EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a hybrid hearing with some participants attending at the hearing centre and some attending by CVP as indicated below. A fully face to face hearing was not held because it was not practicable."

Claimant		**Respondent**
Mr V Vig	**v**	**Benz Travel Ltd (t/a Worldwide Flights/Worldwide Cruises UK)**

Heard at: Watford Employment Tribunal **On**: 20 & 21 September 2021

Before: Employment Judge George (in person)
Members: Ms E Davey (in person) and Mrs G Bhatt MBE (by CVP)

Appearances

For the Claimant: self-representing (by CVP)
For the Respondent: Mr O Lawrence, counsel (in person)

RESERVED JUDGMENT

1. The claim of direct race discrimination is not well founded and is dismissed.

2. The respondent is to pay to the claimant the sum of **£127.54** in respect of underpayment of commission. This is calculated gross but is to be paid net of tax and national insurance contributions.

3. The respondent is to pay to the claimant **£71.50** as damages for breach of contract by failure to pay to the claimant the full notice pay to which he was entitled. This is calculated net of tax and national insurance contributions.

4. The claimant was unfairly dismissed by the respondent.

5. The respondent shall pay to the claimant compensation for unfair dismissal of **£11,290.88** calculated as follows:

	£	£	£
Basic Award			
8 x £538			4,304
Compensatory Award			
16.6.20 to 31.7.20 46 days @ £397 per week net of tax and NI.	2,608.86		
LESS 4% for chance of being on furlough	(104.35)	2504.50	
1.8.20 to 21.9.21 417 days @ £397 per week net of tax and NI.	23,649.86		
LESS earnings in alternative employment	(14,441.76)		
	9,208.10		
LESS 20% for chance of being made redundancy	(1,841.62)	7367.00	
Compensatory award (the prescribed element)		9,871.50	9,871.50
LESS the redundancy payment paid by the respondent			(3,384.62)
Loss of statutory rights			500.00
TOTAL AWARD FOR UNFAIR DISMISSAL			**11,290.88**

6. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. The prescribed element is £9,871.50 and the prescribed period is 28 April 2020 to 21 September 2021.

7. The total sum to be paid by the respondent to the claimant is £11,489.92 of which £127.54 is to be paid after further deductions for tax and national insurance contributions.

REASONS

1. In this hearing which took place on 20 and 21 September 2020 we had available to us a joint bundle of documents and a supplementary bundle which together totalled around 260 pages. Pages numbers in these reasons refer to that bundle. The respondent had also provided a skeleton argument.

2. On 17 and 19 September 2021 the claimant emailed the Tribunal and the respondent with a number of documents. There were five attachments to the first email and the attachments to the second email were a reply to the respondent's skeleton argument, a reply to the witness statements and an opening statement. Mr Lawrence had no objection to us reading the documents and the respondent consented to the additional evidential matters going in evidence. However the respondent objected to the claimant relying in evidence upon the reply to the witness statement because there had been no direction for supplementary witness statements. It was therefore taken to be, in effect, advance notice of what the claimant was likely to say when cross-examined upon matters in dispute and the reply to the witness statements was not admitted in evidence.

3. There was also a remedy bundle which had been provided by the claimant and on the morning of Day Two the claimant provided additional disclosure relevant to remedy in the form of a number of payslips from his alternative employment and an update on the amount of the award made him for job support allowance.

4. We heard from three witnesses: the claimant and two witnesses called by the respondent. They were Romi Singh, manager and Shahla Sunderji, Administration Manager who gave evidence in person at the Tribunal Hearing Centre. All three witnesses had prepared witness statements which they adopted in evidence and upon which they were cross examined. The witnesses, and other relevant individuals about whom we heard but who did not give evidence, are referred to in these reasons by their initials. No disrespect is intended to them by this.

The Issues

5. Following a period of conciliation from 9 June 2020 to 25 June 2020, the claimant presented a claim form on 25 June 2020 by which he complained of unfair dismissal, race discrimination, harassment and victimisation and breach of contract in relation to non-payment of commission payments. The respondent defended the claims by an ET3 form received on 19 August 2020. A case management discussion was conducted on 14 March 2021 at a telephone preliminary hearing the record of which appears at page 40. At that hearing, as appears from paragraph (5) of the hearing summary (page 41), the claimant confirmed that the three causes of action for a full merits hearing were unfair dismissal, direct race discrimination because of his Indian nationality, and breach of contract relating to commission and whether his notice and redundancy payments were correctly calculated.

6. It was agreed by the parties at the outset of the hearing before us that the issues remained as set out in page 41 save that the respondent had since conceded the fact

of unfair dismissal. The issues relating to remedy for unfair dismissal were agreed to be:

a. What is the prospect that the claimant would have dismissed fairly by reason of redundancy and when would such a dismissal have taken place? The respondent argued that had a procedurally fair dismissal taken place there was a 100% chance that the claimant would nevertheless have been dismissed.

b. What would the claimant have received by way of income salary/commission from date of dismissal had he not been dismissed? That may involve consideration of whether the claimant would have been on furlough and what he would have received had he been on furlough.

c. Has the claimant taken reasonable steps to mitigate his loss? He commenced a new employment on 4 August 2020 but is only working 16 hours per week and therefore his remuneration is less than it was with the respondent.

d. How long will any loss C still suffers which flows from the dismissal continue?

7. The issues relating to the race discrimination and breach of contract claims remained as set out in page 42. The issues relating to the race discrimination claim were:

a. It is not in dispute that the respondent dismissed the claimant.

b. Was that treatment "*less favourable treatment",* I.E. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators) in not materially different circumstances? The claimant relies on the following comparators who worked in the Southampton Office: JL, KW, MD, JF – who were placed on furlough and not dismissed, and hypothetical comparators.

c. If so, was this because of the claimant's race (Indian) and/or because of the protected characteristic of being Indian more generally?

