EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Hadj-Chikh	**v**	**Grey Court Ltd**

Heard at: London Central (by video) **On**: 26 January 2021

Before: Employment Judge P Klimov

Representation

For the Claimant: in person

For the Respondent: Mr U. Utip, solicitor, and a director of the respondent

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.

JUDGMENT

1. The respondent has made an unlawful deduction from the claimant's wages in contravention of section 13 of the Employment Rights Act 1996 ("ERA") and is ordered to pay the claimant the sum of **£5,633.67** (gross) for the wages unlawfully deducted and to account to HMRC for any tax and NI due.

2. The respondent has failed to give the claimant his pay statement in contravention of section 8 of ERA.

3. The respondent's breach of section 13 of ERA had one or more aggravated features, and therefore the respondent is ordered to pay a penalty of **£2,816.84** to the Secretary of State.

4. The claimant's claim for breach of contract (wrongful dismissal) fails and is dismissed.

5. The respondent's counterclaim for breach of contract fails and is dismissed.

REASONS

Claim and Preliminary issue

1. By a claim form presented on 10 October 2019, the Claimant brought complaints of breach of contract (wrongful dismissal) and of unlawful deductions from wages with respect to:
   (i) his salary for August 2019 - £2,750,
   (ii) his seven days' pay, retained by the respondent at the start of the claimant's employment - £861.54,
   (iii) overtime - £4,571.40,
   (iv) notice pay - £2,750,
   (v) two months' of tronc/service charge - £780, and
   (vi) accrued but untaken holidays - £2,294.20.

2. The respondent rejects the claims and counterclaims for losses it says the claimant caused to the respondent by breaching his contract of employment. In particular, the respondent avers that the claimant stole from it, failed to work his contracted hours, obtained a bonus payment by duress and by deceiving the respondent that he had been working excessive hours. The respondent further claims that the claimant, in breach of his contractual obligations, failed to keep proper accounting and stock records, at the same time had been working for another employer, permitted the staff to work less than their contracted hours. The respondent avers that the claimant was in fundamental breach of his contract, for which the respondent terminated his employment summarily. The respondent claims that the claimant's breaches caused the respondent to suffer losses, which it values to be £18,572.22 in total.

3. There were two preliminary hearing on 22 May 2020 and 2 October 2020. Both parties complained that the other party had failed to disclose relevant documents. The respondent sought an order for specific disclosure of the claimant's bank statements for the entire period of his employment, his Oyster card printouts of his journeys for the same period and slips of betting transactions made by the claimant in that period. On both occasions the applications were refused because the respondent had failed to present any evidence to substantiate its case that the claimant stole from it or worked for another employer and therefore such requested appeared to the employment judges as a fishing expedition to find possible evidence to support the case the respondent wished to advance.

4. The claimant complained that the respondent was selective in disclosing its documents, specifically, by not allowing the claimant access to all of his work emails, and not providing petty cash transactions records and rotas information.

5. The disclosure of documents order of 22 May 2020 stated that it was made on the standard civil procedure rules basis, which required the parties to disclose all documents relevant to the issues which were in their

possession, custody, or control, whether they assisted the party who produces them, the other party or appear neutral.

6. I was referred to various documents included in the bundle of documents of 594 pages, which the parties introduced in evidence. The respondent was responsible for the production of the joint bundle. The bundle produced by the respondent was badly put together. It was divided into eight separate pdf files, was not properly indexed, documents were not put in a chronological order. Ten and more copies of the same document were included in the bundle. There were many irrelevant documents included.

7. In the afternoon of the hearing, after three of the respondent's witnesses had given their evidence, Mr Utip told me that he had forgotten to add another tab to the bundle and sent a further set of documents related to the cash audit. With this addition the total count of the pages in the bundle became 619. The respondent said that the additional documents had been disclosed to the claimant before. The claimant did not deny that and did not object to the additional documents being introduced in evidence. I reluctantly admitted the additional documents in evidence.

8. At the start of the hearing, the claimant made an application to strike out the respondent's response for failure to comply with the tribunal's orders of disclosure. The claimant said that he still had not received all relevant emails, petty cash records and rota information. The respondent denied not disclosing all relevant documents. It said that petty cash records did not exist, except for the cash taking sheets included in the bundle. It said the rota sheets were included in the bundle.

9. On a quick review of the bundle, I saw that it contained these types of documents. The claimant was not able to explain what further documents he thought the respondent had in its possession and failed disclosed. He also could not tell me what specific emails he sought the disclosure of. I was satisfied that there was no material breach by the respondent of the tribunal's orders, and refused the claimant's application.

10. The claimant gave oral evidence under oath. The respondent submitted witness statements of five witnesses and called four of them (Ms Banasiak, Mr Fernandez, Mr Abadir and Mr Utip). They gave sworn evidence. One of the respondent's witnesses, Mr S Zuccaro, did not attend the hearing to give evidence. The respondent did not seek to introduce his witness statement as a written representation under Rule 42 of the Employment Tribunal Rules of Procedure. It was not delivered to the tribunal no less than 7 days before the hearing as required under Rule 42. Therefore, I do not place any weight on the witness statement of Mr S Zuccaro in my findings of fact.

11. At the end of the hearing, which finished at 18:05, there was no time left for the parties to make their closing submissions. I agreed with the parties that they would send me their closing submissions in writing, which they did.

Issues

12. The issues in the case were discussed with the parties at the preliminary hearing on 22 May 2020. They have very helpfully been set out by Judge Goodman in her Case Management Summary and Order of the same date.

Holiday Pay

13. How many days of untaken holidays the claimant has accrued on the date of dismissal?

14. It is common ground that the claimant was entitled to 28 holidays (including statutory holidays) in an annual leave year, and that the holiday entitlement accrues at 2.33 days per month.

