



EMPLOYMENT TRIBUNALS

Claimant: AFROJA BIBI SONIA
Respondent: HARTIZ LTD
Heard at: East London Hearing Centre by CVP
On: 24th June 2022
Before: Tribunal Judge S Iqbal acting as an Employment Judge

Representation

Claimant: Mr. Jones instructed by Legit Solicitors
Respondent: Mr. Carey, instructed by ATM Solicitors

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's claim for automatically unfair dismissal for assertion of a statutory right (section 104 Employment Rights Act 1996) is not well founded and is dismissed.
2. The Tribunal found that:
 - (i) The Respondent made unauthorised deductions from the Claimant's wages between November 2020 – June 2021.
 - (ii) The Respondent made unauthorised deductions from the Claimant's wages by failing to pay the Claimant for the month of July 2021.
 - (iii) The Respondent failed to provide the Claimant with a written statement of changes to his particulars of employment.
 - (iv) The claim of holiday pay due, under her employment contract and/or under the Working Time Regulations 1998, is well-founded.

- (v) The claim for breach of contract, by a failure to pay one week's notice pay, is well founded.
3. For the avoidance of doubt the Respondent **is ordered to pay the following amounts:**
- (i) For a failure to give notice, the respondent is ordered to pay to the claimant, damages of one week's net pay in the sum of **£245.42**.
 - (ii) Further, the claimant is awarded, and the respondent is ordered to pay to her, 2 weeks pay in the sum of **£491** net pursuant to Section 38 of the Employment Act 2002 in respect of the failure of the respondent to provide the claimant with a statement of employment particulars as required pursuant to section 1 of the Employment Rights Act 1996.
 - (iii) The respondent made unlawful deductions in breach of section 13 of the Employment Rights Act 1996 in respect of the claimant's wages:
 - by failing to pay the claimant holiday pay in the sum of **£1,215 net**
 - by failing to pay the full amount of wages due for the months of November 2020 through to June 2021, in the sum of **£1688 net**
 - by failing to pay the Claimant for the month of July 2021 in the sum of **£553.50 gross** (less any deductions required by tax and national insurance in law)
 - (iv) It is also just and equitable to increase the unlawful deductions award of by 10% pursuant to section 207 A (2) of the Trade Union & Labour Relations (Consolidation) Act 1992 in the sums of (**£1,336.50 net, £1,688 net and £1,107 gross** (minus deductions as above)).

REASONS

[All page references are to the agreed bundle]

Introduction

1. The Respondent is a business that runs a Shisha Lounge based in Ilford London. The Claimant was employed by the Respondent as a waitress in the Lounge from 5th September 2020 to 24th July 2021. It is agreed by the parties that the claimant was employed without a written contract of employment.
2. The Claimant states that she was employed to work 30 hours per week at an hourly rate of £9, which was increased after 2 months to £9.50 (equating to £285 per week or £1,235 per month), as Mr Afzal was pleased with her performance.

3. The Claimant was furloughed for a period of time (which is in dispute by the parties) given the Respondent's business was closed as a result of government restrictions in place at the time. The Claimant during her furlough period received a payment of £640 per month, which she states was contrary to what she was owed
4. The Claimant claims she was underpaid during her furlough period, as she calculated her ordinary monthly pay based on a month of 4 weeks as being £1,140 per month, therefore 80% of this would amount to a furlough payment of £912 per month.
5. The Claimant states that there was an unlawful deduction from her wages, and she informed the Respondent of this, on three occasions, through Mr Afzal, Mr Alladuth and Mr Gofar (this last time being on the 24th July 2021), thereby as a result of asserting a statutory right within the meaning of s104(4)(a) of the Employment Rights Act 1996, she was dismissed. The Appellant claims damages for an automatically unfair reason for dismissal and further that she is also entitled to unpaid holiday and an uplift of up to 25% due to the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
6. The Respondent defended the unfair dismissal claim saying that on the 24th July 2021, they summarily dismissed the Claimant as she had stolen from the till. The Respondent relied on CCTV footage from the night of the 23rd July 2021, which has been made available to all parties and viewed by me.
7. The Claimant however, states that the true reason for her dismissal was her continuing assertion of her statutory rights and accordingly she was unfairly dismissed.
8. On the 31st July 2021, the claimant raised a grievance by way of letter to Mr Afzal and highlights that on the 25th July 2021, she states she called the Lounge and asked if she was still employed, and she was told that she was no longer an employee, and she therefore asked for her P45. Mr Afzal had stated that he would speak to the accountant on Monday, 26th July and on the 29th July he had called her back and decided to pay her only for her hours and that the P45 would be sent back once the accountant came back from the holidays. At the end of her grievance letter, she asked that a meeting to discuss the complaint and how she could be fairly compensated ought to have been set out.
9. On the 10th August 2021, the Claimant began the ACAS process started. ACAS issued a certificate on the 21st September 2021 and the ET1 was lodged on the 3rd December 2021. The claim is in time, save for as highlighted by the Respondent that any alleged wrongdoing on or before 10th May 2021 was out of time.

