



EMPLOYMENT TRIBUNALS

Claimant: 1. Ms P Salvador
2. Ms A Chen

Respondent: Jiemao Jiemao Lashes and Beauty Limited

Heard at: London Central Employment Tribunal (by video)

On: 16 September 2021

Before: Employment Judge Palca (sitting alone)

Appearances

For the claimants: In person
For the respondent: Ms S Boardman (director)

JUDGMENT

The claimants were both employees of the respondent.

The respondent is ordered to pay Ms Salvador the sum of £50,390, calculated as follows:

Compensation for unfair dismissal	£48,125
Payment in lieu of notice	£800
Untaken holiday entitlement	£1,440
Unlawful deductions from wages	<u>£25</u>
Total	£50,390

The respondent is ordered to pay Ms Chen £4,481.10 forthwith, calculated as follows:

Unauthorised deductions from wages:	£1,088.10
Breach of contract (notice pay)	£1,170.00
Untaken holiday entitlement:	<u>£2,223.00</u>
Total	£4,481.10

Recoupment provisions in relation to Ms Salvador:

Monetary award	£50,390
Prescribed element (PE)	£27,600
Period to which prescribed element relates	20.5.20-16.9.21

The amount by which the monetary award exceeds PE £22,790

Conduct of this hearing

- (1) This has been a remote hearing. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.
- (2) In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
- (3) The parties were able to contribute to the discussion and to hear all comments made and see the witnesses as seen by the tribunal.
- (4) No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.
- (5) The claimants produced witness statements and a bundle of documents, and both gave evidence on oath.
- (6) Despite not having lodged any responses to the claims, the respondent attended the hearing. Ms Boardman told the tribunal that the respondent was in the process of being wound up. Given that a search on the Companies House website recorded the company as active, the tribunal determined to continue to hear the claim, and noted that should the company be wound up, any decision in the claimants' favour would then be dealt with under insolvency rules. The tribunal also exercised its discretion pursuant to Rule 21 of the Employment Tribunal Rules of Procedure not to allow the respondent further to participate in the hearing. Ms Boardman was present throughout the hearing.
- (7) The participants were told that it is an offence to record the proceedings.
- (8) The tribunal ensured that each of the witnesses, who were in the same location, had access to the relevant written materials. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The claim

- (9) The Claimants were employed by the respondent beauty company. Ms Salvador claims that she was automatically unfairly dismissed having made a public interest disclosure, and that she is owed money for breach of contract, unlawful deductions from wages and unpaid holiday pay. Ms Chen claims for unpaid wages, 2 years' unpaid holiday pay, and unpaid pension contributions. Before considering the claims, the first issue to determine is whether the claimants, who were both engaged as self-employed consultants, are in fact employees of the respondent. The respondent has not submitted a response to the claims, and its founder, Ms S Boardman, has asserted that it is in the process of being wound up.

The issues

- (10) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:
- (11) *Employment status*
- (i) Are the claimants employees of the respondent?
- (12) *Public interest disclosure claims (PID)*
- (i) Has the first claimant made a protected disclosure? The claimant relies on the following as a protected disclosure:
 - a. Informing the respondent on 7 May 2020 that it was wrongly attributing self-employed status to its staff.
 - (ii) In this, was information disclosed which in the claimant's reasonable belief tended to show one of the following?
 - a. A criminal offence had been committed
 - b. The respondent had failed to comply with a legal obligation to pay PAYE to HMRC in relation to its staff;
 - (iii) If so, did the claimant reasonably believe that the disclosure was made in the public interest?
- (13) *Public interest unfair dismissal complaints (s103A Employment Rights Act 1996)*
- (i) Was the claimant an employee?
 - (ii) Was the making of any proven protected disclosure the principal reason for the dismissal?
 - (iii) If not, the burden is on the claimant to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected
 - (iv) Does the tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?
- (14) *Remedy for unfair dismissal*
- (i) If the claimant was unfairly dismissed, what compensation is payable?
 - (ii) if the dismissal was unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8 and subsequent cases;
 - (iii) Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A TULRCA")?

