EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E. Gunay	**v**	**Perfect Five Studio Ltd**

Heard at: London Central (by video) **On**: 26 October 2020

Before: Employment Judge P Klimov

Representation

For the Claimant: in person

For the Respondent: Mr. J. Cook (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

It is the judgment of this tribunal that:

1. The claimant's claim for unauthorised deduction from wages in respect of the period between 21 – 28 January 2020 fails and is dismissed.

2. The respondent was in breach of contract by dismissing the claimant without notice and is ordered to pay the claimant the sum of **£146.46**, being damages for breach of contract.

3. The respondent was in breach of contract by failing to pay the claimant for 1.54 days of her accrued but untaken holiday and is ordered to pay the claimant the sum of **£104.90**, being damages for breach of contract.

4. By failing to pay the claimant for her accrued but untaken statutory holiday of 0.31 weeks the respondent has made an unauthorised deduction from her wages contrary to section 13 of the Employment Rights Act 1996

(ERA) and breached regulation 14(2) of the Working Time Regulations (WTR). Having been awarded damages in the amount of £104.90 with respect to her accrued but untaken holiday, no additional compensation is awarded to the claimant for these breaches.

5. The respondent failed to give the claimant a written statement of particulars of employment in breach of section 1(1) of the Employment Rights Act 1996 and is ordered to pay the claimant the sum of **£1,362.48**, being the higher amount equal to four weeks' pay, calculated in accordance with section 38 of the Employment Act 2002.

REASONS

Introduction

1. This case was heard by the tribunal on 26 October 2020 together with the related case No.2201466/2020 Mr. F. Domingues v. Perfect Five Studio Ltd ("**related proceedings**").

2. The claimant claims that the respondent made an unlawful deduction from her wages and breached her contract of employment by failing to pay her salary for the period between 21-28 January 2020 and by dismissing her without giving her the required contractual four weeks' written notice.

3. The claimant further claims that the respondent made an unlawful deduction from her wages by failing to pay her for four days of her accrued but untaken holiday. The respondent contests the claims.

4. The claimant represented herself and gave sworn evidence and was cross-examined by Mr. Cook, counsel, who represented the respondent. Mr. Cook called sworn evidence from Ms. Leila Moghadam, a director of the respondent.

5. Ms. Moghadam had initially been named as a respondent in these proceedings and in the related proceedings, however, by the tribunal's decision of 25 August 2020 she was substituted by the current respondent in both cases.

6. I was referred to various documents included in the bundle of documents of 101 pages, which the parties introduced in evidence. The claimant also referred me to some other documents she had sent to the tribunal, which were not included in the hearing bundle. The respondent did not object to the tribunal considering those additional documents. At the end of the hearing the parties made their submissions. After the hearing the parties provided further documents and submission pursuant to my order of 27 October 2020.

Preliminary issues

7. At the beginning of the hearing I had to deal with two preliminary issues.

Respondent's application under Rule 20

8. The respondent failed to present a response to the claim in these and the related proceedings in time, as required by Rule 16 of the Employment Tribunal Rules of Procedure.

9. On 22 October 2020 the respondent's solicitors applied for permission to serve the response out of time and to adjourn the final hearing. They also sought to remove Ms. Moghadam as a respondent, but that was no longer a live issue.

10. The respondent sought the extension of time for presenting a response on the ground that it was not aware of the claims. Since becoming aware of the claims the respondent acted promptly in making the application, however, as it had not received the ET1 it had not been able to submit its draft response with the application.

11. On Friday, 23 October 2020, the respondent's solicitors sent to the tribunal draft grounds of resistance in both cases, but without completed ET3 forms. The respondent's solicitors confirmed that the respondent had received the claimant's ET1 on 22 October 2020.

12. At the hearing Mr. Cook pursued the respondent's application under Rule 20 for the tribunal to grant an extension of time and to allow the responses submitted on 23 October 2020. In support of the application Mr. Cook called witness evidence of Ms. Moghadam, who gave evidence that she had only received the claim forms on 22 October 2020 when these had been sent to the tribunal by email copying her. Her evidence was that the respondent's lease at the address, to which the claim forms had been sent, had expired in January 2020 and a forwarding address had not been arranged as most correspondence had been done by email. She said that the last time she had visited that address was in late June, and at that time was told by the security guard that there was no post for the respondent.

