



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Williams

**Respondent:** Charlwood IFA Ltd

**Heard at:** In Chambers **On:** Wednesday 6 and Thursday 7 January 2021

**Before:** Employment Judge Matthews

**Representation:**

**Claimant:** In Person

**Respondent:** Mr M Charlwood - Director

## JUDGMENT

1. Mrs Williams was unfairly dismissed.
2. Mrs Williams' claim under section 23 of the Employment Rights Act 1996 that the Respondent has failed to pay wages due to Mrs Williams is well founded. The Respondent is ordered to pay Mrs Williams £992.64 in this respect. Any amount which the Respondent lawfully deducts from this sum by way of income tax, national insurance contributions or otherwise shall be treated to that extent as in payment of this order. In the absence of evidence to substantiate the lawfulness and amount of such a deduction (such as a payslip), the gross amount specified shall be due under this Judgment to Mrs Williams.
3. Mrs Williams' claim under regulation 30(1) of the Working Time Regulations 1998 that the Respondent has failed to pay Mrs Williams an amount due under regulation 14(2) of those regulations (holiday pay) is dismissed on withdrawal of the claim by Mrs Williams.
4. No order for re-instatement or re-engagement is made.

5. The Respondent is ordered to pay to Mrs Williams unfair dismissal compensation totalling £4,471.31, comprising a basic award of £458.14 and a compensatory award of £4,013.17.

6. The Recoupment Regulations apply and the particulars required by regulation 4(3) of those regulations are:

- total (unfair dismissal) monetary award: £4,471.31

- the Prescribed Element: £3,713.17

- period to which the Prescribed Element is attributable: 3 May 2020 to 14 September 2020

- amount by which monetary award exceeds the Prescribed Element: £758.14

7. The Respondent's application for a preparation time order is dismissed.

## **REASONS**

### **INTRODUCTION**

1. Mrs Katharine Williams says she was unfairly dismissed by the Respondent Company. Mrs Williams also claims notice pay. Whilst this may appear to be the usual claim of wrongful dismissal, on closer inspection it is not. What Mrs Williams is claiming is pay for the notice period the Company gave her. This is, in effect, a claim for wages. Mrs Williams had also claimed holiday pay. Mrs Williams withdrew the claim for holiday pay during the hearing in recognition of another payment received from the Company.
2. The Company says that the reason for Mrs Williams' dismissal was redundancy and the dismissal was fair. The Company also defends the wages claim in respect of the notice period on the basis that Mrs Williams did no work during that period. For completeness sake the Tribunal records that Mr Charlwood, at the very end of the proceedings, suggested that the contract of employment between the Company and Mrs Williams had been frustrated. This argument had never been part of the Company's case. In any event, the legal concept of frustration is a narrow one and clearly the employment contract in this case was not terminated by frustration. To the contrary, it continued in being and was terminated by the Company on notice.
3. The Tribunal heard evidence from each of Mr Martyn Charlwood (a Director of the Company) and Mrs Williams by reference to

written statements. Mrs Joanne Charlwood (a Director of the Company and Mr Charlwood's wife) countersigned Mr Charlwood's statement and also gave additional oral evidence. There was an "electronic" bundle of documentation. This was in eleven sections with a separate index. References to pages are to pages as so sent, unless otherwise specified.

4. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face-to-face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
5. The hearing had been switched from a hearing in person to the Common Video Platform at short notice. As a result, there was some difficulty in transmission of the electronic bundle to the Tribunal. This was put right, thanks to the Company's efforts. As a result of the delay, the hearing took the two days allowed for it and judgment was reserved.
6. This is a case in which the contemporary paperwork largely records what happened. The differences between the parties are differences of interpretation and as to the legal effect of events. They are a microcosm of the problems faced by employers and employees as the spread of Covid-19 took hold across the country at large in early 2020.