- (15) *Unpaid annual leave* (Reg 14 Working Time Regulations 1998 (WTR))
- (i) When each claimant's employment came to an end, was she paid all of the compensation she was entitled to under regulation 14 WTR?
- (16) *Unauthorised deductions* (s13 Employment Rights Act 1996)
- (i) Did the respondent make unauthorised deductions from the claimants' wages in accordance with ERA section 13 by not paying all their salary and if so how much was deducted?
- (17) *Breach of contract*
- (i) Are the claimants employees?
- (ii) If so, to how much notice were they entitled?
- (iii) Did the respondent fundamentally breach the contract of employment, entitling Ms Chen to compensation?

Facts

The tribunal determined that the material facts were as follows:

- (18) The respondent ran a beauty salon from premises throughout London, including from an office in the city.
- (19) Ms Chen was employed under a contract described as a Consultancy Agreement beginning on 20 August 2018. By the time her employment ended she was described as manager. Her basic hours were 45 hours per week, for which she was paid £13 per hour. Her weekly wage, excluding overtime and commission, was therefore £585.
- (20) Ms Salvador began her employment with the respondent on 1 October 2019, initially as PA to the founder of the business, Ms Boardman. From February 2020 she was promoted to assistant manager, carrying out beauty treatments but also continuing her PA duties. Her basic hours from that point were 40 per week, for which she was paid £10 per hour, so that her weekly wage was £400.
- (21) Each of the claimants was employed by a contract labelled a consultancy agreement, in, for the present purposes, identical terms. It contained a number of clauses including:

1. Term You shall provide your services to the Client from [date] unless and until this agreement is terminated by either party giving to the other not less than 2 weeks' prior written notice or as otherwise provided in this letter.
 - i. Duties You shall use your best endeavours to promote the interests of the Client and, unless prevented by ill health or accident, devote at least 40 Hours per week in each calendar month to carrying out the services for the Client of a Brow Specialist/Microblading Artist/Assistant Manager including related beauty services if required and not limited to eyelash lifts and tints and such other treatments as agreed between the parties (Services).
 - i. If you are unable to provide the Services due to illness or injury you shall notify Salina Boardman as soon as reasonably practicable.
 - ii. You must comply with our policies on social media, anti-harassment and bullying, no smoking, dress code, substance misuse and any other policies in force and communicated to you from time to time.

iii. You shall ensure that you are available at all times on reasonable notice to provide such assistance or information as the Client may require

lii) You have no authority (and shall not hold yourself out as having authority) to bind the Client, unless we have specifically permitted this in writing in advance

liii) We are entitled to deduct from any sums payable to you any sums that you may owe the Client at any time.

Other activities

liiii) You may be engaged, employed or concerned in any other business, trade, profession or other activity which does not place you in a conflict of interest with the Client provided that you shall give priority to the provision of the Services to the Client over any other business activities undertaken by you during the course of your engagement. However, you may not be involved in any capacity with a business which does or could compete with the business of the Client without the prior written consent of Salina Boardman.

xi. Status i. You will be an independent contractor and nothing in this agreement shall render you an employee, worker, agent or partner of the Client and you shall not hold yourself out as such.

ii. You shall be fully responsible for and indemnify the Client against any liability, assessment or claim for: i. taxation whatsoever arising from or made in connection with the performance of the Services, where such recovery is not prohibited by law; and ii. any employment-related claim or any claim based on worker status (including reasonable costs and expenses) brought by you against the Client arising out of or in connection with the provision of the Services, except where such claim is as a result of any act or omission of the Client. The Client may satisfy such indemnity (in whole or in part) by way of deduction from any payment due to you.