8. The issues relating to the breach of contract claims were:

a. The claimant was paid eight weeks' notice pay but denies that it was calculated correctly.

b. The claimant claims he is entitled to outstanding commission earned in the period 9 March 2020 to 30 April 2020.

c. The Respondent contends that there has been an overpayment of notice pay of one week and that it has not clawed back commission to which it was contractually entitled so to do, and that whilst not raising a counter claim, it

seeks to have such sums taken into account if the ET is considering any compensation which it is just and equitable to award.

Law applicable to the issues in dispute

9. It is for the respondent to prove that the reason for dismissal was one of the potentially fair reasons set out in s. 98(1) of the Employment Rights Act 1996 (hereafter the ERA) which include redundancy. An employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to a broad range of situations set out in s.139(1) of the ERA.

> "For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish."

10. In the present case, the claimant alleges that his dismissal for reasons of redundancy was direct race discrimination. We potentially need to consider the respondent's explanation that a redundancy situation existed and that that was the whole reason for the claimant's dismissal. The respondent has accepted that the dismissal was unfair in all the circumstances.

11. In Polkey v A E Dayton Services Ltd [1988] ICR 142, the House of Lords explained that a failure to follow correct redundancy procedures is likely to make the resulting dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been "utterly useless" or "futile". Normally an employer contemplating redundancy dismissals will not act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes reasonable steps to avoid or minimise redundancy by redeployment. However the employment tribunal should go on to consider whether compensation should be reduced to take account of the likelihood that a fair dismissal would have happened in any event.

12. In Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498, EAT, the EAT said that where there is a substantial issue as to failure to mitigate, an employment tribunal should ask itself:

a. what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;

b. whether the claimant did take reasonable steps to mitigate loss; and

c. to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.

13. Employees, such as the claimant, are protected from discrimination by s.39 Equality Act 2010 (hereafter referred to as the EQA) the material parts of which provides that an employer must not discriminate against one of their employees by dismissing them or subjecting them to a detriment. The claimant alleges that he was the victim of direct race discrimination contrary to s.13 EQA. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting him to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of race and does so because of A's race.

14. All claims under the EQA (including direct discrimination) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA (Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC.

15. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race.

16. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by race we must have a sound evidential basis for that inference.

17. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the

reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue: Efobi.

18. In relation to the breach of contract claim for commission payments, the first task for the Employment Tribunal is to find what, as a matter of fact, the claimant's contractual entitlement was in respect of commission payments, when those commission payments fell due and whether, as alleged by the respondent, they were subject to a right of clawback. Identifying contractual terms involves consideration of a variety of potential evidence of those terms, written terms (where they exist) and oral evidence of what was agreed and what the parties did or regarded themselves as obliged to do. Contractual terms may be expressly agreed (either orally or in writing), incorporated with reference to rules governing particular aspects of the employment relationship or stem from statutory provisions. They may also be implied into the contract where the parties must be taken to have agreed them because, for example, they are too obvious to need recording, because they are custom and practice, because they can logically be deduced from the conduct of the parties or are necessary to give "business efficacy" to the agreement as a whole.

Findings of Fact on Liability

19. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

20. Our impression of all of the witnesses was that, for different reasons, the evidence given by none could be accepted in its entirety without qualification.

    a. RS: His recollection of the events of March and April 2020 was patchy at best. The clear implication of his statement evidence (para.10 and 14) is that the decision to make the claimant redundant was that of himself and SS. By contrast, his oral evidence was that the decision was made by him and Sunder Kripalani (SK). There is also an inaccuracy in para.12 of his statement in that one member of the Southampton staff resigned and the implication in that paragraph is that all were made redundant. In circumstances where there is conflicting evidence about who made the decision that there should be redundancies and the decision to choose the claimant, the lack of documentation surrounding those decision is, to our mind, very relevant. When the claimant asked RS why he had not replied to any emails which the claimant had sent asking for clarification, RS said that the reason had been that he had nothing further to say. However, it took the respondent 6 weeks to confirm the decision to dismiss in writing and to set out the claimant's rights on redundancy so the explanation that RS believed that he had nothing further to say does not make sense.

b. SS was more detailed in her recollection. However, her evidence was characterised by a tendency not to address the question directly but to give a great deal of context to the issue addressed by it. This is of course important. It is necessary for us to understand the context. However there were occasions on which it was our view that, despite being given many opportunities to do so, she did not directly answer particular points of importance. Most obviously this was the case in relation to her evidence about the decisions taken on about 27 April 2020 to make the claimant redundant.

c. The claimant's evidence was strongly coloured by his sense of having been wrongly treated. At times he appeared to be stating as fact the position which he thought ought to exist and this was particularly clear in relation to his evidence about the arrangements which were in place for calculating and paying commission. He made some wild suppositions about the respondent's behaviour for which he had no evidence. However in many places his evidence was supported by the contemporaneous documentation and such contractual documents as there was.

21. Having made those general observations, we found the claimant, in general, to be more credible because of the consistency of his evidence with the contemporaneous documents. However that does not mean that we accept everything which he says or all of his arguments. This is particularly so in relation to his evidence about the contractual terms regarding commission when he seemed to us to be explaining what he thought to be fair for him rather than attempting to explain how the term had operated in practice in the past. We did not consider that his evidence on this point was reliable as to how the terms relating to commission had operated in practice.

22. The claimant started work for the respondent on 14 June 2012. He was sponsored by them under the government's Tier 2 scheme as a migrant originally from India. This requires a minimum salary to be proven to the Home Office as a condition of the visa approval. The contract of employment is at page 47.