15. The respondent admits that it did not pay the claimant for his accrued but untaken holiday.

16. The claimant says he has accrued 18.64 days from 1 January 2019 to 30 August 2019 and he did not take any holidays that year.

17. The respondent says that if the claimant had been working his full hours, he would have accrued only 11.6 days because the annual leave year runs from 1 April to 31 March. However, because the claimant did not work his contracted hours, he is not entitled to any holiday pay. The respondent further claims that it is impossible to verify how many days of annual leave the claimant actually took because the claimant did not keep staff work time records.

Unlawful deduction from wages

18. Did the respondent make an unlawful deduction from the claimant's wages by failing to pay the following sums?

    (i) The claimant's salary for August 2019 - £2,750;

    (ii) Tronc money/service charge for August - £390;

    (iii) For 52 shifts of overtime - £4,571.40

    (iv) Money retained from the claimant's salary under clause 4.2 of his employment contract - £861.54

    (v) Holiday Pay

    (vi) Notice Pay

19. To answer this question, I need to decide in relation to each sum of money from which deductions were made:

    (i) Were those sums "wages" within the meaning of section 27 of the Employment Rights Act 1996 ("ERA")?

    (ii) If so, were they "properly payable" to the claimant under section 13 of ERA?

    (iii) If deductions were made from sums, which were "wages" "properly payable", were such deductions either authorised in accordance with section 13(1) of ERA or excepted under section 14 of ERA?

    (iv) Has the respondent showed that it was entitled to make the deductions?

    (v) Where the deduction related to stock or cash shortage, were the deductions made in accordance with the provisions of sections 17-22 of ERA?

20. The claimant avers that all the sums he claims are properly payable and due to him, and the respondent did not have any lawful grounds to make any deductions from them.

21. The respondent says that it has made an overpayment of wages to the claimant, because the claimant did not work the contracted hours, and therefore it was entitled to withhold the claimant's salary for August 2019 and his holiday pay. Further and in the alternative, it says the claimant cause the respondent a loss much greater than the sums claimed, and therefore it was entitled to set off its losses against the money it owes to the claimant.

22. The respondent also claims that it was entitled to keep the seven-days' pay retained under clause 4.2 of the contract to cover losses caused by the claimant's breaches.

23. It further avers that the claimant was not entitled to overtime pay under the terms of his contract of employment.

24. Finally, it says the claimant was not entitled to tronc/service charge monies because the claimant's lack of contribution, and in any event the distribution of tronc/service charge monies' was at the respondent's discretion.

<u>Itemised Pay Statement</u>

25. Did the respondent provide the claimant a written itemised pay statement pursuant to section 8 of ERA, containing particulars of the deductions made from the claimant's wages? If the respondent has failed to give the claimant the requisite pay statement or if the statement given did not contain the particulars required to be included in that statement by

sections 8 or 9 of ERA, should the respondent be ordered to pay the claimant a sum of money not exceeding the aggregate of the unnotified deductions so made?

Breach of contract

26. Was the respondent entitled to dismiss the claimant without notice because the claimant had committed an act of gross misconduct?

27. It was not in dispute that the claimant was dismissed without notice and his notice entitlement was one month.

28. The respondent says the claimant has committed gross misconduct by stealing from the respondent, not attending work during his contracted hours, not supervising the staff properly. He says the claimant breached the duty of trust and confidence. The respondent claims that for these reasons it was entitled to dismiss the claimant summarily.

29. The claimant denies all the allegations made against him by the respondent and avers that he did not breach his duties in any way.

Counterclaim

30. Did the claimant breach his contract of employment?

31. If so, were the losses claimed by the respondent caused by the claimant's breach?

32. If so, what damages should be awarded to the respondent?

33. The respondent says the claimant's breaches caused the respondent the following losses:

    (i) £600 – cash taken by the claimant from the safe on 9 February 2018 and not banked;
    (ii) £350 – cash taken by the claimant as a salary advance;
    (iii) £671.99 - unauthorised credit card refunds;
    (iv) £1,500 – bonus paid to the claimant;
    (v) £700 – missing cash from the Valentine's day event on 14/02/2019 (it appears from the respondent's closing written submissions that it has abandoned that claim);
    (vi) £8,666.67 – paid to the claimant for time he did not work (in its closing written submissions the respondent changed that claim to the sum of £24,000);
    (vii) £4,963.26 – 15% of the total value of void transactions from 01/01/19 to 17/08/19;
    (viii) £420 costs of audit (that loss was not in the respondent's schedule of loss and was particularised by the respondent only in its closing written submissions);
    (ix) £6,000 losses in alcohol sales (in its closing written submissions the respondent changed that figure to £2,664.20);

34. The claimant denies that he breached the contact or otherwise owes any money to the respondent, except for £350. He admits taking £350 as a salary advance, but says it was authorised by the respondent. He denies that he was responsible for any other alleged losses.

Financial Penalty

35. If the tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

Findings of Fact

36. The claimant was employed by the respondent from 19 December 2017 until his summary dismissal on 30 August 2019. He was the manager of the respondent's owned and operated restaurant, Alexandrie.

37. His contract of employment contained the following key terms (my underlining):

4 SALARY & WAGES

4.1 Your base salary is £32,000 per annum, which is payable monthly on the last day of each month directly into your bank or building society account. A profit-sharing bonus is determined every 6 months, starting with 19 June 2018. This bonus gives you a pro-rata share of the profits upon achievement of 'Breakeven' and above. Breakeven is defined as revenues to the business an average of £1,200 per day that the Restaurant is open. On achieving this you will be entitled to £2,500 for the 6-month evaluation period. Any revenues above breakeven entitle you to proportionally more bonus, for example double the breakeven revenue will lead to double the bonus. Targets are calculated bi-annually and run for the period of employment. All targets are based on current costs which the Manager is deemed to be in control of by virtue of that position, and where those costs increase significantly these targets are subject to adjustment by negotiation.

