EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs H McMahon	**v**	Heron Financial Limited

Heard at: Cambridge Employment Tribunal (via CVP)

On: 7th August 2020 (CVP) and 5th October 2020 (parties not in attendance)

Before: Employment Judge King

Appearances

For the Claimant: Ms Ismail (counsel)
For the Respondent: Mr Gray-Jones (counsel)

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal contrary to s104 Employment Rights Act 1996 succeeds.
2. The claimant's claim for wrongful dismissal succeeds to the extent set out below.
3. The claimant's claim for unauthorised deduction from wages in respect of commission and statutory sick pay succeeds to the extent set out below.

REASONS

My reasons are as follows:

1. The claimant was represented by Ms Ismail (Counsel). The respondent was represented by Mr David Gray-Jones (Counsel). I heard evidence from the claimant. I heard evidence from Mr Horrocks, Mr Coulson and Ms Migliorini on behalf of the respondent. The claimant and respondent exchanged witness statements in advance and prepared an agreed bundle of documents which ran from pages to 1 to 314.

2. The respondent prepared supplementary witness statements which it sought leave to introduce in the hearing. This was very late and the claimant did not agree to their inclusion having recently been served with the same. The delay was said to be due to a change in representation. The parties were given full reasons for the refusal and the statements were not merely in response to points the claimant raised in her statement but a fuller account of the respondent's position with no explanation as to why this could not have been included in the witness statements exchanged much earlier or indeed why this was not raised at the response stage. The respondent was instead permitted to ask any supplementary questions of its witnesses and of course to cross examine the claimant on her version of events if it disagreed. The hearing proceeded on this basis

3. At the outset, the claims were identified as unfair dismissal contrary to s104 Employment Rights Act 1996 as the claimant did not have sufficient service to bring an ordinary unfair dismissal claim. The claimant also claimed wrongful dismissal in that she was not paid her salary and car allowance for the beginning of July 2019. She also claims unauthorised deduction from wages in respect of her sick pay and commission. Counsel for both parties prepared helpful written submissions which I have considered before reaching this decision. The hearing went part-heard on the last occasion having been conducted via CVP but we were able to conclude the evidence by sitting very late to do so. I agreed with the parties a date when the Tribunal would sit again and I would consider their written submissions and make a decision as the 5th October 2020 but that the parties were not required to attend on this occasion. This was preferrable to having oral submissions on the morning and the parties awaiting a decision when it could have been reserved.

4. It was apparent from the outset that this was not a one day case even if it had taken place face to face. It was converted to CVP given the current pandemic. There were four witnesses, financial data and much in dispute such that two days for liability and three days to include remedy would have been more appropriate. Given both parties were represented throughout this should have been highlighted to the Tribunal at an earlier stage. This has resulted in the case going part heard to October 2020 and the delay in concluding this case.

5. The claimant's counsel had prepared a schedule of issues for the Tribunal and the Respondent's counsel also did so in his skeleton argument. The issues as to liability were therefore identified as follows.

The issues

Unfair Dismissal

6. Has the Claimant shown that the reason or if more than one the principal reason for her dismissal was that she had alleged that the Respondent had infringed a right of hers which was a relevant statutory right? In particular has the Claimant proven on the balance of probabilities that:

a) In a meeting with Robin Thomas on 30 May 2019 that she alleged that the Respondent had infringed her rights under the Working Time Regulations 1998 ("WTR") not to work more than the weekly working time limit of 48 hours per week and her right not to have unauthorised deductions made from her wages;

b) If so, that that allegation was made in good faith; This is not disputed by the respondent

c) If so, that this allegation was the reason or, if more than one, the principal reason for her dismissal; The claimant asserts so and the respondent asserts that the claimant was dismissed for performance reasons.

d) If so, what remedy is the Claimant entitled to;

e) Should any compensatory award made to the Claimant be reduced on the basis of "Polkey";

f) Has the Claimant mitigated her loss?

Wrongful dismissal

7. Has the Respondent paid the Claimant the monies to which she was entitled in respect of her notice period under clause 9.2 of the Claimant's contract of employment on the termination of her employment?

Unauthorised deduction from wages

8. On any occasion has the total amount of wages paid by the Respondent to the Claimant been less than the total amount of wages properly payable to the Claimant on that occasion?

9. If so what is the amount of the deficiency?

10. Was the complaint brought within 3 months of the date of the payment of the wages from which the deduction was made, or, if there was a series of deductions, the last such deduction in the series?

Uplift

11. Has the respondent failed to follow the ACAS COP1 on disciplinaries and grievances and should the claimant be entitled to an uplift of between 10% and 25% accordingly.

The Law

Unfair Dismissal

12. Dismissal under Section 95 of the Employment Rights Act 1996 not being in dispute, the claimant does not have sufficient service to bring a claim for ordinary unfair dismissal but relies on s104 Employment Right Act 1996 (ERA 1996)

13. Section 104 ERA 1996 provides:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee-

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or –
(b) Alleged that the employer had infringed a right of his which is a relevant statutory right.
(2) It is immaterial for the purposes of subsection (1) –
(a) whether or not the employee has the right, or
(b) whether or not the right has been infringed;
but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
(3) It is sufficient for subsection (1) to apply that the employer, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was."

14. It is accepted by the respondent that the statutory rights relied on by the Claimant are relevant statutory rights for the purposes of s.104 ERA. I concur with this view.