## **FACTS**

7. The Company's business has a property side ("Sterling") and an independent financial services side ("Charlwood IFA"). It operates from Bournemouth. It reported seven employees at the commencement of these proceedings.
8. Mrs Williams started worked for the business on 15 May 2017. Mrs Williams was dismissed by letter dated 3 April 2020 confirming the content of an e-mail sent on 2 April 2020. These purported to give notice effective from 24 March 2020. The parties have agreed the date of dismissal as 3 April 2020 on the basis that Mrs Williams' contract of employment required notice of termination by letter. The Tribunal's finding is that the effective date of termination was 3 May 2020, when the notice expired.
9. Mrs Williams worked as a Property Manager/Accounts. The job involved visiting properties and working from the Company's premises in Bournemouth. The administration side of Mrs

Williams' job included book-keeping, payroll and Financial Conduct Authority ("FCA") reporting.

10. Mrs Williams worked part time and was paid hourly. During school term times Mrs Williams' hours were Monday 1000-1600 and Tuesday and Wednesday 1000-1400. In school holidays, Mrs Williams worked Monday and Tuesday 1000-1600.
11. On Thursday 12 March 2020, as the Covid-19 pandemic began to make its presence felt, Mr Charlwood messaged Mrs Williams to check that she could work remotely at home if the need arose. Mrs Williams replied that she could (section 11, 2).
12. On Tuesday 17 March 2020 Mrs Williams telephoned Mr Charlwood to ask if she could work from home. Mrs Williams' son (one of two children) had developed a cough and she thought it right for her family to self-isolate. Mr Charlwood agreed, although making it clear it was not ideal.
13. Mrs Williams worked from home on Tuesday 17, Wednesday 18 and Monday 23 March 2020. Whilst there is a dispute about their extent, Mrs Williams did make some mistakes in this work. Mr Charlwood put this down to Mrs Williams being distracted by her two children.
14. On Monday 23 March 2020, against the background of an impending national lockdown including school closures, Mrs Williams messaged Mr Charlwood. The message included this (section 11, 12):

*"Will have to speak to you later about next week and going forward as the kids are off now for I don't know how long and my mum is self isolating for 12 weeks."*

15. The interpretation that Mr Charlwood put on this is both instructive and key to what followed (WS 2):

*"On the 23<sup>rd</sup> March 2020 I received a WhatsApp message from the Claimant explaining she was struggling with her work and looking after her two children and had no childcare options. This did not surprise me as most aspects of work the Claimant carried out from home were inaccurate and had to be redone by myself or my Co-Director, Jon Tuck."...."The Claimant had made it clear that the following week and in future weeks (minimum of 12 weeks) she would be unable to do her job as she needed to look after her children and was allegedly unable to obtain childcare for any of the 14 hours a week she worked. In any event the job we had employed the*

*Claimant to do, needed to be performed from our office and was not appropriate to be done whilst looking after two young children.”*

16. Mr Charlwood’s response to Mrs Williams’ WhatsApp message came on Tuesday 24 March 2020. This was “lockdown day”. It was addressed to Mrs Williams and also to a colleague and it included this (section 11, 13):

*“...we plan to take up the government support for both your salaries and neither of you will be expected to carry out any further work for the near future.”....*

*“With regards to your salary I can assure you, you will be paid by cifa the full amount of your salary for this month despite you will be officially registered on the government scheme as of today.”*

17. On Wednesday 25 March 2020 Mr Charlwood sent an email to Mrs Williams. It included (section 11, 19):

*“I understand and appreciate these are uncertain times but please be reassured that we have no intention of taking advantage of your situation. In fact to the contrary part of our decision making process was considering also your own circumstances.”....*

*“Yes, we considered the options of you”....“working from home but for differing reasons which have been communicated this was not desirable but was fully considered. Both our PI insurers, the FCA and our bank have been very clear in terms of what our priorities are and what steps we need to take to protect our clients and our business interests. As I explained over the phone, the very minimal benefit to ourselves as a result of”....“you working from home were and are hugely outweighed by the overwhelming disadvantages.”*

18. The security risk resulting from home working was a particular feature of the independent financial advisory work, rather than the property work (see Mr Charlwood WS 1).

