he had received notice of his dismissal (P143/144).

Discussion and Decision

Unfair dismissal

Employee/Length of service

68. The first issue which we had to consider was whether the claimant had the requisite two years' continuous service as an employee to bring a complaint of unfair dismissal. It was not disputed that the effective date of termination of his employment was 7 October 2020. While the verbal offer for him to work full time at the Hotel was made on 12 October 2018 and he only started to work there in that capacity on 10 December, he had worked at the Hotel as an "intern" since 14 September 2018 and although his work was irregular at first and he had other commitments, there were no weeks thereafter when he did not work there. Looking at the whole picture, we were satisfied when he worked at the Hotel from 14 September that he was an employee: he did so under the control and direction of the respondent Company and the second respondent, Mrs McMillan, in particular; there was the so called "mutuality of

obligations" between the parties; there was no question of the claimant arranging for a substitute to do his work; the "contract" between the parties from 14 September was consistent with it being a contract of service. We were of the unanimous view, therefore, that he was an employee from 14 September and that he had the necessary two years' continuous service to bring this complaint.

Redundancy

69. In every unfair dismissal case where dismissal is admitted s.98(1) of the 1996 Act requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(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. An admissible reason is a reason for which an employee may be fairly dismissed and among them is that the employee was redundant. That was the reason the respondents claimed was the reason for claimant's dismissal. This was the issue which we first considered.

70. The statutory definition of redundancy is to be found in s.139(1) of the 1996 Act. Sub-section (1)(a) deals with the situation when an employer has ceased or intends to cease to carry on business. That does not apply in the present case, although the business closed on 7 October 2020 for a substantial period due to the Pandemic, it always planned to reopen as soon as possible. The relevant provisions are in sub-section (1)(b) which reads as follows:-

"*(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

(a) ……………………………………..

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

71. The claimant was employed as Campaign Manager at the Hotel. He was engaged principally to attract business from China to the Hotel. It was not disputed that in the period to 7 October 2020 the income of the Hotel reduced very significantly indeed. The claimant's work as Campaign Manager had not only diminished, it had ceased altogether. Further, the Hotel closed down on 7 October 2020 and did not reopen until July 2021. In these circumstances, we had little difficulty arriving at the unanimous view this was a genuine redundancy situation as defined in s.139(1)(b) of the 1996 Act.

72. Giving the leading speech of the House of Lords in ***Murray & Another v. Foyle Meats Ltd*** [1999] IRLR 562, Lord Irving, the Lord Chancellor thought that the wording of the relevant statute was: "*simplicity itself*". In his Lordship's view, the language of the section asked two questions of facts. The first is whether the requirements of the employer's business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal was wholly or mainly attributable to that state of affairs. This is a question of causation. So far as the present case was concerned, we were satisfied that the requirements of the respondents' business for employees to carry out Campaign Manager work at the Hotel had, at the very least diminished significantly and that was the reason for the claimant's dismissal. This is consistent with the terms of the dismissal letter (P140).

73. It was alleged by the claimant that his failure to buy the Star Hotel was the reason for his dismissal. That was not so. That assertion was without substance and had no basis on the evidence. Clearly, there was a redundancy situation and the claimant and his girlfriend were still expressing

interest in purchasing the Star *after* the claimant had been given notice of his dismissal (P182, for example).

5 74. We decided, unanimously, therefore, that the claimant was dismissed by reason of redundancy which is an admissible reason.

75. Having reached this decision, the remaining question which we had to determine, under s.98(4) of the 1996 Act, was whether the respondent had
10 acted reasonably in treating the reason for dismissing the claimant as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case. In doing so, we had regard to the authoritative starting point for Tribunals assessing the fairness of a redundancy dismissal, namely the guidance of Lord Bridge in ***Polkey*** : "*The*
15 *employer will not normally act reasonably unless he warns or consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and take such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation.*"

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76. Earlier in 2020, Mrs McMillan called all the staff at the Hotel to a meeting. She explained the significant adverse impact the Pandemic was having on the business and advised that there would have to be redundancies. The claimant did not attend the meeting as he was in China at the time but when
25 Mr Bennett asked about him Mrs McMillan informed him that she would discuss matters with the claimant and *"inform him of the redundancy situation".* Accordingly, on 26 September Mrs McMillan met the claimant and his girlfriend after they had returned from China and explained that the business was struggling financially, the Hotel would be closing for the
30 foreseeable future and he would be made redundant. No minutes were taken and there was no right of appeal. However, this was not a "normal situation". The claimant had been engaged to concentrate on the Chinese tourist sector. There had been few guests and no Chinese tourists for several months due to the Pandemic and the Hotel closed down immediately after the claimant's

dismissal. Nor were we persuaded, as the claimant's representative submitted, that the claimant should have been "pooled" with Zhaohang Lui, the Manager at the Dreadnought Hotel, or indeed with any other employees. The claimant was engaged to promote the Hotel to Chinese tourists. We heard evidence that a condition of the claimant's Visa was that he worked at the Hotel. His duties and workscope were materially different from that of Mr Lui and any other employees. The respondents' decision to treat the role of Campaign Manager at the Hotel as a "stand alone", discreet, position and not create a "pool" was, in our unanimous view, in all the circumstances, within the range of reasonable responses open to a reasonable employer.