The hearing

10. The Claimant attended the hearing and gave evidence to support her claim. On behalf of the Respondent there were three witnesses who gave evidence, as follows:
 - Anwar Alladuth, Operations Manager for Colony Lounge,
 - Israr Afzal the Respondent's Sole Director,
 - Seid Gofar, the Respondent's Floor Manager.
11. I was provided with an agreed bundle [1-112], separately served were statements from the Claimant and Respondent's witnesses, opening notes from counsel for both the Claimant and the Respondent, as well as an agreed list of issues.
12. I was directed to the following pages in the agreed bundle [56-58], the schedule of loss and HMRC records, grievance letter at [93-98], text messages [107-108], as well as all witness statements.
13. At the outset in considering the issue of time, the parties were directed to limit the questions to the claimant up to 1.5 hours and with the three witnesses to 2.5 hours. During the course of the hearing the parties did face some technical difficulties; however, were able to log off and log back in and hearing proceeded.
14. The claimant's solicitors inadvertently submitted the ET1 twice, the first time without particulars attached, and by an order of a legal officer on the 9th February 2022, the two claims were to be directed to be heard together; but by order of the REJ on the 29th March 2022, one of the cases was struck out. The claimant confirms that this causes no difficulties as all the issues are properly particularised in claim before me.

The Issues

15. There is a list of issues as agreed by the parties and can be summarised as follows. The claimant claims automatic unfair dismissal based on an assertion of a statutory right, pursuant to the Employment Rights Act 1996 under Section 104. The burden of proof is on the claimant. Further the claimant claims unlawful deductions from wages pursuant to the Employment Rights Act 1996 Section 13 comprising:
 - (i) Wages inside and outside of furlough.
 - (ii) Holiday pay and,
 - (iii) Notice pay (this is not claimed as a breach of contract or wrongful dismissal).

Jurisdiction

16. The Respondent asks the Tribunal to find that any alleged wrongdoing on or before 10 May 2021, as being out of time given the Claimant first notified ACAS on 10 August 2021.

Written Statement of Particulars

17. The Respondent admits that it did not comply with the requirements contained within Employment Rights Act 1996 s.1.

Terms of the Contract

18. However, given there were no written terms of employment, I must determine the contractual terms in relation to:

a) *Weekly hours?*

- i) The Claimant says the contract obliged her to work for 30 hours per week.
- ii) The Respondent says it was a zero-hour contract, with ad hoc agreement as to when shifts were worked

b) *Payment*

- i) The Claimant says her pay in September and October 2020 was £9.00/hr
- ii) The Respondent says the Claimant's pay was £8.91/hr with holiday pay of £1.11 per hour "rolled-up", making a total sum of £10.02 per hour.
- iii) The Claimant says her hourly rate increased to £9.50 per hour from 1 November 2020. The Respondent denies this.

c) *Notice pay and period:*

- i) There was no discussion on the terms of notice pay or period. The Claimant's statutory notice period was 1 week.

Furlough

19. It was agreed the Claimant was placed on furlough by the Respondent, but the dates of this furlough leave were in dispute:
- a) The Claimant says this was 6 January 2021 to 16 May 2021.
 - b) The Respondent says this was 20 November 2020 to 30 June 2021.