19. On Friday 27 March 2020 Mr Charlwood sent Mrs Williams an email chasing a response to his e-mail of 24 March (section 4, 5). Mrs Williams’ reply included this:

*"It's been on my mind to respond for a couple of days. I've been concentrating on the family during this difficult time of adjustment."....*

*"I thought I had already acknowledged the situation during the phone call?"....*

*"I do however have a couple of questions:"....*

*" - do we know yet how the 80% of my wages will be calculated? Not sure what month will be used as the benchmark? If that's how it's done?*

*While I'm grateful to not have the pressure of working from home with the kids during this time and having the government funding, I am concerned that I will have a job to come back to? My worry over this is the employment of 2 new full time employees, that my part time hours will no long suit? If we could have a chat to discuss at some point, that would be much appreciated."*

20. Mr Charlwood replied on Sunday 29 March 2020 (section 4, 4-5). The reply included this:

*"Forgive me emailing on a Sunday but as you can imagine it's chaos at the moment trying to keep on top of things as well as responding to and dealing with emails."....*

*"....I was wanting your approval to registering you on the government support scheme. Whilst full details are still sketchy it would appear that the government will cover your salary up to 80% (finer detail still to be confirmed) and we need your approval to this before we register you on the scheme."....*

*"Whilst I realise you cannot currently carry out your job please be aware that you are unable to and not required to do any work during this period. I have proposed this option as it was I believe the most suitable option to both you and Charlwood IFA. If you could today confirm your agreement to a reduced salary of 80% we will proceed and register you on the government support scheme? In relation to your questions;"....*

*"2-Unfortunately as mentioned above and understandably due to the lack of time elapsed the precise criteria is still not fully known but I can assure you once we have the info we will advise.*

*3-I understand completely your concerns about future employment and i believe it's important at this time to provide honest communication. The honest answer is I don't know and cannot guarantee what the future holds. I fully understand your worries but we also have similar concerns and worries. Our ifa business revenue is already down 20% with no additional new revenue coming in yet we still have very similar expenditure going out eg employees who are able and willing to continue working who we are committed to supporting and paying. I also have to some how find a way to deal with and keep on top of Sterling work in addition to everything else I was doing and at a time when potential rents might not be paid and future reservations for 20/21 are currently being rescinded with the prospect of empty flats and no income."*

21. Mr Charlwood's evidence is that it was clear to him that the pandemic would have a damaging financial effect on the Company (WS 4). The IFA side lost 20% of its revenue. New business ceased. New flat rentals in the pipeline were being cancelled and rent holidays were being requested. Holiday rentals were cancelled. Mr Charlwood comments "*I realised we needed to reduce our expenditure and that it was no longer viable to employ the Claimant.*" Later in his statement Mr Charlwood adds (WS 5) "*In summary, making the Claimant redundant was a last resort due to the financial implications affecting my business as a result of COVID19 and the Claimant's refusal to accept my furlough offer.*"

22. Mrs Williams did some research on the proposed furlough scheme and an email on Monday 30 March to Mr Charlwood included this (section 4, 4):

*"As per your email to myself"... "last Wednesday stating that we had been put on the scheme as of the date of your original email, please confirm?"*

*As I understand from the Government website guidelines for both employers and employees, we only both need to be in agreement if I have requested to go on the scheme and there is no need for a time lapse, as your claims can be back dated.*

*Again, as per your original email, can you confirm that this month will be my full pay and then going forward it will be at the 80% rate? And that the pension payments will continue?"....*

*“Please be aware as well that I look forward to assisting in getting back up to speed once the dust has settled and we start to come out of this terrible situation. I have spoken to Frazer and we can be flexible with his work and myself being able to use his home office just off the house, or into the office, subject to when you would like me to start helping and working at capacity again.”*

23. Mr Charlwood’s response on the same day included this (section 4, 3):

*“We have not put you on the government support scheme firstly because we require your agreement to what we are proposing and in turn your agreement to a reduced salary of 80% from 24/3/20 and secondly of course the government support scheme is not available yet to register with.*