4.2 During your first month of employment, the Company will deduct and retain the equivalent of 7 days- pay. The retention shall remain in place for the length of your employment. At the end of your employment, the retained monies will be returned to you but the Company retains the right to deduct from such monies any loss that you may have caused the Company in breach of your terms of employment.

4.4 We shall be entitled to and will deduct from your salary or other payments due to you any money which you may owe to the Company at any time.

5. HOURS OF WORK AND RULES

5.1 Your normal hours of work are and will vary from week to week and totes will be published a week before. You may be required to work such additional hours as may be necessary for the proper performers of your duties without extra remuneration.

6. HOLIDAYS

6.1 You are entitled to twenty eight days' holiday during each holiday year. This includes the usual public holidays in England and Wales or a day in lieu where we require you to work on a public holiday. You will be paid your normal basic remuneration during such holidays. Your holiday year runs between 1 April to 31 March. If your employment starts or finishes part way through the holiday year, your holiday entitlement during that year shall be calculated on a pro-rata basis.

6.3 You cannot carry untaken holiday entitlement forward from one holiday year to the following holiday year.

6.4 We shall not pay you in lieu of untaken holiday except on termination of employment. The amount of such payment in lieu shall be 1/260th of your full-tune equivalent salary for each untaken day of your entitlement under clause 6.1 for the holiday year in which termination takes place and any untaken days permitted to be carried forward from the preceding holiday year. However, if we have dismissed you or would be entitled to dismiss you under clause 8.3 or you have resigned without giving the required notice, such payment in lieu shall be limited to your statutory entitlement under the Working Time Regulations 1998, and any paid holidays (including paid public holidays) taken shall be deemed first to have been taken in satisfaction of that statutory entitlement.

6.5 If you have taken more holiday than your accrued entitlement at the date your employment terminates, we shall be entitled to deduct from any payments due to you one day's pay calculator at 1/260th of your hill-time equivalent salary for each excess day.

8. TERMINATION AND NOTICE PERIOD

8.1 After successful completion of the probationary period referred to in clause 1.2, the prior written notice required from you or the Company to terminate your employment shall be as follows:

(a) in the first two years of continuous employment: one month’s notice; and
(b) after two complete years: one additional week for each further complete year of continuous employment up to a maximum of 12 weeks' notice.

8.2 We may at our discretion terminate your employment without, notice and make a payment of basic salary in lieu of notice.

8.3 We shall be entitled to dismiss you at any time without notice or payment in lieu of notice if you commit a serious breach of your obligations as an employee, or if you cease to be entitled to work in the United Kingdom.

Alexandrie Restaurant Staff Handbook

INTRODUCTION

This staff handbook is intended as additional terms and conditions of your employment and we ask that you read it thoroughly because it contains important information for you and the basis under which you are employed with this establishment.

16 HANDLING COMPANY MONIES.

16.1 No member of staff, unless designated staff, may collect monies from patrons or operate the cash till or the credit card processing machines within the restaurant. All transactions must be recorded in the electronic system provided. No alterations to orders may be made without the approval of a manager. Any such alterations must be countersigned.

16.2 All payments including gratuities must be accounted for at the end of every shift by

the shift manager. At the end of any shift, there must be two staff present to certify the records of all payments received. The records must be countersigned by both staff present including the shift manager. All payment receipts must be placed in an envelope and marked with the date.

16.3 No payments may be made from receipts. Any payments required must be by way of a petty cash payment from the petty cash book. Any staff requiring a payment to be made must obtain the necessary authority for a petty cash payment from a shift manager.

16.4 The shift manager remains responsible for all payments put through the cash handling systems. Any shortage from those receipts is the responsibility of the shift manager, and the Company reserves the right to recover any shortages from the relevant shift manager. You are reminded that any shortage is a disciplinary matter.

30 **Gross Misconduct**

30.1 If an employee is found guilty of an offence which is deemed to amount to gross misconduct then the management will have the right to decide on the appropriate course of action. In most cases this will be the termination of your employment. This may be following suspension and an investigation. In the event of suspension subject to an investigation any period of suspension will be suspension on full pay. Gross misconduct will also in a number of instances require summary dismissal, notwithstanding the fact that the Company elects to undertake further investigation.

30.2 If, whether after investigation or otherwise, it is confirmed that you have committed one of the following offences (the list is not exhaustive), you will normally be dismissed:

theft

fraud and deliberate falsification of records

physical violence

serious bullying or harassment

deliberate damage to property

serious insubordination

misuse of an organisation's property or name

bringing the employer into serious disrepute

serious incapability whilst on duty brought on by alcohol or illegal drugs

serious negligence which causes or might cause unacceptable loss,

damage or injury serious infringement of health and safety rules

serious breach of confidence (subject to the Public Interest (Disclosure) Act 1998)

30.3 While the alleged gross misconduct is being investigated, you may be suspended, during which time you will be paid.

30.4 In most cases any decision to dismiss will be taken only after we have

fully investigated the matter.

30.5 However, in a few cases of gross misconduct we may be justified in dismissing immediately without conducting an investigation. In these cases a two-step procedure will be followed.

30.6 Step 1: We give you a written statement

30.7 We will give you a written statement setting out the conduct that has resulted in your immediate dismissal and informing you of the right to appeal against the decision to dismiss.

30.8 Step 2: Appeal against the decision to dismiss

30.9 If you wish to appeal you must inform the Company. A meeting must be held (in accordance with the general principles set out above). We will then inform you of our decision as soon as possible after the meeting.

38. Soon after starting his employment the claimant changed certain working practices in the restaurant. In particular, he changed how tronc/service charge monies were distributed between the staff, keeping 70% to himself. The previous manager took 20% of tronc.

