EMPLOYMENT TRIBUNALS

Claimant: Mrs A Short

Respondent: Boost Performance Limited

Heard at: Remotely by CVP **On:** 24 and 25 March 2021

Before: Employment Judge Holmes (sitting alone)

Representatives
For the claimant: In person
For the respondent: Mr D Flood, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant was not unfairly dismissed, and this claim is dismissed.

2. The respondent did not make any unlawful deductions from the claimant's wages, and this claim too is dismissed.

REASONS

1. By a claim form presented on 20 March 2020 the claimant brought claims of unfair dismissal and unlawful deductions from wages. The claimant had sought to raise other claims, of a very wide ranging nature, which the Tribunal did not have jurisdiction to hear, but at a preliminary hearing on 21 September 2020 the claimant confirmed that the only two claims she was proceeding with, which the Tribunal can hear, are of unfair dismissal and unlawful deductions from wages.

2. The claimant is unrepresented, and appeared in person. Mr Flood of counsel represented the respondent. There was an agreed bundle, in electronic form, in three parts. Additional documents were disclosed during the hearing and added to the bundle. Darren Spence the Managing Director and shareholder of the respondent gave evidence, as did the claimant. The hearing was conducted by CVP video link, the parties having consented to such a hearing. The Code V in the header relates to this.

3. Having heard the evidence, read the relevant documents in the bundle , and considered the submissions of the parties the Tribunal finds the following relevant facts:

3.1 The respondent is a small business owned by and started by Darren Spence, who is its sole Director and shareholder. The claimant was employed from 29 August 2017 by the respondent pursuant to an offer of employment (pages 283 to 285 of the bundle) , and under a contract of employment dated 22 August 2017 (pages 48 to 66 of the bundle) as a Marketing Consultant. At the time of the claimant's dismissal for redundancy on 31 October 2019 the respondent had three employees, plus Darren Spence, the Managing Director.

3.2 There were terms of her contract of employment (page 50 of the bundle) that:

"9.Payment paid to the Employee for the services rendered by the Employee as required by this Agreement (the "Payment") will include a starting annual salary of £32,000.00 GBP. This will be altered in line with the terms outlined in the "Offer of Employment" document emailed to the Employee on l9th August 2017.

10. This Payment will be payable at on the last working day of the month while this agreement is in force. The Employer is entitled to deduct from the Employee's Payment or from any other compensation in whatever form, any applicable deductions and remittances as required by law.

11 . The Employee understands and agrees that any additional remuneration paid to the Employee in the form of bonuses or other similar incentive compensation will rest in the sole discretion of the Employer and that the Employee will not earn or accrue an right to incentive remuneration by reason of the Employee's employment."

3.3 The claimant's job title was Marketing Consultant. Her original job description is at pages 67 to 68 of the bundle, and it was subsequently updated in 2018 , at pages 69 to 70 of the bundle.

3.4 When the claimant was first employed there was no formal bonus scheme in place, but in her offer of employment (page 283 of the bundle) the respondent referred to the Company Bonus scheme, of which details were to follow, but was said to consist of two payments per annum, one every 6 months, starting from the start date of 29 August 2017.

3.5 No formal bonus scheme, however, was in place at the time. The claimant was paid a bonus of £1,200 in March 2018, Darren Spence considering that this was in accordance with what the claimant had been led to expect. It was not calculated by reference to any performance on the part of the claimant or the respondent company, but was awarded at his discretion.

3.6 Another Marketing Consultant , Dora Chow, was recruited in early 2018 , and the claimant was involved in interviewing her. A third Marketing Consultant, Lisa Ventura, was recruited in September 2018, and again the claimant was involved in interviewing her. The claimant was often consulted by them in relation to their work, and was the senior employee in the business.

3.7 All three Marketing Consultants were paid the same, and did the same range of work. The respondent's business is , and has always been run remotely, with no office that the staff attended, all meetings and communications being by email, telephone and video meetings.

3.8 In September 2018 Darren Spence of the respondent introduced a new, more formal bonus scheme. It was introduced in an email dated 21 September 2018 (page 72 of the bundle) to be discussed at a subsequent meeting in October . He summarised its provisions as being that the maximum bonus that could be earned would be based as to 20% on the overall business performance, as to 40% on individual behaviours, and as to 40% on the achievement of personal objectives. The employees were told that the scheme would commence on 1 October 2018.

3.9 Subsequently a full slide (or power point) presentation was prepared and delivered (pages 246 to 256 of the bundle) in which the details of the scheme were set out. The relevant competencies were set out, and how they would be assessed. At page 251 there is guide as to how to carry out an assessment , and the basic terms of the scheme were set out. The scheme provided that all employees could earn up to 4% of their annual salary as a bonus every 6 months, equating to 8% per annum. An example is given of an employee earning £30,000 per annum, whose 6 monthly bonus could be £1,200, together with a potential further £300 if they exceeded their individual objectives. This page has diagrammatic explanation of the breakdown of the elements of the bonus that could be earned.

3.10 On page 252 the business performance targets are set out, and the respondent's financial year divided into two parts H1 – 1 November 2018 to 30 April 2019, and H2 – 1 May 2019 to 31 October 2019. All other objectives were to be assessed half yearly as well.

3.11 This was followed up by an email of 30 October 2018 (page 244 of the bundle, also at pages 74 and 75) from Darren Spence in which he enclosed the personal objectives for H1, including his own. He attached a copy of the slides from the presentation , the competency framework and bonus plan.

3.12 In early 2019 the respondent began to struggle financially. It was losing customers. From January 2019 to 31 March 2019 it made a loss of £48,982 (page 237 of the bundle for the Profit and Loss account for this period).

3.13 Darren Spence decided that action needed to be taken so he looked at reducing the respondent's overheads by reducing the number of staff it employed. At this time there were only three employees, the three Marketing Consultants and Darren Spence himself.

3.14 On 30 April 2019 therefore he sent an email (pages 78 and 79 of the bundle) to all three employees, informing them that the marketing side of the business was losing money, and how the income was only sufficient to pay for 1.5 full time employees , rather than the current 3. He wanted to speak to them to ask for any ideas or solutions that could prevent that action being taken. He warned that if alternatives could not be

found, the next action would involve each person re-applying for two jobs, one full and one part time.