20. It was agreed that, during the furlough period, the Claimant should have received 80% of her normal pay (in accordance with the Coronavirus Job Retention Scheme definitions), as this was orally agreed at the beginning of the furlough period.

Unlawful deductions from wages and holiday pay (under WTR)

21. In relation to unlawful deductions from wages the issues to be considered were whether the Claimant was paid the correct amount in respect of:
- a) Wages outside of the furlough period;
 - b) Wages within the furlough period; and
 - c) Holiday pay.
22. It was agreed that the Respondent did not pay the Claimant any sum in relation to her notice period, but the issue arose as to whether the Respondent entitled to withhold payment in respect of the notice period?
- a) The Respondent relies on the Claimant having committed a repudiatory breach of contract (by having stolen cash from the Respondent) as grounds for not making that payment.
 - b) The Claimant says the theft allegation is untrue and is a lie to disguise the real reason dismissal (her request(s) to be paid in accordance with her contract).

Automatic Unfair Dismissal

23. It was agreed that the Claimant was summarily dismissed on 24 July 2021, however the Claimant stated she asserted a statutory right not to suffer unlawful deductions from wages. The issues that arises is whether the Claimant made such an assertion on any of the following occasions:
- a) [Unknown date]: by telephone to Afzal Israr;
 - b) On 30 May in person with Anwar Alladuth;
 - c) On 22 July in person with Anwar Alladuth and Afzal Israr;
 - d) On 24 July with Seid Gofar.
24. Further was/were the assertion(s) made in good faith? And was the sole or principal reason for the dismissal because of any of the assertions above?
- a) The Claimant says yes.

- b) The Respondent says the reason was the genuine belief that the Claimant had stolen cash.

Remedy

25. In relation to the remedy the issue was whether the Claimant proved that she suffered the losses set out in her schedule of loss. Further, whether she then made reasonable attempts to mitigate her loss
26. Other relevant matters included:
- whether the Claimant was entitled to claim for overdraft fees;
 - was an uplift in compensation pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 appropriate?
 - a) If so, what percentage?
 - was the Claimant entitled to an award in respect of the Respondent's failure to provide written particulars?
 - a) If so, how much?
 - was the Claimant entitled to claim for interest on any amount awarded?

Findings of Fact

Terms of contract

27. I note that the Respondent admits that he did not comply with the requirements contained in the Employment Rights Act 1996, namely, to provide a written statement of particulars of employment. I therefore go on to consider the terms of the contract which are in dispute. The claimant states the contract obliged her to work for 30 hours per week; however, the Respondent says it was a zero-hour contract with ad hoc agreement as to when shifts were worked.
28. There is also dispute as to the agreed rate of pay, the Claimant states it was £9 per hour between September and October 2020, whereas the Respondent says the claimant's pay was £8.91 per hour with a holiday pay of £1.11 per hour "rolled-up" making a total sum of £10.02 per hour with the claimant stating an increase in the hourly rate to £9.50 from the 1st November 2020.
29. The Respondent provides a document entitled 'Hour worked table' [56] which relates to the hours worked by the Claimant between September 2020 – June 2021, however, I do not find this document to be reliable for a number of reasons especially as there is no contemporaneous record of the hours worked by the claimant. Firstly, in relation to the amounts provided by the respondent as being paid for September 2020 in the sum of £1,157.31 and October 2020, in the sum of £796.59 are not consistent with the figures they provided to HMRC [57] (£1158.20 and £796.63 respectively) and although the difference in the

figures is minute, I have been provided with no explanation by those who prepared the records as to the reasons for the difference in the amounts. In addition, the amount in the document is not actually consistent with the amount actually paid to the Claimant as seen in her bank statements [67-68] (£1114.36 and £796.41 respectively). This therefore leads me to doubt on balance, the Respondent's account that the document reflects Claimant's rate of pay at £10.02/hour, inclusive of the holiday pay.

