



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Bruin

Respondent: Ms R Silk

Heard at: London Central (remotely by CVP)

On: 23 May 2022

Before: Employment Judge Heath

Representation

Claimant: In person

Respondent: In person

RESERVED JUDGMENT

1. The respondent has made unauthorized deductions from the claimant's wages amounting to **£2203.72 gross**, and must pay her this sum.
2. The respondent must pay the claimant the sum of **£481.14 gross** in respect of accrued annual leave that was untaken at the termination of her employment.
3. The claimant has breached the claimant's contract of employment by not paying her for hours worked in excess of contractual hours, and must pay her **£463.32 gross**.

REASONS

Introduction and issues

1. The claimant was engaged by the respondent as a housekeeper at the respondent's family's London house in the spring and summer of 2021. From 22 April 2021 until 27 May 2021, the engagement was expressed to be a "tutorial period" during which the claimant was being trained for employment. From 27 May until 31 July 2021 the relationship was expressed to be one of employment until its termination on the 31 July 2021.

2. The claimant in her ET1, claims “*unpaid wages, holiday pay and for the unlawful deduction from wages*” during the course of her employment, which she says began on 22 April 2021. The respondent denies unlawful deductions and any shortfall in holiday pay.
3. In order to determine the claims, the tribunal has to consider the following issues:
 - a. What was the claimant’s status (worker/employment) from 22 April 2021 until 27 May 2021?
 - b. Did the respondent make unauthorised deductions from the claimant’s wages and if so, how much was deducted?
 - c. As part of the above issue, it may be necessary to consider whether any deduction was required or authorised by a written term of the contract?
 - d. What were the terms relating to overtime in the agreement between the parties, and did the respondent breach them?
 - e. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Procedure

4. At the start of the hearing, which had been listed for one day, I had not been provided with a bundle of documents the claimant had prepared. The respondent also wished me to see a copy of the claimants CV. Neither party was represented.
5. I took some reading time to read the claimant’s witness statement together with emails (dated 15 February 2022 and 19 March 2022) in which she set out the loss she claimed, the respondent’s witness statement and the documents in the bundle. The bundle was not paginated, but contained 11 different documents and around the 64 pages.
6. The claimant gave oral evidence and was questioned by the respondent; the respondent gave evidence and was questioned by claimant; and both parties gave brief closing submissions orally.
7. It was shortly before 4 pm when the case finished, and I reserved my decision.

Facts

8. I have found the following facts.
9. In around April 2021 the claimant applied for an advertisement on Gumtree for a position as a live-in housekeeper in the respondent’s household. The advert included the following: -

“Live-in Housekeeper. Work 4 days pw Mon to Thur ALL Wknds free. Package £20k/yr including accomodat (sic)

....

You are completely free Friday to Sunday with no work commitments but accommodation and food is provided 7 days a week

All wknds free.

Free Accommodation in double bedroom 24/7 + all food.

...

Total annual package of £20k + free accommodation 7 days a week + food + 4 weeks paid holiday per year

Salary is paid monthly but equivalent to £341/week + £2000 bonus if you leave having worked at least one year, giving me at least 3 weeks notice. I give the bonus because I really only want somebody who is prepared to stay for a minimum of one year, otherwise it can be so disruptive.

...

Accommodation in your own room is available to you for the whole week on days that you are working and days that you are not. (You are not obligated to live-in on your days off if you don't want to but you are obligated to live-in on your working days starting from Sunday evening.)"

10. At some point in April 2021 the claimant had an interview with the respondent. She performed well at interview, coming across as intelligent, eloquent and capable to the respondent. During the interview the respondent went through a number of the requirements of the role. The respondent showed the claimant two charts outlining in significant detail the tasks the role required to be undertaken. The respondent explained to the claimant that the hours were long that she was not looking for someone who would be out late partying and thereby unable to carry out their demanding role.
11. On a date which again is not entirely clear, the claimant had a telephone call with the respondent. It may be that she was offered the job during this telephone conversation. The claimant sent a message through the Gumtree app saying she was interested in the position of housekeeper. Amongst other things, she set out some experience she had and said that she returned to the UK from working abroad as she struggled to support herself. She mentioned she only had £80 to her name, no income from another source, no supportive family, that she was divorced and that she had no home and was living with a friend on a temporary basis.
12. At the hearing, the respondent began her cross examination of the claimant suggesting she had "*presented [her]self in [her] statement as an abused person*" in contrast with the capable eloquent person she presented as at interview. I find that the claimant's personal circumstances were such that she was potentially vulnerable to abuse, notwithstanding her intelligence and other capabilities.