15. The parties have referred me to a number of cases in their written submissions to which I have had regard. The respondent has referred me to:

Armstrong v Walter Scott Motors (London) Ltd UKEAT/766/02;
Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) [2019] ICR 687;
Smith v Hayle Town Council [1978] IRLR 413; and
Abernethy v Mott, Hay & Anderson [1974] ICR 323

The claimant has referred me to:

Elizabeth Clare Care Management Ltd v Francis UKEAT/0147/05; and

<u>Unauthorised deductions from wages</u>

16. The law as relevant to this case is set out in s13 ERA which states as follows:

13Right 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.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

17. The right to enforcement is found in s23 as follows:

23Complaints 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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three

months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B)Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

S24Determination 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,

(b)in the case of a complaint under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15,

(c)in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and

(d)in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision.

(2)Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

18. Commission falls due as wages in accordance with the definition found in s27 (1) ERA 1996.

19. The claimant also alleges that the respondent has failed to comply with the ACAS Code of practice COP1. Section 207A of the Trade Union and Labour Relations (Consolidation Act 1992 TULCRA) deals with the adjustment of awards for failure to comply with the ACAS Code as follows:

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.

(6) …….

20. The parties have drawn my attention to a number of case law authorities to which I have had regard. On behalf of the Respondent in its written submissions as follows:

Blackstone Franks Investment Management Ltd v Robertson [1998] IRLR 376;
Mears v Safecar Security Ltd [1982] ICR 626;
Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206;
Devonald v Rosser & Sons [1906] 2 KB 728;
The Moorcock (1889) 14 PD 64;
Woods v WM Car Services (Peterborough Limited [1981] ICR 666;
Malik and another v Bank of Credit and Commerce International (in compulsory liquidation) [1998] AC
Attrll v Dresdner Kleinwort Ltd [2013] IRLR 548;
White v Reflecting Roadstuds [1991] ICR 733; and
Johnson v Unisys Ltd [2001] ICR 480

On behalf of the Claimant in its written submissions as follows:

Delaney v Staples [1991] ICR 331

21. **<u>Finding of Fact</u>**

21.1 The claimant was employed by the respondent from the 19th June 2017 to 4th June 2019 as a New Build and Mortgage Protection Adviser. The respondent is a mortgage and insurance brokers. It is a small employer and did not have in house HR function. The respondent told the Tribunal that it had since improved its policies and procedures.

21.2 The claimant was in a unique role with the respondent as although it had other mortgage protection advisers who would also arrange new build mortgages the later was very much the focus of the claimant's role. Other mortgage advisers with the respondent were based at the office which was the respondent's registered office in Rickmansworth. The claimant initially covered the Chilterns which included Oxfordshire, Buckinghamshire and Hertfordshire but more latterly also spent time over in the South East region including the Isle of Sheppey and Kent. The claimant would go to site and meet client's viewing show homes on the new developments and spent a great deal of time at one particular developer's site in Benson South Oxfordshire. The claimant would typically work one day from home and divided the remaining time between the site and the office. The later would account for 1/2 days a week.

21.3 Mr Horrocks and Mr Coulson were at the material time directors of the business. The claimant reported to both directors but after Mr Horricks moved to the role of Operations Manager, the claimant reported to Mr Robin Thomas. The two directors gave evidence in this claim. The Tribunal was informed that Mr Thomas was no longer employed and he did not give evidence before the Tribunal.

21.4 The claimant was initially employed on a starting salary of £25,000 per annum and received a higher car allowance at £600 pcm rather than the £400 pcm originally envisaged by the contract due to the high mileage she would be covering. The claimant was given a pay rise in July 2018. She was told that this was because she had trained a new starter Charlie Brooks and due to the business relationship she had developed with the developer and the amount of business she was generating. Her basic salary increased to £27,000 per annum as a result.

21.5 The claimant's evidence was that she worked long hours including travelling to site, spending time in the evenings returning calls and paperwork and she also worked weekends. If she was on a site she could work as much as a 12 hours day without a lunch break including the travel time but of course there were days when this was not the case. She would initially try and take Wednesday off in lieu but would be required to be available with any applications for mortgages for the developer often on this day too. After around a year she managed to agree with Mr Horrocks that she would only work every other weekend.

21.6 The claimant had a written contract of employment dated 28th April 2017 which ran to 8 pages and was signed by the claimant on 10th May 2017. This contract provided details under section 6 of the hours of work and rules for the claimant as follows:

"Your normal hours of work are between 9.00am and 6.00pm Mondays to Fridays inclusive with a lunch break of one hour. You are also required to work Saturdays between 10.00am and 2.00pm. Therefore, you are required to work a minimum of 40 hours per week with a day off to be agreed in lieu. You may be required to work such additional hours as may be necessary for the proper performance of your duties without extra remuneration."

21.7 There was no opt out of the 48 hour maximum working week in that contract or that was before me in evidence. The contract provided that the first six months of the claimant's employment was a probationary period and provided that the employer could extend this for an additional three months. During this period the claimant's performance and suitability for continued employment would be monitored. There were no performance issues raised in this period and the claimant passed her probationary period.

21.8 In addition to the contract of employment the claimant dealt with her mortgage applications as an adviser authorised by the PRIMIS Mortgage Network who the claimant had an advisor agreement with through the respondent. This agreement was also terminated when the claimant was dismissed.

21.9 The employment contract also dealt with commission which is at the heart of this claim. In respect of the commission, this was dealt with under the contract at clause 5 which stated:

"You are entitled to receive commission payments as part of your remuneration. Details of the scheme and targets will be issued to you separately.

The Company reserves the right to review the scheme periodically and any changes that affect you will be notified to you in advance."

21.10 In addition to the contract the claimant was given details of the commission scheme in the offer of employment email on 25th April 2017 from Mr Coulson which stated that:

"You will be paid a 15% commission on all paid business up to your first £100k of income. This commission will then increase by 2.5% for every additional £50k of income up to a maximum of 25%. You will receive retrospective lump sums commissions at each threshold."