3.15 Lisa Ventura replied, on behalf of all three of the employees by email of 1 May 2019 (page 80 of the bundle) . They had discussed the situation and offered to each go part time, working 19 hours per week each. They offered to accept a reduction in hours as a temporary solution for a three month period. They made a number of other cost saving suggestions.

3.16 There were further meetings about the situation, and in an email of 17 May 2019 (page 81 of the bundle) the claimant expressed the concerns that the employees were having about the situation, and the uncertainty they were experiencing, which was causing strain upon them. She became the unofficial spokesperson for the employees.

3.17 Darren Spence considered this proposal , but ultimately decided that this was not in the interests of the business. Customer satisfaction needed to be improved, and for that a single point of contact was preferable, which having three part – time employees would not achieve. It is unclear whether, and if so and when, he communicated this to the claimant and her colleagues, but he did not take up their suggestion. By email of 18 May 2019 from the claimant to Lisa Ventura the claimant stated that she had not heard anything from Darren Spence . She suggested that she was surplus to requirements, and that Darren Spence had no idea of what she did for the business.

3.18 The respondent's first half year , period H1, ended on 30 April 2019. Because of the losses, Darren Spence decided that no bonus would be paid, and none was paid. This was not formally notified to the claimant and her colleagues, but she was aware of it , as she did press him for a bonus, but he did not deal with her request. Darren Spence did not, however, communicate that no bonus would be paid to the claimant , and her colleagues, and during summer 2019 engaged in exploration of a possible merger with another business Pure Channels, run by a friend of his, which may have offered the opportunity for joint working and expansion. The financial position remained uncertain, and by the end of July 2019 the claimant and her colleagues were grateful just to get paid at the end of the month. There was an email exchange between the claimant and Lisa Ventura on 31 July 2019 (page 106 of the bundle) in which these issues were discussed, and the claimant informed Lisa Ventura that she would check her contract to see about the bonus. She remarked that they would be due their "next one" at the end of October, and it was worth thinking about , if they had a chance of getting it. Lisa Ventura replied saying she would do the same, and expressed the view that Darren Spence had sent the at risk email of 30 April 2019 to get out of paying the bonus.

3.19 In August 2019 Darren Spence decided that he would make a payment of £2000 to Dora Chow. Whilst described as a "bonus" it was not, in fact, a payment made under the bonus scheme that had been devised in October 2018. The sum of £2000 was not arrived at by any calculations of the individual's or the respondent's performance, but rather, in Darren Spence's mind was made up in part of a £1500 training allowance to which Dora Chow was entitled but had not taken up, in part to reflect the fact that she had not claimed any expenses, and in part to reflect the hours

she was working , and other steps she was taking (she is from Hong Kong , and was learning English) to improve her skills. Darren Spence was worried that she may leave the business , and made this payment, unbidden, to assist her.

3.20 The claimant and Lisa Ventura were also entitled to the training allowance referred to, and had not taken it up. The payment of this "bonus" to Dora Chow became known to the claimant by virtue of Lisa Ventura looking at Darren Spence's electronic diary, in which she saw an entry which revealed that this payment was to be made to Dora Chow. By email 16 August 2019 she sent this to the claimant, remarking that there was no corresponding entry for herself and the claimant (page 107 of the bundle) . The claimant replied to Lisa Ventura, saying that he was unbelievable , this was unequal treatment and was paid outside the official period. They discussed whether they should let Darren Spence know that they had seen this. It is unclear whether they , or either of them actually raised this with him at the time.

3.21 The claimant considers that from April 2019 her working relationship with Darren Spence deteriorated, and he unfairly questioned her work on a frequent basis. She began to keep a journal of these events, and on 21 June 2019 spoke to him on the telephone, and asked if he had issues with her. He considered that he did not, but the claimant considered this did not resolve matters. Darren Spence considers that if he was having issues with the claimant , he also was probably having similar issues with her colleagues. There is evidence in Lisa Ventura's emails with the claimant that she had a low opinion of Darren Spence during this period, and was planning to leave the respondent. She offered to assist the claimant in any grievance, but the claimant never raised one.

3.22 In August 2019 the claimant suffered a sudden and devastating bereavement when her niece died whilst attending a festival. She was off work for three weeks, the last two of which were covered by a fit note (page 282 of the bundle) for two weeks. She returned to work (in the sense that she resumed working, for she worked from home) on 16 September 2019. She did some work for the respondent whilst off work. The respondent subsequently agreed, notwithstanding that its policy for compassionate leave was for two days, to allow the claimant to have two weeks leave at full pay, and one week at half pay for this period.

3.23 In due course, around this time, Darren Spence came to the view that the merger was not a viable option, there were still losses , and by September 2019 he had come to the view that there was no alternative but to restructure the business. He decided that the needs of the business would be best met by removing the three Marketing Consultant posts, and splitting the functions previously carried out by all three Marketing Consultants across two new roles, Account Manager, and Copy and Content Manager.

3.24 Whilst he had delayed taking any action until the claimant had returned to work, Darren Spence decided, that he had to act. He first informed the claimant (and her colleagues) of these proposals in an "At – Risk" letter of 17 September 2019 (pages 116 and 117 of the bundle) , the relevant parts of which read:.

"As explained on our team call (Tuesday 17th September 2019) and further to similar communications that took place earlier in the year, in order to protect the long term

interests of Boost Performance and its employees, I am having to make some changes to the organisation and transform how we work.

Over the last 9 months we have lost some important high-value annuity-paying customers, all of which were needed to cover our overheads. As a consequence, we are not operating at profitable level and as such the business is not sustainable in its current form.

To help reduce our overheads, and improve our client satisfaction levels and general customer service, and after taking advice from people around the industry, I have taken the hard decision to do two things:

- We need to reduce the ongoing cost of our overheads by 1/3
- We need to re-organise how we work with our clients

I am today seeking your ideas to help us through this challenging time. If you do wish to put forward alternative workable solutions to help address the two points above, can you please communicate them to me via email or phone by 12:30 on Friday 20th September. Any ideas will be given due consideration.

If no alternative workable solutions are agreed upon, the role of "Marketing Consultant" will be made redundant and replaced with two new roles: 1) Account Manager, and 2) Copywriter and Content Manager. As such, this letter serves to advice [sic] *you that your role is at risk of redundancy.*

In order to provide the best possible service to our clients, and in keeping with how other marketing agencies are structured, the new team will consist of:

- Darren Spence, Managing Director
- Account Manager (reporting into Darren)
- Copywriter and Content Manager (reporting into Darren)

Job descriptions of the two new roles are contained later in this letter. All current pay and conditions will continue to apply to the roles stated above.