13. The respondent told the claimant that she would have an initial “tutorial” engagement from 22 April 2021 onwards. On 22 April 2021, a Thursday, the claimant attended the respondent’s home to begin this engagement. She was shown a letter bearing this date which set out, at length, the basis of the engagement.
14. The letter began *“Further to our conversation I am delighted to confirm that I have offered and that you have accepted to receive tuition in relation to becoming a housekeeper in my home. As housekeeper you will be expected to perform all duties involved in looking after our home from Monday to Thursday. Following on from the tuition days I will immediately issue you with a formal contract of employment should be both decide to proceed with your employment with me”*.
15. The letter included the following: -
 - a. It set out that there would be detailed charts for most of the procedures and pieces of equipment to be used in carrying out the role.
 - b. It made clear that the aim of the tutorial period was to get the claimant to the point when she could follow each chart accurately without supervision. The tutorial would end when the claimant demonstrated her ability to follow every chart accurately in the house ticking off each task on each chart after she had completed it.
 - c. The claimant was told that she would be given guidance and explanation on *“each and every line of each and every chart”*.
 - d. It was set out *“we will probably start most but not all of the charts by completing daily tasks only to give you a feel for the house. We will return to all of the charts later in the tutorial process to learn the weekly tasks so that you understand how and when to complete the whole of every chart for every room in the house”*.
 - e. It was set out that the first stage of the tutorial would be the Morning Priority Items (“MPI”). It was envisaged that the first time this was undertaken the MPI might take a day. It was stated that once the claimant was actually doing the job the MPI should only take about 60 to 90 minutes.
 - f. The second part would be the afternoon checklist, which the anticipated should only take about 30 minutes.
 - g. The third part of the role would be the daily cleaning of the house following various cleaning charts carefully.
 - h. The respondent set out in the letter that the claimant would be consolidating stages one and two on her own but that someone would always be on hand to help. The respondent said in the letter that there were variables in terms of how long cleaning tasks would take, and that she would start to take timings so that the claimant could assess her own ability to complete daily tasks. It was envisaged that she would improve in terms of her timings.

- i. The letter set out that the three stages would be consolidated and that the claimant would be carrying out the stages working alone, but with someone around to offer assistance if required.
- j. The letter also introduced a supermarket chart and some security measures.
- k. The letter contains the following:

“For the avoidance of doubt I wish to make it clear here that I have explained to you verbally that there is a substantial cost to me associated with providing the tuition days. If you are not successful or you decide not to proceed with the job of housekeeper that will be offered to you there will be no charge for the tuition that you have received. Clearly no charge will be made by you to me for the tuition days if you decide not to proceed with the job of housekeeper or if you are not successful in securing a position with us.

Once you have successfully secured a position with us as our housekeeper a contract of employment will be signed immediately. Subsequent to the signing of our agreement I agree to pay you for all days worked after the date the signing of the contract. If you are successful in securing a position with us as our housekeeper I will also pay you for the tuition days on the proviso that you stay working as described during your tutorial period for a minimum of one year. If your employment with us ends before you have worked here for one year I will deduct the payments made for your tutorial days from any monies owing to you.

Any payments to you will be made at the same time as I normally pay salaries. As discussed at the very start of your interview salaries are paid by BACS in arrears no later than seven working days after the end of each month. So your first payment which will include payment for your tutorial days will be before the 7th working day of the month following the signing of our contract.

For the avoidance of doubt any days that you are in our home before a contract has been signed are either unpaid tuition days or rest days. No payment will be made to you or owed to you before the contract of employment has been signed.

- l. The letter went on to make reference to the outside areas of the house being covered by CCTV.
 - m. The claimant was told *“the tutorial period will end when you demonstrate your ability to follow EVERY accurately in the house alone and to complete each chart by ticking to show completion only AFTER you have completed each task – not before”*.
16. The letter did not include details of how the work would be remunerated if a contract were later signed or give details of working

hours. The letter did not refer to any financial aspect of the live-in nature of the role.

