**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4109710/2021**

**Held in Glasgow on 8 March 2022; 31 May 2022 and 1 June 2022**
**Deliberation day on 6 June 2022**

**Employment Judge P O'Donnell**

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| **Mr Arshid Malik** | **Claimant**<br>**In Person** |
| **A&R Invesment Ltd** | **Respondent**<br>**Represented by:**<br>**Mr Raza - Manager [for 8 March 2022] and Mr Chehal – Representative [31 May 2022 and 1 June 2022]** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is as follows:-

1. The claims for unlawful deduction of wages are well founded and the Claimant is awarded the sum of £4394.59 (Four thousand three hundred ninety four pounds and fifty nine pence).

2. The claim for holiday pay is well founded and the Claimant is awarded the sum of £1051.82 (One thousand fifty one pounds and eighty two pence).

3. The Tribunal makes a declaration that the Respondent breached the Claimant's right to an itemised payment statement under s8 of the Employment Rights Act 1996.

4. The Tribunal makes a declaration that the Respondent breached the Claimant's right to a written statement of initial employment particulars under s1 of the Employment Rights Act 1996.

5. The Tribunal makes an additional award under s38 of the Employment Act 2002 of £872 (Eight hundred and seventy two pounds)

## REASONS

### Introduction

1. The Claimant has brought a range of complaints against the Respondent.

2. The primary complaint relates to alleged deductions of wages which can be broken down into the following elements:-

    a. That the Claimant was paid less than the National Minimum Wage over the whole period of his employment.

    b. That he was paid less than he should have been during the period of the pandemic. This breaks down further into allegations that his furlough pay was calculated using the wrong full-time salary, that certain payments were not made at all and the allegation regarding the National Minimum Wage set out above.

    c. That the holiday pay paid to him on the termination of his employment was less than should have been paid.

3. The Respondent resists these claims and the dispute hinges on the question of whether the Claimant was, as he alleges, employed to work 25 hours a week and was paid £187.50 a week or whether, as the Respondent alleges, the Claimant was employed for 11 hours a week (reducing to 10 hours a week after a certain date) and paid £100 a week.

4. The Claimant also brings a claim that he was not provided with a statement of main terms and conditions in terms of s1 of the Employment Rights Act. The Respondent concedes that they did not provide such a statement to the Claimant.

5. Finally, the Claimant alleges that his right to itemised pay statements was breached and that these were not provided at the time he was paid. The Respondent resists this on the basis that they say such statements were provided either at the time or later.

6. Evidence was led before the Tribunal by both parties and submissions were made in relation to a dispute over the amount of notice pay paid on the Claimant's termination. No such claim was pled in the ET1 and it had not been added by way of amendment as had the claims relating to payslips and the statement of terms and conditions. At the outset of the hearing, the Tribunal identified to the parties the claims which it understood it was being asked to determine and parties confirmed that the Tribunal's understanding was correct. A claim in relation to notice pay was not identified and so the Tribunal does not consider that such a claim was before it for determination.

**Evidence**

7. The Tribunal heard evidence from the following witnesses:-

   a. The Claimant.

   b. Shazia Malik (SM) – the Claimant's wife.

   c. Iqraa Malik (IM) – the Claimant's daughter.

   d. Hassan Malik (HM) – the Claimant's son.

   e. Sheroz Malik (SM2) – a friend of the Claimant's family.

   f. Riaz Ahmed (RA) – owner and director of the Respondent.

   g. Amjad Raza (AR) – Respondent's manager.

   h. Amin Ghosal (AG) – a friend of RA.

   i. Adil Naseem (AN) – one of the Respondent's employees.

   j. Selina Snooks (SS) – an employee at the accountancy firm used by the Respondent.

8. In terms of the bundle of documents, the Claimant produced a bundle for the first hearing comprised of documents to which he intended to refer and the Respondent brought two additional documents. For the continued hearing dates, the representative appointed by Respondent by that point had created a bundle which incorporated the Tribunal process, documents to which the Respondent sought to refer and the bundle produced by the Claimant at the first hearing date. The Tribunal has used this consolidated bundle when preparing its judgment and references to page numbers below are references to that bundle.

9. An unusual feature of this hearing was the number of occasions on which the Tribunal had to intervene where matters were being raised in the evidence of the Respondent's witnesses which had not been put to the Claimant in cross-examination. These were not circumstances where a witness had said something unexpected and they were, in almost every case, part of the planned examination-in-chief of those witnesses. For example, none of the evidence which AG was called to give was put to the Claimant, RA sought to dispute the contents of the document at pp59-63 but this was not challenged in cross-examination of the Claimant and nothing about a fundamental part of the Respondent's case (that is, that the Claimant did not work regular hours and provided cover as and when required) was put to the Claimant.