39. Further, the claimant changed the orders entry procedure. Previously all staff had their unique IDs, which they had to use to make any transaction through the tills, so that the transaction could be traced back to the person who made it. The claimant gave all staff, including himself, the same user ID. The claimant also dispensed with the manual time keeping system for staff signing into work and did not replace it with an electronic system. The claimant was doing cash counting at the end of each day by himself without another members of staff present. Mr Zuccaro, who was a senior waiter, used to do that together with the previous manager, but the claimant excluded him from the cash counting procedure.

40. The respondent says these changes were done by the claimant to avoid being detected when voiding transactions and misappropriating cash and stock, and to hide the fact that while assigning himself full-day rotas, he was not working his contracted hours. The claimant denies that but could not provide a cogent explanation for making these changes.

41. On 09 February 2018, Mr Zuccaro sent an email to Mr Abadir raising his concerns that the claimant might be taking cash from the till and the restaurant's safe. He wrote that the 08/02/18 cash report showed that the claimant had moved £500 from the till to the safe, but it was not possible to verify that because the claimant had moved the safe's key from its usual place and had hidden it from Mr Zuccaro. He also said that the last time he had checked the safe there were £100 missing from it. He expressed his worries for the respondent's money and his own safety and indicated that he would not be willing to work the rest of his notice in that environment. He eventually left the restaurant on 10 March 2018.

42. On the same day Mr Abadir, who is living abroad, forwarded Mr Zuccaro's email to Mr Utip. He said that on 6 February he had asked the claimant to deposit cash in the bank once a week and would be monitoring the bank account to check that. The respondent's evidence is that £500 was never deposited in the bank account or otherwise accounted for by the claimant. The claimant says the cash was used for paying staff cash in hand for extra parties and for other cash expenses. The claimant claims that all such cash payments were recorded in petty cash records, which the respondent failed to disclose.

43. Mr Utip spoke with the claimant, and the claimant told Mr Utip that Mr Zuccaro was falsely accusing him because he resented the claimant's appointment and his manager. Mr Utip accepted the claimant's assurances and dismissed the concerns raised by Mr Zuccaro.

44. There were negative reports on TripAdvisor website about the restaurant's service on the Valentine's day in 2018. The reports caused Mr Abadir to investigate the matter, including looking at payments made by the restaurant's customers on that day. That showed that the average spend on the night was £50, where the set menu was £49, excluding drinks and service charge.

45. On 16 February 2018, Mr Abadir wrote to the claimant asking him to explain zero spend on wine and to provide sales reports. He also reminded the claimant that cash must be deposited with the bank once a week.

46. The claimant replied on the same day blaming other staff and the overbooking for the problems during the Valentine's day service. He also said that Mr Zuccaro had told him that cash should be deposited only once a month.

47. On 16 February 2018, Ms Banasiak, a waitress, wrote to Mr Abadir complaining about the claimant. She said that she was not getting required help from the claimant, and that the situation was unprofessional. She said that unless changes were made, she would have to look for another job. It appears the respondent took no action, and Ms Banasiak eventually left in June 2018.

48. On 22 February 2018, Mr Abadir again wrote to the claimant asking why no cash had been deposited in the bank and why he had not sent the sales report from the Valentine's day. The claimant replied saying that he would deposit cash the following day. He sent the sales report.

49. It appears the respondent took no further actions with respect to these matters.

50. On 24 May 2018, Mr Utip wrote to the claimant about a complaint he had received from a member of staff about the claimant keeping a large part of tronc/service charge money and asking the claimant to "find a way to review this". The claimant replied giving his justifications for his share of

tronc/service charge money. He said he worked long hours and brought additional business to the restaurant. He asked Mr Utip to call him to discuss the issue. It appears that Mr Utip did not respond to the claimant.

51. On 26 June 2018, the respondent awarded the claimant £700 bonus "*in recognition of [his] efforts*." The respondent made the award despite the Breakeven condition in the contract had not been met and therefore the claimant's contractual bonus was zero.

52. On 11 December 2018, the claimant wrote to the respondent saying that by the end of the month he would have had accumulated 29 days of untaken holidays and asking the respondent to pay him for 20 days and allow 9 days to be carried forward into 2019. Mr Abadir replied on the same day agreeing to that and thanking the claimant for his effort and dedication.

53. On 27 January 2019, the claimant wrote to Mr Abadir asking to be paid for the nine holidays carried forward from 2018. I was not presented with any evidence to show whether the monies were paid, but the claimant makes no claim for that sum.

54. From 1 March 2019 the claimant's salary was increased to £33,000.

55. On 14 March 2019, the claimant requested a payment of £4,571.42 for 52 extra shifts. He said that he had done extra shifts to cover for holidays and staff shortage. The respondent replied on the same day, declining the request on the basis that, unlike other employees, the claimant was on a fixed salary and not a shift pay. He, as the restaurant manager, was responsible to manage shifts, including his own, and on occasions was expected to work extra hours. He was also paid £3,569.23 in lieu of holiday in 2018, and was on a profit-sharing scheme. However, the respondent agreed to pay the claimant a one-off bonus of £1,500 and did so in the April payroll.

56. On 23 March 2019, the claimant wrote to the respondent again making various complains about him having to work extra time for no extra pay and "sacrificing his holidays for the sake of the business".

57. On 28 March 2019, Mr Utip replied to the claimant's email responding to each of the complaints. In his reply Mr Utip said that on the issue of carrying forward holiday entitlement that "*Paolo [the restaurant's previous manager] was authorised to carry forward an element of holiday entitlement <u>and the same will apply to you given your position</u>"*. (<u>my underlining</u>)

58. On 22 June 2019, Mr Abadir asked the claimant how much cash was in the restaurant and the claimant replied that there was around £1,200. Mr Abadir instructed the claimant to use cash to pay a utility bill of £861. The claimant did not pay the bill immediately and did not pay it using the restaurant's cash.