If you are interested in applying for either of the roles above, can you please communicate so to me by close of play Friday 20th September 2019. Interviews for both roles will take place on the afternoon of Wednesday 25th September, with the successful (and unsuccessful) candidates being notified no later than close of play on Friday 27th September.

Any unsuccessful candidates will then be given one month's notice and will be required to work as necessary through to the end of October, when their employment will be terminated by way of redundancy. During the notice period you will be permitted reasonable pre-approved time off to look for work and attend interviews. For the avoidance of doubt, the following timetable will apply:

Tuesday 17th September 2019	*At-risk letters of redundancy issued*

12:30pm Friday 20th September	*Deadline for alternative options to be communicated to September Darren either by email or phone*
5:30pm Friday 20th September	*Deadline for existing employees to express whether they'd be interested in applying for either of the published roles*
5:30pm Monday 23rd September	*Darren to communicate whether any alternative options have been found to address the current challenges. If they have a new timetable may be issued. If they haven't the timetable below will come into effect*
12pm—5pm Wednesday 25th September	*Interviews to take place for the two new roles*
5:30pm Friday 27th September	*Deadline by which notifications will be sent out to all successful and unsuccessful candidates*
Monday 30th September	*Anyone highlighted for redundancy will be given one month's notice. Any successful candidates will begin new role*
Thursday 31st October	*Employment terminated for any on-notice employees by way of redundancy"*

The Job Descriptions for the two new posts were sent with this letter (pages 118 and 119 of the bundle).

3.25 Dora Chow applied for the Account Manager post (not evidenced in the bundle, but not in dispute). By email of 20 September 2019 Lisa Ventura informed Darren Spence that she wanted to considered for the Copy and Content Manager post (page 122 of the bundle). By email of the same day the claimant informed him that she wanted to be considered for both posts (page 123 of the bundle). In her email to Darren Spence she queried who would be undertaking the interviews with him, and said that an unbiased representative on the panel to ensure fairness would be good conduct. In that email she also raised, as one of three outstanding issues, finalising the bonus.

3.26 Darren Spence replied later on 20 September 2019 (page 128 of the bundle) that it would only be him conducting the interviews, as he was the only Director, and there was no one else. He was not sure who else the claimant thought would be involved.

3.27 By email of 23 September 2019 (pages 130 and 131of the bundle) Darren Spence informed the claimant and her two colleagues that no alternative suggestions had been sent to him last week, so the timeline as communicated would be followed. He sought to make arrangements for the interviews to suit all three candidates. He stated that only he would be conducting the interviews, and that his decision would be

final. He said he would be interviewing against a set pre-prepared template, and feedback would be given at the end of the week. His email repeated the timeline from the notification of 17 September 2019.

3.28 After some further email traffic as to the timing of the two interviews that the claimant was to have on 25 September 2019 (she was the only candidate applying for both posts) her interviews were arranged for 2.00 p.m for the Copy and Content Manager role , and thereafter she had the interview for the Account Manager role. In no email communication about the interview process, nor in any other email at this time (there are others on 24 September 2019 relating to operational matters) did the claimant raise any issue as to her fitness to attend and conduct the interviews.

3.29 Darren Spence had taken advice from his wife, Cathy Hoy who is a Learning and Development professional , who has worked with major UK companies, as to appropriate interview questions , and a scoring system for the interviews for each role. Some 8 questions were devised for each role, some similar, but others different, according to the role. A scoring system , across the exercise , was devised, with 1 point for basic answer, 2 points for a comprehensive answer , and 3 points for an outstanding answer. The claimant was informed in an email of 24 September 2019 (page 133 of the bundle) that Darren Spence would be sharing his notes with all candidates so everyone could see what was said, and his scoring.

3.30 The interviews duly took place on 25 September 2019. Each candidate's answers were recorded (i.e noted) and written into a record for each set of interviews, with the two candidates' answers, and Darren Spence's scores, and comments, set out in the documents that were produced. The Copy and Content Manager interview record and scoring is at pages 150 to 155 of the bundle, and the Account Manager interview record is at pages 144 to 149 of the bundle.

3.31 In the former, Lisa Ventura scored 17 out of 24, and the claimant 11 out of 24, and in the latter Dora Chow scored 21 out of a possible 24 , and the claimant 10.

3.29 The 8 questions , and respective scores for each applicant for each role were:

Account Manager:

Q1.What do you think the job of an Account Manager involves?

Scores: DC : 3 ; the claimant :1

Q2. What do you think are the most important competencies for the role?

Scores: DC : 3 ; the claimant :1

Q3. What relevant experience have you that relates to the role?

Scores: DC : 3 ; the claimant :1

Q4. A large percentage of our target market operate in the data, cloud and security space. What relevant experience have you relating to that specific subject-matter and how do you keep up with the changing market?

Scores: DC : 2 ; the claimant :1

Q5. What are the current trends in the market?

Scores: DC : 3 ; the claimant :2

Q6. One of the key requirements of the role is the ability to come up with innovative and impactful ideas that generate leads and pre-agreed outcomes. Can you give me an example of a relevant campaign idea you have come up with that drove a successful outcome?

Scores: DC : 3 ; the claimant :1

Q7. The ability to build strong client relationships is an essential part of this role. Can you give an example of a client you have built a strong relationship with?

Scores: DC : 3 ; the claimant :1

Q8. In order to keep client relationships going you need to be constantly proactive and take new ideas or insights to them without prompting. Can you give an example of when you have been proactive with a client?

Scores: DC : 2 ; the claimant :2

Copy and Content Manager:

Q1.What do you think the job of a copy & content manager involves?

Scores: LV : 2 ; the claimant :1

Q2. What do you think are the most important competencies for the role?

Scores: LV : 3 ; the claimant :1

Q3. What relevant experience have you that relates to the role?

Scores: LV : 2 ; the claimant :1

Q4. A large percentage of our target market operate in the data, cloud and security space. What relevant experience have you relating to that specific subject-matter and how do you keep up with the changing market?

Scores: LV : 3 ; the claimant :1

Q5. What are the current trends in the market?

