EMPLOYMENT TRIBUNALS

Claimant: Miss K Kroenenberg

Respondent: Mr R Hutchings

FINAL HEARING

Heard at: Birmingham **On:** 1 to 2 May 2019

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondent: in person (assisted by his daughter, Miss H Hutchings)

RESERVED JUDGMENT

(1) The claimant had not been continuously employed by the respondent for 2 years when her employment ended and her unfair dismissal claim therefore fails.

(2) The claimant was wrongfully dismissed and the respondent must pay her £258.30 in damages.

(3) The respondent breached the claimant's contract of employment by not paying her the wages that were due to her, and made unauthorised deductions from her wages, and must pay her £6,822.21, which is the total amount that the claimant was underpaid.

(4) The respondent must in addition pay the claimant the sum of £198.45 in compensation for accrued but untaken annual leave under the Working Time Regulations 1998.

(5) The respondent must also pay the claimant the sum of £516.60, being 2 weeks' pay, pursuant to section 38 of the Employment Act 2002.

(6) The total sum the respondent must pay the claimant is: **£7,795.56**

REASONS

1. This is a claim for unfair dismissal, wrongful dismissal, holiday pay, compensation for accrued but untaken holiday, and unpaid wages; the unpaid wages part of the claim being claimed under the unauthorised deductions provisions, alternatively as damages for breach of contract.

2. The main issues in the case are:

   2.1 the claimant's employment status prior to August 2016 – was she the respondent's employee, in accordance with section 230(1) of the Employment Rights Act 1996 ("ERA"), or not? If she was not the respondent's employee then she was not with the respondent long enough to be entitled to bring a complaint of unfair dismissal, in accordance with ERA section 108;

   2.2 how many hours of did the claimant do for the respondent for which she is entitled to be paid? The parties agree how much the respondent paid the claimant and the respondent concedes he owes the claimant something more, in accordance with the National Minimum Wage Act 1998 ("NMWA") and the National Minimum Wage Regulations 2015 ("Regulations"). The question is: how much?

3. The law concerning 'employment status' – whether someone is an employee – is particularly complicated and to summarise it all would take up several pages of these Reasons. For the purposes of this decision, however, I need only mention two things:

   3.1 there has to be a legally binding agreement – a contract – between the 'employer' and the 'employee'. It does not have to be in writing and does not have to be at all formal, but both sides must intend the arrangement to create legal obligations;

   3.2 the legal obligations must include an obligation on the 'employer' to provide some work and on the 'employee' to carry out some work.

4. The claimant is a Dutch national. The respondent owns and runs a farm in Shipston-on-Stour, which is predominantly a sheep farm, with approximately 350 ewes (the "Farm").

5. The claimant originally worked for the respondent in 2015, in March and April, as a work experience student, as part of her academic studies. She was at a Dutch college or university, studying something to do with agriculture and/or animal husbandry, and her college or university had a formal, official arrangement with the respondent for its students to gain experience helping out with lambing. This arrangement was completely above board.

6. As I understand it, normally students at the claimant's college would only go to the respondent's farm once. However, the claimant, for various reasons of her own, wanted to return; and the respondent was willing for her to do so. She returned in March 2016 – lambing lasting from around the first week of March to around the first week of April – and, with a fellow student, again assisted the respondent.

7. The claimant's claim as put before the tribunal was to the effect that she was continuously employed by the respondent from 6 March 2016. However, she conceded in oral evidence that the arrangement in 2016 was exactly the same as

it had been in 2015 – that, in other words, she was still doing work experience as part of her studies and that, officially, her course did not end until after lambing ended. Although it is conceivable that the claimant was a "*worker*" (ERA section 230(3)) during that period from March to April 2016, I do not think she was an employee. In any event, she would not be entitled to the national minimum wage because at the time she was undertaking a higher or further education course and was required as part of that a course to attend work experience. This work would therefore fall within the exemption contained within regulation 53 of the Regulations.

8. The claimant's work with the respondent came to an end in mid-May of 2018. Her claim for unpaid wages is made only from 8 August 2016 onwards. The respondent has conceded that the claimant was an employee from that date. However, it is necessary for me to consider the claimant's employment status prior to 8 August 2016 – from, at least mid-May 2016 – because of the unfair dismissal claim, as explained above.

9. In her oral evidence, the claimant effectively conceded that she was not an employee during March 2016. At the beginning of April 2016, when she was finishing her official work experience as part of her studies, there was a discussion between her and the respondent as to whether she could stay at the Farm. It is common ground that she asked the respondent whether she could do so and he said she could. This was just before she went home. She then did go home: she left the UK on or about 4 April and returned on or about 15 April 2016.

10. The claimant's evidence about the period between April and August 2016 was, at times, rather confused and contradictory. For reasons which I shall come on to explain, I do not accept the accuracy of much of her evidence. In relation to what happened in April 2016, I prefer the respondent's evidence. The respondent tells me that his agreement with the claimant was that she could come back to the Farm to help him finish off the lambing, because he had a few ewes who were lambing late. Essentially, she could stay at the Farm and her helping with the lambing would pay her board and lodging.

11. It was not a formal arrangement of any kind – the claimant and the respondent seem to agree about this. The respondent was not envisaging the claimant staying for any length of time, nor did he think he was engaging somebody as an employee. Indeed, I do not think that at this stage there was any intention to create a legal relationship between him and her, i.e. there was no contract of any kind. I suspect he was helping her out, out of entirely laudable quasi-paternal feelings. The respondent has two daughters of not dissimilar age to the claimant and it seems that, at that time, the claimant did not have a particularly happy home life in the Netherlands. At least at the start, then, the idea was that the claimant could stay in the farm house because there was room until, effectively, she had found her feet in England. The respondent thought that she would get a job and move out after a relatively short time.