21.11 This was confirmed in an email from Mr Coulson in December 2017 following a request by the claimant as:

"Commission payable at 15% on proc fees, protection commission, GI commission and administration fees. This will rise to 17.5% after £100k of gross commission is generated and then again to 20% after £150k rising

by 2.5% for each additional £50k of business with a cap at 25% of gross commission generated. "

21.12 The claimant's contract of employment also confirmed at clause 8.5 in respect of sick pay that once she had passed the probationary period she would be entitled to full pay for five working days and thereafter her statutory sick pay.

21.13 During the first year of employment the claimant earnt commission and no issues were raised over performance. In the second year of employment she exceeded the initial threshold earning commission of £100,000 and had progressed into the second threshold in respect of commission. The Claimant had her July 2018 pay rise which was indicative of no performance issues.

21.14 The claimant would submit the mortgage application and at the time it was submitted both the respondent and the claimant would have an idea as to the level of commission due. The commission was calculated on a set formula if the application was successful. Once the application was submitted and the purchase completed PRIMIS would pay the commission to the respondent and the respondent would in turn pay this to the claimant. Most of the work was in submitting the application in the first place. Once the application was submitted there was little for an adviser to do unless an issue arose and as the claimant's applications mostly related to new builds there could be a time lag before competition.

21.15 There was a significant area of dispute between the parties as to whether the claimant had targets and KPI's in her role. This is important as the reason for the dismissal is cited to be performance by the respondent. The claimant had no ad hoc chats with directors as to her performance on her evidence and there is no documentation to support the KPI's and targets being communicated to her other than the thresholds referred to above and in respect of anticipated pipeline set out below. The respondent asserts that there were concerns about her performance and that the claimant raised this on the day of her dismissal. I will deal with this meeting in due course but there are two documents in the bundle the respondent relies upon to support the KPI's. The first is an internal document which was not shared with the claimant called "Target Summary".

21.16 The respondent accepts in this document that no targets were set in the previous financial year and this document refers to a target of 12 per month commencing in December 2018. It is not clear what the 12 are but the respondent's evidence was that this was applications which can be seen in other documents. When asked about the target bearing no relation to the thresholds and not being a monetary figure it was suggested that the respondent looks at the number of applications rather than the revenue generated. Their explanation in this regard lacked credibility as on the one hand the evidence was that they were a sales driven business and on the other hand the value of the applications was irrelevant it was

the arbitrary number of 12 applications irrespective of the revenue and commission it generated. The employees were incentivised financially through the commission arrangements on the value of lending not the number of mortgage applications.

21.17 I accept the claimant's evidence that this "Target Summary" document was not shared with her. Her whole commission structure was based on the amount of revenue generated not the number of applications. I also accept her evidence that it would be difficult for her role to be compared to an office based mortgage adviser as she was seeking out her own work and travelling and they were not doing this in the same way. Further there is no evidence to support that the suggestion that this was implemented in December 2018 or that this was ever communicated to the claimant as a new target for her to achieve. It is also stark that the respondent accepts that it was only in place from December 2018 for a business that says it is so sales driven. It's case on this is illogical.

21.18 The Tribunal was referred to a number of emails sent on a regular basis throughout the month to the wider team including the claimant setting out the number of applications made by each employee and the value of that lending which was circulated to all. It can be seen on some periods that the claimant had fewer applications but a higher lending value.

21.19 The picture this paints in the run up to the dismissal is particularly stark. The last month of figures the claimant was off work during May 2019 for 2 weeks yet was still above one colleague for the number of applications made at 9 and above one colleague for the lending value. Had this been a full month rather than a half month her performance would arguably been double this and have been above 6 colleagues on the number of sales and 5 colleagues on the value of lending.

21.20 The same can be said for April 2019 where she made 11 applications placing her above two colleagues on the number of applications and level with another yet she was above three colleagues on the value of lending and again in April 2019 she was on holiday for a fortnight. In March 2019 the claimant had 12 sales (the same number the respondent says was a target) but was still above three colleagues on the value of the lending and the number of applications. In February 2019 she made 9 applications but this was still above 2 colleagues on numbers of applications and 5 colleagues on lending value. The claimant was not the poorest performer and those that were lower than her despite being more office based were not dismissed. There is no evidence that they were in the alternative subject to any performance management. If anything her figures for 2019 were stronger and her evidence was that she had one of the highest conversion rates in the Company and was also given champagne as a reward.

21.21 The respondent sought to rely on an email sent to all employees concerning cases for the week and what the advisers were planning to send in this week and when. It set out a number of employees and how

many cases they needed to hit their target for the month and the claimant is named. This is an email from the administrator (not a manager of the respondent) sent to all and the targets differed between employees and with number of cases and a financial target in some cases. It obviously makes sense that in a sales role an employee is expected to bring in sales in excess of overheads but a figure of 12 would not necessary meet this objective. Value is a more important measurement in a sales environment. I accept the claimant's evidence on this document as an example of chasing forecasts so that compliance matters could be met by the administration team who supported the advisers. It does reference targets but the email does not support the respondent that there were clear and communicated targets to the claimant and that she was under performing. It is not from management and is generic and not aimed at the claimant or her under performance as the respondent now seeks to suggest.

21.22 The respondent has not been able to demonstrate a single email or documentary evidence where the claimant's target is set out to her or her performance is queried in writing in the way one would expect if there were performance issues. Mr Thomas the claimant's line manager was not called as a witness to give evidence to dispute the claimant's clear evidence that such matters were not raised with her orally either.