13. Her evidence were not challenged by the claimant.

14. In his submissions Mr. Cook argued that I should exercise my discretion and allow the respondent's late responses as this would be in accordance with the overriding objective under Rule 2.

15. He referred me to the case: *Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT*, which sets out the relevant legal test I should apply in deciding on the application. Mr. Cook drew to my attention the three factors that I should consider in deciding on the application. These are:

    (i) The respondent's explanation as to why an extension of time is required,

    (ii) the balance of prejudice, and

(iii) the merits of the defence.

16. Mr. Cook submitted that:

(i) the respondent had provided a reasonable and honest explanation for the delay in responding to the claims. He referred me to Ms. Moghadam's unchallenged evidence in that regard.

(ii) if the application were refused the respondent would suffer a far greater prejudice than the claimants, as it would be prevented for defending the claims, and

(iii) the respondent's case clearly had merits, and when deciding on the application the tribunal should not conduct a mini-trial on the merits, but simply satisfy itself that the defence had some merits, in which case this should be enough to favour granting an extension. He referred me to the respondent's draft grounds of resistance in support of his contention.

17. Mr. Cooked also submitted that if I was not prepared to exercise my discretion under Rule 20 in favour of the respondent and to allow the late responses, I should exercise my discretion under Rule 21(3) and allow the respondent to participate in the hearing.

18. I asked the claimant if she was opposing the respondent's application. She said that she was not.

19. I was satisfied that the respondent had met the Kwik Save Store three factors test, however, as the respondent had only presented draft grounds of resistance, and not completed draft ET3 forms, I asked Mr. Cook whether it was his case that I had the necessary power under Rule 20 to allow the respondent's responses in that form, despite Rule 17 requiring the tribunal to reject a response if it was presented not on a prescribed form.

20. Mr. Cook said that he believed there was an authority on that point and asked for a short adjournment to allow him to find it and address me on that issue. The hearing was adjourned for 15 minutes.

21. After the adjournment Mr. Cook said that he could not to find a direct authority on that point, but submitted that in deciding the application for an extension of time I should only consider Rule 20, which requires that the application "*be accompanied by a draft of the response which the respondent wishes to present*", and, unlike Rule 16, does not say that the draft response shall be on a prescribed form. He argued that if there was such a requirement for a draft response submitted under Rule 20, Rule 20 would have said so.

22. Mr. Cook also submitted that if the hearing on the merits were to be postponed, the tribunal could make an order for ET3 to be presented by the respondent.

23. I rejected Mr. Cook's interpretation of Rule 20. I decided that Rule 20 did not give me the discretion to allow the respondent's grounds of resistance to be treated as "a draft response" under Rule 20, as it was not submitted on a prescribed form. The respondent failed to submit completed ET3 forms together with the grounds of resistance, and Rule 17 required me to reject the respondent's response for that reason, and therefore there was no "draft response" submitted by the respondents for the purposes of Rule 20.

24. While I am cognisant of the requirement in Rule 2 that the tribunal should avoid unnecessary formality and should seek flexibility in the proceedings, I do not consider that Rule 16 has no application if a response is submitted out of time. To hold otherwise would mean that a response submitted in time, but rejected under Rule 17 for not being submitted on a prescribed form, could be later re-submitted out of time, together with an application for an extension of time, with the same defects as caused it to had been rejected in the first place, but this time in deciding on whether to allow a defective response to be presented out of time the tribunal must disregard those defects. This cannot be right.

25. Mr. Cook's interpretation is also difficult to reconcile with Rule 19, which allows a respondent, whose response has been rejected under Rule 17 to apply for a reconsideration on the basis that the notified defect can be rectified. Rule 19(2) requires the respondent to rectify the defect, and Rule 19(4) says that if the judge decides that the original rejection was correct but that the defect has been rectified, the response shall be treated as presented on the date that the defect was rectified. I see no logical reason why the same rules should not apply to a defective response submitted out of time.