12. The next development in the relationship was at or around the start of the second week of May 2017. That is when lambing finally finished. The claimant's experience was in lambing and sheep work more generally. It was not in other aspects of farm work. The claimant did not, however, wish to leave the Farm and the respondent continued to be willing for her to stay. I note that the Farm had for many years been run simply by the respondent, with some help from his

daughters, and with another full-time member of staff, albeit that member of staff was apparently engaged, at least nominally, on a self-employed basis. In other words, the respondent had no need of another worker on the farm. His need for additional workers was limited to the busy seasons – lambing and harvest. Nevertheless, the claimant wanted to stay and the respondent (again, I suspect, out of fatherly feelings towards her), was willing for her to stay, without having to pay board and lodging, so long as she helped out with odd jobs around the Farm that she was capable of doing. I think there was at this time an element of the respondent coming up with things that the claimant could do, rather than him actually needing the claimant to do that work.

13. At this stage, I don't think the claimant was an employee. I don't think the claimant and the respondent had any contract between them because, as with the period from the beginning of April to mid-May, I don't think there was a mutual intention to enter into a legal relationship. Even if I am wrong about this, there was not a contract under which the respondent was obliged to provide work for the claimant to do. If there was a legally binding contract between them at this stage, it was a worker contract, not a contract of employment.

14. The next change in the relationship came at the end of July and the beginning of August 2016. The claimant went back home to the Netherlands between 14 July and 7 August 2016. Partly, she was going back to collect the certificate or diploma that marked the end of her course. Again, she wanted to stay living on the Farm and she asked the respondent whether she could do so. It was not a case of the respondent actively wanting her to stay on the Farm and work for him, but of him being willing for her to do so.

15. Before she went away, the two of the them had a discussion. By this stage it must have become clear to the respondent that the claimant was not just staying for a short time so as to find her feet but, if she returned from the Netherlands to the Farm in August, that she would be there rather more long term. I think that for this reason, the respondent wanted to have a more formal relationship between himself and her. The conversation he had with her was to the effect that if she returned after going home at the end of July, he would give her and she would carry out a set number of hours of work each day on the Farm. When she arrived back in the UK, around 7 or 8 August 2016, he told her that the set number of hours work would be 5 hours.

16. While the claimant was back home at the end of July, the respondent paid, by transfer into her Dutch bank account, a sum of a little over £3,000. This was by way of remuneration for the work that she had done for him in 2016 from the beginning of March, in particular for the work helping out with lambing. The respondent did not pay any further money to the claimant for the work that she did during 2016, from 8 August onwards, until January 2017.

17. This brings me to difficulties I had with the claimant's evidence and reasons why I do not accept the accuracy of that evidence.

18. The first time the claimant asked the respondent for money in any concerted way, it was shortly after the ending of their relationship in May 2018. She provided him with a piece of paper claiming wages for 5 hours a day, and claimed only for the period from 8 August 2016 onwards. In her claim form, although she suggested that she started work on 6 March 2016, she said "*Been paid alright till after I got*

back from home. Started work on August the 8th 2016, haven't been paid a proper wage since." The claim was issued on 19 July 2018, after a period of early conciliation from 18 June to 18 July 2018.

19. On 14 August 2018, after the claimant had got some advice from something called Warwickshire Employment, which is a free legal advice centre of some kind, the claimant sent the respondent what I think was a further copy of a document she had already provided him with, in which she sets out a claim for 5 hours per day from 8 August 2016 but also for what she described as "*the proper hours that I have worked for you.*" The claim for the "*the proper hours that I have worked for you*" is, similarly, a claim from 8 August 2016 onwards and not before.

20. A further document referring to August 2016, rather than earlier in 2016, is a letter or document provided to the respondent by the claimant in response to a letter that the respondent had sent the claimant in May 2018, which marked the end of the employment relationship between the two of them. As I understand it, that document from the claimant was submitted sometime in May 2018, or shortly afterwards. It is headed, "*Start of employment: August 2016*".

21. In her oral evidence, the claimant told me that in 2016, she had worked during March when assisting with lambing for perhaps 16 hours a day and then, from when she returned home in April, for 10 to 12 hours a day, 7 days a week until she again went home in July. During March 2018, she claimed that she had worked fewer hours than she had in 2016, 13 to 16 hours rather than up to 18 hours, and that she was due over £2,500 in respect of that work in 2018. It would, surely, have been obvious to her, that the £3,000-odd she was paid in July 2018 did not begin to cover her for the work that she claims she did from around 6 March 2016 to 13 or 14 July 2016.

22. Realising that this was the case led me to ask her why it was that she had never made a claim for the period before August 2016, given that it was her case (at least until part way through her oral evidence) that she was the respondent's employee and entitled to be paid the national minimum wage from 6 March 2016 onwards. She told me that this was because she had been told by the respondent, and had assumed, that she had been paid in full and properly for the period of work up to 14 July 2016 by the respondent's payment into her bank account at the end of July 2016 in the sum of £3,000-odd.

23. I suggested to the claimant that although she might well have believed his assurances in 2016, surely, by the time she was bringing employment tribunal proceedings against him in 2018 on the basis that he had not paid her properly, she would be fully alive to the possibility that his assurances about the payment in 2016 were inaccurate. She told me something to the effect that she hadn't really gone through the figures until after she had submitted her letter of 14 August 2018 and hadn't realised the discrepancy in relation to what she had been paid prior to August 2016 until it was too late. I understood from what she was telling me that she believed that once she had, in her eyes, complied with the case management order made for provision of a statement of remedy, she was stuck with whatever she had put in that statement and could not come back to it. My difficulty with that as an explanation was:

    23.1 first, that explanation is not an explanation for why, prior to 14 August 2018, she did not examine whether she had been paid accurately for the period

before August 2016, given that she was providing copious details of the hours that she said she had worked between August 2016 and May 2018. Nobody had ever told her that she could not claim in respect of the period between March and August 2016. The choice to start at August 2016 was hers and hers alone, and I note, as above, that by this stage she had received some advice;

23.2 secondly, at tribunal at this final hearing, initially she had said to me that she believed that she had been paid accurately up to August 2016. It was only when I challenged this and pointed out to her that in accordance with the case she was putting forward, namely that she had worked 10 to 12 hours each day from mid-April right the way through to mid-July, she had been grossly underpaid, did she suggest that, actually, she thought she had been underpaid for that period as well, but that she had thought that she couldn't claim for it because she had already submitted a statement of remedy or schedule of loss not including such a claim.