21.23 The claimant was further asked to mentor a new starter Mr Brooks. The respondent pointed out he performed better than the claimant but the claimant's unchallenged evidence on this was that he was dealing with re-mortgages having been given the leads already. He did not hit his "target" for May either yet was not dismissed. The respondent further relied on a photo emailed by an administrator as to a white board in the office which bore reference to targets but this had a figure of 4 for the claimant which even for the week did not bear reference to the figure of 12 the respondent relied on for a month and the claimant was not frequently in the office to see any such white board. I do not accept that this board was evidence of targets set.

21.24 Mr Thomas was by the time of the claimant's dismissal line managing the claimant and he was not called to give evidence that he had at any time raised these matters with the claimant. I accept the claimant's evidence that such matters were not raised with her. The only targets for the claimant were the commission thresholds that were communicated to her and which she had exceeded the lower threshold in the second financial year. She was personally incentivised in respect of sales and had exceeded the £100,000 threshold communicated to her. She was sent monthly summaries showing the details of her applications made and the key figures for mortgage commission generated and the commission that was due. This was then sent to payroll. The claimant's evidence on this point was clear and it would be both illogical and contradictory for the respondent's position on the number of applications to be the target when there is a clear commission threshold set. This is not even a case where the respondent can show that the claimant failed to exceed that £100,000

target as she did. None of these monthly emails raised any such performance concerns. If they were said to summarise the position again this would have been ample time to say to the claimant she must do better next month.

21.25 By email dated 10th May 2019 the claimant queried her commission in that she felt she was now due the uplift and asked that Emma Migliorini review this. Emma Migliorini confirmed that she passed this onto the directors.

21.26 In May 2019 the claimant took a period of sickness absence from 16th May 2020 until her return to the office on 30th May 2020. It is in respect of this period of absence that the claimant claims sick pay as being two days short.

21.27 When the claimant returned to work on 30th May 2019 she went into the office in Rickmansworth. I accept her evidence that she had an unscheduled meeting with Mr Thomas at her request following her return to work. The claimant's evidence was that there were three matters on her mind which she discussed with Mr Thomas. The contact from the respondent whilst on sick leave trying to persuade her to attend an event during such leave, her working hours which she felt were long and that she wanted to reduce her hours and thirdly the salary and commission she received in her May 2019 payslip she had received whilst off sick. In fact this related to deduction on her payslip of unpaid holiday in the sum of £726.92 and her commission.

21.28 The claimant's evidence on what was said was set out in her witness statement and given in oral evidence. With respect to the 48 hour week she said "Even though I was by then only working every other weekend I was still working very long hours. I said to Mr Thomas that I was working more than 48 hours a week, that it was stressing me out and that I wanted somehow to reduce my hours". The claimant gave oral evidence that she had agreed to take on an additional region in Kent as she had a good relationship with the developer. She also expanded orally that she felt that the stress made her ill. Given her role she had a degree of self-management concerning her time and to plan her diary accordingly. The claimant confirmed that she had raise this following research she conducted at the time as she believed it was her statutory right not to work more than 48 hours.

21.29 The claimant's evidence which I accept was that she also raised commission as she had not had an answer on her email from 10th May 2019 concerning the fact that she had met her threshold and was entitled to additional commission which had not been paid. Mr Thomas said he would raise this with the directors. The claimant confirmed she did not ask Fiona about this as she deals with payroll and the Emma Migliorini would deal with commission and she had already raised this with her. The claimant's evidence was that she had raised the deduction of £726.92 for unpaid holiday.

21.30 The claimant's evidence was that Mr Thomas said he would raise these matters with the directors which I accept. On his suggestion the claimant also emailed Fiona Hopton regarding the unpaid sick pay.

21.31 The claimant emailed Fiona Hopton on 30th May 2019 at 15.49 to say:

> "I have scanned my sick notes to you. From what I can workout on my payslip I have had 7 days unpaid but I think this should only be 5. I have self-certified and sent this to you so hopefully I will get SSP. Can you double check that the pay that has been deducted is correct, also if I will get the SSP in June payslip?"

21.32 Fiona Hopton confirmed on 3rd June 2019 that she had "passed this on to payroll as the manage this" (sic). Nothing further was heard by the claimant prior to her dismissal.

21.33 The next day the claimant was due to attend the monthly meeting with her colleagues which is held off site. The claimant drove from her home to the meeting and had just parked the car when she received a text message from Mr Thomas asking her to instead go into the office. On arrival Mr Harrocks was there to meet the claimant. It is not in dispute that the respondent dismissed the claimant in this meeting. The contents of the meeting is however in dispute between the parties. The claimant's evidence was that she had queried why she had to go to the office and was told on arrival that the respondent was letting her go without other explanation. Mr Harrocks gave evidence that the claimant entered the meeting room and asked if she was being fired because of her figures and that Mr Harrocks responded that he was going to have to let her go as her performance was not up to par with the standard and expectations of the business. Further, Mr Harrocks stated that the claimant told him that he had done her a favour as she was not sure whether to go travelling with some friends and that she could now go.

21.34 It is necessary for me to resolve this dispute of evidence because if the respondent is correct it both goes to the reason for dismissal and the fact that the claimant knew she was underperforming in line with its case. I have considered both witnesses evidence in line with both the chronology and the documentation in this case.

21.35 I prefer the evidence of the claimant and do not find the evidence of the respondent credible on this point. The first time such matters are suggested by the respondent is in Mr Harrocks' witness statement. There is no reference to these comments in the response to the claim (when the claimant gave her version of the meeting), no letter sent confirming dismissal and no reference to them in the grievance outcome expressly. Given my findings of facts on targets or rather the lack of them, that there was no communication as to any performance issues and the grievance documentation it lacks credibility that the claimant would know why she was being dismissed and accept this particularly when she had no advance notice of the meeting.

