mf

EMPLOYMENT TRIBUNALS

Claimant: **Mrs R N Dsouza**

Respondent: **Chandni Rach trading as "Lashious Beauty Dagenham"**

Heard at: **East London Hearing Centre** **On: 19-20 October 2017**

Before: **Employment Judge Ross (sitting alone)**

Representation

Claimant: Mr S Pereira (Husband)

Respondent: Ms N Kang (Human Resources)

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The name of the Respondent be amended to read "Chandni Rach trading as "Lashious Beauty Dagenham"".

(2) The complaint of unfair dismissal is not upheld.

(3) The complaint of unlawful deduction from wages is well-founded. The Claimant is entitled to the notice pay and the holiday pay claimed.

(4) The complaint of breach of contract is well-founded. The Claimant is entitled to payment for her outstanding travel expenses at the date of termination of her employment.

(5) Section 38(2) of the Employment Act 2002 applies. The Tribunal makes an award of two weeks pay to the Claimant.

(6) The Respondent do pay the Claimant the sum of £2,146.91 consisting of:

6.1. holiday pay of £313.85;

6.2. travel expenses of £112;

6.3. notice pay of £1,140;

6.4. an award under section 38(2) Employment Act 2002 of £581.06.

(7) So far as is necessary, applications for reimbursement of fees, however paid or by whom, shall be made in accordance with administrative arrangements to be announced by the Ministry of Justice and Her Majesty's Courts and Tribunal Service shortly.

REASONS

1 The Claimant was employed by the Respondent between 4 April 2014 and 7 October 2016 as a beautician. It is important to record that these dates were admitted by the Respondent in its ET3 response and not questioned in its witness statement evidence. This was not a factual issue between the parties on the pleadings and the evidence.

2 From the Claim form, the Claimant complained of:-

2.1 unfair dismissal;

2.2 unpaid notice pay;

2.3 unpaid holiday pay;

2.4 unpaid travel expenses.

3 The Claimant had filed a schedule of loss on 15 August 2017.

4 At the outset of the hearing, I considered that it would further the overriding objective if this hearing heard evidence as to both liability and remedy. It appeared to me that this would involve little or no extra evidence. The parties were informed.

5 The issues were set out in the case management order of Employment Judge Ferguson dated 27 April 2017. Despite reciting the complaints, the list of issues set out in the case management order did not refer to unpaid notice pay or breach of contract at all. I raised this with the parties after the first day of the hearing, particularly before the main Respondent witness gave evidence, Ms Rach. I explained that notice pay was claimed and this was either due as unpaid salary because the Claimant on her case had given notice to the end of the month or breach of contract and on both the Respondent's case and the Claimant's case the Claimant had resigned with notice (the Respondent's case being that the Claimant resigned with notice on 2 October 2016, before resigning without notice on 7 October 2016).

6 Having explained this, I questioned whether the notice pay claim was still contested, and the Respondent confirmed that it was because the Respondent alleged the Claimant had resigned with immediate effect on 7 October 2016, an allegation disputed by the Claimant. I therefore explained to the parties that the list of issues

would also include the following in respect of breach of contract: whether there was a breach of contract outstanding at the termination of the Claimant's employment, namely:-

6.1 Whether the Respondent failed to pay notice pay to which the Claimant was entitled;

6.2 Whether the Respondent failed to pay for the cost of the travel card to which the Claimant was entitled.

The identity of the Respondent

7 At the outset of the hearing, I ordered that the actual employer be substituted as the Respondent, because I understood Ms Rach to be a director of a business. At that time, I was informed by Ms Rach that the Claimant was employed by a limited company "Lashious Beauty Dagenham Ltd". At that point, I directed that the Respondent provide proof of this overnight.

8 At the start of the second day of the hearing, the Respondent retracted that the Claimant was employed by a limited company. It was stated that Ms Rach was a sole trader trading as "Lashious Beauty Dagenham". I asked for evidence of that which arrived mid-morning and led to a delay whilst it was printed off.

9 On the face of these documents, I accepted that the Claimant was employed by Chandni Rach trading as "Lashious Beauty Dagenham". I record that this name should be substituted as the name of the Respondent.