30. However, this on the other hand this does not support the Claimant's claim that she was on a contract for a minimum of 30 hours. She stated in evidence, that the job advert had set out these terms but was unable to produced anything to corroborate her claims of these terms, which she states were also agreed verbally with Mr. Afzal, when she was interviewed. I take into account that the Claimant was employed during the pandemic, at a time when things were uncertain for the hospitality industry, and I accept therefore the Respondent's evidence on balance that she was employed under zero-hour contract.
31. On the same note, I find that it is not likely on balance than an agreement was reached that the claimant would receive £10.02 per hour which included holiday pay. On the basis of employment without written statement of particulars which appears to be quite a casual agreement, and I find on balance such an casual basis of employment could not have included a detailed term to include holiday pay within the rate of pay. Mr Gofar was unable to provide and clarification in his evidence about the mechanics of rolled up holiday pay and I find his evidence was not helpful on this issue.
32. I am satisfied on balance therefore that the rate of pay for the claimant was £9 per hour further that I am satisfied therefore that the claimant is entitled to holiday pay separately. As there is no written terms of contract or any evidence as to discussions on terms of notice pay, I am satisfied that the Claimant is entitled to a statutory notice period of one week.
33. Insofar as the Claimant claim that her hourly rate increased to £9.50 from the 1st November 2020, I find that on balance whilst there is some evidence to demonstrate the Claimant received good reviews, particularly included in the bundle at [103-104], as at the date the Claimant claims an increase, the business was closed due to restrictions during the lockdown. I find therefore on balance it is unlikely such a raise would have been agreed. It is not in dispute by the employer that the claimant was a very good and valued employee, Mr Afzal, stated in evidence before me that the only reason for the dismissal was the incident which I will come to later in this judgement.

Furlough period

34. The Claimant began work with the respondent on the 5th September 2020 and quite soon after she was furloughed. She states this between 6th January 2021 and 16th May 2021 when she returned to work in the restaurant part of the lounge on the 17th May 2021. However, the Respondent states the Claimant was furloughed from the 20th November 2020 to the 30th June 2021 and that any work before the 30th June 2021, was carried out for Paprika Ventures

Limited (PVL), which is the restaurant part of the lounge and owned by sole director Zeghum Afzal (aka Ziggy), the brother of Israr Afzal, sole director of the Respondent. I have heard from Mr Alladuth, who I found to be a straightforward witness and he confirmed that he managed both the restaurant and shisha lounge, and they were considered separate entities.

35. During the period of the Claimant's furlough, I note that she received payments of £640 per month. As per the HMRC document at [57-58], it was recorded that the Respondent had provided figures for the Claimant's taxable income as follows:
- 30th September 2020 - £1,158.20;
 - 31st October 2020 - £796.63;
 - 30th November 2020 – 31st March 2021, £640 (which represented money paid through the furlough scheme).
36. The Claimant provides her bank statement which show monies paid into the account by the Respondent as follows:
- 1st October 2020 - £1,114.26 [67];
 - 2nd November 2020 - £796.63 [69];
 - 5th November 2020 - £216 [69];
 - 3rd December 2020 -£640 [71];
 - 6th January 2021 - £640 [74];
 - 8th February 2021 -£640 [80];
 - 9th March 2021 - £640 [83];
 - 9th April 2021 - £640 [86]
 - 13th May 2021 - £640 [90];
 - 8th June 2021 - £640 [92]
37. I find that the payment of £1,114.26, made on the 1st October 2020, represents the wages for the period from the 5thSeptember 2020 – 30th September 2020. Thereafter each payment highlighted above corresponds to work done for the preceding month. Therefore, I find that the Claimant on the evidence in the form of her bank statements has demonstrated she was furloughed sometime in early November 2020, given her first furlough payment of £640 was made on the 1st December 2020. I find the last payment made on the 8th June 2021 represents furlough paid for May 2021, which in itself does not support the Claimant's account that she returned to work on the 17th May 2021.
38. In addition, the Claimant has not been candid in her disclosure of documentation to help corroborate her claim that furlough ended in, particularly, by failing to submit her bank statement for the month of July 2021. This would help determine what she was paid for the month of June 2021, i.e., was it £640 which is the amount she was paid whilst furloughed or was she paid

more than that to support her claim that she returned to work in May 2021. What I do have before me, however, is her bank statements which demonstrate that she was paid an amount of £640 on the 8th June 2021, which as I have highlighted above, I find relates to the furloughed wages for the month of May 2021.