24. My conclusion on this is that the reason the claimant limited her claim to the period from 8 August 2016 onwards was that she did think she had been paid appropriately up to then. And the reason she thought she had been paid appropriately up to 8 August 2016 was that she was not working for the very long hours that she now claims to have been working during April, May, June and July 2016.

25. I am afraid that this inaccuracy in the claimant's evidence about what happened up to August 2016 does lead me considerably to doubt the accuracy what she has told me about what happened from then onwards. I should make clear that I do not think the claimant has at any stage been wilfully lying to me. The fact that I do not accept somebody's evidence and think that it is inaccurate doesn't mean I think they are deliberately lying. People misremember things all of the time. The ability of human beings to convince themselves that black is white is very considerable indeed.

26. There were a number of other details in the claimant's evidence that I found a little unsatisfactory and that gave me further cause to doubt the accuracy of what she now recalls. Early in her evidence (and I should mention that she did not produce a witness statement, and that, after some debate, I permitted her to give evidence orally; and that her evidence consisted of me effectively examining her in chief, but using the existing documentary evidence as the basis for my questions), we had a conversation about the arrangements for her going home from 14 July to 7 August 2016. The reason why we were having that conversation was that, potentially, that period when she was at home broke continuity of employment. On the basis of the findings I have already made, there was no employment to break the continuity of. But at the time, what I was trying to get from the claimant was whether there was a firm agreement that she would be away for a particular length of time and that on her return she would definitely start working – the kind of agreement there would be if this were an employment situation.

27. When I asked her, in this context, what conversation, if any, she had had with the respondent before she went away, she said something to the effect that she couldn't remember exactly what was discussed, but that she felt that she would have said something like, "Would it be all right if I went home for a bit?" I then asked her whether a specific date for her to come back was discussed. She told

me that the concern was not precise dates but days of the week, because the respondent would be picking her up from the airport (at that stage she couldn't drive and didn't have her own car) and that the respondent didn't want to drive to Birmingham airport on a Friday because it was too busy. Only when I started probing this and explaining to her that if, effectively, she could stay away as long as she liked and come back when she liked, so long as it wasn't on a Friday, that that might mean that there wasn't continuity of employment relationship over this break, did she start to suggest that she did have a conversation, or that she must have had a conversation, about precisely how long she would be away for. I was left thinking that, rather than telling me what had actually happened, she was changing her evidence to, as it were, 'tick the boxes' that I was telling her she would have to tick in order to have 2 years continuous service as an employee.

28. Another thing in the claimant's evidence that I found a little unsatisfactory was what she told me about the agreement to work 5 hours a day. She accepted the 5 hours a day figure was discussed, and that fits with the document that she submitted to the respondent in 2018 when first asking for money and with her original schedule of loss of August 2018. The seeming disagreement between her and the respondent at that stage was that, according to her, the expectation was that she would work more than 5 hours a day, but that any work over and above 5 hours per day would be for her board and lodging.

29. I have already mentioned the claimant's evidence that she was working 10 to 12 hours a day consistently, from April 2016 onwards. She also suggested to me that the work that she did didn't change materially between just before she went away in early July 2016 and what she was doing after she returned in early August 2016. Clearly, then, according to her, she would at all times have known that she would be working 10 to 12 hours a day. If that is right, then when she was told by the respondent that she would only be paid directly for 5 hours of work a day this meant that the cost of her accommodation – her board and lodging – was 5 to 7 hours-worth of her work per day. It was put to her in cross examination by the respondent's daughter on his behalf that it was implausible that she would have agreed to an arrangement (as she says she did), under which she was effectively being charged up to £40 or so per day for her accommodation. I agree with the point being made on the respondent's behalf by that part of the cross-examination.

30. A further issue I have with the claimant's evidence in relation to the 5 hours per day is that, at the start of her evidence, she appeared to me to accept that the conversation which she agreed she had had with the respondent about 5 hours a day was in July or August 2016. When I had asked her earlier about previous conversations in April and or May 2016, her evidence had been extremely vague. However, towards the end of her evidence, once, it seemed to me, the issues had become clearer to her and what it was she needed to prove in order to succeed in her claim had become clearer to her, she suggested that the conversation about being paid for 5 hours a day had been in early April, before she had even started working for the respondent in any capacity other than as a student doing work experience. Once again, she seemed to be trying to tailor her evidence to fit her case.

31. In addition, I have already noted it is common ground that the respondent did not directly pay the claimant anything between August 2016 and the end of the year. Even if she was only doing the 5 hours work a day the respondent concedes she

was entitled to be paid for, it is surprising she should have remained working for the respondent during 2016, given that he was not paying her any money at all. However, she was getting her board and lodging for nothing and during November 2016, he paid a total of over £800 for a car for her, including payment of an insurance premium which he put on a group discount so that the insurance was only £100-odd instead of potentially a 4-figure sum. He also paid for vehicle tax and an HPI check. Bearing this in mind, it is less surprising than it first appears that she would have stuck with the respondent for no direct pay, at least, if she was working 5 hours a day.