17. The bundle prepared by the claimant contained one example of the MPI sheet for June 2021. It is 20 pages long and runs to task number 80. That said, a number of tasks were broken down further, for example, 2(a)(i), 2(a)(ii), 2(b) etc. set out in detail not only the task but the manner in which it is to be performed. The sheets were printed and the claimant would have to tick off each task in turn after she had performed it. In addition to the MPI sheet there would be similar sheets for afternoon priorities and sheets for each room of the house which the claimant cleaned or worked in.
18. The respondent's family spent most weekends in Cambridgeshire. During the tutorial period the claimant was not permitted to stay at the respondent's London home for insurance purposes. The claimant went back to her friend's home in Essex, and the respondent paid her train fare. On other weekends during the tutorial period the claimant was invited to go to Cambridgeshire, but she preferred to spend time in Essex with her friend, apart from one weekend during which she stayed with the respondent and her family in Cambridgeshire. The respondent paid for the claimant's train tickets. The claimant retained these tickets and included them in the bundle.
19. The respondent verbally told the claimant that she would be working 12 hour shifts on four days per week. During the course of this tutorial period the claimant carried out work, including cleaning and other housekeeping tasks. For some of that period the respondent accompanied the claimant and let her know how she was doing. For a considerable part of this period the claimant carried out work alone. It emerged during cross examination of the claimant by the respondent that additionally, and unknown to the claimant, the respondent was monitoring her work on CCTV.
20. In response to a specific question from the tribunal, the respondent indicated that it stood to reason that the claimant would not be able to send a substitute to carry out her work as she was learning the role.
21. At some point during the tutorial element, and perhaps even before it at the interview stage, the respondent and the claimant discussed the requirements of the role. The claimant formed an understanding from these conversations that from Sunday evening to Friday morning she would be expected to be no more than 15 minutes walk away from the house. The respondent's evidence was that she did discuss the demanding nature of the role and wanted to make clear to the claimant that she was not looking for "a party animal" who would be out late at night and in difficulty starting at 7am each morning.
22. It has not been easy to resolve this factual dispute. However, on the basis of the entirety of the evidence I consider the claimant's account is more likely. The whole picture which emerged from the evidence is of the respondent retaining a very substantial degree of control over the claimant. One aspect of this is the worksheets, which I will deal with below. A requirement that the claimant stay within walking distance of the house is in keeping with this overall picture of tight control.

23. The claimant's evidence was that she quickly began to realise that dealing with all of the tasks on the MPI sheet within 12 hours was impossible. I have little difficulty in accepting her evidence on looking at the sheets. It is not simply the sheer number of tasks that is striking, but the detailed prescriptive manner in which many of the tasks (which were to be carried out in the order shown in the MPI) were to be carried out. Just as a couple of examples among many, there are detailed instructions about the rotation of avocados between the fruit bowl and the fridge, about counting cutlery, about how to carry items from the coffee table to the sink, and about how to clean stools.. The laundry instructions alone run to a page and a half and include instructions on setting alarms and sending texts about collection of dirty clothes. The impression I formed was that following the numerous tasks within the charts in the exact order they were set out, and ticking them off once done, was a feat of compliance that was practically a task in itself.
24. I accept the claimant's evidence that she found that it was taking her around six hours just to do the MPI tasks. What would happen when the claimant finished her MPI tasks would be that the respondent would discuss with her priorities for the rest of the day. I accept the claimant's evidence that the respondent would suggest to her that things should not be taking as long as the claimant was taking.
25. When the claimant finished the MPI tasks she would be allocated priorities for the afternoon by the respondent. Again, I accept the claimant's evidence that these afternoon tasks took a long time. This finding is based on the nature of the tasks set out in MPI. Whilst I was not shown sheets in relation to afternoon work (the claimant says the afternoon priority list was longer than the morning one) or individual rooms, all of the documentation in this case points towards the fact that the respondent had strong ideas about what work was to be done and how precisely the claimant was to do it. One can see how the claimant might have been daunted (or "overwhelmed" to use her words) about the magnitude of tasks set out in these sheets. It is easy to accept that the tasks would have taken a long time.
26. As the claimant cleaned or carried out other tasks in each room of the house (though there were several rooms she never cleaned, including the respondent's sons' rooms and the weekend housekeeper's room) she would send the respondent a WhatsApp message to indicate when she had started and when she had stopped cleaning the room. The idea was to get a sense of time as it would take her to complete her tasks.
27. The claimant and the respondent are both agreed that as the claimant worked on the tasks in various sheets, that the sheets were amended to try to cover issues that arose.
28. The tutorial period lasted for around five weeks until 26 May 2021. The claimant said, and I accept, that she was exhausted and was looking forward to greater independence in how she carried out her work at the point she signed the contract.
29. On 26 May 2021 the respondent presented the claimant with a letter confirming her appointment as housekeeper. The 18-page letter

expressed itself to be setting out the terms and conditions of the claimant's employment under section 1 of the ERA. The letter included the following:

- a. The claimant's employment was expressed to commence on 27 May 2021 stating "*however you will also be paid for 19 tutorial days since April 22nd on the basis that you stay working as described during your tutorial period for a minimum of one year from Thursday 27th May. If you leave before working here for one year I will deduct the payments made for your tutorial days from your final salary.*"
- b. The claimant was told the tasks would be added to those which she carried out during the tutorial period. It was stated "*Your hours per month will increase to 208 hours excluding any breaks*". The hours would be "*worked across the Monday to Thursday of each month between the hours of 7 AM and 10 PM. You are entitled to 30 minutes each day for lunch break however this is unpaid*".
- c. The letter stated "*You may not work more than the aforementioned hours without receiving from me first written authorisation to do so*".
- d. The importance of the charts was again mentioned - "*It is essential that these charts are followed with great accuracy and the records on them are meticulously updated as you work through the charts every day*".
- e. Under "Salary" the claimant was told "*You will receive a basic hourly rate of £8.91 gross of Income Tax and Employee National Insurance Contributions for those hours you work and you are authorised to do so, which will be paid monthly*". Payment was in arrears on the seventh working day after the end of each month. £8.91 was the relevant national minimum wage rate for that period.
- f. Under "Accommodation" the claimant was told "*You will also be remunerated by way of free accommodation to a reasonable standard which I have valued at £58.52 per week. Such accommodation is at my absolute discretion*". I note that this sum is the equivalent of the accommodation offset for the purposes of national minimum wage legislation.
- g. The claimant was entitled to a reasonable amount of food at the respondent's expense every day whether she was working or not.
- h. Under "Bonuses" the claimant was told "*If you resign and a minimum of 12 months of continuous employment with me has elapsed then you will receive a bonus of £2000. This bonus is only paid if you abide by ALL the rules of this contract, the typically but not exclusively that you give me a minimum of three weeks written notice of termination.*"
- i. The claimant was entitled to 1 1/3 days of annual holiday per month worked during each calendar year. She was told she was likely to be required to work on bank and public holidays.