39. Accordingly, I find she remained on furlough for that month through to the 30th June 2021 as claimed by the Respondent.
40. I find that the Appellant's work prior to this date, was for the restaurant separately owned by PVL, and the copies of messages [108] between the Claimant's mobile and Mr Anwar's mobile show what appears to be '*Floor June WK4*' on the 20th June 2021 and '*Floor June WK5*' on the 27th June 2021, with a message on the 4th July 2021 to 'Anwar' asking about her pay. The response is that '*have left your wage at restaurant collect when you can*'. I am satisfied that is consistent with Mr Alladuth's evidence that whilst the lounge was closed the Claimant picked up shifts at the restaurant for which she was paid separately.

Furlough pay

41. The documentary evidence which demonstrates the taxable income received by the claimant is recorded on HMRC document in the bundle at [57-58]. The net income is reflected in the payment made to the claimant on the 1st October 2020 received in her bank in the sum of £1,114.26 at [67]. The second is in the sum of £796.63 dated 2nd November 2020 at [69]. Another payment is seen in the claimant's bank statement on the 5th November 2020 with the reference "*chairs*" in the sum of £216. The claimant states that the money paid on the 5th November 2020 was to make up the 30 hours worked and that she was entitled to.
42. The Respondent's case is that this was payment for an invoice for chairs they had ordered. However, there is no evidence from the Respondent to corroborate the fact that there was such an invoice or that they had indeed had to make such a payment for chairs in that sum. There is nothing to demonstrate the Claimant was asked to pay this money back or that the chair vendor had made a further demand for unpaid monies. I am satisfied on balance therefore that the money seen in the claimant's bank statement, although labelled "*chairs*" was a top-up for her salary for the month of October 2021 and this is consistent with what she was paid in September 2021. Neither Mr Alladuth nor Mr Afzal were able to provide a satisfactory answer to support the assertion that these monies were wrongly paid to the Claimant.
43. I find the Respondent has attempted to adjust their figures to the HMRC to support a lower wage for the month of October 2021 especially as I note that the HMRC document sets out "*Hartiz Ltd has made some changes to the information they first gave us. These came after the end of the tax year and had therefore included in the table.*"

44. In these circumstances I find that the claimant was paid £1,114.36 net and £1,012.63 (£797.03 plus £216) net for the months September and October respectively. After this date she was placed on furlough between November 2020 – 31st June 2021.

Deductions from Furlough Pay

45. On the basis that it was agreed during furlough period an individual ought to have received 80% of their normal pay, I find that in considering the average of amount paid for the two months she worked and taking 80% of that would provide the net amount she was entitled to that she ought to have been paid during the furlough period. This is therefore $(1114.36 + 1012.63 / 2 \times 80\%) =$ an amount of £851 net. The Claimant was therefore underpaid during her furlough period in the sum of $(£851 - £640 = £211 \times 8)$ (November 2020 – June 2021) **£1688**.
46. I find that as this is a claim in respect of a series of deductions made from her pay within three months of the last of the deductions in the series, as prescribed by ERA 1996, s 23, then she is entitled to recover the sums that had been deducted from the wages properly payable to her between the period of November 2020 to June 2021, a period of 8 months.

Pay for July 2021

47. The Claimant also claims 62 hours for work done in July 2021, which she supports with a text message sent to Mr Afzal on the 29th July 2021 [107] and the Respondent does not deny that the Claimant worked these hours and was not paid. On this basis I find that she ought to be paid for the work done during this period as follows, $(61.5 \times £9 \text{ per hour})$, a sum of **£553.50 gross**.