Documents

10 The parties had not agreed a single bundle and to be frank had paid little attention to previous directions; this caused the hearing to take longer than it should have, despite my efforts in having documents copied by Tribunal staff to speed matters up.

11 The Claimant had prepared a bundle which is marked C1 (1 to 41). It is to be noted that page 41 was admitted in evidence during the cross-examination of the Respondent, and without objection from the Respondent.

12 The Respondent had a selection of documents which was treated as a bundle, and marked R1, paginated page 1 to 38.

13 At the end of the evidence, the documents received from the Respondent's accountant to prove the identity of the Respondent were made into a bundle and marked R2.

Oral evidence

14 I read witness statements and heard oral evidence from:-

14.1 the Claimant,

14.2 Mr Pereira, her husband.

For the Respondent:

14.3 Asif Rauf, manager,

14.4 Chandni Rach.

15 I also heard oral evidence from Minal Radia, despite no witness statement having been served. The Respondent applied to call her and in the absence of complaint I felt this would further the overriding objective to allow this evidence.

16 Overall, in broad terms, I preferred the oral evidence of the Claimant to that of the Respondent's witnesses where there was any conflict. I found the Respondent's witnesses to be hostile to the Claimant for no reason save that she had gone to work for a competitor, which as we shall see, I have found she was entitled to do. I found the Claimant's evidence and account of events was largely supported by the documents. As I have explained below, on the disputed issues, I found the Respondent's evidence was either unreliable or not credible, and not corroborated by certain documentary evidence.

The facts

17 The Respondent is a business providing beauty services in salons. According to the Respondent, it employs 10 people over two salons; but it seems to me that it is likely to be part of a larger family business because the Respondent stated on its ET3 that there were 60 employees.

18 The Claimant was initially employed by Mayfair Outlet Ltd and transferred to work for the Respondent in 2015. It is accepted that the Transfer of Undertakings Regulations applied.

19 The Claimant worked approximately 42 hours per week over five days. She worked every Saturday and one Sunday per month.

20 When the Claimant was recruited, she was not provided with a statement of terms and conditions nor any form of written agreement, a point I will return to. It was admitted the notice period under her contract of employment was one month, which Ms Rach confirmed in evidence.

Contract of employment: no statement of terms

21 I accepted the Claimant's evidence that she was never provided with a written contract of employment nor any statement of terms.

22 In their amended response, the Respondent did refer to a contract of employment. In evidence the Respondent said that she had given a copy of the draft contract at R1 page 19 to 25 to the Claimant in late 2015. I rejected that evidence as unreliable, if not untrue, for the following reasons:-

22.1 This was not part of the Respondent's witness statement evidence at all. There was no mention of the Claimant being given a contract of employment.

22.2 The Claimant was never cross-examined about the alleged handing over of the draft contract to her in late 2015. In order to deal with this issue in fairness to the Claimant, the Claimant had to be recalled to respond. I accepted her evidence that the first time she had seen this draft contract of employment was in the Tribunal bundle of R1.

22.3 The draft contract of employment at page 19 to 25 of R1 is not completed. No such document in the Claimant's name was ever provided. I could not accept that this employer, despite being a small one, would not have kept a copy of a contract of employment if one existed. This was particularly so if, as I have found, the Claimant was questioning what her rights were particularly in respect of holiday leave.

23 The real question is what terms were agreed at the commencement of the employment and whether these were varied at any time. The Respondent produced no evidence of the terms agreed with the Claimant when recruited by Mrs Daxa Rach.

24 There is no evidence the Claimant was bound by any restrictive covenant of the type referred to in the amended response, even if these were lawful and not too wide.

25 For reasons I shall come to, I find the attempt of the Respondent to blacken the character of the Claimant because she chose to work for a competitor in Bishops Stortford as unnecessary and misguided. There is no reason why, having left the Respondent's employment, the Claimant could not work for whichever salon she wished to.

26 In evidence, the Respondent admitted the notice period applicable to the Claimant's contract of employment was one month.

27 In addition, it was admitted by Mr Asif Rauf and the Respondent that it had been agreed that the Claimant's travel expenses in the form of a travel card to Bishops Stortford, would be paid by the Respondent. The Respondent's case in respect of that travel card expense was that the sum had been paid in advance by the Respondent.