21.36 I have considered that whilst the claimant did not immediately raise a grievance and waited until nearly a month later but balanced this against the respondent's failure to communicate in writing the reasons for dismissal and the claimant may have wanted this letter and her final pay. Indeed, her pay was short on notice as well as other payments when she received the payments. The claimant sets out clearly in her grievance that she was taking advice after her dismissal and this arose following what she felt were further shortcomings in the payment received on 24th June 2019.

21.37 It is not in dispute that after the meeting on the 4th June 2019 between the parties that the claimant was asked to hand over her mobile telephone and that her laptop was in her car parked close by. The claimant and Mr Harrocks walked back to her car and he retrieved the laptop. No letter confirming dismissal or the reason behind it was sent to the claimant.

21.38 By letter dated 2nd July 2019 following taking advice and in the absence of further communication on dismissal from the respondent, the claimant raised a grievance. She set out that she had not been provided with reasoning, evidence supporting any reasoning, warning, time to prepare or an opportunity to be accompanied at the meeting in which she was dismissed. Further that a reasonable dismissal procedure was not adhered to and she was not offered an opportunity to discuss and respond to the reason/s for her dismissal. She then set out that she felt that this was linked to the assertions of her statutory rights to work less than 48 hours per week, unpaid commission and the querying of unauthorised and unlawful deductions from her May 2019 wages.

21.39 The respondent dismissed her grievance by letter dated 4th July 2019. No meeting was held. This letter confirmed:

"*Given the nature of our business, the role in which you were employed it is important that we manage performance and conduct issues in a timely and confidential manner with as little disruption to the business as possible.*

I must dispute that you were not given the opportunity to respond, as a meeting was arranged to discuss the areas of concern at which you were present. At the time of our discussion, it was my understanding that you were in agreement with the shortfalls highlighted and you did not suggest any areas of improvement that could be made nor did you offer any alternative resolutions.

As such, given your acceptance of the allegations and lack of interest, the decision was made to terminate the contract with immediate effect. I confirmed at that meeting that you would not be required to work your notice and could leave on the same day.

I am surprised to hear this complaint now, a month later, as no appeal was submitted at the time, nor were any concerns raised during or immediately

preceding the meeting. Had you submitted an appeal, in line with our Disciplinary Policy, you would have been given the opportunity to discuss your points of appeal and dispute the outcome of the meeting. "

21.40 As set out above there is no reference in the 4th July 2019 letter to the comments Mr Harrocks attributes to the claimant for the first time in his witness statement. Even the "allegations" or "areas of concern" are not set out. The response to the claim sets out that the poor performance was cited as the reason for dismissal. This is not correct and it is not clear from reading the grievance outcome as to whether the claimant has been spoken to about conduct or performance matters. The suggestion that a meeting was arranged and that she was given the opportunity to respond would suggest a formal invite and allegations not the adhoc text message she did receive. She is criticised for not appealing under the disciplinary policy which she was not sent at the time and no right of appeal was actually given to her. The travel suggestion is raised for the first time in the witness statement. The claimant was quite adamant on cross examination that she neither made such a statement nor that she went travelling. I therefore on balance prefer the claimant's evidence of what happened at the meeting. The respondent failed to follow the ACAS Code of Practice on disciplinaries and grievances (COP1). The issue of uplift will be determined at the remedy stage if the parties cannot resolve this between them.

21.41 Mr Harrocks stated that he was unaware of the conversation with Mr Thomas or that the claimant was raising these issues. Yet this was a small business and the directors discussed matters regularly between them. The respondent sought to reply on a text message from Mr Thomas that he cannot recall the meeting "From memory nothing formal was made but if it was a quick chat I cannot be 100% certain as she was always moaning. In all aspects if she wasn't happy I did point her in yourself or Matt's direction."

21.42 If anything this supports the fact that Mr Thomas would have referred to the directors on these issues. The email of 10th May 2019 was copied to both directors. Mr Harrocks' own evidence was that the meeting was fabricated but that the claimant was very money driven and unhappy about her pay. This combined with Mr Thomas' comments gives the impression that the claimant was seen as someone who complained a lot.

21.43 The claimant received £2,764.69 from the respondent on 24th June 2019 and she was subsequently provided with a payslip indicating she was owed £2,764.69. She then received a further payment on 4th July 2019 of £2,444.86 and a second payslip for the same period indicating she was owed £5,209.55. The later is the sum of the two payments she had received. Part of this was to correct the notice period which had been wrongly paid to the claimant as a week instead of a month.

21.44 The issue of commission is in dispute between the parties. This was not particularly helpfully set out to the Tribunal as to what the sums were that

the claimant felt were owed and the respondent's reason as to why they were not paid. There was however a table referred to by the parties at pages 137-138 which was more helpful. The respondent accepts that some commission is outstanding and the claimant now claims £9,143.41 on the basis set out in her witness statement (reduced from £11,234.74 in the claim form). One of the key issues of dispute was whether the claimant was entitled to commission for work done before her dismissal but for which the commission payment fell due after dismissal.

21.45 The respondent submits that it is industry practice that commission is not paid after employees have left. To evidence this it relies on some informal comments by others in the industry who have not had sight of the claimant's contract. I do not accept that there was a custom and practice in the industry that the respondent can rely on in this case.

21.46 The claimant's evidence was that completion can take longer with new builds and the work of the claimant has concluded long before that. Once the application is submitted she has to wait for completion and then commission is paid and the claimant is paid. The claimant accepts that if the application is NPW (not proceeded with) no commission is due. The point for dispute between the parties are the applications submitted prior to the termination of her employment. It was open to the respondent when setting out the commission structure to expressly state that no commission will be paid after termination of employment but it did not do so.