Automatic Unfair Dismissal

48. Section 94 of the Employment Rights Act 1996 (“ERA 1996”) provides that an employee with sufficient “qualifying service” of two years has the right not to be unfairly dismissed by their employer.
49. Section 104(1) of the Employment Rights Act 1996 specifies that an employee can claim *automatic* unfair dismissal (i.e., no qualifying service needed) if the reason or principal reason for dismissal is that:
- (1) *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –*
- (a) *brought proceedings, or*
- (b) *alleged that the employer had infringed a right of his which is a relevant statutory right.*

- (2) *It is immaterial for the purposes of subsection (1) -*
- (a) *whether or not the employee has the right, or*
 - (b) *whether or not the right has been infringed;*
- but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*
- (3) *It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.*
- (4) *The following are relevant statutory rights for the purposes of this section–*
- (a) *any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,*
 - (b) *the right conferred by section 86*
 - (c) *the rights conferred by*
 - (d) *the rights conferred by the Working Time Regulations 1998, and*
 - (e) *the rights conferred by*

50. In order to succeed in such a claim there must have been an actual infringement and not just not merely an anticipation or threat of future infringement **Mennell v Newell & Wright (Transport Contractors) Limited** [1997] IRLR 519 and **Spaceman v ISS Mediclean Limited T/A ISS Facility Service Healthcare**[2019] IRLR 512.
51. Furthermore, the beliefs held by the decision maker on behalf of the Respondent, in this case, Mr Afzal, must be the reason for dismissal (**Orr v Milton Keynes Council** [2011] ICR 704 EWCA).
52. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in **BHS v Burchell** [1978] IRLR 379 for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.
53. I note it is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.

54. If I were to reject the respondent's reason for the dismissal then it is open to me to accept the reason put forward by the Claimant or decide that a different reason was the true reason for dismissal; **Kuzel v Roche Products Ltd [2008] IRLR 530, CA.**
55. The parties agree that the Claimant was summarily dismissed on the 24th July 2021. The Claimant's evidence before me this was because she asserted a statutory right not to suffer unlawful deductions from her wages, on at least 4 occasions the first by telephone to Mr Afzal, Mr. Alladuth in person on the 30th May 2021, and on the 22nd July 2021 in person to both Mr Alladuth and Mr. Afzal, and then lastly to Mr Gofar on the day she was dismissed, the 24th July 2021.
56. I note the only documentary evidence which refers to the Claimant's wages is contained in text messages [107] dated the 16th July 2021 from the Claimant to Mr Afzal, in which she asked Mr Afzal about her pay, and his response was that he would let her know as soon as it came in. Similarly, on the 4th July there is a text message [108] to Mr. Alladuth in which she questions not being paid and the response she received was that he had left the wage at the restaurant. Nowhere within these messages does it demonstrate that the Claimant was unhappy with the amount being paid or that she had ever queried the amount she was being paid for any of the work she had undertaken for the shisha lounge.
57. Mr Alladuth gave evidence that he managed operations for Paprika as well as the Respondent overlooking all their accounts, but he had more responsibility for PVL. He confirmed that the payment for the wages she questioned in text messages to him on the 4th July was for work done at the restaurant. I note that neither of the parties have provided me with what appears to be referred to as a floor rota in the text messages or to confirm whether that was the rota was for the restaurant or the lounge. Therefore, I am not assisted any further by the text messages save for the matters as highlighted above, i.e., the Claimant was querying when she was due her wages.
58. Mr Afzal did clarify in evidence that the Claimant had questioned the amount she was being paid during furlough on more than one occasion as she had not understood how it was worked out. Given the concept of furlough was new, having been implemented over the lockdown period, I find on balance the Claimant's queries about its operation were natural and I am satisfied that this does not mean that it was the reason which led the Respondent dismiss the claimant. There appears to be no bad feeling between the Claimant and the Respondent demonstrated by any documentary evidence whilst she was employed by them. Further I accept, Mr. Afzal's evidence before me which I found to be credible, confirming the Claimant was a good member of staff.
59. I go on to consider the circumstances the Respondent claims were the reason for the Claimant's dismissal. It is not in dispute that the Claimant was offered a lift by Mr Afzal on the night of the 24th July 2021, at the end of her shift and that he told the Claimant that after viewing CCTV footage on the night of the

23rd July 2021, it was noted that the Claimant had kept some cash back from the till.