28 I find as a fact that there was no agreement between the parties at the commencement of the Claimant's employment as to when her holiday year started, nor was any agreement made with her about the commencement of her holiday year after she started employment.

Travel expenses

29 The Claimant was required to work at Bishops Stortford branch, some distance from her home. The parties had agreed that because of the cost of travel, the Respondent would pay for the Claimant's travel card.

30 On all the factual issues concerning the travel expenses, I accepted the Claimant's evidence. I find she was honest in explaining that the process for claiming this expense was that she would submit her receipt for the travel card expense, and was paid in arrears for it. Mr Rauf changed his evidence on this issue; in his witness statement he said the Claimant was paid for her travel in advance, but admitted in oral evidence that he could not be sure if this had been agreed.

31 The Claimant was always paid in cash for the travel card. The Claimant's evidence was that she was not paid in cash for the last month's travel card that is for the travel card for October 2016. I accepted this: she requested payment and presented the receipt. This expense should have been paid, but it was not.

32 It was agreed that the cost of the travel card was £112. The Respondent's evidence was that this had been paid, probably by her mother. But I prefer the direct evidence of the Claimant that it had not been paid because:-

32.1 There was no direct evidence that this sum had been paid.

32.2 The Claimant's evidence that it had not been paid was corroborated by the text at C1, page 41, in which the Claimant is requesting payment of it.

32.3 In my experience, it would be unusual for an expense to be paid before it was incurred, and I find that this was unlikely to have been the arrangement between the Respondent and the Claimant.

Holiday pay

33 As I have explained there were no agreed terms as to the Claimant's holiday pay or when her holiday year started. There was no "relevant agreement" for the purposes of the Working Time Regulations 1998.

34 The consequences of this in this case I explain below in my conclusions. The period that I am interested in, in respect of holiday pay for 2016, is the period from the anniversary of the Claimant's commencement in employment. I accepted the Claimant's evidence that she took two weeks (10 days) holiday during the year from 4 April 2016 until her resignation took effect. These weeks were:-

34.1 From 4 April 2016 to 10 April 2016 (which was part of a longer holiday to India which commenced on 24 March 2016).

34.2 One week in August 2016.

35 The Claimant's evidence on this was not disputed.

Constructive dismissal

36 The Claimant's evidence was that she was never told how many holidays she had, and that different members of staff told her different things about the holiday year. The Claimant wanted to find out what her holiday entitlement was. This in itself may explain why she was not given a copy of any contract of employment. On the facts, however, I find that this did not cause her to resign.

37 In May 2015, from the point at which the Respondent commenced running the business containing the Bishops Stortford salon, the Claimant said that the Respondent was rude to her and set unreasonable targets for turnover for the individual beauticians. A flavour of her evidence is as follows:

> "*Always some or other target, block bookings, sometimes customer not want this. I tried my best she not happy. I was always stressed out: came by train exactly 9 or just after, not happy about*."

38 The arbitrary setting of targets probably was a feature of the Respondent's management. She was a very inexperienced manager, who by her own account had been plunged into the deep end when she took over this business. This is demonstrated by the events on 28 and 29 September 2016. In a similar way, the Claimant had no employment law training and yet felt her opinions very strongly about what was the right or wrong way for an employer to proceed, irrespective of the law of contract or the Employment Rights Act 2016. On this issue, I did not accept the Claimant's evidence insofar as she suggested that the Respondent terrorised her staff, although this may have been her perception.

39 In respect of the incident on 28 September 2016, it was a rule in the Bishops Stortford salon that beauticians were not to eat their food in treatment rooms. On that day, Daxa Rach, the Respondent's mother, entered the salon and found Minal Radia and the Claimant eating in a treatment room. She told them off. The Claimant's witness evidence about what was said was not challenged. I find Mrs Rach had every right to scold these staff, albeit she went over the top in doing so, because there was a smaller room at the back for breaks.