*Our options were/are to give you notice of termination or to put you on the government support scheme with a reduced salary of 80% with effect from Tuesday 24/3/20. Assuming the government support scheme is your preferred option we will be paying you your full salary for the month of March but in turn we will be registering you on the government support scheme when able and effectively your salary will be 80% of your normal salary from Tuesday 24/3/20 and therefore some form of balancing payment will need to take place to correct the overpayment we will be making. Without your agreement to us paying you 80% of your normal salary from Tuesday 24/3/20 we will not be registering you on the government support scheme and will instead be giving you notice to terminate the contract later today. If when registering you on the government support scheme the full details oblige us to pay pension contributions or other associated costs we will consider this and if we deem it not affordable or not appropriate we will in turn give you notice to terminate the contract at that point.”....*

*“Forgive me but without your agreement as detailed above by 1pm today we will have to give notice to terminate the contract.”*

24. Whether justified or not, Mr Charlwood had now backtracked on his original assurance that Mrs Williams’ salary for March would be paid as normal.
25. Mrs Williams got the message (agree or be dismissed) and her reply in the morning of the same day included (section 4, 3):



*“I confirm acceptance to go on the 80%”*

26. Mr Charlwood acknowledged receipt. However, between Monday 30 March and Wednesday 1 April 2020, Mr Charlwood’s thinking obviously crystallised. On 1 April Mr Charlwood sent a lengthy email to Mrs Williams that included this (section 4, 1b-2):

*“The government scheme is still not available to register you on and we still do not know all the terms and conditions but I have now had greater time to consider the implications to us as a business as a result of placing you on this scheme. Whilst we naturally want to help and support you we do not want this to be to our detriment during what is an extremely difficult time for us as a business. I have summarised below just a few of my thoughts and concerns;*

*We do not want any ongoing costs relating to your employment whilst you are not working for us. We have agreed already that we will only be paying you 80% of your salary on the understanding that we are successful in registering you on the government support scheme and we are refunded the same amount. We do not however want to make any other ongoing payments for your benefit whether that be pensions or any other which are not going to be refunded to us by the government support scheme and whilst you are not working for us. Currently you are unable to perform your job and the chances of you being able to do this to the extent I need you is very unlikely until your children go back to school in September (some 5 months or so away). I realise this is not your fault but it is also not our fault and it is nether affordable or fair for my business to be responsible for these costs.*

*If I were to give you 4 weeks notice of termination as at 24/3/20 as opposed to a later date the redundancy costs would be less now than they would be at a later date and more importantly this would enable me to instruct somebody else to train and assist me to carry out your job.*

*Whilst I would like to think it was possible for me to pick up your work load for 5 months or so in addition to what I already do and keep your job open for you, this may well be unrealistic and necessary for me to find someone else to replace you.*

*In addition I do not know what else might change or effect me and my business tomorrow or in these next 5 months*

*and therefore this raises uncertainties such as if the days and hours you are currently working are going to be the same days and hours I need you to work in the future. I know already that you working from home is not a solution or beneficial to me partly because of the security risk highlighted in previous emails but also because if you are not doing the maintenance jobs and checks, viewings, handing over keys etc etc I or someone else then needs to do these things.*

*All of the above are negative consequences to my business at a time when my various business interests are experiencing some extreme difficulties. If I am to consider deferring/avoiding giving you notice of termination as at 24/3/20 I will require your agreement to the following on the assumption that we keep your job open and place you on the government support scheme;*

*Full agreement that the terms of your contract signed and dated 13/6/17 can be terminated from the 24/4/20 with no notice period and no financial implications/costs from either party and that any and all terms within this contract of employment can be renegotiated without ANY financial implications (redundancy costs or otherwise) to allow both parties to find a suitable agreement when and if we were able to reemploy you at some future date. Effectively this means that should we choose not to continue your employment for any reason eg we terminate your employment anytime after the 24/4/20 you agree to forfeit the right to any notice period or redundancy payment or any other financial payments which would normally be due under your contract of employment dated 13/6/17.”....“Assuming the above meets with your approval could you please confirm otherwise we will need to terminate your employment with effect from the 24/3/20. Naturally if this is your preference to us attempting to keep your job open and registering you on the government support scheme we will honour any redundancy payment/contractual obligations on the assumption your employment was terminated with 4 weeks notice from the 24/3/20.”....“Please could you confirm by 5pm tomorrow at the latest otherwise we will need to proceed with the termination of the contract.*

27. In effect, Mr Charlwood was asking Mrs Williams to give up her employment rights and contract of employment in return for discussions about whether or not and on what terms she

remained in the Company's employment and (although this is not clear) being placed on furlough.