60. I have been provided with the CCTV footage which all parties have seen, and the Claimant confirmed that she had first seen this when Mr. Afzal showed it to her on the night that she was dismissed. The Claimant in evidence explained that she told Mr Afzal on the night in question that this was a tip given to her by a table; however, having closed a wrong bill on one table she attempted to correct the accounting with second bill which was the reason for her counting/recounting the money.
61. The video footage shows the Claimant at the till and for some time, and in a state of what can only be described confusion, she looks around and appears to count and recount the money in her hands, eventually placing money in the till and taking some with her. The CCTV footage does not demonstrate how much money she kept back. However, I note the Claimant has remained consistent through her different forms of evidence in explaining what was seen in the CCTV footage. I therefore accept the Claimant's evidence corroborates the Claimant's actions as seen in the video.
62. I note Mr Afzal states he thought it was enough of a lesson as she was young to have dismissed her and allow her a chance rather than report it to the police. However, I note that the Respondent have failed to provide any evidence to demonstrate that they conducted any kind of investigation into missing money or provided any documentary evidence to demonstrate that the accounts for that night did not tally up. Mr Afzal simply states in evidence that he was not satisfied with the Claimant's explanation and that he had shown the video to Mr Alladuth they were of the view that a theft had taking place.
63. I have also noted that the Respondent in the grounds of response [38], simply refer to the Claimant having stolen from them, however, from the evidence before me it is clear that the Respondent failed to conduct any investigations and/or provide any evidence to demonstrate that having balanced their books of their takings on the night in question, that they were short in any way and therefore that monies had been stolen. I am therefore not satisfied on balance that a theft has taken place.
64. In addition, I note the Respondent's case has evolved since their grounds of response, stating now that as the Claimant had kept a tip then she was acting in breach of their policy on tips, and as such this constituted a theft.
65. All three witnesses for the Respondent gave evidence in relation to this. Mr. Afzal in evidence before me stated that the Claimant knew given the internal policy of the Shisha Lounge, that every staff member would divide all tips which would go into the till and agreed that service charge was added to the bill. Mr Alladuth in his statement set out "*The member of staff that collects payment is not permitted to pocket the gratuity. On rare occasions where a customer is insistent on handing their service, cash specifically for them, the policy is that the server informs the manager of this so it can be acknowledged.*". If such a

situation arose, then the employee would let him or the Floor Manager, Mr Gofar know. Mr Gofar's evidence was in similar vein.

66. However, while such a policy would make sense, it is clear that the Respondent operates on an relaxed basis insofar as employment is concerned as demonstrated by a failure to provide the Claimant with written term of employment. Therefore, I find it is unlikely that they had such a rigid policy. In any event even if such a policy existed, I find on balance it is doubtful whether such a policy was ever communicated to Claimant, especially as she was only working there two months before she went on furlough and in this sense I find neither Mr Alladuth's or Mr Gofar's evidence addressed when they might have told the Claimant of such a policy and therefore, I find their evidence on this issue is of limited value.
67. What I do however, go on to consider is whether the Respondent had a reasonable belief that theft had taken place and having considered the CCTV footage itself. I am satisfied having viewed the CCTV that the Claimant's actions are open to interpretation given (as described above) what it shows. I find in these circumstances, whilst I am satisfied there has been no theft, the Respondent did dismiss her given their genuine belief on the night of the 24th July 2021, (having viewed the CCTV footage of the 23rd July 2021) that the claimant has stolen cash (Orr).
68. Accordingly, therefore, the burden of proof being on the Claimant to show that her alleged assertions in respect of wages paid or any unlawful deductions from them, was not the reason or principal reason for her dismissal, she has failed to discharge that burden and she was not, therefore, automatically unfairly dismissed contrary to s.104.
69. If the Claimant were bringing a claim of 'ordinary' unfair dismissal, based on having two years' service, she would have been able to challenge the Respondent's reasoning for her dismissal and its overall fairness, but she cannot do so.