- (22) The clauses in the contract, relating to the indemnity, are unenforceable.
- (23) The agreements also contained identical restrictive covenants included 6-month clauses preventing non solicitation or dealing with clients in relation to the same type of business in which the claimants were involved while working for the respondents, and a three month blanket non-compete provision preventing the claimants in effect from working for any competing business during this period.
- (24) In addition, the contracts provided that the Consultant take out insurance cover. Ms Chen did, and was reimbursed for it by the respondent for the first year she worked, but not the second. Ms Salvador did not, citing the fact that the pandemic occurred shortly after she was given her new contract in February 2020.
- (25) While working for the respondent, the claimants experienced the following:
- (i) Each was engaged for a set number of hours each week, for which they would be paid whether or not they provided services to a client;
 - (ii) The claimants were given standard tasks to carry out each day, and in particular Ms Salvador was given very specific tasks to perform in her role as PA to Ms Boardman;
 - (iii) The respondent exercised control over how the claimants managed their day, for example it set out various rules with which the claimants were expected to comply regarding lunch breaks,
 - (iv) The claimants were fully integrated into the team working at the relevant location of the respondent.
 - (v) The claimants' hours were measured via clocking system, and pay was deducted should they arrive late;

- (vi) They were not able to choose the hours they worked – these being determined by Ms Boardman;
 - (vii) If they were not able to attend for work, they could not provide a substitute, although they might agree with Ms Boardman that another “consultant” to the respondent could work a particular shift.
 - (viii) The contract between the parties contained no right of substitution;
 - (ix) All holiday would have to be agreed with Ms Boardman, but no holiday payments were made;
 - (x) The claimants were required to wear the company’s uniform;
 - (xi) The respondent paid their expenses, such as travel;
 - (xii) The respondent paid for training for the claimants;
 - (xiii) The respondent provided equipment and materials for the claimants
 - (xiv) The claimants had the respondent’s business cards with their name and job title printed on them;
 - (xv) Ms Chen had a company credit card;
 - (xvi) The agreements under which the claimants worked included restrictive covenants preventing them among other things from working for competing businesses for a period after their employment terminated.
- (26) In November 2019 Ms Chen attended training on administering facials. The respondent paid for the treatment. There was no evidence before the tribunal that the claimant was contractually required to reimburse the respondent for this training should she resign.
- (27) In March 2020 most employees of the respondent were told that they were not required to attend work, because of Covid. The respondent maintained that the staff could not be furloughed because they were self-employed and not employees.
- (28) The respondent continued to require Ms Salvador to provide services, particularly in her PA role, and she continued to be paid. Her weekly hours were reduced to 10 from 13 April 2020, without her consent.
- (29) Ms Chen was not paid for the period 1-13 April 2020. Neither claimant received any holiday pay.
- (30) On 18 April 2020 Ms Boardman contacted Ms Chen and told her that if she wanted to return to work it would be on a zero hours contract. Ms Boardman maintained that this should be paid at Ms Chen’s standard hourly rate, rather than via commission. As a result of this, that day, Ms Chen gave notice to resign both orally and in writing, with immediate effect. She did not give the two week’s notice which was required. She was not paid any payment in lieu of notice.
- (31) The respondent’s staff had concerns about their employment status. Ms Salvador had several conversations with Ms Boardman concerning her, and then all staff status. On occasion in the past, there had been issues about whether the staff were legitimately described as self-employed consultants. On 7 May 2020, following legal advice from the CAB, Ms Salvador told Ms Boardman by phone that she had been advised that staff were in fact employees of the respondent, and as such should be paid via PAYE, should have various employment rights, and had the ability to be furloughed. Ms Boardman replied that her accountant had advised that it was in her business’s best interests for staff to be self-employed.

- (32) From 10 May onwards, Ms Boardman did not meaningfully engage with Ms Salvador, save via some text messages, one of which stated that the respondent's lawyer had advised that Ms Salvador should be removed from her role.
- (33) On 20 May 2020, Ms Salvador's contract was terminated by the respondent with immediate effect, ostensibly on the grounds that due to the pandemic the respondent was unable to trade and therefore did not have funds to continue to pay for her services. She was not invited to any meeting prior to being notified of the decision, nor was she given a right of appeal. She requested one, but the respondent did not reply. She received no payment in lieu of notice. £25 was deducted from her pay for the non-return of a key. There was no evidence before the tribunal that the respondent was entitled to make deductions from Ms Salvador's pay for that reason.
- (34) In about June 2020 the respondent engaged a replacement for Ms Salvador. Drew. Instagram pages from June 2020 indicate that Drew and others were carrying out work for the respondent during that month.
- (35) Ms Salvador has applied for jobs, without success. She has set up her own business, which is currently loss making, so has earned no net income from it. She has been receiving universal credit at £300 per month.
- (36) Ms Chen has also set up her own business, which began trading on 15 August 2020. Her net income from April 2021 to the date of the hearing has been in the region of £24,000. She did not have evidence for prior periods.