77. We arrived at the view, therefore, that in the unique circumstances of the case and, having regard to the relatively small size and administrative resources of the respondent Company and the close working relationship between Mrs McMillan and the claimant, that further consultation would have been utterly futile. We decided unanimously, therefore, that the claimant's dismissal was not unfair.

78. Further, and in any event, even if we are mistaken in that view, we were of the view that if a fair procedure had been followed, in accordance with ***Polkey***, that the outcome would have been the same: the claimant would still have been dismissed and we would not have made any award of compensation.

Furlough

79. We were also satisfied that the respondents' decision not to place the claimant on furlough was, in all the circumstances of the present case, within the range of reasonable responses which a reasonable employer could have taken. There was no obligation on the respondents to furlough the claimant; the respondent Company had no income from guests as the Hotel had closed down; if he had been placed on furlough this would have involved the

respondents in further costs at a time when their financial position was parlous; at the time the claimant was dismissed there was no prospect of the Hotel re-opening in the foreseeable future. In arriving at this view we were mindful of the decision in ***Mhindurwa***, to which we were referred by the claimant's representative. However, that is a first instance, Employment Tribunal, case and turned on its own particular facts. In another case, at first instance, ***Handley v Tattenhill Aviation Ltd*** UKET 2603087/20, it was decided that the decision to make Mr Handley redundant, instead of keeping him on furlough for longer, was within the range of reasonable responses open to the business, given that the flight-training part of business had no income at all and they envisaged this remaining the case for the foreseeable future. Ultimately, therefore, the decision to furlough is a matter for an employer, and so long as their decision is within the range of reasonable responses, as it was in the present case, it will not be unfair.

Redundancy payment

80. As we understand it, the claimant only received one week's pay by way of a redundancy payment. As we decided that had been employed by the respondents for two years, he is entitled to a further one week's pay by way of redundancy payment which amounts **£423.10**.

Notice

81. The claimant only received one week's notice pay. He should have received two weeks as he was employed for two years. His notice pay is calculated on the basis of net pay. Accordingly, the claimant is entitled to a payment of **£344** in this regard.

Inadequate rest periods

82. We were of the unanimous view that this complaint was not well-founded. There was insufficient evidence to support this complaint and there was insufficient specification of what was being claimed. There was corroborative evidence from all the respondents' witnesses that the claimant was not required to work more than 48 hours each week as he claimed. All the witnesses were quite clear about this. They all presented as credible and reliable in this regard. Not only was there evidence from the respondent Company's management to that effect, but also from the claimant's fellow workers, James Bennett and Sarah Barker. When it was put to Mr Bennett in cross examination that the claimant worked 120 hours some weeks he said the claim was "ridiculous". The claimant also tried to enlist Ms Barker as a witness on his behalf but when she heard his allegations she refused. She *"found it impossible to believe that what he said was true….."* (P194).

Written employment particulars

83. We found in fact that the claimant had received a written statement of his terms and conditions of employment.

Race discrimination claim

84. This was a complaint of direct discrimination. We found in fact that the claimant was not required to work in excess of 48 hours per week. We found in fact that he was not given "inadequate rest periods". We found in fact that the claimant was not , *"required to be available at all hours of the day and night"* as he alleged. The remaining allegation of less favourable treatment, therefore, was the contention that the claimant and the other Chinese nationals employed by the respondent Company were treated less favourably than the non-Chinese employees in that the Chinese nationals were required to work whereas the Scottish nationals were furloughed and their weekly wage was "made up" by the respondent Company.

Burden of proof

85. A discrimination complaint requires a claimant first to establish facts that amount to *prima facia* case. S.136 of the Equality Act 2010 ("the 2010 Act") provides that once there are facts from which an Employment Tribunal could decide on unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove a non-discriminatory explanation.