10. This issue led to the Claimant having to be recalled to the witness stand three times during the continued hearing. The first instance occurred before the Respondent's witnesses gave their evidence and arose from an application by the Respondent's agent.

11. In granting that application, the Tribunal took account of the following matters:-

    a. The orderly presentation of evidence is essential to a fair hearing. One aspect of this is that the party going second should put all relevant factual matters in dispute to the first party before leading their own evidence.

b. The Tribunal is under no duty to tell parties what evidence they should be leading or what matters should be put in cross-examination.

c. In this case, the Tribunal bore in mind the following specific issues:-

i. Both parties at the initial hearing date were litigants-in-person.

ii. The Respondent was given an explanation by the Tribunal at that time about the need to put their case to the Claimant in cross-examination and the consequences of not doing so.

iii. At the point, the issue to be put to the Claimant was the issue of him working as and when required. This was a fundamental issue in dispute and it was something of a double-edged sword for the Respondent. On the one hand, if they were not allowed to lead evidence on this then they are prejudiced in not being able to advance their claim and this weighed in favour of recalling the Claimant. On the other hand, even as a party litigant they must have known the importance of this issue (it is part of their pled case and they had planned to call witnesses to speak to this) so it was inexplicable why they would not put this to the Claimant; it is not some minor point that had missed but, rather, a central factual pillar of the Respondent's case.

iv. The Claimant is prejudiced by the delay in progressing the case in being recalled but would be even more prejudiced if not given the opportunity to answer the Respondent's case. Further, he is not being ambushed as this issue is pled by the Respondent.

d. Taking account of the overriding objective and the interests of justice, the balance of prejudice fell in the Respondent's favour for the Claimant to be recalled and the evidence put to him.

12. The later recalls of the Claimant occurred once the Respondent's witnesses had started giving their evidence. In those circumstances, the Tribunal considered that the Claimant would be prejudiced in not having the

opportunity to give his response to the evidence being led from the Respondent's witnesses and so recalled him to speak to those matters.

13. It was not entirely clear to the Tribunal the extent to which these issues arose from the failure of the Respondent to properly instruct their representative for the continued hearing. Regardless, the Respondent certainly did not comply with the obligation to properly present its evidence in the way it went about leading evidence from its witnesses. It was said that RA had been out of the country prior to the continued hearing which hampered instructions but the Tribunal did not consider that this was an adequate explanation; the representative had been appointed for approximately two months before the continued hearing which is more than enough time for him to be properly instructed; if RA had been out of the country for the whole of that period there was no explanation why any communication could not be carried out by telephone or other remote method; RA had not been present at the initial hearing and it was AR who had represented the Respondent so it was not clear how RA's absence prevented AR explaining what had happened at the hearing in terms of what he put to the Claimant in cross-examination.

**Dispute of fact**

14. The crux of this case was the dispute of fact between the Claimant and the Respondent about the hours which the Claimant was contracted to work and how much he was paid. If the Claimant is right that he was contracted to, and actually did, work 25 hours a week and was paid £187.50 a week then all of his claims relating to wages succeed and if the Respondent is correct that the hours were 11 and 10 hours with the Claimant being paid £100 then the claims all fail.

15. There is also a dispute about when the Claimant received his pay slips with the Respondent saying that they were provided monthly and the Claimant saying that there were not provided until much later after the dispute about his wages began.

16. For the reasons set out below, the Tribunal prefers the evidence of the Claimant and his witnesses on the issues in dispute.

17. The Tribunal should be clear that none of the reasons set out below were determinative in and of themselves. Rather, it was taking account of these as a whole that persuaded the Tribunal to prefer the evidence led by the Claimant.

18. In considering which version of events to accept the Tribunal took into account the burden of proof. In most cases, the burden of proving that there has been a deduction of wages lies with the Claimant. However, this case involves an allegation that the Claimant was paid less than the National Minimum Wage and section 28 of the National Minimum Wage Act 1998 reverses the burden of proof in such cases and it is for the Respondent to prove that the minimum wage has been paid. This is not a case where the burden lies solely on the Claimant and there is a burden on the Respondent as well.

19. The Tribunal also took into account that there were contemporaneous documents produced in evidence in which the Claimant asserted his position regarding his hours of work and pay. These were a text message sent to AR on 13 May 2020 querying the amount of furlough pay in which he asserted that his average pay was £187.50 (p318), a letter to AR dated 14 December 2020 (p89) setting out the Claimant's formal complaint about his pay and a letter to AR dated 1 January 2021 which sets out what the Claimant says was discussed at a meeting held on 22 December 2020 between the Claimant and various officers of the Respondent including AR and RA (pp59-63) in which the Claimant sets out his position in some detail. AR accepted that he had received these documents at the relevant times.