Law

Public Interest Disclosure

- (37) S43 of the Employment Rights Act 1996 (ERA) defines a protected disclosure. Qualifying disclosures, which include disclosures to employers, are defined to include "*any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
- (a) that a criminal offence has been committed, is being committed or is likely to be committed,*
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject...."*
- (38) S103A ERA, which is in the section of the Act dealing with circumstances where an employee may be automatically unfairly dismissed, even if she does not have the requisite two years' service, provides that "*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 made a protected disclosure*".

Employment Status

- (39) ERA 1996, s. 230(1) defines an 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*' and a "worker" as "*an individual who has entered into or works under (or, where the employment has ceased, worked under) - (a) a contract of employment, or (b) any other contract, whether*

express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

- (40) There have been many court decisions concerning employment status, the most recent being *Uber BV v Aslam and Others [2021] UKSC5*. In his judgment, Lord Reed observed that it is wrong in principle to treat the written agreements as a starting point in deciding an individual's employment status. He explained that *Autoclenz Ltd v Belcher [2011] UKSC 41* identified the correct approach as being to consider the purpose of the relevant employment legislation, which is to give protection to vulnerable individuals who have little or no say as to their working terms or conditions because they are in a subordinate and dependent position in relation to their employer. Legislation also precludes employers from contracting out of these provisions. A tribunal is entitled to conclude that the wording of an employment contract does not reflect the true arrangements between the parties, and may be "sham" designed to protect the employer from providing employment rights to his staff. The true agreement, said Lord Clark in *Autoclenz*, will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.
- (41) Other cases have highlighted other issues, such as the degree of control exercised by the employer over the individual's performance, and whether the individuals are required personally to perform the work.

Unlawful deductions from wages

- (42) S13 of the Employment Rights Act 1996 (ERA) gives workers the right not to have unlawful deductions made from their wages. "Deduction" is defined to include no payment being made at all.

Breach of Contract/non-payment of pay in lieu of notice

- (43) Reg 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (1994 Order) allows employees to bring a claim for damages for breach of a contract of employment, which arises or is outstanding at the termination of the employment, in the employment tribunal.

Untaken holiday entitlement

- (44) Reg 13 of the Working Time Regulations 1998 (WTR) entitles workers to four weeks' ordinary annual leave in each leave year. A leave year begins either on the date set out in the worker's contract or some other relevant agreement or, if there is none set out, the date the worker joined the employer, and each subsequent anniversary of that date. Where there is a

set holiday year, the leave to which a worker is entitled is equal to the proportion of that leave year remaining on the date on which his employment begins. Generally, this holiday cannot be carried forward from one year to the next.

- (45) Regulation 13A entitles workers to an additional 1.6 weeks' holiday per year, which leave may be carried forward if a relevant agreement provides. The maximum number of days holiday per year that can be taken under these two provisions is 28.
- (46) Reg 14 (WTR) entitles workers to a payment in lieu of any untaken holiday on the termination of their employment either calculated in accordance with a relevant agreement or, if there is no such contractual provision, a sum equal to the amount that would be due as determined according to the formula $(A \times B) - C$ where—A is the period of leave to which the worker is entitled under regulation 13 and 13A, B is the proportion of the worker's leave year which expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date.