86. ***Igen Ltd v. Wong*** [2005] IRLR 258 remains one of the leading cases in this area. In that case the Court of Appeal established that the correct approach for an Employment Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the Tribunal could infer the discrimination has taken place. Only if such facts had been made out to the Tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then "shifts" to the respondent to prove – again on the balance of probabilities – that the treatment in question was "*in no sense whatsoever*" on the protected ground.

87. We were also mindful that in ***Bahl v. The Law Society & Others*** [2004] IRLR 799, that the Court of Appeal upheld the reasoning of the EAT and emphasised the unreasonable treatment of a claimant cannot of itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof, the principle is still valid. In other words, unreasonable treatment is not sufficient in itself to raise a *prima facia* requiring an answer. As the EAT said in ***Bahl*** at para. 89: "*……merely to identify detrimental conduct tells us nothing at all but whether it has resulted from discriminatory conduct.*"

88. We accepted the evidence of Ms Theobald that, *" From July till the closure of all hotels in October 2020 the following number of staff were working at the hotel-*

- *Total staff working at the Hotels = 13 and of these, 5 were Chinese.*

- *Total number of staff working and not on ay Furlough Scheme and receiving wages from the Company = 8 and 3 were Chinese.*
- *Total number of staff 13 who were being paid by either the Company or Furlough Scheme and remaining at home and not asked to work = 0"*

89. We had little difficulty in arriving at the unanimous view that the claimant failed to prove facts from which we could infer that the discrimination has taken place. Indeed, we were not even persuaded the claimant had been treated unreasonably, let alone less favourably. Not all non-Chinese nationals employed at the Hotel were furloughed and required to stay at home; some were required to work at the Hotel. The claimant was not treated less favourably. This complaint is not well-founded and it is dismissed.

Unlawful deduction from wages

90. Although we had witness statements and heard evidence over a number of days, what emerged was extremely confused. It was complicated by the fact that the claimant alleged that he had made various payments to Mrs McMillan; we did not hear oral evidence from Mrs McMillan (which was understandable due to her ill-health); the handwritten notes of her calculations were very difficult to comprehend (P119/120, for example); we only had a written statement from her (P.184). Nor were the reasons for the payments which the claimant made and what was agreed between him and Mrs McMillan altogether clear. It is unusual, to say the least, for an employee to make payments to his or her employer, certainly of the magnitude in the present case. The working arrangements between them bordered on the bizarre.

91. However, on the evidence we were able to make the following findings in fact. On 13 March 2020, the claimant made a payment to Mrs McMillan of £7,000 (P.121). There was insufficient evidence to establish that the claimant also

paid her £615.80, as he alleged (P.20 and P.120). We were satisfied that the payment of £7,000 was in respect of “wages” which would be due to be paid to the claimant each week. £343.80 was repaid to him from the £7,000. However, shortly thereafter the situation changed as the respondent Company started to receive furlough payments for the claimant and the claimant agreed to accept these payments, which were 80% of his normal wage, in full payment of his wages. As the respondent Company was in receipt of furlough payments from the Government, the £7,000 which the claimant paid in advance in respect of future “wages” should have been repaid to him less the £343.80 he received. We arrived at the unanimous view, therefore, that there had been an unlawful deduction from wages of **£6,656.20**.

Overpayment of wages

92. We were mindful that on 7 October 2020, the day his employment ended, the claimant paid the claimant the sum of £ 615.57, (in addition to the £1,575 for accommodation charges for himself and his girlfriend). We were satisfied that this payment was in respect of an overpayment of wages and, as such, with reference to s.14 of the 1996 Act, this was not an unlawful deduction from wages.

Holiday pay

93. We accepted Ms Theobald’s evidence that her Accountants ensured that the claimant received all monies due to him when his employment ended (P156) We noted from the payslip dated 30 September 2020 that he had received holiday pay of £423 (P203). In any event, there was insufficient evidence to establish that the claimant was due accrued holiday pay and the onus was on him to do so.

Conclusion

94. It was clear that the claimant enjoyed working at the Hotel and had a very cordial working relationship with Mrs McMillan in particular. In our view, apart from the £7,000 payment which gave rise to the successful claim for unlawful deduction from wages and the claims arising from the claimant's length of service, which, to be fair to the respondents, was not entirely clear, the remaining claims were not well-founded, scattergun in nature and something of an afterthought. The claimant left his employment at the Hotel, without complaint and on amicable terms; at the time of his dismissal he accepted that his position as Campaign Manager was redundant and it was perfectly clear that it was; nor did he complain at the time of race discrimination, a very serious allegation indeed, which was levelled without foundation and understandably caused Mrs McMillan and her family considerable unnecessary distress.

Employment Judge **N Hosie**
Date of Judgement **3 December 2021**
Date sent to parties **6 December 2021**