21.47 The parties had prepared a spreadsheet at page 137-138 setting out what the claimant said was owed and the respondent's comments. These fall into three broad categories. Firstly, those that the respondent agrees are owed which amount to £1,443.21 but which the respondent says that this was paid to the claimant in her May £995 commission payment. This does not make sense as the sums it accepts exceed the sums it says it has paid by over £440. There are two applications marked as NPW as set above the claimant accepts are not due and another application was resubmitted by Mr Thomas sometime after termination so would not be payable to the claimant. The final category of applications are those it accepts that the application was submitted during employment but that the respondent did not get commission for until after termination and after the claimant left. These total £2607.07. The respondent says that this is not payable to the claimant as she was no longer an employee.

21.48 The claimant commenced ACAS early conciliation on 30th August 2019 and the certificate was issued on 30th September 2019. The claimant presented her claim to the Tribunal on 30th October 2019.

21.49 After dismissal, the claimant was unable to get assistance from the job centre because she had been dismissed and there was a period therefore where they would not assist. On 12th July 2019 the claimant set up a business with an ex colleague having applied for appointment as an approved representative with the Right Mortgage and Protection Network and was approved on 9th August 2019 which is when the business was

able to trade. The business has income but the claimant says that the business has actually made a loss. The claimant made two applications to be a foster carer in September 2019.

21.50 The claimant made a number of applications for jobs on 14th November 2019, three on the 16th November 2019 and two on the 17th November 2019. The claimant made one further application on 3rd December 2019 and then no further applications until 20th April 2020.

21.51 The claimant made an application to Bryn MacMillian Consulting who was known to the directors of the respondent. The respondent produced evidence that they did not hear from the claimant to follow up on her application. The claimant gave evidence that she did call him back and left him a voicemail but that he did not get back in touch. This vacancy did not progress as a result.

Conclusions

Unfair Dismissal

Has the Claimant shown that the reason or if more than one the principal reason for her dismissal was that she had alleged that the Respondent had infringed a right of hers which was a relevant statutory right? In particular has the Claimant proven on the balance of probabilities that:

In a meeting with Robin Thomas on 30 May 2019 that she alleged that the Respondent had infringed her rights under the Working Time Regulations 1998 ("WTR") not to work more than the weekly working time limit of 48 hours per week and her right not to have unauthorised deductions made from her wages?

22. The claimant relies on the maximum working hourly week and the unauthorised deduction from wages in respect of her sick pay and commission. She also pleaded that she raised commission with Mr Thomas. As set out above I have accepted her evidence that the conversation took place and she raised these matters with him.

23. Firstly, has an assertion of a statutory right taken place under s104(1)(b) ERA 1996. If I was to find that there was no such assertion of a statutory right then the claimant's claim must fail. If there was such an assertion then I will need consider the burden of proof and whether the claimant has established this was the reason for (or the principal reason) for the dismissal.

24. The statutory rights relied on by the claimant are relevant statutory rights within the meaning of s104. There is no requirement that the employee specifically refer to the statutory right itself *Armstrong v Walter Scott Motors (London) Ltd UKEAT/766/02* but it is a requirement that the right has been infringed not that it may be in the future as per *Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) [2019] ICR 687.* It is

also immaterial whether the employee has the right or whether it has been infringed although the claim to the right must be made in good faith.

25. As set out above in the findings of fact the claimant raised her salary and that she felt that May's payslip was short. This is also evidenced by the email sent to Fiona Hopton on 30th May 2019. I do not accept that this is just a query and not an assertion of a statutory right. The claimant set out in the email that she had 7 days unpaid but that this should only be 5 days and that she hoped she would get SSP. The claimant clearly set out that she was two days short and that this had not been paid. As per *Delaney v Staples [1991] ICR 331* a late payment or shortfall can amount to a deduction from wages.

26. As per *Elizabeth Claire Care Management Ltd v Francis UKEAT/0147/05* one right of the employee is not to have deductions made from her wage and the remedy for infringement of such a right is a complaint to the Tribunal. Section 13(1) of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him and that this is actionable under s23 ERA 1996. The complaint by the claimant was that she had been paid less than she should have been by the respondent at that time. The same case is clear authority that it must be reasonably clear to the employer what the right alleged to have been infringed was. It is the gist of the words used, that is key. I have found that she had raised that she had not been paid correctly and that her wages were short and that this was a statutory right that had been asserted. She did not need to make reference to unlawful deduction from wages but it was clear what the issue was. Her commission should have been calculated at the higher threshold and secondly that she had not been paid enough.

27. As set out above I have accepted the claimant's evidence that she raised this with Mr Thomas and that she was told to follow the salary issue up with the email. In my view the contents of the email would be enough to establish the assertion of a statutory right in respect of the sick pay but that in addition she had raised this with Mr Thomas in the meeting of 30th May 2019. Mr Thomas told her he would raise it with the directors. I accept the claimant's evidence that she raised the commission being incorrectly calculated also having not had an answer to the 10th May email and that this was equally a statutory right that had been asserted in the meeting.

28. In respect of the 48 hour week the claimant had not signed an opt out and as such if the claimant was working in excess of 48 hours average across the week then her right was being infringed. It is not in dispute that this is a statutory right capable of protection. I accept the claimant's evidence that she told Mr Thomas that she was working in excess of this maximum and that it was stressing her out. I therefore find that this was also a statutory right that she asserted was being breached. If the respondent had the usual opt out agreement then the assertion made could not have been a statutory right as this only applies if the respondent does not get the worker's agreement in writing first. If the claimant had given that

agreement then there was not a suggestion as the respondent contends that the respondent was failing to take such necessary steps to protect her and this element of her claim may well have been unsuccessful. However, in circumstances where there is no opt out she had the right not to work in excess of 48 hours a week.