59. On 8 July 2019, he paid the bill with his credit card. At the hearing, the claimant said it was more convenient for him, as he did not want to walk to the bank to pay the bill because it was too hot outside.

60. In early July 2019, the respondent asked Bowker Orford accountants to do a cash audit at the restaurant. The auditors visited the restaurant on 5 July 2019. The claimant was not in the restaurant, and the auditors had to wait until 4pm for him to arrive. The respondent says that the claimant was using that time to find cash to put in the safe, so that auditors do not find the discrepancy. The claimant did not explain his absence.

61. Based on random checks, the auditors identified the following issues as points of concern:

    1. *Cash is apparently left in the till overnight. This is not the proper procedure as it should be counted and put in the safe overnight.*
    2. *There appears to be very few sales especially on Tuesdays where there appears to be no cash sales at all over the last few months.*
    3. *No cash count appears to have been performed at the end of each day which is against previous standard practice.*
    4. *The cash float policy does not appear to have been followed at all.*
    5. *Cash is banked very rarely. This should be banked regularly.*
    6. *Last Friday at the time of the audit there was no cash in the till or in the safe to be counted.*
    7. *It appears as if all the waiting staff have the Managers code to void transactions and the Manager said a report could not be made from the till system for the voided transactions. However, in the past we have had a report from the system.*

62. Following the receipt of this audit report, Mr Utip wished the auditors to undertake a further and fuller investigation, and in particular, to track and examine void transactions.

63. On 26 July 2019, an auditor emailed the claimant asking him to set up in the till software residing on his company's laptop an email alert/report for all till void transactions, so that Mr Abadir would be notified by an email whenever a transaction was voided. It appears that the respondent wished such alerts to be set up without the claimant's knowledge, because by that stage they had developed a suspicion that the claimant was responsible for voiding transactions and taking cash. The auditors must have misunderstood the respondent's instructions and alerted the claimant.

64. In early August 2019, Mr Abadir noticed that there had been large orders for wine and spirits made, where the restaurant was running nearly empty for the last 4-5 months.

65. On 6 August 2019, he wrote to the claimant requesting an explanation and asking him to provide a stock/flow report for wines and spirits since January 2019.

66. On 13 August 2019, the claimant sent the sales report and the wine stock count. He said that it was the first wine stock count that he could found since 2015. The respondent says that it was untrue because the previous manager used to do stock counts regularly, and in any event, it was the claimant's duty to do stock counts each week.

67. Based on the data provided by the claimant, Mr Abadir concluded that there was an unusually low margin on wine sales. He says in his evidence that the usual restaurant mark-up on a bottle of wine is 300%, where the data showed that the restaurant was making only about 200%.

68. Also, the claimant's alcohol sales report showed a loss of £2,664.20 on "open drinks". The respondent says this can only be explained by the claimant misappropriating the proceeds of sale or stock, or consuming alcohol himself. The claimant says the report is incorrect because it includes "open drink" supplied to guests of Mr Utip's wedding reception in the restaurant and fails to take into account "deals" when drinks are included in a set menu or when customers ask not to show consumed drinks on the bill.

69. On 23 August 2019, the respondent generated an automatic report from the tills' system and discovered a large number of voids, which are reversals of taken orders, made through the tills. The report showed that the total value of the voids since 01/012019 was £33,088.40.

70. The respondent says that, although voids do happen when, for example, a wrong food order was taken by a waiter or if a customer changes his mind or is dissatisfied with a meal, the number of voids before the claimant became the manager were in the region of £1,000 - £2,000.

71. On 26 August 2019 at 10:05, Mr Utip emailed the claimant the voids report asking for an explanation. Having not received the claimant's response, at 18:53, Mr Util emailed the claimant again saying that in the absence of the claimant's explanations he concluded that the voids had been used to divert cash, and that had undermined the respondent's trust and confidence in the claimant. He suspended the claimant with the immediate effect and told that unless an explanation was provided by 28 August 2019 the claimant would be summarily dismissed.

72. On 27 August 2019, the claimant emailed Mr Abadir with information on staff wages, tronc monies, shifts and holidays. In that email he included a line: "*Rani 350 cash advance on salary*". This was the first time the respondent was told by the claimant that he had taken £350 of the respondent's monies.

73. On 27 August 2019, the claimant replied to Mr Utip, saying that he could not tell from the report why those voids had been made and suggesting that Mr Utip should ask other staff. Mr Utip replied asking again for a detailed explanation of every voided transaction. He also asked about £350 cash advance the claimant took from the restaurant's receipts, and who authorised it.

74. The claimant replied complaining that he was not properly treated and rewarded for his work, and saying that he was being set up, that the tills system was not user-friendly, that he almost never did any voids, and they could only be done by staff members who took customers' orders. He said the voids could be to give a customer a discount on his order, or due to mistakes made in taking an order, or when using the system for training purposes. He also argued that the wine profit calculations were flawed because they did not take into account "open drink", a set menu service with wine included.

75. On 28 August 2019, Mr Utip wrote to the claimant stating that he was not satisfied with the explanations provided and asking the claimant again why he had taken cash, why he had paid the utility bill with his credit card and requiring him to identify the voids he had personally made.

76. On 30 August 2019, not having received further explanations from the claimant, Mr Utip wrote to the claimant confirming his decision to terminate his employment summarily on the ground that the claimant was guilty of misappropriating the company's property, taking unauthorised loans from the company's funds, failing to monitor staff resulting in a loss to the company. The claimant was informed that he could appeal his dismissal.