40 The next day, 29 September 2016, in response to news that the Claimant and Ms Radia would be late to open the salon, the Respondent replied as follows (page 13, C1):

> "I'm not happy with bishops and the last thing I need is problems with opening up too!
>
> I spoke to my mum about what happened yday, I'm super disappointed in both of you and Rita tbh!
>
> I need you to push your sales today and sell some block bookings otherwise I'm going to look at cutting yours and Rita's hours for some one who can sell block bookings.
>
> And bring in more money
>
> Your individual targets for today is £400
>
> I don't care how you do it, that's what's expected from you today!"

41 It appears to me that the target of £400 each was being imposed in an arbitrary way, as a form of disciplinary measure for the lateness of the Claimant and Ms Radia. There was no evidence it was part of any policy, nor whether trade for November 5 November 2016 was forecast to justify £400 in sales for each beautician.

42 I find that this, whilst being unreasonable, was not a breach of the implied term of trust and confidence. It was simply an unsophisticated form of motivation by the owner of the business, which was borne out of her lack of experience.

43 The Claimant's strong feelings about how an employer should behave is shown by her complaint that the Claimant had not allowed any Christmas leave, save for Christmas day. In fact, I accept the Respondent's evidence that the needs of her business meant that Christmas was the busiest period and there was no time off allowed over the Christmas period for beauticians.

44 In respect of the incident on 21 April 2016, I did not find that this amounted to a breach of the implied term of trust and confidence. The Claimant experienced severe travel problems on her way to Bishops Stortford from Cheshunt. She spoke to her manager Mr Rauf, and he advised her to go to Tottenham Hale and then go to Barking by underground. The Claimant went on a very crowded train to Tottenham Hale, after which she did not feel she could go to work. She was unhappy with Mr Rauf because he told her to go to Barking by underground and this is not possible direct from Tottenham Hale. The Claimant does not travel alone very much in London.

45 The Claimant rang her husband who asked her to come home. I accept this was the act of a caring husband, but I can equally understand the frustration of Mr Rauf shown in his text at page 8 to 9 of C1, which I do not repeat.

46 The text communication between Mr Pereira and Mr Rauf was not constructive. It made a bad situation worse. Mr Rauf concluded (page 9 of C1): "She has done a very wrong thing last week also. And if this happens again today, then I dont want her to come tomorrow also".

47 I find that this was an unreasonable reaction to Mr Pereira's interference, but I can see that Mr Rauf had some cause for such a reaction.

48 It is important to note that I heard no evidence of any sanction or disciplinary process being applied to the Claimant after this incident, nor after any of the other incidents referred to above.

The Claimant's resignation

49 The Respondent's evidence was that the Claimant had resigned on 2 October 2016, by telling her mother or Mr Rauf; she could not specify precisely the circumstances or whom she had learned this from. Mr Rauf could not recall who or exactly when he had learned of the resignation, but said probably Daxa Rach had told him about it.

50 In contrast, the Claimant's direct and clear evidence was that she did not resign on 2 October 2016. I accept that evidence. On that date, the Claimant only spoke to Mr Rauf and Mrs Rach about a pay rise. I consider it very unlikely that if the Claimant had resigned on 2 October 2016 there would have been no documentary confirmation of this or even a text by the Respondent to record it.

51 In respect of the events on 7 October 2016, I preferred the Claimant's account of the factual events. The Claimant received a call at the salon from the Respondent asking about sales figures. The Respondent sounded unhappy and requested the Claimant and Minal Radia to "up sell" the block bookings. The Respondent complained the salon at Bishops Stortford was not doing well: the Claimant was scared that the Respondent would impose a significant target. As a result of these tensions, a heated argument broke out. In the course of the call, the Claimant stated that this would be the last month that she would work for the Respondent and resigned.

52 After receiving this resignation, as a knee-jerk reaction, Ms Rach suspended the Claimant. Having suspended the Claimant, Ms Rach alleged that the Claimant owned a salon in competition with her own, and had given her telephone number to clients.

53 When I questioned the Respondent about why she had suspended the Claimant if the Claimant had (as the Respondent alleged), resigned forthwith in that call, her answer was very unsatisfactory; she failed to provide any actual answer:

> "it was like an argument – one of those things, because she had given out her number. After she resigned, it was like she admitted, cos she was accused."