23. The claimant complained that the respondent had originally disclosed to him a document which is at page 1 of the disclosure forwarded to us on the last day which was added to the bundle at page 48a and which, he explained, the respondent had incorrectly put forward as having been his contract.

24. SS explained in her evidence that she had been working remotely and had been unable to find the claimant's contract so had completed a template for their sales staff with the claimant's details and forwarded that as his contract. The claimant very fairly pointed out that it was quite wrong to do so without any explanation that that was what she done because it 6understandably caused him to conclude that they were putting forward a document as his contract which was not in fact his contract. SS may have genuinely believed that the document disclosed to the claimant accurately included the terms of his contract but the fact that she was prepared to put it forward as if it were his contract, without explanation, causes us some concern.

25. There was a dispute between the parties as to the amount of the claimant's basic annual salary. Page 48a states the claimant's salary as at the time of dismissal to be £22,000. The respondent's evidence was that this was the claimant's basic salary

and he earned commission in addition. However, the true contract at page 47 states that the claimant's salary is £24,394.50. This is described within the contract itself as the annual salary and under the heading "SALARY DEDUCTIONS (Pay As You Earn)" on page 48 the contract provides that "all payments including: basic salary, commission, bonus, holiday pay is subject to UK PAYE tax and NI deduction" (sic).

26. The respondent provided the certificate of sponsorship (page 52). They relied upon the statement at the bottom of page 53 that the "gross salary in pound sterling including any allowances and guaranteed bonuses: 24394.50". The respondent's evidence was that the agreement between the parties at the time the employment started was that the claimant should be paid a basic salary of £16,000 and that a salesman of the calibre of the claimant would easily achieve the minimum required salary for sponsorship under Tier 2 of £24,394.50. However as between them and the claimant, their evidence was, the basic was only £16,000 as at the start of employment rising incrementally to £22,000 by the time dismissal. Therefore, they argues, all heads of compensation should be calculated on the basis that the basic salary was £22,000. In closing, it was accepted on behalf the respondent that the effect of their own evidence was that there was a guaranteed salary plus commission of £24,394.50 and therefore that that was the minimum amount that should be used as the basis for calculating loss in the present case.

27. SS was insistent that the claimant, who had worked for the respondent on a previous occasion before the employment that started 2012, was fully aware of the way in which commission worked and that there was a basic salary which was less than the amount which they needed to guaranteed to be his salary for the purposes of sponsorship.

28. The only document setting out details of the commission scheme which operated between the claimant and the respondent is the email from SS to the claimant dated 26 June 2012 at page 51. It provides,

    "The Salary (inc commission) is paid on the last Friday of each month (same as before). For the commission, we generate a report from Dolphin and pay commission (where applicable) on fully paid folders. We pay commission two weeks in arrears of the payroll week. So for June payroll the last commission week paid is wk beginning 4 June 2012.

    If you have deposit bookings, you will not be paid commission on those folders until payment has been received in full (again this is same as before)."

    <u>Events of 23 March 2020 to 28 April 2020</u>

29. The background to the dispute with which we were concerned is the outbreak of coronavirus which began to impact upon the UK in early 2020. The respondent's business includes selling cruises, particularly to the United States, as a large proportion of its income generating activity. On 18 March 2020, the United States barred all UK and EU arrivals which, at one step, prevented providers of holidays in the United States from fulfilling their obligations to the customers who had purchased them. The respondent specialises in providing holidays in the USA so they were hit particularly hard. It is a matter of public knowledge that the Coronavirus Job

Retention Scheme (commonly referred to as the furlough scheme) was announced on 20 March 2020 although the rules of the scheme were not published in detail until 16 April 2020. Prior to that, information available to employers about how the scheme was to operate was only in the form of guidance.

30. The respondent's managers immediately realised that this would have a dramatic effect upon their business and on 23 March 2020 the staff of the Wembley office were told work from home. At this time, the respondent also had a head office in Central London. To the best of the knowledge of the witnesses from whom we have heard, the respondent did not have any sales staff employed in it.

31. They also had a separate office in Southampton from which the respondent operated a business under the brand name Affordable Cruises. Five people were employed in the Southampton office: one manager and four sales staff. The actual functions carried out by the sales staff in the two offices were probably very similar, but we accept that those in Southampton were entirely engaged within the Affordable Cruises business which operated under a different brand to that operated from the Wembley office.

32. SS's evidence, which we accept, was that the respondent initially thought that the problems would last for a limited period of time and therefore a very quick decision was made to put the Southampton office into (in our words) cold storage for limited period and to accept the opportunity to put the staff there on furlough which they did from 6 April 2020. Correspondence with those staff members are at pages 93 – 100. We can accept the logic of that decision and find that that was what they decided. The respondent moved its administration out of the Central London office at the same time.

33. Cancellations of booked holidays started to come in from cruise liners and airlines initially in small numbers but then the cancellations escalated. Some cruises already en route were turned away from their destinations because of the suddenly imposed travel restrictions so there would probably have been basic concerns about the safety and wellbeing passengers. Against that backdrop they decided that they could do without the staff from Southampton and the expenses of that office.

34. We think it likely that the stresses of that initial period and the number of exceptional concerns which they were dealing with has probably affected the ability of RS and SS to recall the details of conversations. On the other hand, the claimant would, understandably, view these matters which concerned his personal circumstances of vital and pressing importance for him. He also took the trouble to document many of the conversations and communications he made with his employer at this time, albeit briefly, with follow-up emails and therefore we accept the claimant's evidence on the detail of the communications he himself had with RS and SS and the chronology of relevant telephones calls, in particular.