32. I, of course, accept that the claimant was relatively young and inexperienced in the ways of the world, that she had reasons for wanting to be in the UK other than simply wanting to work, that she enjoyed being on the Farm, and mostly had a good relationship with the respondent, that she had formed a close relationship with one of the respondent's sheep dogs, and that she was in a, to her, foreign country. But even so, it does seem to me improbable that she would have stuck at it for no money for that relatively long period of time if she were working the number of hours that she alleges she was working and not just 5 hours a day.

33. The claimant also said contradictory things about how board and lodging would be taken into account. As already mentioned, she initially said that the agreement was for her to be paid for 5 hours a week, and that anything on top of that work-wise was to go towards her board and lodging. However, later in her evidence, she suggested that she had been told that her board and lodging was going to be deducted from her wages. A number of times during the hearing, she said something to the effect that board and lodging couldn't be deducted from her wages when she wasn't being paid any wages.

34. I turn to what work the claimant was doing that she alleges took her 10 to 12 hours a day.

35. This is probably a convenient point to mention section 28(2) of the NMWA, which states: "*Where a complaint is made … to an employment tribunal under section 23(1) (a) of the Employment Rights Act 1996 …. 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.*" How that should affect my decision in this case is a question I have found difficult to answer.

36. I have already explained the difficulties and doubts I have with and about the claimant's evidence. Because of those doubts, and for reasons I shall explain in a moment, I am satisfied that the claimant worked significantly fewer hours than she is claiming she worked. The difficulty I have is that I am very far from sure how many hours she <u>did</u> work. NMWA, section 28 ("section 28") cannot mean that unless the employer proves that the employee worked a particular number of hours, the tribunal has to accept the employee's claim in full, at least not in a case like this one where the tribunal is [I am] satisfied that the employee's claim is exaggerated. Somehow, I must decide how many hours the claimant worked. In deciding how many hours the claimant worked, I have to bear in mind what section 28 says. I also bear in mind the legislation as a whole which, for example, includes an obligation on the employer to keep sufficient records, an obligation which the respondent, by his own admission, did not comply with in the present case.

37. The reason the respondent did not comply with that obligation was that he was completely unaware of it. In fact, in his mind, he was not employing the claimant at all. I think what section 28 requires me to do is, essentially, give the claimant the benefit of the doubt. But I still have to make a decision as to how many hours she worked, and I have to do that based on the evidence I have. Were the position that I thought it was possible that she had done the hours that she was claiming and had I not made a positive finding that she had not worked that much, then section 28 would apply with full force and it would simply be a case of me awarding what she had claimed.

38. The respondent has satisfied me that the claimant did not work the hours that she is claiming for. What he has more difficulties with in satisfying me that on particular days, she worked a particular number of hours.

39. It is not all that unusual, in my experience, for there to be an informal working relationship which at the time no one really thinks of in terms of a job, with particular hours of work and, consequently, no one pays much attention to how many hours of work are being done. It is almost always difficult for a tribunal to assess the value of any minimum wage claim arising out of that kind of relationship. But there are particular difficulties in undertaking that task in the present case, which don't usually arise.

    39.1 The claimant's workplace was also partly the place she was living. There was a blurred line between things she was doing which could be classified as work and things which she was doing because she actively wanted to do them for their own sake, and/or between work and things which she was doing effectively as a house guest and/or quasi-member of the respondent's family.

    39.2 Although the respondent is not relying on the 'household member' exemption in the Regulations, the claimant's case comes very close to being one where that exemption would apply. She was living in the same house as the respondent, having her meals with members of the family, and sometimes socialising with the respondent's daughters when they were home. If, for example, she helped clean the house which was her own home and in which she was living rent free, can that really be classified as work, particularly given it was not actually part of her job to clean the house?

    39.3 The claimant's main job was seeing to the sheep. If she went out by herself first thing in the morning, which is habitually what she would do, the respondent was not monitoring what she was doing, and how could he? She could be a mile or two away in a field and he had his own work to be getting on with. If she went out at, say, 6 o'clock in the morning and did not return to the farm until 11, it does not necessarily follow that she was doing 5 hours of work. She evidently enjoyed being out of doors and being with her favourite sheep dog. The respondent did not, I find, mind if sometimes, on the occasions he did check up on her pursuant to his duty to take reasonable care for her health and safety, he found she was sitting on a hay bale on her mobile phone.

    39.4 If the claimant was out for 5 hours ostensibly carrying out an activity which the respondent reasonably expected her to be able to carry out in 3 hours, this would not mean she was necessarily not working for 2 hours. It could

simply have been that she was a bit slow at carrying out that activity. A worker is entitled to remuneration for the whole of the time they are working, even if they are working slowly and even though another worker would be able to get a lot more done over the same period of time.

40. The respondent's evidence and that of the respondent's daughter, Miss H Hutchings, which I accept, is that it would take them perhaps 2 ½ hours per day to carry out the shepherding activities that needed to be done. Mr Hutchings accepted that if there was a particular problem with the sheep that needed to be dealt with, then that 2 ½ hours might increase to 3 hours or so. The gist of Mr Hutchings' evidence was that allowing the claimant 5 hours a day to do the work that she was expected to do was very generous provision.

41. The claimant was asked in cross-examination what work she carried out that, according to her, took her 10 to 12 hours per day. When answering that question, the claimant at one point said that of course it hadn't taken her 10 to 12 hours a day simply to look after the sheep. However, when asked to list what it was she did in addition, she mentioned only the following things: making the respondent a cake once a week, "*because he likes a cake*"; doing a "*couple*" of gardening jobs; cleaning and cooking; providing the respondent with lunch (that is, making his lunch at the same time as making her own). She could not think of anything else when specifically asked this question except for what she classified as work looking after, or keeping an eye on, the respondent's son.