Scores: LV : 2 ; the claimant :2

Q6. One of the key requirements of the role is the ability to take direction and execute a quality output. Can you please give me an example of something you have executed to a high standard that started from a brief from someone else?

Scores: LV : 1 ; the claimant :3

Q7. The aim of any piece of content is to get a desired impact. Can you give an example of a piece of content you produced recently and the impact it had in relation to the brief?

Scores: LV : 1 ; the claimant :1

Q8. What types of content do you think are the most impactful today ? (Blogs, videos, whitepapers, emails….)

Scores: LV : 3 ; the claimant :1

Darren Spence provided in each case a commentary as to why he has scored each candidate in the way that he did.

3.32 Darren Spence based his decision solely upon the interviews, and not any other material, such as CVs. He accordingly determined that Dora Chow was the successful candidate for the Account Manager role, and Lisa Ventura was offered the Copy and Content Manager role. He announced his decision in an email to the claimant on 27 September 2019 (pages 137 and 138 of the bundle) , and confirmed that her position had been made redundant, her employment terminating on 31 October 2019. He stated that he would share with her and her colleagues later that day how the decision was reached, so that they would have total transparency of the decision making process. His email went on to address other matters, and in particular the work that was still to be done up until the termination date of 31 October 2019. He concluded by thanking the claimant for her work with the company, where she had played a key role, and expressed his sorrow at having to terminate her position.

3.33 Later that day Darren Spence sent an email to all three members of the team (page 143 of the bundle) enclosing the interview scores so each could see how they all performed. He again expressed that the scoring, and his decision, was final. He reiterated how he was aware this was a very hard time for the claimant , and again thanked her for her fantastic support over the previous two years.

3.34 There ensued further communications between the claimant and Darren Spence about holiday, the redundancy payment, time off for seeking alternative work, and allied matters.

3.35 In relation to bonus, the claimant submitted her evidence in support of a claim for bonus in early October. Darren Spence went through it, and on 3 October 2019 he sent the claimant an email (page 163 of the bundle) in which he raised some points about her submission, and the evidence she had provided. The claimant replied later by email that day (page 162 of the bundle) asking where she had not provided

evidence so she could provide this. She asked if the other members of the team had been asked to provide all this evidence. They had not, in fact, as the claimant was the first person in respect of whom Darren Spence was carrying out this exercise, as he wanted to conclude it before she left.

3.36 The claimant duly provided further evidence (pages 164 to 167i of the bundle) to Darren Spence . On 4 October 2019 Darren Spence sent the claimant an email (page 184 of the bundle) ahead of a call they were to have later that morning. In it he set out his calculation of what her bonus would be, based on what she had submitted. He pointed out that the maximum bonus she could earn was 10% of her 6 months salary , £1625. Going through the elements that made up the bonus, he observed that the first 20%, based on company performance would not apply, as the business only broke even in the first 6 months. The next element, accounting for 40%, related to the claimant's personal objectives , where the claimant met 3 out of 4, would entitle her to £487.50, which he agreed she had earned. The remaining 40% element , relating to behaviours, however, required the claimant to achieve a rating of at least 15 out of 20 points to qualify. She was currently on 10 points. He asked her to have a think, and see how she could "bump up" her scores, as she was a little light at the time.

3.37 It is unclear what precisely occurred during 4 October 2019, but the claimant and Darren Spence spoke, and at 13.18 the claimant sent Darren Spence a revised document (page 186 of the bundle), though it is unclear what precisely was attached to this email. The claimant sent a further email to Darren Spence at 13.38 that day (pages 187 and 188 of the bundle). In it she refers to what she had submitted, and made the following points. She referred to how they had not "gone through this process in April", and no objectives were issued for the second part of the year, which was correct. She suggested this put her and her colleagues at a disadvantage. In relation to the maximum of £1625 , she queried how Dora got a £2000 bonus in August. She considered that at odds also with the business only breaking even in the first 6 months. She had been checking with her colleagues, who had not had to go into the same detail as she had. This was correct, as Darren Spence had not at that stage carried out the exercise with anyone else, the claimant was the first because of her impending departure. The other aspects were details relating to particular work, and how she considered she should be assessed.

3.38 Darren Spence and the claimant clearly spoke further , and there may have been further emails which are not in the bundle. At some point that afternoon, however, Darren Spence recalculated , and proposed to the claimant a bonus payment in the sum of £1072.50. By email of 16.10 on 4 October 2019 (pages 193 and 194 of the bundle) the claimant agreed that bonus payment. Her email went on to deal with other outstanding matters relating to her termination, and Darren Spence in reply agreed all these matters in an email of 16.11 that day (same page).

3.39 There ensued during the rest of the claimant's time with the respondent whilst working her notice some issues with her performance, Darren Spence considering that she was not working as well as she should have been. The claimant for her part contended that the respondent had breached GDPR. There was email traffic about all of this, but it is not germane to any issues that the Tribunal has to determine.

3.40 The claimant's employment ended on 31 October 2019, and her final pay (see page 236 of the bundle for the payslip) included £1072.50 , paid expressly as bonus.

4. Those, then are the relevant facts. There was no real dispute on most of the facts, and the Tribunal is quite satisfied that neither witness has done anything other than tell the Tribunal the truth as they saw it.

The submissions.

5. The parties made submissions. It was agreed that the claimant may be assisted by Mr Food going first, and he duly did so.

6. In relation to the unfair dismissal claim, Mr Flood took the Tribunal through the requirements for a fair dismissal. Redundancy was a potentially fair reason, and the claimant had conceded that there had been a redundancy situation, She had, or had largely, conceded that redundancy was the reason for her dismissal , although she had introduced a "wrinkle", in that she had latterly suggested that her dismissal was pre-determined because Darren Spence wanted her out of the business. Once the potentially fair reason for dismissal was established , the burden of proving which lay upon the respondent, the burden relating to fairness , under s.98(4) of the ERA was neutral.

7. He referred the Tribunal to the traditional distinction between procedural and substantive fairness. He invited the Tribunal to hold that there had been no procedural unfairness, and no substantive unfairness either. The respondent had adopted a fair and transparent process for selection for the new posts. It was applied to all the applicants, and based upon questions which were relevant to the new roles. Darren Spence had sought advice from his wife, and applied a fair and transparent process.

8. There was no substantive unfairness. The claimant had vacillated on whether her dismissal was pre-determined because Darren Spence wanted her out of the business, but she had not in her witness statement alleged this was the case, nor did her claim form say this in terms. She had not originally cross – examined Darren Spence on this basis.