35. The Wembley staff were expected to handle the ramifications of cancellations of the bookings which had been part of the Southampton team's work. It is common ground that between 23 March 2020 and 14 April 2020 the claimant and all the other Wembley staff members were working from home on same work as each other but they have absorbed the Southampton office workload. This workload would not

have been a "normal" workload because the staff are handling the consequences of mass cancellations and rebookings of cruises for some time in the future when, it was hoped, the holidays might go ahead.

36. On 14 April 2020 there was a telephone call between the claimant and SS the reason for which was, according to SS, in order that she had up to date postal address for furlough letters for the Wembley staff. The claimant recorded that conversation in an email dated 24 April 2020 which he copied to other the Wembley staff members (page 103) asking whether anyone had received a furlough letter.

37. It certainly appeared to us to be SS's evidence that between 23 March and 28 April the claimant and all other sales staff from the Wembley office were working from home essentially doing the same work as each other. We have been given no evidence about any specific difficulties problems encountered during this period or any criticism of the work that the claimant was doing at that time.

38. SS and RS did say that, in general, the claimant could be abrupt with customers or that he had a manner which led to more complaints against him than there were against his peers. There is no documentary evidence of the claimant ever being spoken to by SS or RS or anyone else in the past about customer complaints. The most detail which RS could provided sounded to us like normal management matters which had been dealt with by the respondent in low key way. Equally, there was no evidence whatever about any complaints directed towards the other sales staff.

39. If one considers the job pre-pandemic, the claimant is accepted by SS to have been an effective salesman. We observed the claimant in oral evidence to appear unsympathetic to the suggestion that at that uncertain time there were those customers who would need careful handling given the circumstances. However we think that there is a very limited extent to which it is right to make a judgment about how the claimant operated as a salesman from his manner in tribunal after 18 months of stressful litigation.

40. In any event, good employment practice would mean that an employer should manage a salesman who was causing the level of customer complaints which this respondent now seeks to say the claimant was responsible for. This was not done in respect of any concerns about the claimant's manner toward customers in any other than a very low key way, prior to the events with which we are concerned.

41. The respondent moved from a position in which all Wembley sales staff were working from home and a request has been made on 14 April 2020 for home addresses in case the Wembley staff were put on furlough to one where the claimant and only the claimant was made redundant. We needed to consider the evidence about why the respondent made that decision.

42. SS's oral evidence was, in effect, that the decision had been made that the claimant would be the one to go right at the start on 23 March 2020 and that why he was sent home immediately lockdown started - before being called back to help in the management of the above fallout. She explained that, after the US shut their borders on 18 March 2020, at 11 am on 23 March 2020, prior to the respondent even knowing the word furlough, they had called the claimant into the office.

"RS and I had a meeting in the morning. The Government had not fully announced about the furlough scheme. We decided that if there were no sales we had to look at shutting and cutting jobs. Although [the claimant] was really good in sales, out of the 5 sales staff in Wembley he was the least able to deal with the customers. His general manner can be a little antagonistic at times to customers. That morning we called him into the office about 11 am and we said to him – we didnt know about the word furlough - look things have turned on their head you stay at home. We didnt talk about pay but said as soon as things start resuming in few weeks going we'll bring you back into the office. [we were going to] deal with who we had in the office and that will give time for RS to discuss with the other director how to proceed going forward. Within a few hours of telling [the claimant] to go home we'd been obliterated from cruise liners and airlines cancelling and decided at that point that we needed all hands on deck. … We would be better with 5 pair of hands and not 4 pairs of hands … We decided it was better if we could get [the claimant] back and RS called him to come back to the office because knew that we were going into the lockdown and the government were making announcements and sales staff anxious that they should not be working together so we wanted [the claimant] to download software and apps to work comfortably from home."

43. None of this information about the 23 March 2020 is in her witness statement. Indeed para.15 of SS's statement talks about the lack of need for all five sales staff at Wembley because of the small number of bookings made when all but essential travel had been prohibited by the UK government. We accept that particular consideration was given by the respondent to the importance of the US as a major destination for their customers given that US had banned travel to that country from UK and EU starting points. There is no explanation as to why the written statement does not set out the detail which SS gave in oral evidence.

44. We accept the claimant's evidence about the events of 27 and 28 April 2020. This is because he followed up the several telephone calls between him and RS on 27 April 2020 with emails which record their conversations. For the most part there was no reply to those emails, certainly no reply which challenged the account in them of the conversation which had just taken place.

45. First the claimant sent an email to RS asking him, as a follow-up to the page 103 email of 24 April sent to SS, whether all of the Wembley staff are on the normal payroll furlough scheme (page 102). The significance of the date is that it is coming up to the end of the month and, presumably, the claimant is trying to find out how and what he will be paid. As with the 24 April 2020 email, he copied that email to all of the sales staff in the Wembley office.

46. Next there was a telephone call between the claimant and SS to which the claimant refers in his paragraph 5. He called her and she confirmed to him that she had done furlough letters for the Southampton branch but was not ready to advise whether he was furloughed or not. The next day, the claimant spoke to KK, who carried out administrative functions, and he also said that the Wembley office was not furloughed. Next the claimant received a phone call from RS who likewise told him that he had not been furloughed. The claimant followed this up with email at the top of page 102 which he again copied to all members of the sales staff in the Wembley branch.

47. There is then a second phone call from RS referred to in paragraph 8 of the claimant's witness statement which the claimant follows up with an email at page 119. The email is timed at 13.41 and in it the claimant says the following recent (i.e. second) telephone call he understands that he will be on furlough from 1 May 2020 until further notice.