26. Therefore, I rejected the respondent's application under Rule 20, however, I was satisfied that it would be in the interest of justice to allow the respondent to participate in the hearing to the full extent and to rely on the submitted grounds of resistance and evidence and permitted the respondent to do so under Rule 21(3).

Postponement application

27. The respondent sought to postpone the hearing. Mr Cook pointed out that the hearing was listed for two hours and the remaining time was insufficient to deal with all substantive issues in both cases.

28. He also submitted that given the respondent had become aware of the proceedings only a few days ago, it had not been able to fully investigate all relevant matters and adequately prepare for the hearing.

29. The claimant opposed the respondent's application. She said that the respondent was fully aware of all facts relevant to her claim since January 2020. Despite the respondent not submitting its response in time, she did not oppose the respondent defending her claim. Since on its own case, the respondent became aware of the claim on 22 October 2020, it should have had enough time to prepare for the hearing.

30. The claimant was happy with the hearing going beyond the allocated time. Mr. Cook said that he had another appointment at 3pm but was happy to continue until then. Later Mr. Cook was able to rearrange his 3pm appointment so that the hearing could be concluded, for which I am grateful. Ms. Moghadam said that she was also able to stay beyond the initially allocated time.

31. I decided that the hearing should proceed. I balanced the respondent's reasons for postponing the hearing against the claimant's points in opposition and refused the application because:
    (i) the parties were present and were able to continue beyond the allocated time,
    (ii) the respondent was represented by counsel,
    (iii) it was aware of the issues to be decided and was able to prepare its defence, which the claimant did not oppose despite it being presented late,
    (iv) the facts upon which the claimant was relying were known to the respondent,
    (v) the respondent did not specify what further investigations it needed to undertake to prepare for the hearing,
    (vi) the respondent said that it was no longer trading and in the process of preparing to enter administration, therefore delaying the hearing further was likely to be prejudicial to the claimant, if she ultimately succeeded in her claim,
    (vii) Rule 2 of the Employment Tribunal Rules of the Procedure requires me to deal with cases fairly and justly, including, avoiding delay, so far as compatible with proper consideration of the issues.

Issues for the Tribunal to decide

32. Having dealt with the preliminary issues, I discussed with the parties the substantive issues I had to decide. These were:

Unlawful deduction from wages in respect of salary

33. Did the respondent make an unlawful deduction from the claimant's wages by failing to pay her for the period between 21-28 January 2020?

Breach of contract/notice pay

34. How much notice was the claimant entitled to receive?

35. Was the respondent in breach of the claimant's contract by failing to give her the requisite notice?

Pay for untaken holiday

36. How much holiday had the claimant accrued on the date of termination of her employment?

37. Was the respondent in breach of her contract of employment and/or in breach of her statutory holiday entitlement by failing to pay the claimant for her accrued but untaken holiday?

38. Alternatively, did the respondent make an unlawful deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 by failing to pay the claimant for accrued but untaken holiday?

Findings of fact

39. Having heard the claimant's and Ms. Moghadam's oral evidence and having considered the documents, to which I was referred to by the parties and the subsequent submissions and the documents presented by the parties pursuant to my order of 27 October 2020, my findings of facts are as follows.

40. The respondent operated a fashion retail store in central London, at 20-21 Floral street, Covent Garden. The store closed on 20 January 2020.

41. The claimant was employed by the respondent as a Sales Associate from 16 August 2019 until her dismissal. Her place of work was the Floral street store.

Claimant's Terms of Employment

42. I find that the claimant was employed by the respondent on the terms of the Offer Letter and the terms substantially the same as the terms of Ms. Davis' contract, except for the hourly rate of pay. This is because:

    (i) The claimant claims that in or around the same time as giving her the offer letter of 9 August 2019 (page 67 of the bundle) ("**Offer Letter**") the respondent sent her a draft contract of employment, which she annotated with some handwritten corrections and returned to the respondent. She did not sign the contract and did not retain a copy of it. The respondent does not accept that a written contract has ever been given to the claimant and points out that the claimant failed to produce her employment contract in support of her contention.