29. In light of my findings it is the clear that during the meeting on 30th May 2019 the claimant asserted a number of statutory rights. Mr Thomas felt that she was "moaning" as she was "always moaning"

<u>If so, that that allegation was made in good faith?</u>

30. There was no evidence that the claimant raised such matters not in good faith. This is not disputed.

<u>If so, that this allegation was the reason or, if more than one, the principal reason for her dismissal; The claimant asserts so and the respondent asserts that the claimant was dismissed for performance reasons.</u>

31. In light of my findings it is the clear that during the meeting on 30th May 2019 the claimant asserted a number of statutory rights. Next it is necessary to consider the reason for dismissal. As the claimant had less than two years' service the burden is for her to establish that the prohibited reason relied on was the reason or principal reason for her dismissal *Smith v Hayle Town Council [1978] IRLR 413*. An employer is unlikely to ever admit that they dismissed an employee for an inadmissible reason and, as with discrimination claims, overt evidence will rarely be available. The employee will need to point to facts or matters from which a tribunal can draw an inference that the dismissal was due to an inadmissible reason. Where the tribunal is presented with competing reasons for dismissal, one from the employer and another from the employee, it will have to decide which explanation it accepts.

32. Considering the circumstances in this case the claimant asserted statutory rights on 30th May 2019 and was dismissed summarily without due process on the 4th June 2019. This was two working days later.

33. I do not as set out above accept the respondent's evidence as to what was said at the meeting on 4th June 2019 and I prefer the evidence of the claimant on this meeting and I accept the claimant's evidence as to what happened at the 30th May 2019 meeting. I do not read too much into the respondent's failure to follow a process prior to dismissal as the claimant had less than two years service and this would not be unusual in such circumstances. I therefore do not draw an inference from the lack of process on its own. One could draw an inference from the proximity of the claimant's dismissal to the assertion as to this being the reason for it. Just two working days passed and there was nothing that occurred in these days which warranted dismissal.

34. Could it be as the respondent now suggests that performance was the issue and that the timing is merely coincidental. I am not satisfied that the

respondent's performance argument is a credible one. There is nothing to evidence any performance discussions having been raised with the claimant prior to the assertion of statutory rights. There were as I have found as a fact no targets in the way the respondent puts its case. The claimant had exceeded the first threshold for commission and was thus performing. She had outperformed her colleagues in March, April and May on numbers of applications (as the respondent puts its case) and the value particularly when one considers the absences for annual leave and sickness. Those that had performed "worse" were not performance managed or dismissed. The respondent did not confirm the reasons for dismissal at the time and even at the grievance outcome stated it was for conduct or performance and the letter failed to clearly set out the reasons for dismissal at that stage.

35. It is clear to me that the respondent's management considered that the claimant was a "moaner" someone who complained. The respondent is not going to admit that it dismissed the claimant for inadmissible reasons but given the proximity of the assertion of the statutory right and that matters are now only raised at the point of witness statements to justify that decision and that this was something the claimant expected and welcomed which I have not accepted, I consider that the claimant has established in the absence of any other credible reason that her dismissal was because she was "moaning" and that these complaints were about her statutory rights. I believe that Mr Harrocks was aware of these matters and that this was the reason or principal reason for the claimant's dismissal. His evidence on this could not be accepted given his evidence on other matters and it is inconceivable the matter was not referred to him given the size of the respondent and the management team.

36. I am satisfied that the claimant was dismissed for assertion of a statutory right. That dismissal was unfair as no process was followed and there was no fair reason to dismiss the claimant.

<u>If so, what remedy is the Claimant entitled to?</u>

<u>Should any compensatory award made to the Claimant be reduced on the basis of "Polkey"?</u>

37. There was no evidence that the claimant would have left of her own accord in any event. The claimant was clearly unhappy in her work place and it was likely that she would have decided to leave at some point in the future but I accept her evidence that she was not in a financial position to just leave she would have stayed no doubt until she secured alternative employment and we cannot say with any certainty when this would have been. Leaving voluntarily was entirely different to being dismissed in any event.

38. The respondent has sought to rely on the claimant forwarding emails about her commission payments to her personal account as evidence that she would have been dismissed in due course. I do not consider this unusual in circumstances where the emails are around commission

payments over which there is a dispute to enable the claimant to work out her entitlement. There was no evidence led as to when this would have been discovered and whether it amounts to gross misconduct.

39. I therefore do not make any reduction on the basis of Polkey.

Has the Claimant mitigated her loss?

40. Both parties made submissions as to remedy and mitigation. The claimant only made two applications for work except to become a foster carer to 4th November 2019. She applied to become an approved representative swiftly but this was not approved for a period of time. She made further job applications on 16th and 17th November 2019 and then 3rd December 2019 and then nothing until 20th April 2020. The claimant had not made adequate attempts to mitigate her loss. Whilst she would want to spend some time perfecting her CV this does not adequately explain particularly when her own evidence was that financially she needed to work why she did not look for work sooner whilst she established herself on a self-employed basis. She was approved to work in her own right in August 2019 and considered three months reasonable before she started to earn in that business otherwise she would not have commenced her job hunt at this time. After three months of concentrating on the business she felt she should now find alternative employment.

41. I consider that had she taken adequate steps to mitigate her loss she would have full mitigated her loss by December 2019 within her own business or having earnt sums in mitigation in the interim. Her applications were few and far between and were not all in her field or area of expertise where her CV would have supported such applications. This period of loss is 6 months after dismissal and given her employment history she was able to work in her chosen field. I have considered the impact of dismissal and awarded a longer period than I would otherwise have done given that this was a regulated role and further enquiries would have to be made to ensure that the claimant could practice given the reference.