20. Contemporaneous documents can form evidence in themselves especially where, as in this case, there was no response or challenge to the contents of the documents made at the time the correspondence was sent. No-one from the Respondent (be it AR or anyone else) replied at the time to the correspondence from the Claimant to dispute what is said and the natural inference to be drawn from such a failure is that the Respondent accepted that what was said in these documents was accurate.

21. AR did give an explanation in evidence for his failure to reply which can be summarised as he was very busy and did not have the time or inclination to reply to the Claimant. At best, this reflects very badly on AR as a manager; he may well have been busy but it is a fundamental part of a manager's role to deal with staff and any queries they raise. The Tribunal does not consider that this is a particularly adequate explanation, especially where, by the time of the 1 January letter, matters had escalated to what, on the face of it, was a formal grievance about the Claimant's pay. The Tribunal considers that a reasonable employer would respond and set out their position on such a fundamental issue.

22. The Claimant had also produced his own contemporaneous record of his hours worked on dates in November and December 2020 (pp126-127). These were said by him to be part of the normal process for providing his hours to the Respondent where he would write the hours he had worked on a piece of paper and leave it in the till. The documents are provided in the form of screenshots from the Claimant's phone of pictures he took of these pieces of paper which has the date and time at the top.

23. Again, such contemporaneous documents are capable of being evidence in and of themselves although the Tribunal does bear in mind that these are documents which were created by the Claimant at a point when the dispute about his pay had arisen and were not documents which the Respondent accepted that they had seen. However, the Tribunal does consider that these documents do weigh in the Claimant's favour where they are consistent with other evidence and the evidence is viewed in the round.

24. By contrast, with the exception of payslips (which the Tribunal will comment on below), the Respondent produced no contemporaneous documents at all. There were, for example, no time sheets recording the Claimant's hours or anything else which supported their assertions regarding the hours he worked.

25. Given that it was the Respondent's case that the Claimant worked as and when required rather than fixed hours, the Tribunal would expect there to be

some means by which the Respondent monitored the Claimant's hours to ensure that he was working his contractual hours each week.

26. Further, other than the payslips, there was no documentary evidence showing the payments made to the Claimant. It was clearly part of the Claimant's case that he did not accept that the payslips were accurate and so the Respondent was aware that more evidence might be required. For example, although it was common ground that, up until he was furloughed, the Claimant was paid cash in hand and so payments to him would not appear on the Respondent's bank statements, such payments to the Claimant would be recorded in the Respondent's accounts and these could have been produced. Further, the Claimant was paid by bank transfer when he received furlough payments and it was his evidence that certain of the sums recorded on the payslips were not made in whole or in part. A copy of the Respondent's bank statement showing those payments would have provided evidence that they were made but this was not produced.

27. Turning to the payslips themselves, the Tribunal did not find these to be particularly reliable evidence for the following reasons:-

    a. The sums recorded on the payslips were not based on any external evidence of the hours the Claimant had worked each month but rather on the instruction from the Respondent to their accountant that the Claimant is being paid a fixed sum every month.

    b. The accountant was not involved in making any payment to the Claimant and simply produced the payslips for the Respondent. SS could not, therefore, provide any evidence of what was actually paid.

    c. The payslips all record that the Claimant was paid by BACS transfer whereas it was common ground that the Claimant was paid cash in hand up until he went on furlough. This, of course, could be a simple administrative error and if this was the only issue with the payslips then the Tribunal may not have given it much weight. It is, however, one of a number of factors which has been taken into account.

d. The first payslip dated 30 September 2019 (p190) shows a payment for the whole month which is inconsistent with the information used to calculate the Claimant's holiday pay. The detail of this is recorded in an email from SS to the Respondent's former agent at p48 and states that the start date for the Claimant is 23 September 2019. In her evidence, SS confirmed that this was the information held in the payroll data for the Claimant. There was no adequate explanation for this discrepancy.

e. As noted above, the Claimant disputed in his oral evidence that certain payments recorded in the payslips were not made in whole or in part and the Respondent produced no supporting evidence.

f. The Respondent asserts that the Claimant worked as and when required but the payslips, which are the Respondent's documents, show a consistent payment every month. The industrial experience of the Tribunal is that those who work on an "as and when required" basis tend to see their wages fluctuate depending on the hours worked. It can be possible that someone could work the same total hours on such a basis but, in the absence of any evidence about how the hours were recorded and monitored, the Tribunal has no evidential basis to conclude that this has happened in this case.