28. Unsurprisingly, on Thursday 2 April 2020, Mrs Williams emailed Mr Charlwood asking for time to consider. However, Mr Charlwood sent Mrs Williams an email that day which included (section 4, 1b):

*“please accept this email and my letter going out in tonight's post as 1 months notice to terminate your employment with effect from the 24/3/20.”*

29. The position was somewhat complicated because, immediately before sending that email Mr Charlwood had sent another e-mail which included (section 4, 1a):

*“...I will issue our email and letter to terminate employment and subject to what you come back to me with we can reconsider at that point if indeed you wish to be placed on the government support scheme.”*

30. What Mrs Williams “came back with” was a solicitor's letter. Mr Charlwood was (and at the hearing remained) considerably put out by that. In response, in a further e-mail to Mrs Williams on 4 April 2020, Mr Charlwood made it clear the dismissal stood as delivered (section 4, 1b).

31. It was clear from Mr Charlwood's evidence that the job Mrs Williams did for the Company continued to be done after her dismissal. It was divided up between other employees including Mr and Mrs Charlwood. The Company evolved other ways of working, such as virtual property viewings, but those came later.

32. On 19 May 2020 a “redundancy” payment of £478.64 was paid by the Company to Mrs Williams. The Company did not pay Mrs Williams during her notice period because, Mr Charlwood says, Mrs Williams did no work.

33. Mrs Williams reports that her search for work began slowly (WS 31). Mr Williams had lost his job and became ill, later being diagnosed with Type 1 Diabetes. Mrs Williams also had to look after her two children, unable to attend school because of the pandemic. Nonetheless, to her credit and happily, Mrs Williams found work at a better rate of pay than she had enjoyed with the Company commencing on 14 September 2020.

## **APPLICABLE LAW**

34. Section 13 of the Employment Rights Act 1996 (the “ERA”), so far as it is relevant, provides as follows:

**“13 Right not to suffer unauthorised deductions**

*(1) An employer shall not make a deduction from wages of a worker employed by him unless-*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”....*

*“(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”*

35. Section 23 of the ERSA, so far as it is relevant, provides as follows:

**“23 Complaints to employment tribunals**

*(1) A worker may present a complaint to an employment tribunal-*

*(a) that his employer has made a deduction from his wages in contravention of section 13”*

36. Section 24 of the ERA, so far as it is relevant, provides as follows:

**“24 Determination of complaints**

*(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer-*

*(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,”*

37. Section 27 of the ERA, so far as it is relevant, provides as follows:

***“Meaning of “wages” etc***

*(1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including-*

*(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,*

38. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his/her employer. Section 98 of the ERA sets out provisions for determining the fairness or otherwise of a dismissal. So far as it is relevant it provides:

***“98 General***

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

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

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

*(2) A reason falls within this subsection if it-”....*

*“(c) is that the employee was redundant,”....*

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

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

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

39. Section 139 of the ERA, so far as it is relevant, provides as follows:

***“139 Redundancy***

*(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) the fact that his employer has ceased or intends to cease-*

*(i) to carry on the business for the purposes of which the employee was employed by him, or*

*(ii) to carry on that business in the place where the employee was so employed, or*

*(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 where the employee was employed by the employer,*

*have ceased or diminished or are expected to cease or diminish.”*

40. It is not for the tribunal to substitute its view for that of an employer provided that the employer's view falls within the band of responses which a reasonable employer might adopt. This general principle applies both to the substantive circumstances of any dismissal and to the procedural way in which it is carried out.

41. The Tribunal was not referred to any case law.

**CONCLUSIONS**

42. The claim for notice pay

43. When Mrs Williams was dismissed, Mr Charlwood gave her the one month's notice she was entitled to under the terms of her contract of employment. Mrs Williams was not, however, paid for that period. The reason the Company gives for this is that Mrs Williams did not do any work in the period in question.