    (ii) At the hearing the claimant relied on a three page extract from a contract of employment, which the claimant said was that of Ms. Angelique Davis who, according to the claimant, was another employee of the respondent ("**Ms Davis' contract**").

(iii) Counsel for the respondent submitted that it was not a complete and signed contract, but just a three pages' extract. It did not show the names of the parties, it was not clear whether the employee-party to that document was in the same or a similar role to the claimant's, and in any event, that document was not the claimant's contract of employment and therefore could not establish the claimant's entitlements.

(iv) The respondent further argued that even if the claimant had received a written contract, on her own case, she had not signed it, but instead had made some handwritten changes before returning it to the respondent, and therefore, on ordinary contractual principles she had not accepted the respondent's offer on the terms set out in that contract, but had made a counter-offer on the amended terms, which, the respondent had not accepted. Accordingly, the respondent says, there is no legal basis to hold that the terms of that contract applied to the claimant's employment.

(v) At the hearing there was insufficient evidence to enable me to decide whether the claimant had a written contract or not. I made an order requiring the respondent to search for and, if found, disclose the claimant's contract of employment. The respondent made reasonable searches but was unable to find it. The respondent made further submissions on this issue, reiterating its position that it did not accept that the claimant had been provided with a written contract of employment, and even if she had, she had not accepted it and instead had made a counteroffer, which the respondent had not accepted.

(vi) The claimant, however, was able to locate and provided a full copy of Ms. Davis' contract, together with her submissions. She points out that Ms. Davis' contract has the claimant's name typed twice in the signature blocks on page 9, and her post code in Ms. Davis' address on page 1, and that the document still contains the same original mistakes as those that the claimant had corrected in handwriting in her version (those, according to the claimant, were in relation to hours of work, her home address and the store's opening hours). She says this shows that the respondent amended and sent her contract of employment to Ms. Davis, who joined the respondent after the claimant. Therefore, there was a written contract of employment provided to her by the respondent, and that contract was on substantially the same terms as Ms. Davis' contract.

(vii) On the balance of probabilities, I find that the respondent gave the claimant a draft contract of employment on the terms substantially the same as Ms. Davis' contract, and that she made some handwritten changes and returned it to the respondent. She did not retain a copy of it and therefore did not know what contractual terms, except those stated in the Offer Letter, applied to her employment with the respondent.

(viii) I reject the respondent's argument that there was no contract of employment between the parties because the claimant refused the respondent's offer by making handwritten changes to the draft. I find that by amending and returning Ms. Davis' contract, the claimant had made a counteroffer to the respondent to employ her on those amended terms. The respondent did not present any evidence that it had rejected the claimant's counteroffer. I, therefore, find that the respondent accepted the claimant's counteroffer by conduct, by virtue of employing the claimant and paying her wages.

(ix) I further find that the claimant's handwritten changes did not change the terms related to her notice and holiday entitlements, as those set out in Ms. Davis' contract. The claimant did not claim that she had made such changes to increase the entitlements, and I find no plausible reasons why she would have made changes to those terms so to reduce them.

(x) The claimant was, therefore, employed under a written contract of employment, and the key terms in relation to notice and holidays were:

i. Holiday entitlement – 20 days in addition to the usual public holidays, calculated pro-rata based on actual days worked, inclusive of bank holidays (clause 8.1 and the Offer Letter);
ii. Holiday year - from 1 January to 31 December (clause 8.2);
iii. The employee cannot carry over untaken holiday from one holiday year to the following, unless is prevented from taking it in the relevant holiday year due to sickness, maternity, paternity or adoption leave (clause 8.4);
iv. On termination of employment, the employee will be entitled to a payment in lieu of any untaken holiday at the rate of one day's pay (calculated at 1/260th of their full-time equivalent salary) for each day's holiday not taken accrued to the termination date (clause 8.5);
v. The employee's employment may be terminated by the employer on giving the employee written notice as follows:
    a. during the probation period not less than one week's notice;
    b. after completion of the probation period but where the employee has less than five years' service, four weeks' notice (clause 10.1.2)
vi. On the giving of written notice the employer may require the employee to work throughout the notice period, or make a payment of salary in lieu of notice in respect of all or part of the notice period, which will be calculated without reference to any bonus or commission that might have been earned during the notice period (clause 10.3).