48. There is then a third telephone call from RS in which he informed the claimant that he was being made redundant. See claimant paragraph 9. Following this third call the claimant sent the email timed at 15.23 (page 118) to RS which starts "I am not sure what is going on. Some time back today you advised me that I'll be on furlough and now you've called again and advised that I'll be made redundant." He asks for the reason why he's being made redundant and asks for confirmation about pay and commissions. He explained that since 23 March 2020, when he was asked to work from home, until that morning everything was fine and he had been working the same shifts as he was working earlier from the office.

49. On the basis of that telephone conversation with RS, the claimant's relies on 28 April 2020 as the effective date of termination. According to their ET3 (see page 20), the respondent says that the effective date of termination was 30 April 2020.

50. The claimant appealed his dismissal on 5 May 2020 (page 117 - see his statement paragraph 11) and received no response to that. This was sent before the claimant had had any explanation of the reason for his redundancy or an explanation of his entitlement to a redundancy payment. He asked for the reason for being made redundant and argued

    "since government is providing furlough scheme, I can be placed on it as well and government will be providing support. I have done my work properly and was doing same or similar job as others were doing, so I can not understand why I have been made redundant".

51. Eventually he was sent a letter on 17 June setting out that he had been made redundant (pages 122 to 123 – the letter itself bears the date of 1 June 2020 and is at page 106). It states that the respondent was treating his last day of employment as being 30 April 2020 although that was the first time that that was mentioned. The claimant challenged the calculation of the termination payment (page 121 to 122), in particular the taxation of the redundancy payment. A corrected calculation was sent to the claimant by a letter at page 124.

52. The above chronology suggests that, on 14 April 2020 when SS asked for the postal addresses, the respondent was contemplating furloughing somebody. By 27 April 2020, RS told the claimant that he was being made redundant.

53. The decision to make the clamant redundant was effectively made by RS and SS even if the proposal was taken to director to be rubber stamped. SS's evidence about their thinking was more lucid than was that of RS. She said that by 4 weeks after the announcement of lockdown, they had realised that the initial optimism that the situation would improve within 6 to 8 weeks (i.e. 2 to 4 weeks from when they then were) was misplaced and cruises were being cancelled into the summer and September. Therefore activities with booking flights and general holidays was "never going to be enough work for the five sales staff in Wembley".

54. In essence the respondent explains that they did not think it right to put the claimant on furlough as an alternative to redundancy because they could already see that 5 sales roles in the Wembley office was not a viable business model. The respondent denies that the claimant was originally told that he would be on furlough but we have accepted the claimant's evidence on this. However the change in position seems to us just to underline the lack of careful logical thought by the respondent at this time, possibly because of the stressful circumstances in which they were working which had the potential to be disastrous for their business.

55. At the end of April 2020 the Southampton staff had been on furlough for about a month but the realisation that things were not going to improve soon didn't cause the respondent to take the Southampton staff off furlough and make them redundant. As a matter of fact, they did not revisit that decision at the end of April 2020. SS explained that they did so later, when the furlough scheme changed and it was going to cost the respondent money to keep them. Her evidence was that the respondent chose not to put one person from the Wembley office on furlough rather than make redundant because "need for 5 salesmen not viable within the lifetime of the scheme".

56. By the time the claimant was made redundant all of the Wembley staff were doing exactly the same thing. We see from the Sales Report comparing the months of March to May in each of the three years 2018, 2019 and 2020 that business was impacted very significantly by the events of 2020. The respondent's witnesses were insistent that their then understanding was that furlough would be for three months and based upon the figures at page 83 which show the unfolding situation in Spring 2020 they could not see the need for 5 sales staff over the three month period that furlough was expected to last.

57. This is hard to understand the choice to make *the claimant* redundant as being rational, particularly when he appears to have been chosen based upon short term reasoning. If he was, in general, an effective salesman would they not need him in the future? Furthermore, in the short term the respondent would still need someone able to persuade customers to rebook in the future rather than cancel altogether which would lead to a complete refund.

58. However, we accept that there was a pressing need for the respondent to reduce costs. We accept other evidence from SS to the effect that they had reduced the number of software licences which they had at the same time. The respondent had removed the operating costs of two offices.

59. We accept that the respondent believed at that time that the furlough scheme was projected only to last three months and accept the accuracy of the figures on page 83. The next question for us is whether we accept that the respondent genuinely concluded that in three months' time they would only need 4 sales staff such that it was wrong to consider the fifth such role viable. The respondent is now saying that they didn't want to waste government money – do we genuinely accept that was in their minds?

60. To act consistently with that, had they addressed their minds to it, they would have made all the Southampton staff redundant at the end of April 2020, rather than keep

them on furlough at government expense because they would have realised that they were unlikely to need staff focused on cruises as soon as the end of July 2020. They actually kept them on until August when the respondent would have begun to incur costs by keeping them on furlough.

61. Although we found SS and RS's evidence unsatisfactory in some respects, we do accept that, when making the decision to make a redundancy in April 2020 from the Wembley office, they genuinely thought it likely that a fifth sales job in Wembley was not viable in three months' time and that it was not in accordance with the furlough scheme to put a member of the sales staff on furlough. However, we consider that that decision was irrational because it was inconsistent with the decision for the Southampton staff. We therefore consider that furlough was an alternative to redundancy for the Wembley staff and that no reasonable employer would have failed to consider that. There was a redundancy situation because the respondent needed to cut costs and they were paying for all 5 Wembley staff. We accept that a business decision was taken that the respondent needed to cut costs by one head. It seems to us that, possibly in the heat of the moment, the respondent did not consider whether they should therefore revisit the position of the Southampton staff.

62. The Southampton sales staff were made redundant with effect from 1 August 2020. Relevant correspondence is found at page 129 (a letter dated 17 August 2020 to JL) and page 130 (a letter dated 17 August 2020 to KW). The third member of sales staff had resigned with effect from 31 July 2020. It appears that none of them had more than two years' continuous employment. JB, the manager of the Southampton was made redundant little while later.