44. The Company points to the contract of employment that specifies salary as “£15.00 per hour worked” (in fact the rate of pay had increased, but that has no consequence in this context). The Company says that is a contractual acceptance that, if an hour is not worked, it is not paid. That, however, is a selective approach.
45. What the contract of employment also specifies is hours of work. It records “*Your agreed hours will be as follows:*” The Company, therefore, agreed to employ Mrs Williams during those hours and, all else being equal, pay for them.
46. Mr Charlwood asserted on several occasions that the onus was on Mrs Williams to contact him and offer to work during her notice period. It was not. The Company well knew what the constraints on Mrs Williams might be and Mrs Williams was not contacted to discuss how she might work around them. It is clear that Mr Charlwood made up his mind very early on that Mrs Williams could neither attend work nor work from home (see paragraph 15 above in particular). Mr Charlwood drew his conclusions to suit his agenda. Mr Charlwood’s agenda was that he didn’t want Mrs Williams working from home distracted (as he saw it) by two children.
47. In support of his conclusions Mr Charlwood points to three things in particular. First, there were security reasons why Mrs Williams should not be allowed remote online access to the IFA side of the business. Second, Mrs Williams had made some mistakes when she had worked from home. Third, part of Mrs Williams’ job involved visiting properties. The Tribunal takes no issue as far as the security issue is concerned. Mr Charlwood was entitled to take an unfettered management view on that. However, that left the property side of the business and the support operations for the IFA business, such as the accounts and payroll. The mistakes were an issue but that could have been overcome with a reasonable discussion between employer and employee. As far as outside visits were concerned, Mr Charlwood simply assumed these could not be done and there was no attempt at discussion on the subject. This, it must be remembered, was against the background of Mrs Williams having been instructed to do no further work.
48. In the circumstances, it seems objectively reasonable to conclude that the Company could have given work to Mrs Williams during her notice period which she says she was available to do. Mrs Williams should, therefore, be paid for it.

49. Mrs Williams' gross weekly pay (averaged over a 52 week period accounting for the variation in hours worked during school holidays) was £229.07. A month's pay is calculated as  $(£229.07 \times 52) \div 12 = £992.64$ . That sum is awarded as wages owing by the Company to Mrs Williams. As indicated in the Judgment above, it is anticipated that it will be paid through the payroll in the normal way subject to deductions for tax and National Insurance and accompanied by a payslip.

50. The claim of unfair dismissal

51. It is for the Company to show a permissible reason for the dismissal. The Company paid Mrs Williams what it referred to as a redundancy payment. Discerning the principal reason for the dismissal is not a straightforward task in any event but it is crystal clear that it was not redundancy. It does not fit any of the categories set out in section 139 of the ERA (see paragraph 39 above). Mr Charlwood freely accepted that Mrs Williams' job continued in being. It was carried on by other employees based out of the same Company premises.

52. As is often the case, there was a mixture of factors behind the dismissal. The Company was faced by severe financial constraints. Had Mr Charlwood said to Mrs Williams "I cannot afford to keep you on because of the financial pressure the business is coming under", that would have been the reason for the dismissal. The difficulty with that, however, is that was clearly not Mr Charlwood's preoccupation. As was explored in paragraph 47 above, Mr Charlwood made his mind up very early on in the process that Mrs Williams could not work from home. Another way of looking at it is this. If the Company had faced no financial pressures and all the other circumstances had been the same, would Mrs Williams have been dismissed? The Tribunal's conclusion is the outcome would have been the same. Mr Charlwood was not going to keep Mrs Williams on the books if she could not, as he saw it, do her work.

53. It follows, therefore, that the principal reason for the dismissal was Mr Charlwood's view that Mrs Williams could not do her work from home.

54. That reason is capable of being "some other substantial reason" for the purposes of section 98(1)(b) ERA (see paragraph 38 above).