28. Broadly, the Tribunal found the quality of the evidence led by the Respondent to be lacking in detail. For example, part of the Respondent's case was that the Claimant did not work fixed hours but, rather, provided cover where it was required. However, they led no evidence detailing how this was organised in terms of who informed the Claimant of when he would be working, when he was informed and, as noted already, how this was monitored. Further, it was said that the Claimant did not work every Friday but no evidence was led about which Fridays the Claimant had not worked. This is all evidence which is in the power of the Respondent to produce but they did not do so.

29. On the other hand, the evidence from the Claimant and his witnesses was consistent with his position that he worked the same hours (with some

overtime) on the same days each week and was of the quality which the Tribunal would expect in such circumstances; his wife confirmed that he received at least £187.50 each week which he handed to her to add to the household finances; his daughter confirmed that she brought him lunch and dinner each day he worked to ensure he ate because he was diabetic; his son and family friend confirmed that, when the Claimant's car was in need of repair, they would drive him to work and collect him at the same times and days each week.

30. A submission was made that little weight should be placed on the evidence from the Claimant's family because they are his family. The Tribunal does not consider that simply because they have a close connection to the Claimant, these witnesses are inherently unreliable, lacking in credibility or that little weight should be give to what they said. Rather, their evidence should be assessed in the same way as any other evidence is assessed.

31. Indeed, a similar argument could be made for the evidence of the Respondent's witnesses all of whom had a close connection to the Respondent being the owner, a friend of his, a manager and a current employee. The Tribunal would reject such an argument in respect of the Respondent's witnesses and carries out the assessment of their evidence in the same way as it has for the Claimant's witnesses.

32. Much was made of the Claimant not raising a dispute about his wages until December 2020 and that this was more than a year after he started. It was argued that this showed that the Claimant had accepted that he worked 11 (or 10) hours for £100 a week. However, the Tribunal does not consider that this provides the Respondent with the assistance which they think it does and, in fact, provides more assistance to the Claimant's case for the following reasons:-

    a. It is not factually correct to say that the Claimant had not raised a query until December 2020. He first raises a query in May 2020 in his text to AR (p318) querying his furlough pay and asserting his normal weekly wage to be £187.50.

b. This sequence of events is much more consistent with the Claimant's case than the Respondent's position. If the Claimant was, as he alleges, being paid £187.50 a week as had been agreed with the Respondent then there would be no reason for him to raise any query with the Respondent. It is only when his furlough pay is less than expected that he raises a query and this is entirely consistent with his case.

33. Indeed, there is a central "mystery" in this case as to why any dispute about what the Claimant was paid arose in the first place. If, as the Respondent asserts, it had always been agreed that the Claimant was to be paid £100 a week then it is strange that the Claimant in May 2020 on receipt of his first furlough payments suddenly, out of the blue and apropos of nothing asserts that he had been getting paid the very specific sum of £187.50 a week.

34. On the other hand, if the Claimant is correct that there had been an agreement that he was to be paid £187.50 a week then the question arises as to why the Respondent would calculate furlough pay at a lower wage. As was submitted, the Government is paying furlough pay and so, it is said, there is no financial impact on the Respondent.

35. The Tribunal considers that some answer to this lies in one of the passages in the Claimant's letter to the Respondent of 1 January 2021 which the Respondent sought to challenge. The passage in question is at p62 and is the paragraph numbered 3 on the page. It records a discussion between the Claimant's brother and "Riaz Qureshi" who, it is common ground, is RA (he is known to the Claimant's family as Riaz Qureshi).

36. This is not a passage of this letter to which the Claimant alluded to in evidence and it was one of the matters about which the Claimant had to be recalled as he was not cross-examined about it. It was not clear why the Respondent was at such pains to challenge what this passage recorded when it had not arisen in evidence prior to this.

37. What the passage records is that RA told the Claimant's brother that the Claimant would not receive full furlough pay because it was not possible to

show an increase in the Claimant's salary but that once lockdown was over then they would update their records to show the Claimant's correct pay. This is presumably because furlough payments were based on the wages declared to HMRC and a difference in what had been declared and what is claimed as furlough pay would be queried by HMRC.

38. This does suggest that the wages being declared by the Respondent to HMRC from the outset of the Claimant's employment were £100 a week and that this position has had to be maintained when furlough payments began. It is consistent with the Claimant only having an issue with his pay once furlough payments were being made and provides an explanation why furlough payments were being calculated on a lower amount than the Claimant was being paid.

39. Having taken into account all of these matters, the Tribunal prefers the evidence of the Claimant and his witnesses in relation to the facts in dispute in this case.