63. The claimant obtained new employment on 4 August 2020 with FirstCare Limited in the care sector as an Absence Advisor and has earned £14,441.76 since his dismissal. His contract is limited to 16 hours per week and it is a customer service role. It appears that he has been promoted to an Enhanced Absence Advisor since starting and there are extra hours available on top of his contracted minimum. He has been acting up as Client Account Manager. The claimant described the satisfaction of being appreciated for his skill in his new role and seems to us to see his new employment as having prospects. He described to us going through a very difficult time and suffering some effects of stress and anxiety following the redundancy. We accept that evidence.

Conclusions on the Issues and findings on remedy

64. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

Race discrimination

65. The claimant compares his position with that of the Southampton staff: he was made redundant whereas they were put on furlough. He is an Indian national, they are white British. Has he shown facts from which it might be inferred in the absence of

any other explanation that in making him redundant he was treated less favourably than the respondent treated them and did so because of race? We have explained above, in paragraph 61, that we consider the decision at the end of April 2020 to make one person from the Wembley office redundant and for that person to be the claimant to be irrational, and to ignore the alternative of furlough, in part because the respondent did not revisit their decision to place the Southampton staff on furlough. In those circumstances, we think that the burden of disproving discrimination passes to the respondent.

66. When considering the arguments on race discrimination, we consider it significant that the judgment made by SS and RS to place the Southampton staff on furlough and the judgment to make the claimant redundant were made at different times. The decision to put the whole of the Southampton office into cold storage (as we have put it) was made as soon as lockdown was announced: the office was closed and the staff were put on furlough at a time when the detailed rules of the scheme had not been published. We accept that that decision was not revisited until it became clear to the respondent that the rules of the furlough scheme were going to change in a way which meant that they would incur cost by having staff on furlough.

67. The decision to make someone redundant from the Wembley office was made in the last week of April 2020 – around 27 or 28 April 2020. By that time, we accept, the respondent was through the initial phase of dealing with escalating cancellations of holidays and was making a judgment focused upon staffing needs in the more medium term with knowledge of the sales figures for March and early April. The Southampton staff were placed on furlough at a different time and should be regarded as a discrete group and that affects their suitability as comparators to the claimant. As a matter of fact, the respondent did not have the position of the Southampton staff in mind when deciding whether to make someone (regardless of who) redundant from the Wembley office. They were not costing the respondent money as at the end of April 2020. For that reason, although the evidence of RS and SS was of unsatisfactory in some respects, we do not consider it appropriate to infer that the reason they decided to make a redundancy from the Wembley office (rather than consider furlough as an alternative) was that of race. The reason was entirely that they needed to save further costs and they thought that they only had work for 4 sales staff in Wembley. At the time the decision was made to choose the claimant for redundancy, rather than anyone else, his position is being considered in comparison with the other sales staff in the Wembley office, all of whom were of Indian national origin. We are satisfied that race was not a factor in the decision to select the claimant for redundancy.

Unfair dismissal

68. The respondent conceded that the dismissal was unfair because the respondent did not give sufficient warning to the claimant or carry out adequate consultation with him before selecting him for redundancy (see paragraph 1 of Mr Lawrence's skeleton argument). However the claimant additionally argued (separately to his argument on race discrimination) that the dismissal was unfair because the respondent didn't consider an alternative to redundancy.

69. We concur. We consider that at the time the respondent made the decision to make one person from the Wembley office redundant and chose the claimant to be that person, they irrationally discounted the alternative of putting one sales person on furlough. They did not apply the same reasoning to the decision to keep all the Southampton staff on furlough between the end of April and end of July 2020.

70. The first question for us to consider (see paragraph 6 above) is what are the prospects that the claimant would have been dismissed fairly by reason of redundancy and when would such a dismissal have taken place? This involves considering the prospects that the claimant would have been the one chosen from the five sales staff.

71. It is argued by the respondent that the compensatory award should be limited to one months' pay as that is how much time a proper consultation would have taken and it is certain that he would have been dismissed as redundant at that point. We agree and accept that a 4 week redundancy consultation process is capable of being fair. However, we think that, acting fairly but acting upon their need to reduce costs, the respondent would have chosen one member of the 5 Wembley sales staff to be put on furlough. There is no reliable evidence about the claimant's performance from which to conclude that it was certain that it would have been him, had the respondent been acting fairly. We conclude that there was no more than a 20% chance that the claimant would have been the one to be put on furlough on 27 April 2020 had they acted fairly and considered furlough as alternative to redundancy.

72. We conclude that a fair consultation process could have been started in time to conclude on 1 August 2020 when the Southampton sales staff were made redundant. Again, there is no reliable evidence that the claimant's performance would have meant that it was certain that he would have been chosen for redundancy. There is no reliable evidence from which to compare his performance with the other Wembley sales staff by which to judge that, had objectively fair criteria for selection been used, there was a greater chance of the claimant being selected than the purely statistical probability of 1 in 5. We conclude that there is a 20% chance that the claimant would have been made redundant with effect from 1 August 2020. The probability is that, had one person from the Wembley office been put on furlough, when they were to become a cost on the business they would have been made redundant at same time as the Southampton staff and there is a 20% chance that that would have been the claimant.

73. It was argued by the respondent that the claimant had failed to mitigate his loss. In oral evidence, the claimant adopted the additional information he sets out in his response to the respondent's skeleton argument. He describes applying for numerous jobs in different categories and roles (see remedy bundle pages 11 to 16). We can well imagine that recruitment in the travel sector has not been particularly buoyant since April 2020.