Conclusion

- (47) The first issue is the nature of the claimants' employment. The tribunal must adopt a purposive approach, bearing in mind the guidance set out in Uber and Autoclenz. It must therefore look closely at the nature of the relationship between the parties, and whether the designation of the claimants as "consultants" in their contract of employment reflects the true position.
- (48) The tribunal bears in mind all the facts cited at paragraph 24 above. The reality of the situation is that the claimants worked full time for the respondent, and were under the direct control of Ms Boardman. They were required personally to perform the work, and could not provide a substitute (though they were able to swap shifts with other members of staff). For example, they were given instructions on how to work, what to do and what to charge. Their training was paid for by the respondent, and the respondent provided equipment and materials. They were paid for their basic hours whether or not there was work to do. Their employment agreements included some quite draconian restrictive covenants, that would not be suited to self-employed consultants. The facts that their agreement described them as consultants, required them to take out insurance and to be responsible for their own tax position do not detract from the reality of the situation, namely that they did in fact fall within the definition of employee. The claimants were in a subservient position and therefore found it difficult to do other than to accept the contracts they were offered. The purpose of employment law is to protect individuals and ensure they can access the legal rights to which they were entitled. The tribunal therefore determines that the claimants were employees of the respondent.
- (49) Ms Salvador claims compensation for automatic unfair dismissal, injury to feelings, compensation for untaken holiday entitlement, pay in lieu of notice, compensation for the unauthorised deduction from her wages of £25 for an office key and interest at 8% on the award.

- (50) Automatic unfair dismissal. Ms Salvador's dismissal would be automatically unfair, thereby entitling her to compensation should it be the case that the making of any proven protected disclosure was the principal reason for the dismissal.
- (51) The tribunal determined that the claimant had made a protected disclosure. She had asserted to her employer that it wrongly described her and her colleagues as self employed consultants, and was therefore in breach, among other things of the statutory provisions requiring it to account to the HMRC for PAYE, and to provide its staff with benefits such as holiday entitlement. The allegations therefore related at the very least to a breach of legal obligations imposed both by statute and contract. The disclosure was made to Ms Salvador's employer, a legitimate recipient of such information. It related to the terms and conditions not just of the claimant but of all her colleagues in a similar position. I am satisfied that the allegations were made in good faith, and that in Ms Salvador's reasonable opinion were in the public interest, namely the need to ensure that her colleagues' employment status was correct, that they all received the benefits to which they were entitled, and that tax was being properly dealt with.
- (52) The disclosure was made to the respondent on 7 May 2020. Within 3 days the respondent had effectively stopped dealing with Ms Salvador, and shortly after this collected her laptop and removed her access codes from various on line company work sites. Ms Boardman told the claimant that she had been advised to remove Ms Salvador from her role. Ms Salvador's contract was terminated with immediate effect, without notice or payment in lieu, ostensibly on the basis of redundancy. However, the respondent swiftly recruited a replacement for Ms Salvador, indicating that this reason was not the real one. It is in the opinion of the tribunal an inescapable conclusion that Ms Salvador was dismissed because she had made a protected disclosure. She was therefore automatically unfairly dismissed, pursuant to s 103A ERA.
- (53) Ms Salvador is not entitled to a basic award as she had not been employed by the respondent for two years. She is however entitled to an unlimited compensatory award. This should not include any award for injury to feelings, since Ms Salvador's complaint is for dismissal and not detriment or discrimination, and there are no special circumstances which warrant such a payment.
- (54) Ms Salvador has been unemployed since her dismissal on 20 May 2020. She has started her own business, but has yet to receive any return from it. The tribunal concluded that the claimant would be likely to succeed in her business to make an average of £400 per week within 6 months of the tribunal hearing date. The only evidence before the tribunal is that the respondent was likely to have continued to employ Ms Salvador both during the lockdown periods and after, given that a replacement was swiftly found for Ms Salvador and put to work. While the tribunal has been told that the respondent is in the process of being wound up, it is still recorded as being an active company, and there was no evidence before the tribunal that the claimant would not have continued to be employed up to the date of the hearing and in future. The claimant is therefore entitled to be compensated, at the rate of £400 per week, for her inability to earn for the period from 20

May 2020 to the hearing date (1 year 119 days, or 69 weeks) and for 26 weeks following the hearing date. This sum amounts to :