9. Mr Flood did raise the issue of whether the Tribunal should approach the issue of fairness of the selection criteria and their application on the basis that the respondent was , in effect, dismissing all three Marketing Consultants, and they were applying for new roles. This may entitle to Tribunal to take a different approach to that which applies to selection for redundancy where there is no application for new posts involved. He cited passages from Harvey on Employment Law in this regard, and the cases of ***Ralph Martindale & Co Ltd v Harris UKEAT/0166/07*** and ***Morgan v Welsh Rugby Union [2011] IRLR 376*** in this regard.

10. In relation to a question posed by the Employment Judge as to whether the obligation to consult in relation to selection criteria would apply equally to selection criteria for new posts, he submitted that the suggestion from ***Morgan v Welsh Rugby Union [2011] IRLR 376*** was that there would be leeway here, as the criteria were for selection for a new post, not for redundancy.

11. In the alternative , the respondent will argue that if the claimant was unfairly dismissed, there should be a reduction in any compensatory award pursuant to ***Polkey*** . Until, however, the respondent knew the basis upon which the Tribunal finds the dismissal unfair, it was hard for the respondent to make sensible submissions on this issue, and he reserved the right to return to it at any remedy hearing.

12. Turning to the unlawful deductions claims, Mr Flood submitted that these cannot succeed. The claimant had accepted in relation to the October payment that this had been agreed, after she had submitted further evidence to Darren Spence. There was no claim she had for this alleged shortfall from a maximum of £2000, that she originally claimed. In relation to the April payment, the claimant and her colleagues knew they were not getting one, and could not expect one when on 30 April Darren Spence was proposing making redundancies . Alternatively, any claim from April was out of time, and there had been no impediment to the claimant making such a claim in time.

13. The claimant , after a break, made her submissions, having been assured that she need not worry about the law, and other technicalities, as the Employment Judge would ensure she would not, as an unrepresented party, be disadvantaged by her lack of legal knowledge. The claimant accordingly made these points. In relation to the unfair dismissal she pointed out that Darren Spence had admitted his behaviour may have been difficult with all employees from April 2019. This had been why she had started her journal. The new roles included parts of what she had been doing for two years. The interview process was very limited. She had 24 years of industry experience, but this had not been taken into account. She met each one of the requirements for the new roles . She could provide the service that customers needed, and was the focus of the changes being made. Her CV and 24 years in the industry were evidence of that, but she was judged on a moment in time, on the interview and eight questions. She was at a disadvantage , and going through a very difficult time. She was not 100% at the time in terms of her health. The events from April onwards to the redundancy process had worn her down, and there was nothing left in her. She went along with the process, and had no thought of grievances or appeals. She had in fact long experience in the technology industry compared with the others.

14. In relation to the unlawful deductions relating to the bonus claims , she said there was a lot of confusion as to what period the payments made to Dora Chow and Lisa Ventura related to. The payments were outside the normal timings, and there had been no formal notification that the April payment was not being made. Darren Spence had to be prompted to respond , and the objectives set remained the same throughout the two periods.

The Law.

a.Unfair Dismissal.

15. Redundancy is one of the potentially fair reasons for dismissal under s.98 of the Employment Rights Act 1996 (“ERA”) , which provides that :

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

16. The leaading case on the approach to fairness of redundancy dismissals is ***Williams v Compair Maxam Ltd [1982] IRLR 83*****,** where the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good

reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'

17. In relation to warning and consultation , in the House of Lords in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503*,** Lord Bridge said this:

"… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative"

18. The decision of the EAT (Judge DM Levy QC presiding) in ***Rowell v Hubbard Group Services Ltd [1995] IRLR 195*** also strongly emphasises the importance of consultation. In that case the employees had been warned of impending redundancies, and were informed in their letters of dismissal that any relevant matters could be discussed. The Tribunal held that the dismissals were fair but the EAT overturned this decision and substituted a finding of unfair dismissal. The EAT stressed that the obligation to consult is distinct from the obligation to warn, and that there were no justifiable reasons for not consulting in this case. Moreover, whilst accepting that there were no invariable rules as to what consultation involved, the Tribunal stated that so far as possible it should comply with the following guidance given by Glidewell LJ in the case of ***R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72*,** *at para 24*:

*'24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in **R v Gwent County Council ex parte Bryant**, reported, as far as I know, only at **[1988] Crown Office Digest p 19*,** when he said:*

'Fair consultation means:

*(*a*) consultation when the proposals are still at a formative stage;*

*(*b*) adequate information on which to respond;*

*(*c*) adequate time in which to respond;*

*(*d*) conscientious consideration by an authority of the response to consultation."*

These words were quoted with approval, in the context of stipulating what was involved in consulting a trade union, by the Inner House of the Court of Session in ***King v Eaton Ltd [1996] IRLR 199.***

b).Unlawful deduction from wages.

19. The relevant law here is s. 13 of the ERA , which provides:

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.

And :

(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 the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

20. Wages are defined by s.27 of the ERA which provides:

27 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,

(b) – (h) N/a

(2) N/a

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

(4) In this Part "gross amount", in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.

c)Bonuses.

21. As a general rule discretionary payments do not fall within the definition of wages as there is no legal entitlement to the sum in question. However, ERA 1996 s 27(1)(a) refers to both bonuses and commission and initially the courts took the view that the statutory definition was wide enough to cover discretionary as well as

contractual bonuses, provided there was a reasonable expectation that they would be paid.

22. In ***Kent Management Services Ltd v Butterfield [1992] IRLR 394***, at the time of the termination of his employment, Mr Butterfield's commission under the Scheme amounted to £2,494 but he received only £1,227 (ie he received some payment of bonus but he claimed he was due a greater sum). It was held that the balance was recoverable. Wood J, said:

"…looking at the definition of "wages". First of all was this a sum payable to the worker by his employer in connection with his employment? It seems to us, reading the documentation, that this was clearly a sum payable "in connection with his employment". It was within the reasonable contemplation of both parties that in ordinary circumstances, and there is no suggestion on the documentation nor in front of the [employment] tribunal that there were any special circumstances for non-payment, it was payable. [Sub-section 27(1)(a)] deals with the phrase "whether payable under his contract or otherwise". Again, that indicates that perhaps the payment need not be contractual but would normally be expected and the [employment] tribunal took the view that this was the case. We also accept that view…'.'