55. The Tribunal must now turn to the section 98(4) ERA test of whether or not the dismissal was fair or unfair. This "*depends on*



*whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."*

56. In applying the statutory wording, it is not for the Tribunal to substitute its own views for those of an employer provided that the employer's view falls within the band of responses which a reasonable employer might adopt.
57. It is trite law that circumstances such as those Mr Charlwood and Mrs Williams found themselves facing, normally require consultation and a consideration of alternatives before a fair dismissal can result. There may be abnormal circumstances where this is not the case but there were no such abnormal circumstances here. Whilst it might be hoped that the Covid-19 pandemic was an abnormal circumstance, it was not the real issue here. The issue here was, as Mr Charlwood saw it, Mrs Williams' inability to do her job working from home.
58. There was no consultation. Mr Charlwood points to all the communication leading up to the dismissal as consultation. It was not. Mr Charlwood had made his mind up on the central issues. Mrs Williams *"was struggling with her work and looking after her two children and had no childcare options."* Mr Charlwood was not surprised *"as most aspects of work the Claimant carried out from home were inaccurate."* Mrs Williams *"had made it clear that the following week and in future weeks (minimum of 12 weeks) she would be unable to do her job as she needed to look after her children and was allegedly unable to obtain childcare for any of the 14 hours a week she worked."* Finally, the job Mrs Williams had been employed to do *"needed to be performed from our office and was not appropriate to be done whilst looking after two young children."*
59. Mr Charlwood had reached most of these conclusions on the strength of a sentence in a WhatsApp from Mrs Williams coupled with his observation that Mrs Williams had made some mistakes whilst working from home. Mr Charlwood never asked about childcare options nor did he discuss Mrs Williams' mistakes and what could be done to improve the situation with her. Mrs Williams had never made it clear that she could not do her job for 12 weeks and was never asked if she could, on occasion arrange to visit properties.

60. The only alternative that was considered was furloughing Mrs Williams on the government scheme. The scheme was formally announced on 20 March 2020 and the First Treasury Direction giving details of the scheme was published on 1 April 2020. That Direction made it clear that the scheme would meet pension contributions, which appears to have been one of Mr Charlwood's pre-conditions before he was prepared to consider registering Mrs Williams under the scheme. This was discoverable well before Mrs Williams' notice had expired. Furlough was, however, no longer on the table, ostensibly because Mr Charlwood was piqued at Mrs Williams instructing a solicitor.
61. Objectively considered, the failure to consult in any meaningful way, if at all, or ultimately to give any meaningful consideration to the obvious alternative of furlough leave, places the dismissal of Mrs Williams well outside the band of reasonable responses which a reasonable employer may adopt. The employer did not act reasonably in treating the principal reason for dismissing Mrs Williams (Mr Charlwood's view that Mrs Williams could not do her work from home) as a sufficient reason for dismissing her. This renders the dismissal unfair.
62. This is not a case in which the Tribunal can say that, had there been a reasonable consultation and consideration of alternatives, there is percentage chance that there might eventually have been a fair dismissal. To the contrary, the Tribunal's conclusion would be that the employment relationship would have continued.
63. Remedy for unfair dismissal
64. Mrs Williams does not ask that a re-instatement or reengagement order be made.
65. Mrs Williams is entitled to a basic award calculated as follows:

1 week's gross pay for each year of employment in which Mrs Williams was below the age of 41 but not below the age of 22 (this is the case here)

1 x £229.07 (gross weeks' pay) x 2 (complete years of service) = **£458.14**

Note: The Company made a "redundancy" payment of £478.64 to Mrs Williams. The Tribunal does not give credit for that to eliminate the basic award calculated as above nor the compensatory award calculated below. There was no redundancy and it is not just and equitable to make any deduction in the circumstances.

66. Mrs Williams is entitled to a compensatory award. **£300** is awarded for loss of statutory rights. The Tribunal finds that Mrs Williams found alternative work within a reasonable period and awards loss from the date of the expiry of her notice (3 May 2020) until she started work again (14 September 2020). This is a period of 19 weeks. The calculation is:

19 x £195.43 (net weekly pay averaged for school holiday adjustment) = **£3,713.17**

The total compensatory award is £300 + £3,713.17 = **£4,013.17**

There is an element of loss of pension contributions. However, the Tribunal is unable to calculate this from the information supplied. It is in any event a small amount.

Employment Judge Matthews  
Dated: 13 January 2021

Judgement sent to parties: 21 January 2021

FOR THE TRIBUNAL OFFICE