(xi) There were no evidence presented to the tribunal that the parties had agreed to vary these terms, including so as to allow the

respondent to give the claimant oral notice of the termination, and I find that no such variation was ever agreed between the parties.

43. In coming to these findings of fact I also paid regard to Mr. Domingues' contract of employment, which contains substantially the same terms in relation to notice and holiday entitlements, with the exception that in the case of Mr. Domingues, being the store manage and a full-time fixed salary employee, his termination notice entitlement was eight weeks. The respondent itself sought to rely on the terms of Mr. Domingues' contract to show that the claimant was not entitled to carry over her untaken holidays from the previous leave year.

44. Despite the claimant asking the respondent for her employment contract (see the claimant's email of 16 October 2019 – page 71 of the bundle), the respondent failed to provide it to her. The respondent did not deny that. On the contrary, its case was that it did not accept that it had provided the claimant a written contract of employment and that there were no documentary evidence to support the claimant's assertion that it had.

Hours of Work

45. The claimant was paid according to the number of hours she worked at the rate of £9 per hour, plus commission. Her hours of work varied each month, and she was not entitled to a minimum guaranteed number of hours of work or a minimum guaranteed weekly or monthly payment. I find this because:

    (i) Her offer letter of 9 August 2019 clearly states that her base salary was £9.00 per hour Part Time.

    (ii) Ms. Davis' contract, which I found to be on substantially the same terms as the terms of the claimant's contract of employment, states that days of work and hours of work need to be agreed with the Shop Manager.

    (iii) Neither the Offer Letter, nor Ms. Davis' contract specify that the employee is entitled to any guaranteed minimum hours of work or a guaranteed weekly or monthly payment.

    (iv) The claimant worked variable hours and was paid a different amount each month based on the actual hours worked. She accepted that on cross-examination.

    (v) The claimant argued that at the job interview the respondent had led her to believe that it was a full-time role, and that at that time she had another full-time job offer and would not have accepted the respondent's offer if it had not been on a full-time basis. However, this does not accord with the terms of the Offer Letter she had accepted and the terms of her contract of employment. The reason she had decided not to accept the alternative job offer was not made known to the respondent at that time and in any event cannot

be a conclusive evidence to show that she had been promised a full time position by the respondent, which respondent denies.

(vi) She said that she had signed the Offer Letter in a rush because the respondent had asked for it to be returned on the same day, and had not realised that it said that she would be employed part-time. The Offer Letter is only a half a page long and has only four particulars of employment:

i. Base Salary: £9.00 per hour Part Time
ii. Commission: 2% commission on all sales, providing monthly target is met.
iii. Holiday: Pro rata days inclusive of bank holidays
iv. Start Date: 09th August 2019.

Even if the claimant had not read it before signing and returning to the respondent does not make these terms not valid.

(vii) She also said that her September pay slip included a payment for seven hours of overtime as indicating that she had regular/normal working hours. However, the overtime was paid at the same rate of £9 per hour as her other working hours and the "overtime" label by itself does not prove that she was entitled to guaranteed minimum hours or a fixed weekly or monthly salary.

(viii) The claimant also referred to the rota timesheets, in which part-time employees were marked by an asterisk, and there was no asterisk against her name. This point was not raised by the claimant at the hearing, but only mentioned in her subsequent submission to the tribunal on the question of her week's pay calculation. The respondent did not have an opportunity to answer this point. In any event, I do not find that the absence of an asterisk against the claimant's name proves that she was entitled to minimum guaranteed hours or a minimum guaranteed pay.