(i)	20.5.20-16.9.21	£27,600
(ii)	17.9.21-16.3.22	£10,400
(iii)	Total	£38,000

- (55) To this sum should be added £500 for loss of statutory rights.
- (56) The claimant appealed against her dismissal but received no response. The ACAS Code of Practice on Disciplinary and Grievance Procedures requires employers to hold a disciplinary meeting before taking any disciplinary action and to give employees the right of appeal against any disciplinary action taken against them. This did not happen. S 207A TULRCA provides that in the cases of unreasonable failure to comply with the Code, , if the tribunal considers it just and equitable to do so, it may increase any award it makes to an employee by up to 25%.
- (57) In this instance, the claimant was clearly summarily dismissed by the respondent for having made a protected disclosure. She was given no opportunity to present her case, or to appeal against the decision. These are particularly egregious breaches, and the tribunal determined that it was just and equitable to increase the award in relation to unfair dismissal by 25%.
- (58) The total compensation payable to the claimant for her unfair dismissal is therefore £38,500 x 1.25%., or £48,125.
- (59) Notice. Ms Salvador was neither given the two weeks' notice to which she was entitled on termination of her employment, nor paid in lieu. This amounts to a breach of contract. Her weekly wage was £400. She is therefore entitled to receive £800 compensation.
- (60) Unlawful deductions. The respondent unlawfully deducted £25 from Ms Salvador's pay for failure to return a key. While her contract of employment allows the respondent to deduct any sums she may owe to the respondent, there was no evidence before the tribunal that Ms Salvador was required to return her key to the respondent, failure to do so would result in a deduction of £25. This is therefore an unlawful deduction from wages amounting to £25.
- (61) Payment in lieu of holiday entitlement. Ms Salvador's employment began on 1 October 2019. There was no formal holiday year set out in any agreement. Her holiday year is therefore deemed to begin on 1 October each year.
- (62) Ms Salvador was employed for less than one year. Reg 14 of WTR entitles Ms Salvador to be paid in lieu of the holidays to which she was entitled in her holiday year, beginning on 1 October 2019. She had been paid for no holiday days during that year. Her employment ended on 20 May 2020, by which time she had been employed for 233 days. Ms Salvador worked 5 days a week. She was therefore entitled to ordinary and additional leave each year totalling 28 days. Using the formula established by Reg 14, Ms Salvador was therefore entitled to 18 days holiday during that year. ($233/365 \times 28 = 17.87$, rounded up to 18 days). Her daily wage was £80. Ms Salvador is therefore entitled to receive £1,440 in relation to untaken holiday entitlement.

- (63) Recoupment. Because Ms Salvador was in receipt of Universal Credit, the recoupment provisions apply. These require the tribunal to notify the Secretary of State of the amount of compensation the respondent has been ordered to pay in relation to the unfair dismissal award before any uplift or reduction. The respondent is required very promptly to provide various details to the Secretary of State. The Secretary of State must notify the respondent whether he intends to exercise his right to recoup from that payment the universal credit payments he has made to Ms Salvador, within either 21 days of this hearing, or within 9 days after this decision is sent to the parties, if later (“the notification period”). The respondent is required to pay the claimant the balance of the amount due, namely £22,790, forthwith. The remainder must be paid, subject to the deduction of any amount the respondent is notified by the Secretary of State should be returned to him, either immediately following any notification, or the expiry of the notification period. Further details are set out in the Appendix.
- (64) Ms Chen seeks compensation for her unpaid wages for the period 1-13 April 2020, pay in lieu of 2 weeks’ notice, holiday pay for untaken holiday during both years of her employment, 2 years’ pension contributions, at 3% salary and interest at 8% on the sums awarded.
- (65) Ms Chen was not paid for the period she worked from 1-13 April 2020, namely 1.86 weeks. Her weekly pay was £585. She is therefore entitled to compensation for unauthorised deductions from her wages of £1,088.10.
- (66) Ms Chen was entitled under her contract to two weeks’ notice, and required to give such notice. Although she resigned with immediate effect, the tribunal concluded that this was in response to a proposed fundamental breach of her contract of employment with the respondent, namely being told that should she continue to work for the respondent her contract would have to be changed to a zero hours contract. In view of this fundamental breach of her contract of employment, Ms Chen is entitled to compensation for her notice period. The respondent has alleged that the claimant should deduct from this sum the cost of training for which the respondent paid in late 2019. However, when the respondent paid this sum, the evidence before the tribunal is that it was never agreed that the sum should be reimbursed should Ms Chen resign. Therefore, no deduction is authorised from this payment. Ms Chen’s weekly pay was £585. She is therefore entitled to compensation for breach of contract in the sum of £1,170.
- (67) Ms Chen’s employment began on 20 August 2018. There was no formal holiday year set out in any agreement. Her holiday year is therefore deemed to begin on 20 August each year. While Ms Chen wishes to receive holiday payments to which she was entitled during her first year of employment, she is out of time for doing so, and has no right to carry holiday forward without the respondent’s consent.
- (68) Reg 14 of WTR however entitles Ms Chen to be paid in lieu of the holidays to which she was entitled in her second holiday year, beginning on 20