- j. The letter set out that the claimant must arrive home from holiday no later than 10 PM the day before she starts work. Also she would be expected to be at home at 11 PM on any night before she had work the following day.
- k. The respondent reserved “*the right to hold any salary owing until your final salary payment during your notice period. If your employment ends with us before you have worked here for one year I will deduct payments made for your tutorial days from your final salary as agreed in our original letter when you agree to accept tuition for this role. This agreement is without prejudice to any Statutory Rights you have against me, such as Unfair Dismissal or Redundancy.*”
30. The claimant continued to carry out the tasks within the respondent’s household after 27 May 2021. By this point she was operating with greater independence from scrutiny by the respondent.
31. At some point in early June 2021 the claimant received wages and was sent her first payslip. She received £1753.51 gross, £1589.33 net.
32. It would appear the claimant queried the payslip, as the respondent emailed her on 10 June 2021 saying “*Not sure I understand your question but will try to answer as best I can. The payslip covers all your tutorial days in your days worked from when you arrived with us to 31/5/21.*”
33. On 18 June 2021 the claimant replied by email. She said that according to her records she had worked 20 tutorial days to 26 May, and one day, the 27 May 2021 under the signed contract of employment. She said she had received less than a full month’s wage based on four days a week x 12 hour shifts at £8.91 per hour and totaling 48 hours per week.
34. The respondent replied that the claimant had worked 19 days according to her records. The claimant replied itemising exactly which days she said she had worked which included two Fridays. She set out the calculation that she said was appropriate to her pay:
*“12 hour day at £8.91 = £106.92
I believe the Gross amount would be £2245.32 (£427.68 Gross weekly pay x 5.25 = £2245.32) (£22,339.36 would be the annual gross pay & £1853.28 would be the monthly pay)”*.
35. The respondent replied that there were two issues, the rate of pay and the number of days worked. She said she could easily explain the rate paid to the claimant the following day and would delay her departure to the country by half an hour to do so. She said there was some confusion about the days worked at the start of the tutorial and that April 25 “jumps out” as it was a Sunday. She said that she could not remember the claimant working on a Sunday and does not have a record. She said her diary showed she was not in London. She said “*I think we lost another day somewhere but I would have to go back and check over my records. Maybe you could doublecheck*”. The claimant responded that she accepted that the 25 April was an error of hers but that she needed to clear up the issue and would speak to the respondent the following morning.

36. On 19 June 2021, presumably after a conversation took place between the respondent and the claimant (although I heard no evidence on this), the claimant emailed the respondent twice.
37. In the first email she said that she believed that she needed to be paid a minimum of £1853.28 every month then rent deducted and this needs to be stated on her payslip otherwise it would appear that she was paid less than National minimum wage. She said that the £2000 bonus would need to be a bonus lump sum added on top of her salary not added into her hourly rate payable at the end of the 12 month contract not owed till the contract terminates. She said she believed she should not be charged rent as food and accommodation was stated as free in the job advertisement and there was never a statement regarding rent payments. She said she believed rent deductions to start from the 27 May as she was unaware of this until signing the contract. She said the wage slip must be higher than £1853.28, which was the equivalent of one month's pay based on 48 hours per week at £8.91. She believed she had been underpaid by £384.89 gross. She suggested that moving forward it would be better for her to be paid hourly shiftwork rather than an annual salary using timesheets. She said she did not want to work more than 48 hours per week or more than four days a week. She said that she had to cancel many calls and appointments due to working late and work interruptions outside of her working hours which had been distressing. She said the intention in taking the job was to have three days a week uninterrupted, no food or accommodation paid for in a 48-hour week salary.
38. In her second email the claimant said "*Advertisement states total annual package of £20k + food + accommodation + £2k bonus. The heading states the annual package includes accommodation. Which I interpret as no deductions for accommodation to be made as it is included in the package or at least from my gross pay of NMW*". She pointed out that the total gross annual package must be a minimum of £22,239.36 per annum to meet national minimum wage alone. She stated that free food and accommodation was stated in a job advert and that no deductions were mentioned in the tutorial contract nor in the wage slip. She set out that £2000 bonus at the end of the year on top of wages was not to be included in hourly rates as otherwise this would bring her hourly rate below national minimum wage. She said that £22,239.36 was the gross annual minimum wage which must be paid. She said that £1853.28 was the gross minimum monthly wage that she could receive to meet national minimum wage. She pointed out that the job advert had said free accommodation, which meant that no rent deductions were to be charged from her hourly rate of £8.91. She said that her gross earnings should be £22,239.36 plus free accommodation plus free food plus gross £2000 end of year bonus +4 weeks holiday a year. She pointed out that the official employment contract states rent costs but does not state that the costs are to be deducted from her gross total hourly wage. She pointed out that the tutorial contract does not state deductions for rent and pointed out that she was not allowed to live there on her days off.
39. Pausing there, I find that even without the claimant telling her this, it would be obvious to the respondent that the claimant was working long hours, probably in excess of her contracted hours. If it was not obvious, it