**Findings in fact**

40. The Tribunal made the following relevant findings in fact.

41. The Respondent operates an indoor five-a-side football court business which trades under the name Supersoccer.

42. The Claimant commenced employment with the Respondent on 1 September 2019 in the role of a customer services adviser. He had worked for them previously and was contacted by AR on behalf of the Respondent in the last week of August 2019 to see if he would be willing to return to the same role.

43. The Claimant was willing to return and it was agreed with AR that he would start on 1 September 2019. It was also agreed that he would be employed on the same hours as he had worked previously; this was a total of 25 hours a week, 5pm to 10pm on Friday, 9am to 5pm on Saturday and 10am to 10pm on Sunday. Similarly, it was agreed that he would be paid at the same hourly rate of £7.50 an hour which amounted to £187.50.

44. These were the hours which the Claimant worked each week. He would, on occasion, work longer hours if, for example, it took longer to close up at the end of his shifts. He would also work an extra day on a Wednesday now and again.

45. The Claimant would handwrite his hours on a piece of paper obtained from the till receipt and leave this in the till for AR to collect for the purposes of calculating his wages. He would be paid for any extra hours worked.

46. At the start of this period of employment, the Claimant asked for a contract and payslips to be provided to him as these had not been provided when he had worked for the Respondent previously. He was assured these would be provided but they were not. He chased this on a number of occasions.

47. It is a matter of concession that the Respondent did not provide the Claimant with a written document setting out the terms and conditions of his employment at any point during his employment with them.

48. The first payslip which the Claimant received was in August 2020 and was for the month of June 2020. He did not receive any other payslips until December 2020 when these were provided to him by the Respondent's accountant.

49. Up until he was put in furlough during the Covid pandemic, the Claimant was paid by cash. This was in a brown envelope which was left in the till for him to collect. The Claimant would give the envelope to his wife to add the money to the household finances.

50. The Claimant had no issue with his wages until he started to receive furlough payments which were made directly into his bank account. He received a payment from the Respondent for the sum of £256 on 11 May 2020. He did not recognise the payee and this was the first time that he had any indication of the correct name for his employer.

51. The Claimant, therefore, queried this with AR by text message dated 13 May 2020 (p318). He asks if "A&R Investment" is the Respondent and then asks how the sum has been calculated because it is less than he expected. He

asserts that his pay was £187.50 and that he understands that he should receive 80% of this. Given that he had been on furlough for 10 weeks at this point, he was expecting more than £256. There was no response to this text message.

52. During the remainder of his employment, the Claimant was on furlough for periods of time and also back at work when Covid restrictions allowed as follows:-

    a. The Claimant was on furlough from 23 March 2020 until he returned to work on 14 August 2020.

    b. The Claimant was then at work until he was put back on furlough on 9 October 2020.

    c. The Claimant remained on furlough for a period of 6 weeks until he again returned to work on 20 November 2020.

    d. The Claimant then worked for two weeks in November 2020.

    e. In December 2020, the Claimant worked for two weeks and was on furlough for two weeks.

    f. The Claimant was then on furlough from the start of January 2021 until he was dismissed on 12 February 2021.

53. In the same period, the Claimant received the following payments into his bank account (for furlough payments) or in cash (when working):-

    a. On 11 May 2020 he was paid £256 into his bank account.

    b. On 28 May 2020 he was paid £384 into his bank account.

    c. At the end of June 2020, he was paid £378 into his bank account.

    d. No payment of any kind was made in July 2020.

    e. At the end of August, a payment of £320 was made into his bank account.

f. He was paid £187.50 a week cash for the period he returned to work from 14 August to 9 October 2020, a total of eight weeks.

g. In November 2020, he received two payments into his bank account amounting to £350. He was also paid £187.50 a week for the two weeks he worked.

h. In December 2020, he received a payment of £397.16 into his bank account. He was also paid £187.50 a week for the two weeks he worked.

i. In January 2021, he received a payment of £320 into his bank account.

54. The final payment made to the Claimant consisted of £100 in respect of notice pay and £681.28 in respect of holiday pay.

55. During the period from 13 May 2020 until his dismissal, the Claimant continued to query how his payments were calculated. He made requests for his payslips in order that he could work out how his payments were being calculated. These were provided in December 2020.

56. The Claimant formalised his query in writing in a letter to AR dated 18 December 2020 (pp144-145) in which the Claimant records what was discussed at a meeting between them on that same day. The letter asserts the Claimant's position that he was paid £187.50 a week and provides two tables; the first setting out a comparison between what is shown on the payslips that he had now been provided with what was actually paid into his bank; the second setting out what he should have been paid during the same period. There was no response from AR disputing the accuracy of the contents of the letter.