August 2019. She had been paid for no holiday days during that year. Her employment ended on 18 April 2020, by which time she had been employed for 243 days during her second holiday year. Ms Chen worked 5 days a week. She was therefore entitled to ordinary and additional leave each year totalling 28 days. Using the formula established by Reg 14, Ms Chen was therefore entitled to 19 days holiday during that year. ($243/365 \times 28 = 18.65$, rounded up to 19 days). Her daily wage was £117. Ms Chen is therefore entitled to receive £2,223 in relation to untaken holiday entitlement during her second leave year.

- (69) Ms Chen has claimed for the pension contributions to which she says she was entitled as an employee. However, there is no separate ground upon which this head of damages can be claimed, and this element of the claim is therefore not awarded.
- (70) Both claimants have claimed for interest on their awards. However, neither have made discrimination or detriment claims, and there are no special circumstances in relation to the claims. Therefore no interest is awarded.
- (71) In conclusion, the total sum that the respondent is ordered to pay Ms Salvador is £50,390, and the total sum the respondent is ordered to pay Ms Chen is £4,481.10.

Employment Judge Palca

17th Sept 2021

Sent to the parties on:

20/09/2021

For the Tribunal:

ANNEX TO THE JUDGMENT (PROTECTIVE AWARDS)

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance and Income Support The following particulars are given pursuant to the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996, SI 1996 No 2349, Regulation 5(2)(b), SI 2010 No 2429 Reg.5.

The respondent is under a duty to give the Secretary of State the following information in writing:

- (a) the name, address and National Insurance number of every employee to whom the protective award relates; and
- (b) the date of termination (or proposed termination) of the employment of each such employee.

That information shall be given within 10 days, commencing on the day on which the Tribunal announced its judgment at the hearing. If the Tribunal did not announce its judgment at the hearing, the information shall be given within the period of 10 days, commencing on the day on which the relevant judgment was sent to the parties. In any case in which it is not reasonably practicable for the respondent to do so within those times, then the information shall be given as soon as reasonably practicable thereafter.

No part of the remuneration due to an employee under the protective award is payable until either

- (a) the Secretary of State has served a notice (called a Recoupment Notice) on the respondent to pay the whole or part thereof to the Secretary of State or
- (b) the Secretary of State has notified the respondent in writing that no such notice is to be served.

This is without prejudice to the right of an employee to present a complaint to an Employment Tribunal of the employer's failure to pay remuneration under a protective award.

If the Secretary of State has served a Recoupment Notice on the respondent, the sum claimed in the Recoupment Notice in relation to each employee will be whichever is the lesser of:

- i. the amount (less any tax or social security contributions which fall to be deducted therefrom by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Secretary of State receives from the employer the information referred to above; OR
- ii. the amount paid by way of or paid as on account of Jobseeker's Allowance, income-related Employment and Support Allowance or Income Support to the employee for any period which coincides with any part of the protective period falling before the date described in (i) above.

The sum claimed in the Recoupment Notice will be payable forthwith to the Secretary of State. The balance of the remuneration under the protective award is then payable to the employee, subject to the deduction of any tax or social security contributions.

A Recoupment Notice must be served within the period of 21 days after the Secretary of State has received from the respondent the above-mentioned information required to be given by the respondent to the Secretary of State or as soon as practicable thereafter.

After paying the balance of the remuneration (less tax and social security contributions) to the employee, the respondent will not be further liable to the employee. However, the sum claimed in a Recoupment Notice is due from the respondent as a debt to the Secretary of State, whatever may have been paid to the employee, and regardless of any dispute between the employee and the Secretary of State as to the amount specified in the Recoupment Notice.