23. So far as the form of the agreement in Butterfield was concerned, Wood J had this to say:

''*This must be a form of agreement or clause which is to be found in many situations in employment. If reasonable notice is given, clearly these schemes can be varied and altered and might be abolished, but whilst the schemes are in being, the anticipation will be that in normal circumstances commission will be paid on work which has been carried out and on which the calculation is based; the anticipation of both parties is clearly that it will be payable. There may be circumstances such as breach of the terms of the contract of employment or other circumstances where it may be said "no, there is a good reason why it should not be paid". But it is anticipated that in the ordinary circumstances if it is earned, it will be paid."*

On that basis, Mr Butterfield's unlawful deductions claim could succeed. However, subsequently, in ***New Century Cleaning Co Ltd v Church [2000] IRLR 27***, the Court of Appeal held by a majority (Sedley LJ dissenting) that in order for a payment to fall within the statutory definition of wages, the worker had to show a legal entitlement to the payment (whether contractual or otherwise). As a result, the broader proposition of the EAT in Butterfield (to the effect that a reasonable expectation would be sufficient to bring the bonus or commission within the definition of wages) does not appear to have survived the ***New Century Cleaning*** decision.

24. At first sight the principle in the ***New Century Cleaning*** case – that to fall within the definition of wages there has to be some legal or other entitlement to the payment in question – excludes discretionary bonuses from ERA 1996 s 27(1)(a). There is an exception, however, in respect of when some bonus is in fact paid, but there is a shortfall in the amount paid. That is the effect of s 27(3). This sub-section provides that where a non-contractual bonus is actually paid to the worker, the amount of the

payment is to 'be treated as wages' and 'treated as payable to him… on the day [that] … payment is made'.

25. There may also be an exception when the bonus is declared (***Farrell Matthews and Weir v Hansen [2005] IRLR 160)*** , and in other limited circumstances, which do not pertain here.

26. An additional consideration, however, must be the implied term that the Tribunals and Courts have added to contracts containing discretionary bonus clauses, that when exercising a discretion with regard to a bonus payment the employer must not act in a manner which is irrational or perverse. Equally, it must not ignore factors that are relevant or take account of irrelevant considerations .

27. This, known as the irrationality/perversity test was identified some years ago by Burton J in ***Clark v Nomura International plc [2000] IRLR 766***, QBD and was formulated in the following terms (see [40] of his judgment):

"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."

The fairness of the dismissal.

29. The Tribunal has no hesitation in holding that there was a redundancy situation, and the claimant accepted that. The second issue is what was the principal reason for dismissal? Again, the claimant did not appear challenge this, but later did.

30. Whilst there were issues in the relationship between the claimant and Darren Spence from April 2019, which led to the claimant keeping the journal document attached to her claim form, the Tribunal is not satisfied that these motivated Darren Spence's decision to dismiss her. Whilst the claimant may have felt that way, the Tribunal accepts Darren Spence's evidence that this was not so. He accepted that he made mistakes, and that in the period from April to September 2019 he was under a lot of pressure, and probably had difficult relationships with all the employees. It certainly seems that Lisa Ventura had plenty to say about him, and so all may not have been well with her either. Darren Spence , however, could have dismissed the claimant at any time before 17 August 2019, when she acquired two years service, and hence employment protection. Dismissing her when he did, however, meant that he dismissed the only employee with two years service, and the most expensive one to dismiss. At the end of the day this motivation is one that was not in the claimant's witness statement , nor was it originally put to him in cross - examination. It may, as Mr Flood postulated, be a natural after the event justification in the claimant's own mind for a decision that she considers was otherwise inexplicable. Whilst accepting that it is always hard for one party to prove what motivated the other party to act as it did, the Tribunal has either to accept or reject Darren Spence's evidence as to his reasons for dismissing the claimant .There is insufficient in what the claimant has put forward to support the contention that her dismissal was a pre-determined outcome , desired and engineered by Darren Spence , to make it reject his evidence that that it was not.

31. That does not, however make the dismissal fair. The reason was redundancy, the Tribunal accepts, but the next issue to be addressed therefore is whether the

dismissal, though potentially fair, was actually fair in all the circumstances. The caselaw cited above sets out the various factors that need to be considered in assessing fairness.

32. Some factors can be disposed of at an early stage. In carrying out this exercise, however, the Tribunal reminds itself that it is not standing in the shoes of the employer, and deciding what it would have done in the same circumstances, it is reviewing the actions and decisions of the respondent to determine whether they fell within the band of reasonable responses open to the employer , as it is required to do by the established caselaw such as ***Foley v Post Office*** and ***Midland Bank v Madden [2000] ICR 1283***.

33. The main basis of challenge to the fairness of this redundancy dismissal is the selection of the claimant . The first issue, however, to be considered, whilst not a major feature of the claimant's case, relates to consultation. As the caselaw shows, an employer will not be found to have acted reasonably in dismissing an employee for redundancy if he has not engaged , in good time, in meaningful consultation with the affected employees collectively, and the individual claimant. The Tribunal therefore needs to examine the warning and consultation that occurred.

34. The Tribunal is quite satisfied that there was reasonable consultation. The consultation was when the proposal was still at a formative stage, as Darren Spence's letter of 17 September 2019 (pages 116 and 117 of the bundle) shows. Whilst he proposed the changes to the structure in that letter, he nonetheless also invited "alternative workable solutions" to resolve the need to reduce the cost of the respondent's overheads by one third and to re-organise how it worked with clients. Whilst the deadline for alternative proposals was Friday of that week, this letter being sent on Tuesday 17 September, the Tribunal considers that, given the small size of the business , and the fact that the claimant and her colleagues had been consulted previously at the end of April 2019 about these concerns, and had then had an opportunity to make alternative proposals , which they had done, but which were not acceptable, the consultation period, in overall terms, in respect of the proposals, was reasonable.

35. The respondent, however, accepts that there was no specific and separate consultation in relation to the selection criteria for the new posts. The 8 questions that were to be the interview questions upon which the applications would be scored in the applications for the two new posts were not discussed with the claimant or her colleagues before the interviews.

36. The Tribunal has paused to consider whether in that regard, the respondent may have acted unreasonably in not consulting upon those criteria. This gives rise to an issue of whether the selection criteria for the new posts were really selection criteria for redundancy. If they were not, the respondent may have acted reasonably in not consulting upon them, if they were, then the converse may apply.