Grievance

70. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:
- 'any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.'*
71. The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
72. On the 31st July 2021, the Claimant raised a grievance about all the matters that she has pursued through these proceedings, including having raised complaints about being paid less than was agreed when she was employed,

like wise incorrectly calculated furlough payments and the failure to account for the raise in her pay that she claims after 2 months in employment. Additionally, the Claimant raised issue with the way in which she was dismissed. I find that whilst, the ACAS code of practice does not expressly specify whether it ought to apply to grievances raised by ex-employees the Respondent was in a position to engage with an Claimant's grievance in the hope of resolving them an avoid tribunal proceedings.

73. It is clear they Respondent did not follow a disciplinary procedure in relation to the allegations of theft against the Claimant, nor did they deal with any matters raised in the Claimant's grievance and therefore I am satisfied that the Claimant is entitled to an uplift

Conclusions and Remedy

74. I find under the circumstances that the claimant's dismissal was not unfair by reason of having asserted a statutory right under Section 104 and she is not entitled to a basic or compensatory award.
75. In relation to failure to provide particulars of employment, I find with reference to section 38 Employment Act 2002, the Claimant is entitled to a minimum of two week's (with a maximum of 4 weeks) pay at £245.42 per week (the average paid in September and October 2020 $(1114.36 + 1012.63 / 2) = £1063.50$ per month = £245.42 per week $((£1063.50 \times 12) / 52)$). Therefore, given the average amounts I have calculated she was paid in September and October (see above) and her length of employment for under a year, I am satisfied she is entitled to on balance $(£245.42 \times 2) =$ **£491 net.**
76. In so far as wages within the furlough period as set out above, I find the Claimant is entitled to **£1688 net** for the months of November 2020 – June 2021.
77. In considering the Claimant's entitlement to holiday pay I find she was employed on a zero-hour contract at the rate of £9 per hour and had taken no leave. Having rejected the fact that the Claimant was being paid "rolled up" holiday pay and as it was common ground the Claimant had accrued leave, which she had not taken then, I find pursuant to Regulation 14 of the Working Time Regulations 1998, the Claimant was entitled to 5.6 weeks pays leave per year as R does not operate a holiday year. As the Claimant worked 323 days = 0.885 year, her pro rata entitlement is as follows. The average earned in the two months she worked in September and October $(£1114.36 + £1012.63 / 2) = £1063.50 / 9$ equates to having worked 118 hours per month ($£1416$ hour per year / 27 hours per week). Therefore, she would be entitled to 5.6×27 hours = 135 hours. Essentially, therefore she would be entitled to 135 hours @ £9 per hour. A total of **£1,215 net.**
78. Insofar as the pay for July is concerned, the Respondent does not in any way dispute the claimant worked in July, and the only evidence of the number of hours worked are apparent from the text message sent on the 29th July 2021 at

[107] which shows a total of 61.5 hours, therefore paid at the rate of £9 per hour. She is entitled to a payment of **£553.50 gross**.

79. In all the circumstances, I find under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, the Respondent has unreasonably failed to comply with the Code and therefore, I am satisfied in all the circumstances presented that it is just and equitable to increase the award that the Claimant is entitled to by way of an uplift of 10% on any award of compensation. I have considered an uplift of 10% appropriate given the Respondent is a small company and that the nature of the Respondent's default under the ACAS code is not one which can be classed as an egregious breach.

Notice Pay

80. In the absence of an express provision section 86 of the Employment Rights act 1996 states as follows:

(1) *The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –*

(a) *is not less than one week's notice if his period of continuous employment is less than two years,*

81. In relation to notice pay the Respondent agrees they have not made any payment to the claimant; however, the issue arises as to whether they were entitled to withhold the payment given they claim a repudiatory breach of contract, namely that they state the Claimant stole cash from them on the night of the 23rd July 2021, which they say they observed on CCTV. However, given my findings above that there has been no theft, then I am satisfied that the Claimant is entitled to her notice pay.
82. As the Claimant's employment was employed for under two years then I find she is entitled to one week's notice pay, which I calculate by finding the average paid in September and October 2020 $(1114.36 + 1012.63 / 2) = £1063.50$ per month. The weekly rate equates to £245.42 $((£1063.50 \times 12) / 52)$ and therefore Claimant is entitled to **£245.42 net**.

**Tribunal Judge S Iqbal acting as
an Employment Judge
Date: 20 September 2022**