74. We remind ourselves of our findings at paragraph 63 above but do not repeat them and of the guidance to this question in Gardiner-Hill. We are of the view that the steps that it would have been reasonable for the claimant to take in order to mitigate his loss in April 2020 when he was made redundant, in the circumstances then prevailing, were to seek work in a wide range of sectors which had customer service

roles even if those roles offered fewer hours and lower pay. As time passes, the ongoing duty on the claimant to mitigate his loss means that, even though he had found employment in early August 2020, in order to take reasonable steps to mitigate his ongoing loss, he should have continued to look for full time work leading to a higher overall salary. We take into account that the prospect that the move to the care sector may lead to a career with a supportive employer was a valid and reasonable consideration for the claimant. Therefore it would be reasonable to wait for a while with the new employer to see what the prospects were for longer hours or promotion. The claimant has had some success with that. However, in order to mitigate his loss we consider that it would have been reasonable for the claimant to redouble his attempts to find higher paid work in early 2021. There is no documentary evidence of job applications in that period. We do take into account that the national picture has been one in which the economy has been suppressed in 2021. We are of the view that, had the claimant taken reasonable steps to seek higher paid work despite having found convivial employment with FirstCare Ltd, he would probably have found employment earning as much as he earned with the respondent by the time of the hearing before us and therefore that the period of his loss should cease as at the date of the hearing.

75. He has also received some income from Jobseeker's Allowance.

76. We now make findings about the level of income which the claimant would have earned, had he not been made redundant. During the period 28 April 2020 onwards he would not have been earning commission because there were no new confirmed sales. The question of commission said to be due on past sales will be considered within the breach of contract claim.

77. The respondent now accepts and argues that there was guaranteed minimum salary (by way of basic and commission) of £24,394.20 gross based upon the written evidence of the contract of 14 June 2012 (page 47). There is no other written evidence communicating a different basic salary to the claimant although he accepted that he had subsequently been told that £22,000 was his basic annual salary. There are internal communications from RS to payroll asserting increases of basic salaries (page 73 for example) but no written communications to the claimant. We do not see that that can be effective to, in effect, reduce his basic annual salary. Under the terms and conditions governing his employment, the claimant ought to have been paid £24,394.20 gross per annum.

78. Had the respondent acted rationally at the end of April 2020 then one person would have been placed on furlough instead of being made redundant. We conclude that, had the claimant been put on furlough on 27 April 2020 instead of being made redundant he would have been paid 80% of that guaranteed salary plus the employer's pension contribution.

79. There is therefore a 20% chance that between 27 April 2020 and 1 August 2020 the claimant would have been on furlough being paid 80% of £24,394.20. There is an 80% chance that he would have been at work on £24,394.20 p.a.. Had he been on furlough he would have received the equivalent of £19,515.36 per annum plus the employer's pension contribution. Therefor his losses are the 80% of £24,394.20 gross p.a. which he was certain to be paid, had he been on furlough and four fifths of

the difference between that and the full salary for the period. This amounts to loss for the period 27 April 2020 to 1 August 2020 at the rate of 96% of £24,394.20 p.a. which is at the annual rate of £23,418.43. In other words, there should be a 4% deduction from the claimant's loss in the period 27 April 2020 to 1 August 2020 to take account of the prospect that he would have been on furlough and not in work.

80. From 1 August 2020 onwards, the rate of his loss is 80% of £24,394.20 because there is a 20% chance that it would have been the claimant who was made redundant. Loss from 1 August 2020 should be calculated at an annual rate of £19,515.36 or a 20% deduction should be made for the chance that he would have been made redundant in any event.

81. When calculating the compensatory award the amount of that award is to be "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer" (s.123(1) of the ERA). The duty to mitigate applies by reason of s.123(4). The period over which the claimant should be compensated is that up until the date of the hearing. The evidence is that the other 4 sales staff from the Wembley office have been kept on in employment so no deduction for the prospect of a subsequent potential redundancy is applicable.

Damages for breach of contract.

82. The claimant should have been paid in lieu of notice of termination of employment at the rate of the guaranteed amount of £24,394.20 gross p.a. but the notice pay would not include an element for the loss of the opportunity to earn commission during the notice period which he did not work.

83. The respondent has produced a set of calculations, prepared for the purposes of this hearing (page 105) which they say show, first, commission which appeared payable as at 30 April 2020 on sales made during particular weeks when the weekly target for commission had been reached and secondly, a recalculation taking account of commissions in weeks which still exceeded the weekly target as at 30 April 2021 – taking account of subsequent cancellations for packages which had not been rebooked and had therefore been refunded by the respondent. The explained that their obligation in the circumstances of cancellation by the holiday provider was to provide a full refund, even where there had been disbursements which potentially meant that the respondent was out of pocket.

84. It was stated by SS in her paragraph 6 that "once the booking is processed by the sales agent, the commission would be adjusted or clawed back in its entirety if the booking was cancelled … The commission figure would also be adjusted if there were losses incurred by us on the booking … conversely, there may be additional profit and so more commission to pay to the employee if the currency movement went the other way."

85. The claimant's evidence did not really address how the commission scheme operated in practice over the period of his 7 year employment. He tended to answer

questions about that with his assertions about how the scheme should have operated. It is argued by the respondent that we should find that there was an implied term to the effect described by SS in her paragraph 6. However, we do not accept that there is a basis for such an implied term; it is not necessary to imply such a term for the commission scheme to be workable.

86. On the other hand, we accept SS's evidence that paragraph 6 accurately describes what occurred in practice. Although good practice would mean that something this complicated should have been communicated in writing the only documentation concerning commissions (page 51) does not refer to *clawback*.