37. In essence, the respondent was making all three Marketing Consultant posts redundant. There were thus no selection criteria for that decision. The criteria were for the next stage, the application for the new roles of Account Manager and Copy and Content Manager. Whilst the duties and responsibilities of each one included those

which had been part of the Marketing Consultant role, they were new posts , each with a different focus looking forward. That was rather reinforced by Darren Spence's evidence that , had either of the other two candidates not applied for either of the posts, he would not simply have appointed the claimant to one of them. He would still have interviewed her against the criteria, and , if she had not been satisfactory, he would then have recruited externally.

38. In ***Ralph Martindale & Co Ltd v Harris UKEAT/0166/07***, the EAT analysed the scope of the employer's duty when there is alternative employment available which is suitable for two or more potentially redundant employees but the tactic adopted is indeed to dismiss and invite to reapply. Following ***Darlington Memorial Hospital NHS Trust v Edwards & Vincent UKEAT/0678/95*** the EAT confirmed that it was wrong to equate the test of what is appropriate in selecting a person for redundancy with the criteria that should be applied in the process of considering persons for reselection for alternative employment. In that case the EAT had stated that if employees are told to apply for the available jobs then the applications must be considered properly and the exercise carried out in good faith. In ***Ralph Martindale v Harris*** the EAT stated that the re-selection process should at least meet some criteria of fairness and used the rather novel idea that the employer in these circumstances owes the employees a 'duty of care', in particular in relation to objective choice and lack of caprice or favouritism. In ***Morgan v Welsh Rugby Union [2011] IRLR 376***, where two coaching positions were being amalgamated into one more senior post; both existing coaches were interviewed for the post (along with one outside candidate) but the employer did not stick to the criteria and procedures it had laid down and the claimant was unsuccessful and so dismissed for redundancy. He relied on ***Ralph Martindale*** as establishing legal tests for the fairness of a selection process, but the EAT held that the case (though correct on its facts) laid down no such rules of law. Instead, the only correct approach for the tribunal in such a case is to apply the unvarnished test in s 98(4) (reasonableness, equity and substantial merits) to the eventual redundancy dismissal. Pointing out that it may well be the case that outside candidates will be involved who (short of unlawful discrimination) have no legal rights against the employer, the EAT said that the employer is not always bound by its own rules, that the appointment procedure is more forward-looking and subjective than a straight redundancy selection and that the question is heavily one of fact for the tribunal as to whether the selection process was generally acceptable. They upheld a (majority) tribunal decision that on these facts the employer had acted acceptably in spite of major departures from their own rules. In a third case, ***Samsung Electronics (UK) Ltd v Monte-d'Cruz UKEAT/0039/11*** again a challenge that a reselection procedure for a new senior post carved out of several existing posts had been too subjective and had not been applied fairly failed, citing ***Morgan***. The EAT said that a significant element of subjectivity will always be involved in selection and is not to be castigated too readily, that lawyers should not be too dismissive of HR terminology often used in such cases and that, while there is much that an employer can do by way of good practice in a reselection exercise, that does not necessarily translate into enforceable legal obligations. Moreover, the EAT pointed out that this is an area where a tribunal can easily fall into the 'vice of substitution' (in particular by deciding in effect that they would have given the post to the claimant) and they summed the whole position up by stating (at para 39) that 'Good faith assessments of an employee's qualities are not normally liable to be second-guessed by an employment tribunal'.

39. Whilst none of these cases directly touched upon the obligation for consultation about selection criteria for a new post, if the criteria in question are not really selection criteria for selection for redundancy, but for appointment to a new post, where the employer is regarded as having a greater degree of latitude generally, then the Tribunal does not consider that lack of consultation about them , before formulating them, was unreasonable, or rendered the dismissal unfair. The test is , of course, whether that decision fell within the band of reasonable responses, not whether the Tribunal would have done the same, and the fact that this may have been a failure of consultation applying the guidelines in ***Williams v Compair Maxam Ltd [1982] IRLR 83*** does not mean that the Tribunal must find the dismissal unfair. As Popplewell J in the EAT in ***Rolls – Royce Motors Ltd v Dewhurst [1985] IRLR 184*** pointed out, at paras. 6 to 8:

"No decision of this court seems to give greater trouble than the decision of Williams v Compair Maxam [1982] IRLR 83 (supra). The reason why it seems to give trouble is that practitioners ignore, or choose to ignore, the reservations placed on the effect of the decision by the distinguished members of the Tribunal who gave the decision. It is worth repeating those reservations again and again. Perhaps then the constant citing of the decision to this Tribunal as laying down immutable principles of law will be avoided. At p.87, Browne-Wilkinson J (as he then was) said:

'It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt.'

The phrase 'in very general terms' is important. Browne-Wilkinson J went on:

'This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case.'

That paragraph cannot be emphasised too strongly. He continued:

'But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles ...'

Then the five principles are set out and it is not necessary to repeat them. He went on:

'The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the workforce and to

satisfy them that the selection has been made fairly and not on the basis of personal whim.'

And then at p.89, Browne-Wilkinson J said this:

'We must add a word of warning. For the purpose of giving our reasons for reaching our exceptional conclusion that the decision of the Industrial Tribunal in this case was perverse, we have had to state what in our view are the steps which a reasonable and fair employer at the present time would seek to take in dismissing unionised employees on the ground of redundancy. We stress two points. First, these are not immutable principles which will stay unaltered for ever. Practices and attitudes in industry change with time and new norms of acceptable industrial relations behaviour will emerge. Secondly the factors we have stated are not principles of law, but standards of behaviour. Therefore in future cases before this Appeal Tribunal there should be no attempt to say that an Industrial Tribunal which did not have regard to or give effect to one of these factors has misdirected itself in law."

39. For those reasons, whilst not consulting upon the section criteria for the new posts may not have been perfect, that is , in the view of the Tribunal , not such a departure from the range of reasonable responses in these circumstances as to render this dismissal unfair.

40. Once that has been considered, the Tribunal can see no basis upon which this dismissal was procedurally unfair. The process was transparent, and the claimant accepted that the 8 questions in themselves for the two roles were reasonable ones. Her main complaint is that Darren Spence confined himself so much to her answers and her performance in the interview. She considered that he should have given wider consideration to her CV an employment history. That, with respect, is not enough. The Tribunal's role is not to decide whether the decision could have been made differently, or in a better way. The test is whether the employer's approach in all respects fell within the band of reasonable responses. There may be different ways, and even better ways, of carrying out the exercise, but that is not the test.