should have been had there been an effective way of monitoring the hours worked to ensure WTR time limits were not being exceeded.

40. At some point in early July the claimant received her wage and a payslip in respect of the June pay period.
41. On 2 July 2021 the claimant emailed the respondent saying that she was on a salary, so she needed £22,239.36 based on 48-hour week over four day pay period to be divided by 12 months so that she received consistent sum every month rather than the current calculations which were calculated as the day rate. She proposed a minimum basic income before overtime of £1853.28 minus £253.59 monthly rent which would make gross monthly pay of £1599.69.
42. The respondent replied that the salary of £22,239.36 was not one that was previously mentioned. She said that all salaries were calculated the way she had done to avoid any queries in the future regarding pay for days worked. She said that the claimant had not been authorised to work overtime and referred her to her contract. She said that she was working to a strict budget to try and manage the house. She said that the gross pay that month the been calculated at £1661.22.
43. At some point in July claimant contacted the modern slavery support unit at the Salvation Army where she received support and advice.
44. On the last four working days of July claimant was off sick. On 31 July 2021 she left the respondent's property without giving any notice. She was offered temporary housing by the Salvation Army National Referral Unit.
45. She received no further pay from the respondent.
46. Having engaged in early conciliation the claimant presented her complaint on 17 November 2021.

The law

Worker/employment status

47. Section 230 Employment Rights Act 1996 ("ERA") provides:

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means 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.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.

48. The definition of a worker in Reg 2 Working Time Regulations 1998 ("WTR") is identical in material respects to section 230(3)(b) ERA.

49. In *Uber BV and others v Aslam and others* [2021] IRLR 407 the Supreme Court held:

- a. Whether a contract is a "worker's contract" within the meaning of legislation designed to protect workers is a statutory question rather than a contractual one.
- b. The task for the tribunal is to determine whether the claimant falls within the definition of the worker so as to qualify for the rights irrespective of what had been contractually agreed.
- c. The true agreement between the parties would have to be gleaned from all the circumstances of the case, of which the written agreement is just a part. That did not, however, mean the terms of a written agreement should be ignored.
- d. Any terms which purports to classify the party's legal relationship to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment are of no effect and have to be disregarded.
- e. There is no substitute for applying the words of the statute to the facts of the individual case.
- f. In applying the statutory language, it is necessary to view the facts realistically and to keep in mind the purpose of the legislation, which includes protection of vulnerable workers from being paid too little, required to work excessive hours or otherwise being treated unfairly.

- g. The greater the extent of control of the worker the stronger case for classifying the individual as a worker employed under a worker's contract.

Unauthorised deductions from wages

50. Section 13 of the Employment Rights Act 1996 ("ERA") states that an employer shall not make deductions from wages of the worker unless they are required or authorised by statute or the workers contract, or the worker had previously signified his or her consent in writing to the deduction. Section 13(3) ERA describes a deduction in the following terms: -

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

51. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: *Greg May (Carpet Fitters and Contractors) Ltd v Dring* [1990] ICR 188, EAT. This includes that any ambiguity in the contractual provisions will be resolved in the employee's favour (otherwise known as the *contra proferentem* rule). Once it is established that there is a contractual provision authorising the type of deduction in question a tribunal may then go on to consider whether the actual deduction is in fact justified: *Fairfield Ltd v Skinner* 1992 ICR 836, EAT.
52. The tribunal can construe the worker's contract in order to determine what was properly payable (*Agarwal v Cardiff University* [2019] IRLR 657).
53. The tribunal only has jurisdiction to consider claims for ascertainable sum *Coors Brewers Ltd v Adcock* [2007] IRLR 440.