77. On 31 August 2019, the claimant appealed the decision. Following the appeal, the respondent undertook further investigations, including checking CCTV videos, the claimant's laptop, and interviewing staff. The respondent informed the claimant that the investigation might take up to two weeks and if the outcome of the appeal would be the decision to reinstate the claimant he would be paid for the period of his suspension.

78. Following the claimant's dismissal, the respondent asked two members of staff, Mr Pedro Fernandez and Nuncio, to check stock and receipts and produce a report from the tills' system.

79. On 22 September 2019, Mr Fernandez sent an email Mr Utip and Mr Abadir listing four credit card refund transactions made on separate dates (18/11/2018 - £95.19; 17/12/2018 - £266.80; 20/04/2019 - £60; and 13/07/2019 £250) to a visa card. He said that he could not find the card machine statements or reports for those dates. The card numbers, to which the refunds had been made, was not possible to identify.

80. On 23 September 2019, Mr Abadir wrote to the claimant stating his appeal was unsuccessful and the decision to dismiss stood. Mr Abadir upheld the decision on the ground that the respondent was responsible for misappropriating the respondent's property, including by making unauthorised credit card refunds, for neglecting his duties to check stock and cash on a regular basis and for dismantling the previous stock taking and recording procedures. He also said that the claimant was responsible for not accounting for the low figure of wine sales against the costs of stock; and for failure to identify the shortages in stock and verifying sales receipts with the staff.

81. The respondent did not pay the claimant his salary for August 2019 or for his accrued but untaken holidays. The respondent did not provide the claimant with an itemised pay statements showing what deductions it had made from the claimant's wages.

The Law and Conclusions

Holiday Pay

82. Under the terms of his contract of employment the claimant is entitled to 28 days holiday in each of holiday year. The holiday year runs from 1 April to 31 March. The contract says that the claimant cannot carry forward unused holidays from one holiday year to another.

83. The claimant calculates his accrued holidays from 1 January 2019 until 30 August 2019. The respondent says that the holiday year runs from 1 April and not 1 January and denies agreeing that the claimant could carry forward any unused holidays from one leave year to the next.

84. However, Mr Utip clearly told the claimant in his email of 28 March 2019 that the claimant would be allowed to carry forward "an element of his holiday entitlement" as was the case with the previous manager. Therefore, I find that the respondent did agree that the claimant's holiday entitlement accrued between 1 January 2019 and 1 April 2019 would be carried forward into the next leave year.

85. Therefore, I find that the claimant's accrued holiday should be calculated from 1 April 2019 until 30 August 2019, which gives the 11.7 days of accrued holidays, plus 6.99 carried forward holiday for the period from 01/01 to 31/03 2019. This gives the total 18.69 days of accrued holidays.

86. The claimant says that he did not take any holidays in 2019. The respondent does not dispute that the claimant did not book any holidays, however, it claims that because the claimant failed to work his full contracted hours, he should not be entitled to any holidays.

87. It is not clear on what legal basis the respondent makes this contention. In its ET3 it says that because the claimant removed details of actual days he worked, the respondent could not determine that no holidays had been taken by the claimant. In the alternative, it says that the claimant's unauthorised absences from work should be deducted from his holiday entitlement thus extinguishing his accrued holidays.

88. With regard to the first contention, it is the respondent's responsibility under regulation 4 of the Working Time Regulation 1998 ("WTR") to maintain adequate records of working time. If the respondent failed to do so, even if such failure was partly attributable to the claimant's failure to fulfil his duty as the restaurant manager, this, in my judgment, is not a valid reason for the respondent to deny the claimant his right to annual leave.

89. Secondly, there is nothing in the claimant's contract of employment or the WTR, which allows the respondent to automatically set off any unauthorised absence time against the claimant's holiday entitlement, and the respondent did not refer me to any legislative provision or case law to show otherwise.

90. Under clause 6.3 of the contract of employment, if the claimant was dismissed for gross misconduct, his entitlement to be paid for accrued but untaken holiday was said to be *"limited to your statutory entitlement under the Working Time Regulations 1998".* The claimant's statutory entitlement under WTR is 28 days of annual leave.

91. Regulation 14 of WTR states:

(1) "*where- (a) a worker's employment is terminated during the course of his leave year, and (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.*

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be–
(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–

(A × B) − C
where–

***A** is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;*
***B** is the proportion of the worker's leave year which expired before the termination date, and*
***C** is the period of leave taken by the worker between the start of the leave year and the termination date."*

92. Under regulation 30 of WTR

"(1) A worker may present a complaint to an employment tribunal that his employer-

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him."

93. Applying the statutory formula, I find that the claimant is entitled to 18.69 days of accrued holidays - (28 x 5/12) – 0. Applying the claimant's daily rate of pay £126.92 (£33,000/260), on the termination of his employment owed the claimant the total sum of £2,372.13 (gross) for his accrued but untaken holidays.

94. By failing to pay the claimant for his accrued but untaken holiday the respondent breached Regulation 14 of WTR and made a deduction from the claimant's wages.

95. The claimant advanced his claim for holiday pay as a complaint of unlawful deduction from wages. Therefore, I will now turn to the question whether this and other deductions made by the respondents were lawful.

Unlawful deduction from wages

96. 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."

97. Section 13(2) defines "relevant provisions" as, "*in relation to a worker's contract, means a provision of the contract comprised—*

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion"

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

99. Section 14(1)(b) of ERA states:

"14.— Excepted deductions

Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—
(a) an overpayment of wages, or
(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker."

100. Under Part II of ERA Workers in retail employment are given additional protection when the employer makes a deduction from wages or demands payment from the worker "*on account of one or more cash shortages or stock deficiencies"*. Any such deduction from the wages payable on any pay day must not exceed one tenth of the gross amount of the wages payable on that day — section18(1) ERA and must be made not later than twelve months beginning with the date when the employer established the existence of the shortage or deficiency or (if earlier) the date when he ought reasonably to have done so – section 18(3) ERA. These requirements are in addition to the requirements set out in section 13 of ERA.