87. What we think can be inferred to have been an express term from such documents as there are (especially the email at page 51 and the redundancy letter) is that payment of commission was postponed until payment was received in full for a booking. The respondent told the claimant at the time of his redundancy that "quite a few of your bookings have future departures we can only consider these one the cancellations have been adjusted whee (sic) applicable." We accept that, in the lower hald of page 105, the respondent has recalculated the commissions due to adjust for cancellations which have resulted in refunds and/or non payment in full of the booking in question and that that is in accordance with the way that the commission scheme was operated in practice during employment. It is therefore not a breach of contract to have done so but this leads to the conclusion is that £127.54 is owing to the claimant as commission on work done by him prior to termination of employment.

88. The respondent also argues that they should be able to clawback commissions paid prior to dismissal for bookings which were subsequently cancelled. Our conclusion on that is that, based upon the email at page 51 these commissions were probably not paid to the sales agents until the payment had been made in full or terms for payment of commission satisfied. It seems to us that in the absence of an express term the respondent cannot clawback commission already paid by deducting it from the claimant's subsequently earning commission. It is not necessary for the operation of the scheme for such a term to exist and no evidence that it was operated that way in practice. It would place upon the individual sales person the risk of an exceptional event such as the pandemic and we are not satisfied that there was an express or implied term to that effect in the contract of employment. Indeed it would be a requirement of s.13 ERA that no deduction should be made from wages unless agreement or consent to that deduction had been previously signified in writing. We therefore reject the respondent's argument that the alleged overpayment of £5,206.20 should be deducted from any award made to the claimant.

Calculation of net pay

89. The gross annual basic and guaranteed commission is £24,394.50 which is £469.12 per week. The compensatory award should be calculated net of tax and NI. Using the HMRC tax calculator the income tax payable of this income is £2,379.00 per annum which is £45.75 per week. National insurance contributions by the employee would be due at 12% between £169 per week and £962 per week. The amount by

which the claimant's weekly basic salary plus guaranteed commission exceed £169 is £300.12. 12% of that is £36.01. Therefore the net weekly amount is

Gross annual basic and guaranteed commission		£469.12
Tax	£45.75	
NI	£36.01	
Tax + NI	£81.76	(£81.76)
Net weekly		£387.36

90. The claimant had 7 years' qualifying service and should have been paid notice pay of 7 X £387.36 or £2,711.52. He was in fact paid £3,384.64 less tax and national insurance (see page 125 which shows that the respondent mistakenly paid the claimant for 8 weeks' notice when he was only entitled to 7 weeks'). The respondent has not separated out the tax and NI payable on the notice pay from that payable on the holiday pay. However, the marginal tax rate used (comparing gross for notice/holiday pay of £3474.36 with Tax and NI totally £778.64) is 22%. The amount of the notice pay actually paid after tax and NI can therefore be taken to be £3,384.64 X 0.78. This is £2,640.02. The respondent therefore owes the claimant £71.50 as the shortfall of the notice pay to which he was entitled.

91. The claimant's losses from unfair dismissal therefore start at the expiry of the putative 7 week notice period or on 16 June 2020.

Damages for unfair dismissal

92. Basic Award: This should be calculated in accordance with Chapter II of Part XIV of the ERA. By reason of s.221(3) ERA, since the amount of the claimant's remuneration in normal working hours varied with the amount of the work done in the period "a week's pay" for the purpose of s.119 calculation of the basic award should be calculated as an average of the last 12 weeks. Unfortunately, we have not been provided with the last 12 weeks' payslips. Doing the best we can with the evidence before us, pages 71, and the P60 at p.81 show that for the financial year ended 5 April 2020 the claimant was paid gross income of £41,917.17. Dividing that by 52 weeks makes a weekly gross figure of income from basic, guaranteed commission and variable contractual commission of £806.09. We are therefore of the view that the calculation of the basic award should be at the weekly maximum which at the relevant time was £538 per week. The basic award is 8 time £538 or £4,304.

93. Compensatory award: The net loss of wages (based upon the basic salary and guaranteed commission) should be compensated at £387.36 per week (see paragraphs 89 to 91 above). To judge by the payslip at page 71, the employer contributed 2.5% to the pension scheme. Therefor his loss including employer's pension contribution was £397 per week. The claimant's losses do not start until 16 June 2020 (the end of the notice period). During the period 16 June 2020 to 31 July 2020 there should be a 4% deduction to take account of the chance that he would have been the person selected to be on furlough. From 16 June 2020 to 31 July 2020 is 46 days. There should be a 20% deduction from compensation from 1 August 2020 to date (21 September 2021) because there was a 20% chance of the claimant being fairly dismissed for redundancy.

94. The compensatory award should therefore be calculated as follows:

	£	£
16.6.20 to 31.7.20 46 days @ £397 p.w. LESS 4% for chance of being on furlough	2608.86 (104.35)	2504.50
1.8.20 to 21.9.21 417 days @ £397 p.w. LESS earnings in alternative employment	23649.86 (14,441.76)	
	9208.10	
LESS 20% for chance of being made redundancy	(1841.62)	7367.00
Compensatory award (the prescribed element)		9871.50

95. The compensatory award is therefore £9,871.50. The basic award is £4,304. From that falls to be deducted the redundancy payment which was paid in the sum of £3,384.62. We award £500 compensation for loss of statutory rights. The total award for unfair dismissal is therefore £9,871.50 + £500 + £4,304 - £3,384.62 = £11,290.88.

I confirm that this is our Reserved Judgment with reasons in Case No: 3306136/2020 VIG and that I have approved the Judgment for promulgation.

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Employment Judge George

Date: …17 November 2021 ……..

Sent to the parties on: 2/12/2021

N Gotecha

For the Tribunal Office