Annual leave

54. Under regulation 13 WTR, a worker is entitled to four weeks' annual leave in any leave year and under regulation 13A, a worker is entitled to a further 1.6 weeks' of annual leave.
55. Under the WTR 1998 the amount of week's leave due to a part-time worker is the same as a full-time worker, 5.6 weeks. But the pro-rata principle applies, which means in practice that a part-time worker will get fewer days holiday.
56. Regulation 14 WTR provides:

(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to

which he is entitled in the leave year under regulation 13 F3 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave 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 regulation 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.

Conclusions

Status from 22 April 2021

57. The very first paragraph of the letter of 22 April 2021 sets out in the clearest of terms an offer, acceptance and consideration. In short it is a contract.
58. The letter does not specifically classify what type of relationship the parties were said to be entering into, but the final sentence of the first paragraph envisages that it was not a contract of employment, as the parties would enter into such following successful completion of tuition.
59. To determine the terms of the agreement between the parties I may look beyond the written agreement and look at the facts realistically with an eye to the purpose of the legislation (Uber).
60. My findings are that the claimant worked under this contract, in that she performed tasks set out in the worksheets. Some of it was under the supervision of the respondent some of it was not. I specifically asked the respondent whether the claimant was, for example, sweeping parts of the the garden or cleaning the sitting room, and the answer was that she was.

61. The claimant most certainly was undertaking to do or perform personally work or services for the respondent. She could not send a substitute to perform her work. The respondent was not a client or customer of the claimant's profession or business. The reality of the situation was that she was working under a contract personally to perform work or services, notwithstanding the attempt to dress up the agreement as some kind of tutorial period preparatory to employment. I am fortified in these conclusions when I consider the degree of control, which was considerable, that the respondent subjected the claimant to. This was a worker's contract at the very least.
62. While, strictly speaking, it is not necessary for me to determine the point, the claimant appeared to be working under a contract of service, that is to say a contract of employment. In brief, there are a number of indications of this:
- a. The respondent retained a substantial degree of control over the respondent. The worksheets were tightly prescriptive and it appeared the claimant had very little autonomy indeed over how she carried out the work;
 - b. The claimant was tied to one employer, the respondent, for whom she rendered service personally and she was not free to work for others;
 - c. The work was provided in return for remuneration, albeit that the respondent sought to make this conditional on her being subsequently tied into a "contract of employment" for 12 months.
63. As either an employee or a worker, the claimant had the right not to suffer unauthorised deductions from wages and had the rights conferred in the WTR.

General observations following from conclusions on status

64. My conclusions on the employment status from 22 April 2021 lead me to make some general observations which affect how I view credibility and how I approach some of the other issues in the case.
65. I have found the claimant was an employee of the respondents from 22 April 2021. The arrangement the respondent sought to impose entirely mischaracterised the relationship. In doing so the respondent, on the face of it, sought to deprive the claimant of important rights available to workers and employees. The agreement did not allow her to accrue holiday and did not set a minimum wage.
66. In terms of remuneration for working for the respondent during the tutorial period, the agreement sought to make this entirely conditional on her effectively "passing" this period and being rewarded with a "contract of employment". If she did not pass for whatever reason, she would not get paid for her work. Furthermore, the agreement provided that any money that was subsequently paid to the claimant for working during the tutorial period would be clawed back by the respondent unless she stayed employed with the respondent for 12 months.

67. In the letter of 26 May 2021 the respondent set out that she would pay claimant for “tutorial days” but retained the right to deduct these payments from the final salary if the claimant left within 12 months.
68. Standing back and looking at the relationship between the parties as a whole, I find that this was an employment relationship from the very outset but one in which the respondent sought to deny the claimant a wage for the work she did, and other worker’s rights. When the claimant was granted the status of employee by the respondent (a status she had in fact enjoyed all along), she had hanging over her the prospect for a whole year of five week’s wages, earned for work she had performed, being taken away from her unless she worked for the respondent for a whole year. This is unfair and unlawful.
69. The respondent began her questioning of the claimant by suggesting that the claimant had presented herself as “abused”, whereas in actual fact she was intelligent, eloquent and capable. While the claimant appeared to me all of those things, she was also homeless, financially insecure, divorced and with no family support network. A combination of these characteristics can often lead to vulnerability.
70. In summing up, the respondent suggested that the claimant saw the respondent as a “soft target” and that she had been planning some sort of case against her from the beginning of her engagement. She based this allegation on the fact that the claimant had retained train tickets from April 2021. Strictly speaking this is not a matter that I have to resolve in order to determine the issues. However, in assessing the overall probabilities in finding facts in relation to the issues in dispute, assessing motivations can sometimes be helpful. I do not find, on the basis of retaining a couple of train tickets, that the claimant was planning some sort of claim all along. The contemporaneous email evidence strongly suggests that during the course of her employment, she felt that she was being underpaid and she took considerable steps to take this up with the respondent and seek some form of resolution.
71. In short, I do not find the claimant to be someone trying to affect the veneer of vulnerability and I do not find that she was plotting some sort of cynical claim from the outset. She also made appropriate concessions about the days she had worked and I found her an impressive witness.