57. The Claimant met with representatives of the Respondent on 22 December 2020 including AR and RA to discuss his query. The Claimant wrote to AR by letter dated 1 January 2021 (pp59-63) setting out his record of what was discussed at the meeting as well as recording other discussions that had taken place regarding the pay dispute between the Claimant's brother and RA. The letter includes the tables from the previous correspondence and

repeats the Claimant's position that he had been paid £187.50 a week. The letter also records discussions regarding holiday pay and the national minimum wage. There was no response at the time from the Respondent disputing the accuracy of the contents of this letter.

58. This letter was sent to AR again on 18 January 2021 in the same terms (p152) and there was no response to it.

59. The Claimant was dismissed on 12 February 2021.

60. The Claimant had not taken any annual leave during his employment with the Respondent.

**Claimant's submissions**

61. The Claimant made the following submissions.

62. Payslips and a contract should be given to employees but he was not given these despite chasing them. The first payslip he received was in August 2020 and was for the month of June 2020.

63. He commented on the evidence of the Respondent's witnesses and disputed the truthfulness of what was said by AN and AG. In relation to SS, she was a new employee and could provide little assistance in the case.

64. It was submitted that evidence had been produced to prove that the Claimant worked 25 hours and the Respondent had not objected to these.

65. Reference was also made to the evidence led from the Claimant's witnesses.

66. It was noted that RA had given evidence that he had not read correspondence sent by the Claimant but he was the managing director.

67. It was submitted that the Claimant could not work on an on-demand basis; they would need to know what they were doing to plan their lives.

68. In rebuttal of the submissions made on behalf of the Respondent, the Claimant maintained that when he had been interviewed to return to work for the Respondent, he had been told that his hours and rate of pay would be the

same as before. He had asked for a contract and a payslip but these had not been provided. He chased these and gave the Respondent the benefit of the doubt because of family connections.

**Respondent's submissions**

69. The Respondent's agent made the following submissions.

70. It was submitted that this was a straightforward case with limited documentation that was focussed on the question of whose version of events should be accepted. The Respondent says that the Claimant worked 11 and then 10 hours a week and that should be accepted.

71. Reference was made to p319 and it was noted that the Claimant made no complaints about his pay or his payslips until nearly a year after his employment commenced. The inference to be drawn from this is that the Claimant received £400 a month without complaint and accepted this by his conduct.

72. The Respondent's witnesses gave consistent evidence and reference was made to that evidence. It was submitted that the Claimant only called family members and this evidence should be given the appropriate weight.

73. Reference was made to the documents at p126 and 127 which the Claimant relied upon as showing hours he worked. It is submitted that the Respondent was closed on those dates and the Claimant has fabricated this.

74. The Respondent gains nothing by paying the Claimant less during furlough; the 80% of wages was paid by the Government.

75. The Claimant's P60 shows a salary of £400 a month. This was above the National Minimum Wage.

76. On holiday pay, reference was made to the calculation set out in correspondence at p68 prepared by the Respondent's accountant. It was submitted that there was no provision for holiday to be carried over. The Tribunal raised the question of the Working Time (Coronavirus) (Amendment) Regulations 2020 which allowed for carry over of annual leave during the

pandemic and it was submitted that these came too late to assist the Claimant.

77. It was submitted that payslips were sent to the Claimant by post during his employment. He had also requested them and they were sent by SS before the claim was lodged.

78. It was conceded that a written statement of main terms and conditions of employment was provided to the Claimant during his employment.

79. In light of that concession, the Tribunal asked for comments on the issue of an additional award being made under s38 of the Employment Act 2002 in the event that it upheld any element of the wages claims. It was submitted that no award should be made; there were verbal discussions about pay and hours to which the Claimant agreed. The Tribunal pointed out that s38 states that an additional award must be made (unless there are truly exceptional circumstances) and in response it was said that the award should be limited to two weeks' wages.

**Relevant Law**

80. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

81. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

82. Section 27 of the ERA defines "wages" which include any fee, bonus, commission, holiday pay or other emolument referable to a worker's employment whether payable under the contract or otherwise. Section 27(2)(b) excludes the payment of expenses from the definition of "wages".

83. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year. In normal

circumstances, annual leave under the Regulations must be taken in the relevant leave year. However, The Working Time (Coronavirus) (Amendment) Regulations 2020 amend the 1998 Regulations to allow for annual leave to be carried over where it was not reasonably practicable for a worker to take annual leave in the relevant leave year due to the effects of the pandemic.

84. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:-

*(1) This regulation applies 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] [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 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—*

*(AxB)-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.*

85. Section 8 of the Employment Rights Act states:-

*(1)* *[A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.*

*(2)* *The statement shall contain particulars of—*

*(a)* *the gross amount of the wages or salary,*

*(b)* *the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,*

*(c)* *the net amount of wages or salary payable,*

*(d)* *where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment; [and*

*(e)* *where the amount of wages or salary varies by reference to the time worked, the total number of hours worked in respect of the variable amount of wages or salary, either as—*

*(i)* *a single aggregate figure, or*

*(ii)* *separate figures for different types of work or different rates of pay.*

86. Section 11 allows for complaints of a breach of section 8 to be brought to an Employment Tribunal and, in particular, section 11(3)(b) provides (emphasis added):-

*a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions <u>does not include a question solely as to the accuracy of an amount stated in any such particulars.</u>*

87. The remedy available to the Tribunal on determination a claim for breach of section 8 is set out in Section 12(3) as being the power to make a declaration that a Respondent has failed to give the Claimant a pay statement in terms of section 8.

88. Section 1 of the 1996 Act states that an employer must give an employee a written statement setting out specific information about their terms and conditions of employment. Section 4 provides that where there are any subsequent changes to those terms then the employer must give the employee a written statement of those changes.

89. Section 38 of the Employment Act 2002 provides that where the Tribunal finds in favour of a claimant in respect of proceedings listed in Schedule 5 of the Act and the Tribunal finds that the employer was in breach of its duties under section 1(1) or 4(1) of the Employment Rights Act 1996 then the Tribunal must increase the award to the claimant by a sum equivalent to two weeks' wages and can increase the award by a sum equivalent to four weeks' wages.

90. The National Minimum Wage Act 1998 provides that a worker shall not be paid less than the national minimum wage and goes on to set out provisions relating to qualification for the NMW, powers for Regulations to be made setting out how the NMW is to be calculated, provisions relating to enforcement of the NMW and other miscellaneous provision related to the NMW.

91. Section 28 of the Act reverses the burden of proof in any civil proceedings relating to an alleged failure to pay the NMW and provides as follows:-

*(1) Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.*

*(2) Where—*

*(a) a complaint is made—*

*(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages), or*

*(ii) to an industrial tribunal under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996, and*

*(b) the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above, it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.*

*(3) Where in any civil proceedings a person seeks to recover on a claim in contract the amount described as additional remuneration in section 17(1) above, it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.*

## Decision

92. Having decided that it prefers the Claimant's evidence in relation to the facts in dispute, the Tribunal finds that the Claimant worked 25 hours a week and was paid £187.50 a week. This equates to £7.50 an hour and is, therefore,

less than the National Minimum Wage which was £8.21 up to the end of March 2020 and £8.72 thereafter.

93. There should, therefore, have been paid £205.25 a week from the start of his employment on 1 September 2019 up to 23 March 2020 when he went on furlough. He was paid £187.50 and so the Tribunal finds that there was an unlawful deduction of wages of £17.75 a week for a period of 29 weeks totalling £514.75. The Tribunal, therefore, awards the Claimant £514.75 (Five hundred fourteen pounds and seventy five pence) in respect of the unlawful deduction of wages arising from the failure to pay the Claimant the National Minimum Wage from the start of his employment to 23 March 2020 when he went on furlough.

94. The Claimant was on furlough from 23 March 2020 until he returned to work on 14 August 2020, a total of 20 weeks. If the Claimant had been paid the National Minimum Wage then his normal pay would have been £205.25 for the first week and £218 for the remaining 19 weeks. The 80% of these are £164.20 and £174.40 respectively. In total, the Claimant should have been paid £3477.80 during this period.

95. The Claimant was then at work until he was put back on furlough on 9 October 2020, a total of 8 weeks. If he had been paid the National Minimum Wage then the Claimant should have been paid £1744 (8 x £218) for this period.

96. The Claimant remained on furlough for a period of 6 weeks until he again returned to work on 20 November 2020. If he had been paid the National Minimum Wage then the Claimant should have been paid £1046.40 (6 x £174.40) for this period.

97. The Claimant then worked for two weeks in November 2020. If he had been paid the National Minimum Wage then the Claimant should have been paid £436 (2 x £218) for this period.

98. In December 2020, the Claimant worked for two weeks and was on furlough for two weeks. If he had been paid the National Minimum Wage then the

Claimant should have been paid £784.80 (2 x £218 & 2 x £174.40) for this period.

99. The Claimant was then on furlough from the start of January 2021 until he was dismissed on 12 February 2021, a total of 6 weeks. If he had been paid the National Minimum Wage then the Claimant should have been paid £1046.40 (6 x £174.40) for this period.

100. In total, therefore, for the period from 23 March 2020 until his dismissal on 12 February 2021, the Claimant should have been paid £8535.