(ix) Finally, the claimant claimed that she had been working on a full-time basis until the respondent had reduced her working hours in October 2019. When that happened, she had expressed her disappointment with the change. She referred to her email of 16 October 2019 (page 71 of the bundle), in which she wrote that she had been "*given a verbal agreement to have the full hours*" and that she had been working "*as a full time employee for a while*". Given my findings listed above, I do not consider that the fact that the claimant had been working "full hours" until October gives her a contractual entitlement to minimum weekly hours. Further, even if the respondent was in breach of the claimant's contract of employment by reducing her hours in October, which I find that it was not, the claimant had affirmed the contract by continuing to work for the respondent following the reduction in her working hours. The claimant did not advance a free-standing breach of contract claim arising from the respondent reducing her working hours in October.

46. By contrast, Mr. Domingues, the store manager's, offer letter and the contract of employment specified his base annual salary, expressly stated that it was on a full-time basis and contained a term stating the total working hours per week

Claimant's Termination Date

47. The claimant was informed by the respondent in or around mid-December that the store, in which the claimant had been working, was due to close in late January. The claimant did not deny that in her evidence.

48. I find that the claimant was dismissed by the respondent on 20 January 2020 and not on 28 January 2020, because:

    (i) That was when the store closed.
    (ii) The claimant admitted on cross-examination that she had understood the closure of the store to be the end of her employment with the respondent and consequently put 20 January 2020 as the end date of her employment in her ET1.
    (iii) She further accepted on cross-examination that her employment was terminated on 20 January 2020.
    (iv) Although she said that she had thought that the store might be re-locating to another place, the store did not relocate and there was no other open store she could move to. Unlike Mr. Domingues she did not have any additional work duties she could perform outside the store.
    (v) She also said that she had been originally scheduled to work between 21 and 28 January 2020, however the January rota schedule had been sent to her by Mr. Domingues on 29 December 2019 (that is before 20 January 2020) and a copy of the January rota schedule submitted by the claimant in evidence does not show dates from 21 to 28 January as her working days.

49. The respondent did not give the claimant the requisite four weeks' written notice of the termination of her employment and did not make a payment in lieu of notice.

50. The claimant did not take any holiday in the 2020 leave year, and on the termination date of her employment, being 20 January 2020, she has accrued 1.54 days of annual holiday. The respondent did not contest that.

51. The respondent did not make any payment to the claimant for her accrued but untaken holiday.

Relevant law and conclusions

Unlawful deduction from wages in respect of salary

52. Section 13 of the Employment Rights Act (ERA) prohibits an employer from making a deduction from wages of a worker employed by him unless—

> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

53. A deduction is a complete or partial failure to pay what was properly payable on a particular occasion (*section 13(3) ERA*).

54. Section 27 of ERA defines wages as any sums payable to the worker in connection with his employment.

55. The claimant's case is that she was dismissed on 28 January 2020. The dismissal was communicated to her by an email from Mr. Louis Hopgood, Finance Manager, of the respondent, attaching the claimant's P45. Which was the first time she received written notice and she says that no dismissal was effective except a written dismissal. Therefore, she should be entitled to receive her wages until that date.

56. The respondent's position is that the claimant was dismissed on 20 January 2020 when the store in which she had been working closed. The respondent avers that the claimant had been told in mid-December that the store would be closing in late January. She was fully informed and closely involved in the process of the store closure. It was obvious to her that with the closure of the store her job with the respondent would come to an end. The respondent points out that the claimant entered 20/01/2020 in box 5.1 ("*If your employment has ended, when did it end?*") of her ET1. Therefore, no wages were due to the claimant for the period between 21-28 January 2020.

57. Given my findings of fact in paragraph 48 of this judgment that the claimant was dismissed by the respondent on 20 January 2020 any sums she claims for the period of 21-28 January 2020 cannot be said to be wages for the purposes of section 13 of ERA as any such sums would not be payable in connection with her employment. The claimant was entitled to written notice which was not provided (see below) but she was nonetheless dismissed on 20 January 2019 and therefore her entitlement to wages ceased on that date.

58. Therefore, the claimant's claim of unauthorised deduction from wages in respect of the period 21-28 January 2020 fails and is dismissed.

Breach of Contract/Notice Pay

59. A dismissal by the employer of his employee in breach of the employee's contract of employment gives rise to a claim for damages for wrongful dismissal at common law.

60. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") the tribunal has jurisdiction to determine such claim if it arises or is outstanding on the termination of employment.

61. The claimant claims she was entitled to four weeks' contractual written notice. She says that the only written notice she received was the email from Mr. Hopgood on 28 January 2020 with her P45, and that she never agreed or accepted that oral notice could be given instead. Further, she says that she was never given oral notice anyway.

62. The respondent denies that the claimant was entitled to contractual written notice. It says that she was only entitled to statutory one week's notice and that it gave her notice verbally over one week before 20 December 2019.

63. Given my findings of fact in paragraph 42, I find that the claimant was entitled to four weeks' contractual written notice and by terminating the claimant's employment on 20 January 2020 without giving the claimant the required four weeks' written notice, the respondent breached the claimant's contract of employment and is liable to pay damages to the claimant assessed on the ordinary contractual principles.

64. This requires me to calculate damages on the principle that damages should put the claimant in the position she would have been in had the respondent not breached the contract, i.e. had it given her the required four weeks' written notice.

65. If the respondent had given the claimant four weeks' written notice of termination on 20 January 2020, given that the store closed on 20 January 2020, on the balance of probabilities, I find that the claimant would not have been required by the respondent to work during that period. Under her contract of employment the claimant was not entitled to be paid for days when she was not working. Therefore, she would not have been entitled to any salary for that four weeks' period.

66. Although the respondent was obliged to give the claimant four weeks' written notice of the termination, it was the respondent's choice whether to make a payment in lieu of notice, and therefore no separate liability arises by reason of the respondent making no payment to the claimant in lieu of notice. If the contract gives the employer the right, instead of giving the employee the requisite notice, to make a payment in lieu of notice, and the employee is dismissed without the requisite notice, and the employer does not make a payment in lieu of notice, the employee is entitled to damages on the ordinary contractual principles (***Cerberus Software Ltd v. Rowley 2001 376, CA***).

67. It follows that, although the respondent breached the claimant's contract of employment by failing to give her four weeks' written notice of the termination of her employment, the only loss arising from that breach is the loss of an additional holiday entitlement she would have accrued over that period of time. This, calculated on the same principles as for her claim for accrued by untaken holiday (see below), I assess to be **£146.46** = 2.15

days of additional holiday accrual over four weeks' notice period X the day rate of pay £68.12.

68. In term of the statutory notice, because the contractual notice to which the claimant was entitled to (four weeks) is at least one week more than statutory notice she would have been entitled to under section 86(1) of ERA (one week), pursuant to section 87(4) of ERA the claimant is not entitled to be paid a sum of not less than her week's pay under section 89 of ERA calculated in accordance with Chapter II of ERA .

Pay for untaken holiday

69. The claimant claims that on the termination date she had accrued four days of holiday and the respondent failed to pay her for her accrued but untaken holiday.

70. The respondent admits not paying the claimant any sums in respect of her accrued but untaken holiday, but disputes that the claimant has accrued four dates of holidays upon the termination of her employment. The respondent avers that the claimant was not entitled to carry over any untaken leave from the previous leave year, and therefore on the date of her dismissal, being 20 January 2020, he has only accrued 0.31 weeks of her statutory holiday entitlement.

71. Following the hearing I made an order requiring the respondent to set out its calculations of the claimant's week's pay pursuant to the provisions of Chapter II of Part XIV of the Employment Rights Act 1996, and for the claimant to confirm whether she agrees with the respondent's calculations and if not, provide her alternative calculations.

72. According to the respondent's calculations, the claimant week's pay was £340.62. The claimant disagrees with the respondent's calculation and claims that her week's pay shall be calculated as £349.50.

73. The difference arises from how the claimant's working hours over the 12 weeks' reference period were calculated by the respondent (423 hours) and by the claimant (466 hours). The claimant's calculations do not correspond with her working hours recorded in the rota timesheets she submitted in support of her claim (see, for example, rota timesheets for the weeks beginning 30 December, 23 December, 9 December, 28 October). She also did not include her variable commission in the calculation, which the respondent calculated as £280.47 over the reference period. I find the respondent's calculation to be correct.