Annual leave

72. It follows from my conclusions on status, therefore, that the claimant accrued holiday from 22 April 2021, contrary to the assertions of the respondent.
73. The claimant worked a four-day week, and was entitled under regulations 13 and 13A to 20 days holiday per annum. At the date of the termination of her contract on 31 July 2021 100 days, or 14 weeks and two days, had passed. She had taken no annual leave at this point. The calculation in regulation 14 WTR, $(A \times B) - C$ gives a figure of 5.5 days. I have set out below that the daily figure for payment is £106.92 gross.
74. The claimant is owed **£481.14** holiday pay.

Deductions from wages

75. Despite there being precision and clarity in the documentation as to how and when to replenish and clean the coffee machine or stack the dishwasher, and what order these tasks should be performed, determining the claimant's pay entitlement is less straightforward, and the documentation tending towards the opaque. Where there is any ambiguity I resolve it against the respondent employer (Greg May).
76. I would also expect any employer, especially one with such an obvious attention to detail and an apparent tendency towards scrupulous documentation (if the MPI documents are anything to go by) , to produce records to counter the claimant's evidence as to the days she has worked. As the respondent did not do this, I accepted the evidence from the claimant as to the days on which she worked.
77. Turning first to the claimant's pay. My attention was drawn to various figures: those put forward the job advert, the letter of 26 May 2021, to sums set out in the claimant's emails and sums put forward in the respondent's witness statement. I turned first to the letter of 26 May 2021, which expresses itself to be a written statement of employment particulars under section 1 ERA.
78. The letter sets out that the claimant would work 208 hours per month worked across Monday to Thursday of each week between the hours of 7am and 10pm. The salary was expressed to be at a basic hourly rate of £8.91 gross for those hours the claimant worked which she was authorised to work, and which would be paid monthly in arrears. The fact that the claimant would be paid monthly, would work certain hours per month but that pay was expressed in an hourly rate has not made understanding the claimant's pay easy. Trying to rationalise it with sums put forward in the job advert have not made things easier.
79. The letter under the heading Accommodation stated "*You will **also** be remunerated by way of **free accommodation** to a reasonable standard which I have valued at £58.52 per week*" (emphasis added).
80. There is a potential ambiguity here. Does the accommodation clause suggest that the notional value of the accommodation forms part of her remuneration for the hours worked? In favour of that interpretation might be the fact that £58.52 per week is the accommodation offset which can form part of the national minimum wage. However, that is not expressly set out.
81. The highlighted words strongly suggest that accommodation would be in addition to the financial remuneration. The word "also" connotes this element being in addition to the financial remuneration. The interpretation contended for by the respondent would much more elegantly be expressed by words to the effect of "your accommodation, valued at £58.52 per week, is part of your remuneration", or something similar. The reference to "free accommodation" also suggests that she will gain the benefit of this accommodation without having it deducted from her earnings.

82. I conclude that the claimant's monthly wage is based on 208 hours per month at national minimum wage £8.91. This amounts to £1853.28 gross per month, or £22,239.36 per annum. It would also amount to a daily rate of £106.92 gross.
83. The respondent in her witness statement at paragraph 10 suggests that "*the law requires that an amount... is attributed to the employee as a benefit*". She linked to the gov.uk webpage on the national minimum wage accommodation offset. The accommodation offset is a sum which an employer can take into account and offset for the purposes of national minimum wage. If there is an obligation to attribute to an employee the accommodation offset as a benefit, this webpage does not set it out.
84. As to the claimant accepting, or more probably acquiescing, to some sort of accommodation offset in email correspondence, this does not affect how I construe the contract. I did not find that this created some sort of variation of the contract.
85. I indicated earlier that the tutorial letter of 22 April 2021 set out that the respondent would pay the claimant for "*all days worked*" once the "employment" contract was signed, but does not set a rate. I consider that the claimant is to be remunerated for the tutorial period of her employment at the same rate as the rest of it in the absence of any alternative rate being put forward. It cannot be any less, or that would breach the national minimum wage legislation.
86. I have considered carefully the claim for overtime. There are a number of problems with it being considered as a deduction from wages claim. As set out above, section 13 ERA is for claims for ascertainable sums. My understanding of the section is that it would not be appropriate in a claim where I am, effectively, being asked to accept a rough estimate of hours above contractual hours and compensate the claimant for these. I am therefore not able to point to an ascertainable sum.
87. I accept the claimant's evidence that she was often working more than 12 hours a day, and would be prepared to accept that this was sometimes an hour and a half a day. I accept her evidence on this for a number of reasons: -
- a. First, looking at the employment relationship as a whole, and in particular the attempt to deprive the claimant of her workers'/employment rights and make payment of her wages for the tutorial period conditional on her locking into employment for a year, leads me to believe that treating the claimant fairly as regard payment was not a priority of the respondent;
 - b. The MPI documentation suggests the claimant had a large number of tasks to complete and needed to document her completion of them. That it would take a long time to complete her tasks each day is not difficult to believe;
 - c. The stipulation in the 26 May 2021 letter that 12 hours a day is to be worked between the hours of 7am and 10pm gives scope for the claimant going over her hours. A start time and a finish time makes it easy to see whether additional hours have been worked.