42. What happened in relation to the respondent's son is as follows. He has a degree of autism and had prior to July of 2016 been living, unsupported, away from home. Unfortunately, he had something of a mental health crisis and moved into the Farm in late July 2016, when the claimant was in the Netherlands. He did not need looking after as such, as I understand it. What he needed was somebody there to keep an eye on him and make sure that he did not do anything that was potentially a danger to himself or others. In particular, I understand he had a tendency to go out on to the road.

43. During this period, which lasted until the respondent's son obtained his own accommodation with a full care package – around the start of January 2017 – the respondent's son lived partly at the Farm and partly with his mother, who is separated from the respondent. I accept from the respondent that his son spent about half of the time at the Farm and half the time with his mother. The respondent accepts that the claimant spent some of her time during this period keeping an eye on his son. The question is: was this work, i.e. was this something which the claimant was expected to do as part of her duties as an employee, or was it something that she did as a favour to the respondent, because she was living in the farm?

44. This is an issue I have found very difficult indeed to assess. I note the following:

    44.1 in the material I have in writing from the claimant, she mentions only two specific occasions when she was (as she alleges she was) required to be on the Farm looking after/keeping an eye on Mr Hutchings' son and was prevented by this from going out when she had wanted to, namely Bonfire Night and New Year's Eve 2016;

44.2 carers were brought in to assist with the respondent's son a few days a week, initially NHS carers and latterly a team from a company called "Perspecktive". The fact that professional carers were brought in suggests that the task of keeping an eye on the respondent's son was more of a job of work than the respondent seeks to give the impression it was in his evidence;

44.3 the claimant did some work through Perspecktive looking after the respondent's son, for which she was paid by Perspecktive. This was, as I understand it, 3 hours a day, twice a week. It lasted only for a very short time, because of a falling-out between the claimant and Perspecktive and also because, fundamentally, the claimant was interested in farming and not in adult social care.

45. This is yet another area where I found certain parts of the claimant's evidence unsatisfactory. The claimant's case is that between August 2016 and January 2017 there was a period of time when, in addition to her farming duties, she was looking after the respondent's son and a period of time when she was partly being paid by Perspecktive for looking after the respondent's son. If that evidence were accurate, I would expect to see in the claimant's written evidence about what hours she worked (which is a series of tables covering every day from 8 August 2016 to 11 May 2018):

45.1 a period in late 2016 when she was doing several hours more work than she had been doing beforehand and did afterwards;

45.2 a short period when her claim against the respondent went down again, albeit not to the same level as before she started having any caring responsibilities for the respondent's son, reflecting the time when she was doing work through Perspecktive;

45.3 the hours she was claiming for going down further, back to pre-late 2016 levels, from early January 2017 onwards, when she stopped having any caring responsibilities for him.

46. I don't see any of that. Broadly, the hours she is claiming for don't change during late 2016 into early January 2017. When I asked her questions about this, the claimant was unable substantially to explain or account for it other than by saying she had made a mistake. This mistake further undermines her credibility, in that it gives me further cause to doubt the accuracy of her evidence. This is not simply because she has put forward one bit of evidence that is inconsistent with another bit of her evidence. It is also because if I take out of account the hours spent keeping an eye on the respondent's son, I cannot see how the tasks which the claimant alleges she was carrying out could ever have taken her 10 to 12 hours a day unless for a significant part of those 10 to 12 hours a day, she was not actually working at all.

47. This is not a criticism of the claimant's work ethic. If her agreement with the respondent was that she was entitled to be paid for only 5 hours a day, however much work she did and however long it took her to do it, she was perfectly entitled to do what she liked, so long as she got all of the work done that she needed to get done. All I am saying is that I simply do not believe that from early January

2017 onwards – a time when she had no caring responsibilities for the respondent's son – she was doing, mostly, 10 or more hours work a day.

48. Weighing up all the evidence, and bearing in mind the fact that I must give the claimant the benefit of any doubt in accordance with section 28 of the NMWA, my conclusions are as follows:

    48.1 I think that when the claimant was 'keeping an eye on' the respondent's son, she was not actually carrying out work but was doing something out of a sense of quasi-familial obligation and as a favour to the respondent. I don't doubt that she preferred not to do this task and that there were occasions when it was inconvenient for her. However, her job was working as a shepherdess and on her own case (in the written evidence, at least), she did no more work for the respondent during the period when she was keeping an eye on the respondent's son than during the periods when she was not doing this;

    48.2 putting to one side the periods when the claimant was helping with lambing, which I shall come on to shortly, I am satisfied that the claimant did on average 5 hours a day of actual work – that is, doing things under her contract of employment.

49. Having rejected, as I have, the claimant's own evidence about the hours that she worked, it seems to me that in practice I am forced back to the respondent's evidence, and to his assessment of how much work there was to be done and how long it took to do, and to his agreement that she would be paid for 5 hours a day even though she would probably be doing less than 5 hours' work a day on average. Although, as I have already noted a number of times, section 28 of the Act puts the burden on the respondent to show that the claimant has been properly paid, that burden of proof does not entitle me, for example, arbitrarily to knock a couple of hours off the number of hours the claimant is claiming for, or to split the difference between the figures put forward by the claimant and those put forward by the respondent. What I decide has to be based on the evidence that is before me, however unsatisfactory. I think there is an evidential basis for me either to accept the claimant's evidence or to accept the respondent's evidence. There is none to do anything else. Accordingly, having rejected the claimant's evidence, I am almost bound to accept the respondent's; and I therefore do so.