54 In respect of the allegation that the Claimant was working in competition to the Respondent from 23 October 2017, I found the Respondent's evidence unconvincing, being based on assertion and allegation not real evidence. I prefer the Claimant's account. She said that she had been approached by the owner of the new salon because she liked her work, because she knew the Claimant from being a customer of the Respondent's business. The Claimant did not resign to join the new salon, she resigned with notice because of the argument and the injustice that she perceived and the criticism that she perceived in the Claimant's manner in the telephone call on 7 October 2016.

55 The Claimant was contacted by Laila (the new salon owner) between 20 and 22 October 2016. The Claimant agreed to work for her because she had heard nothing about the alleged investigation, which she was told about by text after the phone call in which she resigned. The Claimant began work for Laila on 4 November 2016, when she had one customer, at which point the salon was not fully opened.

56 I rejected the Respondent's account about events leading up to and after the 7 October 2016 for several reasons:-

56.1. The alleged CCTV evidence against the Claimant was never produced.

56.2. The CCTV evidence and much of the oral evidence given by the Respondent was never put to the Claimant. I find that the Respondent's evidence was unlikely to be true but was more in the nature of allegation.

56.3. The particulars of the phone conversation on 7 October 2016 given by the Respondent in oral evidence were never mentioned before.

56.4. The document at page 17 of R1 is a social media advert. Social media is a notoriously unreliable source of facts, and advertising in general is unreliable as a source of fact.

56.5. There was not a shred of evidence of any investigation by the Respondent, despite the Claimant's letter at page 20 of C1 requesting information about the investigation.

57 The letter at page 20 corroborates the Claimant's case, because it requests notice pay; moreover, there is no evidence that this letter was ever responded to by the Respondent disputing this request on the basis that the Claimant had resigned without notice.

58 For all the above reasons I have concluded that the Claimant resigned on 7 October 2016 and gave one month's notice.

Was there a breach of the implied term of trust and confidence?

59 Up to the point of the Claimant's resignation, I find that the conduct of the Respondent was unreasonable in some respects in some instances, but not a breach of the implied term of trust and confidence. The Claimant was sensitive that her work be appreciated, and the Respondent was an inexperienced manager, who did not appreciate this. I have no doubt that the Respondent approached the subject of sales in an unsophisticated way; but I find that she was genuinely concerned about sales and there were reasonable and probable cause to raise this subject.

Relevant law

Constructive Dismissal

60 Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

61 The burden was on the employee to prove the following:

61.1 That there was a fundamental breach of contract on the part of the employer;

61.2 That the employer's breach caused the employee to resign;

61.3 The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

See *Western Excavation v Sharp* [1978] ICR 221.

62. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal, taken from *London Borough of Waltham Forest v Omilaju* [2005] ICR 481 are as follows:

62.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

62.2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see for example *Malik v Bank of Credit and Commerce International [1998] AC20* 34h-35d and 45c-46e.

62.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, *Browne-Wilkinson J in Woods v Wm Car services (Peterborough) Limited [1981] ICR 666* at 672a. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

62.4. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that looked at objectively it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

62.5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph 480 in Harvey on Industrial Relations on Employment Law:

> *"(480) Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against a background of such incidents it maybe considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship".*

63. I note that a breach of trust and confidence has two limbs:

63.1. The employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and

63.2. That there be no reasonable or proper cause for the conduct.

Working Time Regulations 1998 and Holiday pay

64. WTR as amended provide a right to statutory annual leave with a cap of 28 days (5.6 weeks): Reg 13(1) and 13A(2).

65. The start of the leave year must be a specific date. It can be stipulated by the parties in a "relevant agreement" as defined in Reg 2(1). This reads:

> "…
>
> "relevant agreement", in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer;"

66. In the absence of a relevant agreement, where a worker's employment began after 1.10.98, his or her leave year begins on the date on which his or her employment began and on each anniversary of that date: Reg 13(3)(b) WTR.

Unlawful deduction from wages: Section 13 – 27 Employment Rights Act 1996

67. I have directed myself to sections 13-27 ERA 1996 and considered the relevant provisions. S.27 sets out the meaning of wages. Any payment in respect of expenses is not wages: s.27(2)(b). Unpaid notice pay, where an employee works out their notice period, is wages, whether or not the employee is suspended.