74. Given my findings of fact in paragraphs 42, I find that on the termination date the claimant has accrued 1.54 days of holiday in the leave year starting on 1 January 2020 (20 days holiday / 260 working days x 20 days in the 2020 leave year).

75. The claimant full time equivalent salary calculated by reference to her average week's pay over a period of 12 weeks was £17,712.24 = £340.62 week's pay x 52 weeks.

76. Therefore, under the terms of her contract of employment the claimant was entitled to receive £104.91 for 1.54 days of her accrued but untaken holiday = £68.12 (day's pay) calculated as 1/260th of her full-time equivalent salary x 1.54 days of accrued holiday.

77. By failing to pay that sum on the termination of the claimant's employment the respondent was in breach of contract and is ordered to pay the claimant the sum of **£104.90**, as damages for breach of contract.

78. By failing to pay the claimant for her accrued but untaken holiday the respondent made an unauthorised deduction from her wages contrary to section 13 of ERA and breached regulation 14(2) of WTR. However, being awarded a sum of money as damages for breach of contract in relation to her accrued but untaken holiday, the claimant is not entitled to receive a further compensation under section 13 of ERA or regulation 14(2) of WTR.

Failure to provide particulars of employment

79. Under section 1(1) of ERA the respondent was obliged to give the claimant a written statement of particulars of employment. The respondent failed to do so by not giving the claimant her contract of employment after she had made handwritten corrections and returned it to the respondent. It did not give the claimant any other statement containing full particulars of her employment. I find that giving the claimant a draft contract was not giving her particulars of employment as required by section 1(1) of ERA, because the draft terms had been given to the claimant before she began her employment with the respondent, and the respondent never confirmed to the claimant that these terms would apply to her employment after she started.

80. The Offer Letter did not contain all the particulars required by section 1(4) of ERA. It did not state any terms related to the claimant's entitlement to holiday pay and the length of termination notice she was entitled to receive. Therefore, the respondent breached its duty to the claimant under section 1(1) of ERA.

81. The respondent clearly had the claimant's contract of employment in its possession and had used it to prepare a draft contract of employment for Ms. Davis. The respondent did not provide any good reasons why it had not given the claimant's her written contract, despite the claimant asking for it in her email of 16 October 2019.

82. I find that the respondent's failure was not inadvertent. In coming to this conclusion I took notice of the contents of emails from Mr Hopgood to Mr Domingues of 29 January 2020 and 4 February 2020 (pages 54 and 53 of the bundle), in which Mr Hopgood states that "*none of us have a signed*

contract of employment" and that "*whilst you* [Mr Domingues] *have a contract (which was actually never signed on the companies behalf*". Therefore, on the balance of probabilities, I find that the respondent deliberately withheld the claimant's contract of employment thus failing to provide her with particulars of employment.

83. At the hearing and in its subsequent written submissions the respondent maintained that it did not accept that there ever had been a written contract of employment with the claimant. The respondent's failure to provide the particulars of employment caused serious difficulties for the claimant in establishing her contractual entitlements, which the respondent sought to exploit in these proceedings but putting the claimant to proof in relation to her notice and holiday pay entitlements.

84. Under section 38 of the Employment Act 2002 (EA), if the tribunal finds in favour of the employee in relation to a claim, *inter alia*, for breach of contract or for unauthorised deduction from wages or for breach of WTR and makes and award to the employee, and when the proceedings were begun the employer was in breach of his duty under section 1(1) of ERA, the tribunal must make an award of the minimum amount equal to the employee's two weeks' pay and may, if it considers just and equitable in all circumstances, increase the award by the higher amount equal to four weeks' pay instead.

85. I take into account that the respondent is not a large employer and also that it provided some particulars in the Offer Letter, however, for the reasons set out above I consider it is just and equitable to increase the minimum award of the claimant's two weeks' pay by the higher amount equal to the claimant's four weeks' pay instead. I order the respondent to pay the claimant the sum of **£1,362.48** as an award under section 38 of EA.

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Employment Judge P Klimov
23 November 2020

Sent to the parties on:

23/11/2020

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For the Tribunals Office

Notes

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