50. The next matter that needs to be dealt with in the chronological narrative is the periods when the claimant went home and was not working for the respondent. The claimant and the respondent agree when those periods were. The first of them was from 22 January to 5 February 2017. They are highly relevant to the holiday pay claim because they were, it seems to me, effectively periods of unpaid holiday. I do not accept the respondent's suggestion that each time the claimant went away and then came back, her employment ended and then began again. I think that is an entirely artificial way of looking at things. It may well be that the respondent was never sure that the claimant would be returning, but that was because of the claimant's age and temperament, and the fact that she was going home and working a long way from home. There is no substantial evidence that, after August 2016, she ever went home for an indeterminate period, saying she didn't know when, if at all, she would be coming back; or anything like that.

51. There was no agreement between the claimant and the respondent – no contract – under which she would be paid on days when she did no work. So the claimant's holiday pay entitlement, if she has one, has to come from the Working Time Regulations 1998 ("WTR"). What that means is that her claim for pay for the time she went home, which she has never explained and which consists of nothing more than a tick in the relevant box of her claim form, cannot be a breach of contract claim and has to be a claim for unauthorised deductions from wages under the ERA. Any such claim has time limits difficulties.

52. Time limits for unauthorised deductions claim are dealt with in ERA section 23, the relevant parts of which are:

> *(2) Subject to subsection (4) an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
>
> *(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
>
> *(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*
>
> *(3) Where a complaint is brought under this section in respect of—*
>
> *(a) a series of deductions or payments, or*
>
> *(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*
>
> *the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*
>
> *(3A) Section … 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).*
>
> *(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

53. What this means in practice is that a claimant should begin the early conciliation process within 3 months of the date she should have been paid the money she is claiming, or, if her claim is about not being paid over a period of time and there is a "*series of deductions*", within 3 months of the last date she should have been paid. If she doesn't, her claim is out of time unless she can show it was "*not reasonably practicable*" for her to comply with the time limit.

54. Even if I assume that the claimant's claim for holiday pay is a single series of deductions – and that is assuming a lot – the last of them was from December 2017 to 7 January 2018. She should have been paid for December 2017 to January 2018 in February 2018 at the latest. For her claim to be in time, she would

have to have begun early conciliation in May 2018. In fact, she did not begin early conciliation until June 2018.

55. The claimant gave no evidence at all on whether or not it was "*not reasonably practicable*" for her to present her holiday pay claim on time. It is for her to show that it was and she has not done so. This means that any claim for pay for the periods of time when she went home therefore fails. In terms of what could loosely be called holiday pay, she is left with her claim for compensation for the holiday she had accrued but not taken when her employment ended, which is a claim under regulation 14 of the WTR.

56. Until relatively recently, the claimant would be entitled only to compensation for the holiday which she had accrued but not taken in the final holiday year of her employment. Under the WTR as they are drafted, read literally, holiday is 'use it, or lose it'. In other words, unless your employer expressly allows you to, you may not carry over your unused holiday entitlement from one holiday year to the next holiday year. However, the position now[1] (in accordance with the case of Kreuziger [2018] EUECJ C-619/16 and King v The Sash Window Workshop Ltd [2017] EUECJ C-214/16) is that unused holiday carries over from one holiday year to the next holiday year unless the employer takes particular steps which the respondent did not take in the present case. Accordingly, the claimant's accrued holiday compensation entitlement under WTR regulation 14 is her entitlement under WTR regulation 13 from 8 August 2016 to 11 May 2018, plus her entitlement under WTR regulation 13A for her final holiday year (8 August 2017 to 11 May 2018), less the number of days unpaid holiday that she took during that period. I shall set out the arithmetic later in these Reasons.

57. I should mention, in passing as it were, that the claim for wages, which is separate from this claim for holiday pay, does not have any time limits problems because: most of it can be brought and is being brought as a contractual claim and the time limit for that claim runs from the end of employment; because the claimant was never fully paid, there was a single "*series of deductions*" running all the way through from August 2016 to May 2018.

58. The next issue in the case is: what hours did the claimant work during lambing time – that is, approximately, March 2017 and March 2018?

59. The respondent accepts that the claimant worked around 10 hours a day during these periods. The claimant alleges that she worked between 17 and 20 hours a day in 2017 during lambing and around 15 hours a day in 2018.

60. In relation to these periods of time, I had evidence not just from the claimant and the respondent but also from Miss H Hutchings, one of the respondent's daughters. I was impressed with this part of her evidence because, despite clearly being under pressure (subconsciously; from herself) to unconditionally support her father's case, she effectively conceded that he was, to an extent, underestimating the hours of work that the claimant did.

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[1] I don't think it would be very helpful to the parties for me to go into the legal technicalities in any detail. Suffice it to say that I think it is possible purposively to interpret the WTR so as to permit the carrying over of the claimant's regulation 13 leave entitlement, and that I have to do so, in much the same way that the WTR were purposively interpreted so as to conform with other parts of the Working Time Directive in Fulton & Anor v Bear Scotland Ltd [2016] UKEAT 0010_16_0912.

61. Miss Hutchings was there from around 7 or 8 in the morning every day. This means she could not comment on when the claimant started to help with lambing, because it was common ground that the claimant was there at least from 5 am during both 2017 and 2018. Miss Hutchings agreed with her father that the claimant officially stopped work around 6 or 7 pm. Giving the benefit of the doubt to the claimant, as I am obliged to in accordance with section 28, I take that to be 7pm. Where Miss Hutchings and her father gave slightly different evidence was that, according to the respondent, there were breaks during the day on top of the alleged hour for breakfast and hour for lunch – which is how he gets to his 10 hours a day – whereas the meal breaks were the only breaks identified by her. Given Miss Hutchings and the claimant seem to be in agreement about this, I prefer their evidence to that of the respondent on the point.

62. In addition, in relation to meal breaks and whether they totalled 2 hours a day, the claimant allows one hour and the respondent has failed to satisfy me that it was more than that. My finding is therefore that the claimant was entitled to be paid, at least, for working from 5 am to 7 pm each day during lambing, with one hour's break: 13 hours per day, in other words.