When there is a window in which hours are to be worked it is easy to see how work might expand to fill the time available for its completion. All the more so when, as here, there appears to be no means of measuring or recording hours put in place by the respondent;

- d. The claimant made contemporaneous complaints in email that she was working over her hours, and suggested ways of addressing the issue, which were not taken up by the respondent.
88. The claimant's witness statement suggests that she never finished work on time and would often have to stop work in the evening while the respondent's family used the kitchen and then would restart later. She said that she sometimes did not finish until 11pm.
89. I would be prepared to accept that overall the claimant would have worked on average an hour a day over her hours. This is very much a rough estimate based on all the evidence that I have heard.
90. How to treat this if not a deduction from wages? This has not been easy, in part because it is not easy to construe the agreement between the parties.
91. Doing the best I can in the circumstances, I bear in mind that the claimant was on the minimum wage. I consider that the window of 15 hours each day in which to work 12 hours a day coupled with a complete lack of a mechanism to monitor hours meant that there was a distinct (perhaps even strong) likelihood that the claimant would end up working additional hours.
92. While there was a sentence in the letter which stated "*You must not work more than the aforementioned hours without receiving from me first written authorisation to do so*" this could not operate so as to mean that the claimant's effective hourly remuneration would fall below the national minimum wage. If she worked more than her 48 hours per week but was only paid for 48 hours per week then she would receive less than national minimum wage for her hours worked.
93. The letter of 26 May 2021 set out an hourly rate of £8.91 "*for those hours you work and you are authorized to do so*". It is right that there was no written authorisation for extra hours. However, as I have set out above, the 15 hour window within each 4 day week in which to work hours made it difficult to track hours. I also found that it should have been obvious to the respondent that the claimant was exceeding her hours, had she had some reasonable method of monitoring the hours worked by someone who is working the maximum number of weekly hours under the WTR without an opt-out. As the respondent did not reasonably monitor the hours, it would seem grossly unfair if she were to benefit from the fact that extra hours were not authorised. All the more so in circumstances where it meant that the claimant would be remunerated less than the national minimum wage.
94. In all the circumstances I consider that it was a term of the contract that the claimant would receive £8.91 for the hours that she worked. I conclude, on the claimant's evidence provided in her email 19 March 2021, that she worked 52 days. On average she worked an hour extra per

day. In breach of her contract of employment she was not remunerated for those hours. She is entitled to damages of $52 \times \text{£}8.91 = \text{£}463.32$.

95. In respect of standby time, while I accept that the respondent probably did say something along the lines of wanting the claimant to be within 15 minutes of the home on working days out of hours, I do not consider that there was a requirement either to work or be available for work. I therefore conclude the claimant is not entitled to claim payment for this time.

96. I turn now to the figures.

7/6/21 payslip

97. The claimant was paid a gross sum of £1753.51. Part of this period was the tutorial element for which the claimant was to be paid for all hours worked. I accept the evidence that she worked for 21 days. In her email of 15 February 2021 the claimant also claims the two bank holidays. I cannot see the basis for this claim, and I do not see her pursuing it contemporaneously in employment. 21 days at a daily rate of gives a figure of £2245.32.

98. On the occasion of her first payslip, therefore, the amount properly payable to the claimant was £2245.32 the amount paid was £1753.51. The amount of the shortfall was **£491.81 gross**.

7/7/21 payslip

99. The amount properly payable on the occasion of this payslip was the monthly gross sum of £1853.28. The amount paid was £1661.22. The amount of the shortfall was **£192.06 gross**.

7 August 2021

100. No payslip was provided and no monies paid. The amount properly payable in respect of this occasion for payment was £1519.85. The amount of the shortfall was **£1519.85**.

Overall conclusion and sums due to the claimant

101. The following sums are due to the claimant from the respondent:

Unauthorised deductions

7/6/21	£491.81 gross
7/7/21	£192.06 gross
7/8/21	£1519.85 gross
Total unauthorised deductions	<u>£2203.72 gross</u>
Holiday pay	<u>£481.14 gross</u>
Breach of contract (overtime)	<u>£463.32</u>

Grand total

Case No: 2207147/2021
£3148.18

Employment Judge **Heath**

6 June 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
07/06/2022..

FOR EMPLOYMENT TRIBUNALS