42. Given the respondent's connection to Bryn McMillan Consulting I do not find that if the claimant had explored this vacancy that she would have been successful. On her evidence which I accepted she called him back and left a voicemail but she was not proactive in following this up further and I would have expected her to have been keen to do so given her financial needs. I accept the respondent's submission on this that this is indicative of the effort the claimant made to mitigate her losses as she was not sufficiently proactive.

Wrongful dismissal

Has the Respondent paid the Claimant the monies to which she was entitled in respect of her notice period under clause 9.2 of the Claimant's contract of employment on the termination of her employment?

43. In respect of the wrongful dismissal claim he respondent accepts that it owes the claimant for four days car allowance for July 2019 in the sum of £83.07. The other sums are disputed. I accept that the claimant is due both notice pay and car allowance for 4 days in July 2019 unless the respondent can satisfy the Tribunal that this has been paid. The respondent states this as per the second payslip the sums set out as "Salary". As the claim for wrongful dismissal is admitted the claimant's claim for this succeeds in the amount to be determined if the parties cannot agree it.

Unauthorised deduction from wages

On any occasion has the total amount of wages paid by the Respondent to the Claimant been less than the total amount of wages properly payable to the Claimant on that occasion?

If so what is the amount of the deficiency?

44. The respondent accepts that it does owe the claimant for unauthorised deductions in the sum of £195.94 of unpaid commission.

45. The respondent accepts that it has made an unauthorised deduction from the claimant's wages in respect of unpaid commission and this claim therefore succeeds also. The undisputed amount is £195.94 but the respondent also accepts at page 137 that £1,443.21 was owed to the claimant but says that this was all paid within the payment of £995 when she left. This cannot be right and in so far as any of this sum of £1,443.21 has not been paid the respondent will need to pay this. The Tribunal will determine this at the remedy hearing if the parties cannot agree it.

46. The remaining elements of the claimant's commission relate to payments for applications made whist still in employment that completed afterwards. Commission referable to employment comes under the definition of wages under s27(1) ERA 1996. The respondent's position is that there was no express provision in her contract that commission is paid after termination of her employment but this is not a particularly attractive argument given that the respondent could have set out such a clause to prevent the claimant from making such a claim or demand.

47. The claimant is entitled to commission as part of her remuneration. The claimant was paid commission on "income" as qualified in April 2017 and on "commission generated" in December 2017. The claimant's role in this generation was the mortgage application which once submitted entitled the claimant to commission on a set calculation if the application was successful. Once the application was submitted the claimant had an expectation that she would be paid commission on it when it completed. All parties knew the approximate commission when the application was submitted and once the client completed Primis would pay the commission to the respondent and in turn the respondent would pay the claimant.

48. The commission was generated when the application was made subject to the proviso that the application was successful. On any applications in progress but not actually submitted by the claimant at termination of employment and which were presumably submitted by another adviser no commission can be said to be due as the work was not done or completed during employment. Any sales leads where applications had not been made would be treated the same way. Where the claimant had done the work during employment and made the application she had an expectation of commission on that application. The only time this would not be paid was where the application was unsuccessful or not proceeded with.

50. The commission is generated at the time the application is made and I accept the claimant's submissions that this should be read simply that commission is paid when the sale comes good and commission is generated at the point of sale i.e. mortgage application is made. There is no need to imply a term into the contract to give this effect. There is certainly no need to imply a term into the contract as to some industry practice this is not paid after termination and no clear evidence to suggest this is industry practice. I do not accept the respondent's submissions on this matter. The contract and the commission scheme are set out the contract and subsequent emails and there is no term that enables the respondent not to pay commission after termination. Any ambiguity should be construed in the claimant's favour

51. This is the respondent's commission scheme and it was open to it to deal with this matter expressly if it wanted to and it chose not to do so. This could have been done in the same way as bonuses which often specify one has to be in employment at the time of payment to get the bonus. No implied term to this effect needs to be read into the contract to give the commission effect. If the respondent wishes to rely on such a term it could have expressly stated it. In essence commission is payable on work done and the claimant did this work by the termination date. As such any applications submitted before the termination date that were successful entitle the claimant to commission whether she was there when it was paid or not. From the spreadsheet at page 137 this would appear to amount to £2,607.07 but the Tribunal will determine the amount if the parties cannot agree it.

52. Looking at the spreadsheet it is clear that some of these payments fell due during the notional notice period and only a short while thereafter. The majority were paid to the respondent in June/July and one on the 6th August 2019. The respondent has had the benefit and commission for the work done by the claimant and had she not been unfairly dismissed she would have had these payment too in any event notwithstanding the unlawful deduction from wages point. Even if she was not due this as part of the claim this would be arguable for losses that flow from the unfair dismissal as had she not been dismissed she would have been there when the mortgage application was submitted and when the sum was paid.

53. The claimant's claim for unlawful deduction from wages in respect of two days full pay when she was off sick the Respondent says has been paid outside payroll which the claimant disputes. The respondent accepts that this should be paid and the claimant's claim for this succeeds insofar as this has not already been paid. The Tribunal will determine this if the parties cannot agree it.

Was the complaint brought within 3 months of the date of the payment of the wages from which the deduction was made, or, if there was a series of deductions, the last such deduction in the series?

54. Since the sums arise out of or were outstanding at the time of dismissal and the claim is brought in time, there are no time points that either party has raised. The complaint was brought in time.

55. For the reasons set out above the claimant's claims succeed and the matter will now be listed for a remedy hearing to determine the sums payable to the claimant should the parties not be able to agree.

_____
Employment Judge King

Date: ……21st December 2020……..

Sent to the parties on: .....

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For the Tribunal Office