63. The claimant claims more hours than that, however. First, she alleges she worked from 2 am most days in March 2017. I am afraid I simply don't accept this. Lambing is, of course, a 24-hour operation. The respondent explained to me that the way in which that 24-hour operation was managed was by him working from around 10 am till 5 or 6 am; the claimant would start at 5 am and he would effectively do a 'hand-over' to her before going to sleep; and that the other "girls" (as the respondent described them) would start at maybe 7 am; and that he had absolutely no need for somebody else to be there from 2 o'clock in the morning – that he positively did not want the claimant there from 2 o'clock in the morning.

64. Looking at the hours the claimant alleges she was working in 2017 – 17, 18, 19 hours per day; getting up at 2am most mornings – I am afraid I simply don't believe it. At this stage, in March 2017, she had been paid in total £2,000 and that was by bank transfer on 17 January 2017. It would be rather extraordinary for her to put in the amount of work that she is claiming to have put in in those circumstances. Moreover, I accept the respondent's evidence that he did not need a second pair of hands from 2 o'clock in the morning. The fact that he evidently did not need a second pair of hands at 2 o'clock in the morning in 2018 suggests that the position would likely have been the same in 2017.

65. On the balance of probabilities I prefer the respondent's evidence in this respect to the claimant's evidence. I take into account the findings I have already made about the claimant exaggerating the hours she worked at other times and, generally, the difficulties I have with some of her evidence. I have no similar reasons to doubt the accuracy of the respondent's evidence in general terms.

66. The other way in which the claimant disputes the respondent's version of the hours that she worked is in relation to what happened after 7 pm. As to this, both the respondent and Miss Hutchings agree. Their evidence is that the respondent would routinely tell the claimant to stop work and go in and get something to eat at around 7 pm. Frequently, though, the claimant would choose not to do so and would hang around, because she liked to be there with the rest of the team of workers who were helping out with the lambing. That team included students from the claimant's old college who she was friendly with. I accept that evidence, given,

as it is, by both Miss Hutchings and Mr Hutchings, in circumstances where the only evidence to the contrary comes from the claimant and where (as I have mentioned) I have general concerns about the accuracy of the claimant's evidence. I think the claimant was not working when she was only present in what could be called 'the workplace' because she wanted to be there for her own reasons and where her employer had effectively told her to stop work and did not need or expect her to be there.

67. In summary, during the lambing periods in 2017 and 2018, the claimant is entitled to be paid for no more and no less than 13 hours work a day.

68. There are disputes about a handful of odd days. These are, broadly, days on which the claimant alleges she was working and the respondent disputes this. The respondent gave no detailed evidence about it. It is, I think, a further area where section 28 comes to the claimant's assistance. In relation to the days on which the claimant doesn't agree she was not working, the respondent has failed to satisfy me that she was, indeed, not working.

69. The only other general point that arises in relation to the wages claim is: how is board and lodging to be accounted for? Everyone agrees that the claimant lived rent-free and that her meals were provided by the respondent. The respondent seeks to deduct, from the amount that would otherwise be due to the claimant under the NMWA and the Regulations, an allowance for accommodation, pursuant to regulation 16 of the Regulations, and an allowance for food.

70. The respondent has no right to deduct anything for food and I am not sure where he thinks that right comes from. Regulation 10(f) of the Regulations makes clear that benefits in kind provided to the worker other than living accommodation don't count towards the worker's remuneration.

71. In my view, the respondent is not entitled to deduct any sum from the claimant's wages for accommodation for the period during which I have decided she was working 5 hours per day. This is because her claim for that period is – or at least can be – a purely contractual claim. The respondent accepts that he agreed to pay her at the relevant minimum wage rate for 5 hours each working day. The agreement – the contract – did not require her to carry out any particular number of hours of work. It was to the effect that she would be paid for 5 hours whether the work took her 2 hours or whether it took her 10 hours. Because it is a purely contractual claim, the detailed provisions of the NMWA and the Regulations aren't relevant.

72. The respondent also conceded that there was no discussion between him and the claimant in early August 2016, when this contract of employment was entered into, about how accommodation would be accounted for. He also told me in his oral evidence that he would not have thought the claimant was entitled to less than 5 hours pay per day if she stopped living on the Farm.

73. My conclusion on this point is therefore that the contract between the claimant and the respondent was effectively for her to be paid a salary equivalent to 5 hours per day, 7 days per week, at the prevailing national minimum wage rate. I would only have needed to concern myself with the NMWA and the Regulations had I found that the claimant was working regularly more than an average of 5 hours per day.

74. I do, however, need to think about the NMWA and the Regulations when it comes to periods when the claimant was helping with the lambing. This is because there was no contract specifically governing that period. On the evidence, there was no agreement between the claimant and the respondent that when she was helping with lambing she would be entitled to be paid for any particular number of hours on top of the 5 hours per day she was entitled to be paid for in any event. Her claim for the additional 8 hours per day can only be made under the NMWA and the Regulations and as an unauthorised deductions claim. The respondent is, then, entitled to deduct the statutory amount for the provision of accommodation under the Regulations during the lambing period.

75. I shall now set out my arithmetical calculations.

76. From August 2016 to the end of February 2017, the claimant worked on 160 days. I accept the respondent's calculations (set out in a table on page 5 of the respondent's bundle of documents), based on 5 hours per day at the prevailing national minimum wage rate: £5,205 was payable for this period.

77. In relation to the lambing period in March / April 2017, there is a dispute over when lambing started, but I don't fully understand the respondent's case because (in a document headed "*Time off not stated*"; his other evidence on this point was even less clear) he suggested that lambing did not start until 6 March 2017, but also that four ewes lambed early, on 2 March 2017, and that the work then "*gradually increased*". In her written evidence, the claimant claims for 16 to 19 hours per day from 3 March to 2 April 2017.