Breach of Contract

68. The jurisdiction of employment tribunals to hear breach of contract claims is provided for under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623. Article 3 provides:

> "Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –
>
> …
>
> (*b*) the claim is not one to which article 5 applies; and
>
> (*c*) the claim arises or is outstanding on the termination of the employee's employment."

Section 38 Employment Act 2002.

69. I reminded myself that Section 38(3) EA 2002 provides, with emphasis added:

> "(3) If in the case of proceedings to which this section applies –
>
> (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead."

70. Schedule 5 EA 2002 includes claims for unlawful deductions from wages.

Conclusions

71. Applying the above facts to the law set out above, I reach the following conclusions on the issues outlined in the Case management order and by me in respect of breach of contract.

Unfair constructive dismissal

72. The Claimant did resign on 7th October 2016 in response to the conduct of the Respondent on that date.

73. The Respondent's conduct on that date was not a breach of the implied term of trust and confidence. It was somewhat crude management.

74. Moreover, the conduct of the Respondent on 7th October 2016 was not the last straw following a series of breaches of contract or a course of conduct likely to destroy the implied term of mutual trust and confidence.

75. The Claimant was not constructively dismissed. The issue of whether any dismissal was unfair does not arise.

Unlawful deduction from wages: Notice pay.

76. The Claimant was entitled to one month's notice pay. Her notice ended on 6th November 2017. This sum was unlawfully deducted from the Claimant's wages.

77. On the first morning of the hearing, the parties agreed that the Claimant's net monthly pay was £1,140 (the average of the net monthly pay over 6 months). This is the notice pay to which the Claimant is entitled.

Breach of contract

78. There was no breach of contract outstanding at the termination of the Respondent's employment in respect of notice pay, because the Claimant had resigned with notice, and the Respondent had not dismissed her.

79. The claim for travel costs of £112 was outstanding at the termination of her employment. I conclude that this was a payment in respect of expenses, or wages. It is therefore recoverable as breach of contract, if not as wages.

Holiday pay

80. At the outset of the hearing, the parties agreed that the net daily earnings figure was £49.08. This means that one week's net pay is £245.40.

81. The Claimant's leave year was 4th April to 3rd March each year.

82. From 4th April 2016 until 6th November 2016, the Claimant was entitled to the following holiday:

> (215 days/365 days x 5.6 weeks) – 2 weeks taken = 1.28 weeks holiday had accrued.
>
> This equates to days. From the agreed daily net earnings figure, the Claimant is entitled to £49.08 x 1.28 weeks = £313.85.

83. The Claimant is therefore entitled to holiday pay of £313.85. This is slightly lower than her estimated figure because the law requires me to calculate it net of tax, and in days, not in hours.

Section 38 Employment Act 2002

84. Section 38 EA 2002 provides as follows:

> **Failure to give statement of employment particulars etc.**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.
>
> (2) If in the case of proceedings to which this section applies –
>
> (a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change **[F1**or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday**]**),
>
> the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
>
> (3) If in the case of proceedings to which this section applies –
>
> (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 **[F2**or under section 41B or 41C of that Act**]**,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3) –

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

85. It is to be noted that this section places a duty on the Tribunal to make an award if certain conditions are met. In this case, I found that the Respondent had failed to provide any statement of terms and conditions at all to the Claimant.

86. Therefore, I am required to award the Claimant at least two weeks pay. I consider that given the inexperience and lack of understanding of the Respondent, it is not necessary to award the higher amount. This is her first employment dispute, as far as I could tell. If what she says is true, and employment contracts are now provided to all staff, then the failures in this case may not be repeated.

87. There are no exceptional circumstances here. The failure to give the Claimant a statement of particulars of her employment terms was poor management.

88. I therefore award two weeks pay to the Claimant under section 38. I calculate this on a gross pay basis as required by the statutory provisions. The parties agree in their pleadings that gross pay is £1259 per month, which equates to £290.53 per week.

89. Therefore, I award £581.06 under this head (and no deduction for tax or NI is to be made to this sum before payment to the Claimant).

Employment Judge Ross

9 November 2017