41. The Tribunal has no hesitation in finding that Darren Spence's procedure, and the decision he took did indeed fall within the band. The claimant accepts that on her performance on the day, she was marked correctly against the other two candidates. Whilst she may well still ave been affected by the effects of the tragic bereavement she suffered only a month previously, she gave no indication to the respondent that she was not well enough to undergo the process , nor did she after the event raise this.

42. It is appreciated that there was no appeal, but the Acas Code of Practice on disciplinary and grievance procedures confirms expressly (at para 1, see S [1]) that it does not apply to redundancy dismissals. The normal procedural rules applicable to misconduct and incapability cases thus do not apply. One particular aspect of this is that there is no general requirement for the employer to provide an employee selected for redundancy with an appeal. This was affirmed by the NI Court of Appeal in ***Robinson v Ulster Carpet Mills Ltd [1991] IRLR 348***. Thus, this is not and cannot be ground of unfairness. Had the claimant sought any kind of review or reconsideration, but Darren Spence had refused one, the position way be different, but she did not.

43. Thus whilst sympathising with the claimant at being dismissed at such a difficult time, which doubtless reduced her resilience , and added to the distress she was understandably suffering at the time, the Tribunal cannot find that her dismissal was unfair, and this claim is dismissed.

44. It is accordingly unnecessary to consider whether any ***Polkey*** reduction should be made, as there will be no award .

The unlawful deductions claims.

45. The Tribunal will start with the second of these, in time. This relates to the claim that although the claimant received a bonus at the end of October 2019 when her employment ended, this was less than it should have been. She received £1072.50. Her claim, as originally put , in her schedule of loss and in the "settlement" calculation figures at the end of her witness statement, is for £927.50. This is ascertained by taking the total figure she has claimed of £2927.50, and deducting from it the sum of £2000 in respect of the bonus that she claims should have been paid in April or May 2019. She has , since her claim was presented, based her bonus payment claims on a maximum of £2000 payable on each occasion. That, however, was based solely upon the fact that Dora Chow was, in August 2019, paid a "bonus" of £2000.00. An examination of the terms of the scheme reveals that the maximum was only ever 8% of annual salary, plus some additional element of up to almost 2%, making 10%, roughly the maximum. The claimant's salary was £33,500, making the maximum , as she was told by Darren Spence it was , 6 monthly bonus £1675.00.

46. Leaving aside the issue of the discretionary nature of the bonus scheme, and applying s.27(3) of the ERA, the Tribunal agrees that, given that a bonus payment was made in October 2019, the Tribunal has jurisdiction to consider whether it was paid in the correct amount.

47. In essence, as with all deductions from wages claims, the issue for the Tribunal is what was "properly payable". Treating the bonus scheme as contractual for a moment, the issue would then be has the bonus as paid by the respondent in October 2019 been correctly calculated and paid in accordance with the terms of the scheme ? Darren Spence did not accept the claimant's first submission of supporting material upon which the bonus would be calculated, he urged her to present more evidence from which he could, applying the terms of the scheme, calculate her "entitlement" based upon the various constituent elements . He did so, and on 4 October 2019, offered the claimant an increased bonus in the sum of £1072.50. The claimant is unable to say or demonstrate why that calculation is wrong. More pertinently, however, she expressly accepted the offered bonus in the sum of £1072.50. There was offer and acceptance, and , even if Darren Spence's calculation was wrong, the claimant accepted that offer. That disposes of this claim, as the properly due sum then was £1072.50, and that was what was paid. This claim fails.

48. Turning to the other claim, that in relation to the non payment of any bonus in April 2019, here the discretionary nature of the scheme is highly pertinent. The respondent , in the person of Darren Spence , in April 2019 exercised its discretion to pay no bonus at all. No payment was made to any employee. It did so because the

company was making a loss, and was contemplating making redundancies. It is appreciated that this decision was not communicated in terms to the employees, but it hardly needed to be. There is no evidence that anyone seriously challenged that they were not getting a bonus, and whilst the claimant may well have asked Darren Spence about it, she took no action. From the emails between herself and Lisa Ventura on 31 July 2019 they were both aware they had not got a bonus in April 2019, and were looking ahead to the next one.

49. The Tribunal accepts that the discretion in clause 11 of the claimant's employment contract is subject to the implied term that the respondent would not exercise that discretion in an irrational or perverse manner. The Tribunal does not consider for one moment that not paying any bonus in April 2019 was an irrational or perverse exercise of that discretion. There was no track record of bonus payments being made, as this would have been the first time the scheme was operated, so one cannot compare the decision not to pay bonus in these circumstances with any previous occasions when payments had been made. In fact, to pay any bonus in these circumstances would arguably have been the perverse or irrational thing to do.

50. That is enough to dispose of this claim, on its merits. The Tribunal, however, should not even consider the merits, as this claim which , arising as it would in, at the latest, in late May 2019, but not being brought until 20 March 2020, has been presented considerably out of time. The claimant accepted there was nothing preventing her presenting such a claim within the three month time limit, and she and Lisa Ventura were clearly aware at the end of July 2019 that they had not been paid, and were unlikely to be paid, the first half yearly bonus. As the claimant cannot rely upon the second under – payment of bonus in October 2019 as being part of a series of deductions, she cannot rely upon that to extend the time for presenting any claim for the earlier deductions so as to make it in time.

51. On the grounds that this claim is out of time, and in the alternative, even if it is not, it is without merit, and is dismissed.

Postscript.

52. The Tribunal would, whilst not germane to its judgment, record its hope that, now that this case has been resolved, and both sides have appreciated that there have been some mistakes, misunderstandings, and possibly some unhelpful meddling, Darren Spence's offer to assist the claimant in any future employment by the provision of a reference (leaving aside the documented threat to withhold one in the closing days of the claimant's employment) will be taken up , and will help to restore the personal relationship which, by all accounts, until the financial woes of Spring 2019 , had been a good one.

Employment Judge Holmes
Date: 26 March 2021

RESERVED JUDGMENT SENT
TO THE PARTIES ON
30 March 2021

FOR THE TRIBUNAL OFFICE