78. Giving her the benefit of the doubt in accordance with section 28, I award the claimant wages based on her having done 13 hours per day from 3 to 31 March 2017 at £5.55 per hour (£2,092.35) and from 1 to 2 April 2017 at £5.60 per hour (£145.60): £2,237.95. From this sum, £6.00 and £6.40 per day should be deducted for accommodation: £186.80. The total due for the 2017 lambing period is therefore: £2,051.15

79. For the rest of April 2017, consistent with my general findings about hours of work and entitlement to pay, the award is based on 5 hours per day for 28 days at £5.60 per hour: £784.

80. The respondent's calculations (at page 5 of the bundle) for May 17 to the end of February 2018 and for April 2018 are correct, and the total due is: £9,622.50

81. In 2018, lambing took place during the whole of the month of March. The amount awarded is £7.05 per hour for 13 hours per day for 31 days, less £6.40 per day for accommodation: £2,841.15 - £198.40 = £2,642.75

82. So far as concerns pay for May 2018, neither side's evidence was particularly clear. In his written evidence, the respondent suggested that the claimant did 2 hours work per day only. It seems to be common ground that for at least some of that month, the claimant was not working her usual hours and was doing less work than she would normally have been doing. This was because her grandparents had come to stay. However, in the claimant's written evidence, she claimed 9 hours per day for every day in May 2018 up to the 11th, apart from the 6th to the 9th, in relation to which she claimed 5 hours per day.

83. Neither party gave detailed oral evidence about this. And neither side adequately put its case to the other in cross-examination.

84. Given the poor quality of the evidence on this issue, I fall back on what I have decided the underlying agreement between the parties was, namely for the claimant to be paid for 5 hours per day, however long she actually worked. I therefore award her, for May 2018, 55 hours multiplied by £7.38, which is: £405.90

85. It is not in dispute that: the gross amount of money the claimant received from the respondent in respect of work done from August 2016 onwards is £11,783.67; the value of relevant purchases made for her by the respondent for which she must account is £2,105.42; the total amount the respondent has directly or indirectly paid the claimant is therefore £13,889.09

86. The claimant is therefore awarded, for underpaid wages: £405.90 + £2,642.75 + £9,622.50 + £784 + £2,051.15 + £5,205 - £13,889.09 = £6,822.21

87. Compensation for accrued but untaken annual leave is calculated using the claimant's average weekly earnings. Her total earnings from 8 August 2016 to 11 May 2018, a period of 91 weeks and 4 days, was £20,743.10. During that period, she was on unpaid holiday for 52 days: 7.429 weeks. That means her average earnings per working week was: £246.52. As explained above, the claimant's accrued holiday compensation entitlement under WTR regulation 14 is her accrued holiday entitlement under WTR regulation 13 (4 weeks per full year) from 8 August 2016 to 11 May 2018, plus her accrued holiday entitlement under WTR regulation 13A (1.6 weeks per full year) for her final holiday year (8 August 2017 to 11 May 2018), less the amount of unpaid holiday she took during that period: 7.429 weeks. 8 August to 11 May is 0.756 years.

88. The claimant's award for compensation for accrued but untaken holiday is therefore: (1.756 x 4) + (0.756 x 1.6) – 7.429 = 0.805 x £246.52 = £198.45

89. The penultimate issue in the case is whether the claimant was dismissed or not. If the claimant was dismissed, whether conventionally or constructively, then she has a wrongful dismissal claim, i.e. a claim for pay in lieu of notice. This is because: whether she resigned or was dismissed, it was without notice; she would be entitled to a week's notice pursuant to ERA section 86, on the basis of my finding that she was continuously employed by the respondent for more than one but less than 2 years. The week's pay she would be entitled to as damages for wrongful dismissal is based on what she would have earned that week: 5 hours per day at £7.38 for 7 days = £258.30

90. Given the amount of money at stake, it would not be proportionate to deal with this issue at length. In short, I think the claimant was dismissed. I think she and the respondent had a row at the end of which she said something to the effect that she was going to leave the respondent's employment, not that she was ending the employment relationship there and then. If the claimant had actually, unequivocally, resigned on 6 May 2018, I don't think the respondent would have worded his letter of 14 May 2018 as he did – referencing a "*notice to quit*" – and would not (as he did) have given her credit for working 2 hours per day for 11 days in May 2018. I think the claimant was effectively dismissed when the respondent decided the claimant had resigned with immediate effect when, in point of fact, she hadn't.

91. Finally, section 38 of the Employment Act 2002 ("section 38") obliges me to award to the claimant either 2 weeks' or 4 weeks' pay because the respondent did not provide her with a statement of employment particulars in accordance with ERA section 1. A week's pay for these purposes is the pay she would have received for her normal working hours at the date her employment ended: £258.30.

92. I did not ask for submissions from the parties on whether the award under section 38 should be 2 weeks' or 4 weeks' pay (it can't be nothing or any other amount). I have contemplated asking for the parties' written submissions on whether it should be 2 weeks' or 4 weeks' pay. But upon reflection, what I am going to do is make a decision based on my provisional view. I emphasise the word "provisional". My provisional view is that it should be 2 weeks' and not 4 weeks' pay.

93. The reason for my provisional view is: that the respondent is a sole trader who had never formally employed anybody before, so far as I am aware; that he was simply ignorant of his obligations as an employer and, indeed, did not even realise that he was an employer at the time; although he is guilty of breaching ERA section 1, he has about as much mitigation for that breach as it is possible for someone to have.

94. If the claimant wishes to challenge that provisional view, I invite her to make a reconsideration application in accordance with rule 71 of the Rules.

Signed by Employment Judge Camp

Date: 25 June 2019