101. The one-tenth ceiling only operates to limit the rate at which qualifying deductions can be made or payments can be demanded from the gross wages of retail workers during their employment. Once the employment comes to an end there is no limit on the amount that can be deducted from the final instalment of wages to cover cash shortages or stock deficiencies — section 22(2) of ERA. However, the 12-month limitation period still applies.

102. The final instalment of wages means:

(a) wages payable to a worker by way of contractual remuneration for the last of the periods for which he or she is employed under the contract before termination of the contract (any wages relating to an earlier period being excluded), or

(b) *a sum paid in lieu of notice where this is paid after the last payment of wages as defined above* — section 22(1) ERA.

103. Section 17 of ERA contains relevant definitions (my underlying).

17.— Introductory.
(1) In the following provisions of this Part—

"cash shortage" means a deficit arising in relation to amounts received in connection with retail transactions, and
"stock deficiency" means a stock deficiency arising in the course of retail transactions.
(2) In the following provisions of this Part "retail employment", in relation to a worker, means employment involving (whether or not on a regular basis)—
(a) the carrying out by the worker of retail transactions directly with members of the public or with fellow workers or other individuals in their personal capacities, or
(b) the collection by the worker of amounts payable in connection with retail transactions carried out by other persons directly with members of the public or with fellow workers or other individuals in their personal capacities.
(3) References in this section to a "retail transaction" are to the sale or supply of goods or the supply of services (including financial services).
(4) References in the following provisions of this Part to a deduction made from wages of a worker in retail employment, or to a payment received from such a worker by his employer, on account of a cash shortage or stock deficiency include references to a deduction or payment so made or received on account of—
(a) any dishonesty or other conduct on the part of the worker which resulted in any such shortage or deficiency, or
(b) any other event in respect of which he (whether or not together with any other workers) has any contractual liability and which so resulted,
in each case whether or not the amount of the deduction or payment is designed to reflect the exact amount of the shortage or deficiency.
(5) References in the following provisions of this Part to the recovery from a worker of an amount in respect of a cash shortage or stock deficiency accordingly include references to the recovery from him of an amount in respect of any such conduct or event as is mentioned in subsection (4)(a) or (b).
(6) In the following provisions of this Part "pay day", in relation to a worker, means a day on which wages are payable to the worker.

104. If a worker suffers an unlawful deduction from his wages, section 23 ERA gives him the right to complain to an employment tribunal. If the tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and order the employer to pay to the worker the amount of any deduction made in contravention of section 13 (section 24 of ERA).

105. Although the claimant was not a waiter and was not directly serving customers and taking payments, and therefore not carrying out retail transaction himself, he was responsible for cashing up proceeds at the end of each day. Therefore, his employment involved "*the collection by [him] of amounts payable in connection with retail transactions carried out by other persons directly with members of the public*". Accordingly, I find that he was a worker in retail employment pursuant to section 17(2)(b) of ERA.

106. Therefore, to the extent the deductions were made by the respondent from the claimant's wages "*on account of one or more cash shortages or stock deficiencies"* the additional requirements set out in sections 17-22 apply.

Were the amounts claimed by the claimant "wages" within the meaning of section 13 of ERA?

107. The claimant's August 2019 basic salary, holiday pay and the seven days' retained salary at the start of his employment and overtime pay (if due) all fall within the definition of wages as these are "sums payable in connection with his employment" – section 27(1) ERA.

108. Tips, if payable to employees directly by customers, are unlikely to be regarded as wages. However, tronc money/service charge that collected by the employer and then distributed to its employees are "wages" (see Saavedra v Aceground Ltd [1995] IRLR 198).

109. Therefore, I find, that all sums claimed by the claimant are "wages" withing the meaning of section 13 of ERA.

Were the "wages" "properly payable" to the claimant?

Basic salary and Retained Sum

110. In New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA the Court of Appeal held that in order for a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question.

111. Clearly, by virtue of the contract with the respondent, the claimant had legal entitlement to his basic salary, including the seven days' pay retained by the respondent at the start of his employment. That entitlement continued until his contract was terminated. Even if the claimant was in repudiatory breach of his contract, until the breach was accepted by the respondent as brining the contract to an end and dismissed the claimant, the respondent remained bound by the contract, including by its obligations to pay the claimant's wages. Therefore, the claimant's salary remained "wages properly payable" for the period up to his dismissal.

Holiday Pay

112. As I found earlier, the claimant had contractual and statutory entitlement to the sum £2,372.13 for his accrued but untaken holidays, and therefore that sum was "properly payable" to him.

Tronc/Service Charge

113. Turning to tronc/service charge monies, I need to decide whether the claimant had some legal entitlement to those monies. The claimant's contract of employment does not give the claimant any right to receive any tronc/service charge monies.

114. The respondent did not operate a formal tronc agreement. The respondent says it has a policy that all service charges are paid to its staff. The respondent's evidence, which I accept, is that the previous restaurant managers took less than 20% of tronc money. Upon becoming the manager of the restaurant, the claimant unilaterally decided that his share of tronc monies should be 70%. That led to complaints by other staff members. The respondent thus became aware of this issue as early as May 2018. Mr Utip wrote to the claimant asking to "find a way to review this", but the claimant continued to take 70% of the service charge and the respondent took no actions in response. Mr Utip explains that by not wanting to undermine the claimant's authority and that he hoped that with time the claimant would start giving a large share to other staff. Furthermore, before joining the respondent, the claimant asked about service charge arrangements and Mr Abadir replied on 15 December 2017, saying that "*the manager shares the service charge with the staff and is in charge of its allocation in line with what he sees fit to reward/motivate. The company takes 0% of that*".