101. The actual payments made to the Claimant during this period amount to £4655.16 and so the Tribunal finds that there was an unlawful deduction arising from a combination of a failure to pay the Claimant the National Minimum Wage when he was working, a failure to calculate furlough payments using the normal wage which the Claimant should have been paid and a failure to make actual payments.

102. The Tribunal therefore awards the Claimant the sum of £3879.84 (Three thousand eight hundred seventy nine pounds and eighty four pence) in respect of this deduction of wages.

103. In respect of his whole period of employment with the Respondent, the Tribunal finds that the Claimant was subject to an unlawful deduction of wages arising from a combination of a failure to pay the National Minimum Wage for the hours worked, a failure to pay furlough payments based on the normal weekly wage which the Claimant should have been paid in order to comply with the minimum wage and a failure to make certain payments at all. The Tribunal awards a total sum of £4394.59 (Four thousand three hundred ninety four pounds and fifty nine pence).

104. Turning to the issue of holiday pay, it had been submitted on behalf of the Respondent that the 2020 Regulations came too late to assist the Claimant but those Regulations were laid before Parliament on 27 March 2020 and came into force immediately they were made as per Regulation 1. Given that there was no contractual term setting the holiday year then the default under

the 1998 Regulations (that the holiday year starts on the first day of employment) applies, the 2020 Regulations were in force at the end of the Claimant's holiday year which began on 1 September 2019 and ended on 31 August 2020.

105. The Tribunal finds that it was not reasonable for the Claimant to have taken his holiday entitlement for September 2019 to August 2020 given the period of time that he was on furlough and so this did carry over to the next holiday year. Under Regulation 14(5) the payment in lieu of untaken holidays to be made on the termination of the Claimant's employment should include the leave carried over.

106. The Claimant had worked 5 whole months of the 2020/2021 leave year which amounts to 0.42 of the holiday year. The total entitlement at the date of termination was therefore 1.42 x 5.6 weeks = 7.95 weeks. On the basis that the weekly wage for the Claimant should have been £218 as at the end of his employment then he was entitled to a payment of £1733.10 in lieu of untaken holidays.

107. The actual payment made to the Claimant was £681.28 and so the Tribunal finds that there was an unlawful deduction of wages in respect of the payment in lieu of untaken holidays made to the Claimant and awards him the sum of £1051.82 (One thousand fifty one pounds and eighty two pence) in respect of this.

108. The Tribunal now addresses the claim relating to the right to an itemised pay statement. The right under s8 of the 1996 Act is for such a statement to be provided *"at or before the time at which any payment...is made".* The Tribunal prefers the Claimant's evidence that the payslips produced to the Tribunal were not provided to him at the time the payments were made and were provided much later when he requested them.

109. In these circumstances, the Tribunal makes a declaration that the Respondent breached the Claimant's right to an itemised payment statement under s8 of the Employment Rights Act 1996.

110. The Respondent concedes that it did not provide the Claimant with a written statement of employment particulars at any time during his employment with them. The Tribunal, therefore, makes a declaration that the Respondent breached the Claimant's right to a written statement of initial employment particulars under s1 of the Employment Rights Act 1996.

111. In light of the fact that the Tribunal has made a finding that the Respondent breached the Claimant's right under s1 of the 1996 Act and has made an award in respect of a claim listed in Schedule 5 of the Employment Act 2002 then an award under s38 of the 2002 Act must be made at the minimum amount under s38(4), that is, a sum equivalent to two weeks' wages.

112. The only question for the Tribunal is whether it is just and equitable to award the higher amount equivalent to four weeks' wages.

113. In considering this issue, the Tribunal has taken into account the following matters:-

a. There was a wholesale failure by the Respondent to comply with their obligations under s1 of the 1996 Act. This is not a case where the Respondent produced a statement which was not complete or where there was an error in what it recorded.

b. The Claimant worked for the Respondent for nearly 18 months and so there was more than sufficient time for the statement to have been provided.

c. The Tribunal has accepted the Claimant's evidence that he had requested such a document at the outset of his employment and had repeated this request when none was produced.

d. These entire proceedings could have been avoided if the Respondent had complied with s1 of the 1996 Act. It was entirely within their power to produce a statement which accurately recorded the hours the Claimant was to work and what he was to be paid. If they had then these proceedings would likely have never arisen as parties would have had a clear, written record of what they had agreed.

114. In these circumstances, the Tribunal does consider that it is just and equitable to award the higher amount. The Tribunal has found above that the Claimant's weekly wage should have been £218 at the termination of his employment and so it makes an additional award of 4 x £218 = £872 (Eight hundred and seventy two pounds).

**Employment Judge:** **P O'Donnell**
**Date of Judgment:** **15 June 2022**
**Entered in register:** **17 June 2022**
**and copied to parties**