115. Although the respondent let the claimant to decide how much of the service charge should be allocated to him and to other members of the staff and has acquiesced in what it now calls the "despicable behaviour" of the claimant of keeping 70% of tronc/service charge, in my judgment this is not sufficient for the claimant to acquire some legal entitlement to tronc monies, whether at 70% of the total monthly collected service charge or at all.

116. The tronc system operated by the respondent was informal. Tips paid by customers by way of an additional service charge on the bill are monies which properly belong to the respondent. By distributing them to its staff, the respondent was essentially passing "gifts" from its customers to the staff, however, was under no legal obligation to do so. By allocating to himself a lion portion of such customer gifts, the claimant did not in any way change the legal status of tronc monies or otherwise created an obligation on the respondent to continue to pass them to him or any other member of the staff in those or any other shares. Therefore, tronc monies remained discretionary payments, to which the claimant had no legal entitlement.

117. It follows, that his claim for unlawful deduction from wages in relation to tronc money/service charge fails.

<u>Overtime</u>

118. I have no difficulty in concluding that the claimant had no legal entitlement to the claimed overtime. There is nothing in his contract of employment to suggest that he had such an entitlement. On the contrary,

clause 5.1 says that he "*may be required to work such additional hours as may be necessary for the proper performers of your duties without extra remuneration*".

119. Moreover, he had made the same overtime claim in March 2019, and it was rejected by the respondent. Other than claiming that he worked long hours, which based on the evidence I heard, I reject, the claimant could not provide any coherent explanation why he say he was entitled to an overtime payment.

120. I, therefore, find that the claimed overtime monies were not "wages properly payable" to the claimant. Further, his claim for overtime related to a period before 14 March 2019, and therefore is out of time.

Notice Pay

121. The claimant's one months' notice pay is not "wages" for the purposes of section 13 of ERA (see Delaney v Staples [1992] IRLR 191). I will deal with his claim for notice pay as a breach of contract claim later in my judgment.

122. It follows that his claim for unlawful deduction from wages may only proceed in relation to:

(i) his basic salary for August 2019,
(ii) the seven days' retained salary at the start of his employment, and
(iii) his holiday pay.

"Deductions"

123. The respondent did not pay these monies to the claimant, and therefore has made deductions from his wages.

124. I now need to consider whether the deductions were authorised under section 13 or excepted under section 14 of ERA.

125. The respondent's case is that those deductions were to compensate the respondent for losses caused to it by the claimant's breach. In the alternative, the respondent says these deductions were to compensate the respondent for an overpayment of wages to the claimant.

"Overpayment of wages"

126. Dealing with overpayment question first. Under section 14 of ERA a deduction from the employee's wages made by the employer for the purpose of reimbursing the employer in respect of an overpayment of wages made (for any reason) by the employer to the worker is an excepted deduction and therefore section 13 of ERA does not apply to such a deduction.

127. However, to be an overpayment, the payment of the money in question would have had to have been wrongfully paid at the time of the payment (see Key Recruitment UK Ltd v Mr J C Lear).

Basic Salary

128. The respondent claims that it has overpaid the claimant £24,000. It says, that is because the claimant's normal working hours were 8 hours a day on a six days' working week basis, and in fact the claimant worked only half of that time, and therefore by paying his full salary the respondent has made an overpayment of wages. The respondent relies on the evidence of its staff, who testify that the respondent was not in the restaurant during the day and would typically come in the morning for a couple of hours, then leave for most of the day to return towards the closing time to cash up. The claimant denies not working his contracted hours. He says he was busy with different projects he ran for the respondent, meeting people and businesses outside the restaurant. He did not provide any evidence of such projects and meetings.

129. The respondent does not have any records of the claimant's unauthorised absences, because, it says, the claimant failed to keep those. While, on the balance of probabilities, I find that on average the claimant worked less than 48 hours a week, in the absence of any further and more detailed evidence (which the respondent failed to provide), I cannot conclude, that the claimant only worked 50% of his contracted hours.

130. In any event, even if he worked less than his contracted hours, his pay was not determined by reference to the hours he actually worked. He was on a fixed salary, payable every month. His contract of employment does not say that the respondent is entitled to withhold part of the claimant's monthly salary in respect of periods of unauthorised absence. The respondent failed to explain in a cogent way on what legal basis it says it was entitled to recalculate the claimant's salary and withhold what the respondent claims to be an overpayment.

131. I accept that by not working his full contracted hours the claimant was in breach of his contract. The respondent was within its rights to initiate a disciplinary process against the claimant for absenteeism. It did not do that.

132. This, however, in my judgment does not mean that the claimant, even if not working his full hours, was not entitled to his monthly salary or that his salary monies were "wrongfully" paid to him at the time payments were made. Therefore, I reject the respondent's claim that there was an overpayment of wages by reason of the respondent paying the claimant his basic salary.

133. If, in the alternative, the respondent says that the alleged "overpayment" of salary of £24,000 represent losses caused by the claimant's breach of failing to work full hours and relies on its right to

deduct the same as "money you may owe to the Company" under clause 4.4 of the employment contract, I reject that. I find that such deductions fall outside the scope of the authorisation in clause 4.4. In any event, I see no basis upon which the respondent may assert that the claimant owes it £24,000. If the respondent says it is a loss it has suffered as a result of the claimant's breach, in my judgment, the respondent has failed to establish the necessary facts and to show the causation on the usual damages for breach of contract principles.

<u>£1,500 bonus</u>

134. Turning to the question of whether £1,500 paid to the claimant in April 2019 was "an overpayment of wages" within the meaning of section 14 of ERA. The respondent says that the bonus was procured by "false pretences and duress". It says that the claimant dishonestly claimed that it had been working extra hours and sought an overtime payment of £4,571.40. Based on the claimant's false representations the respondent agreed and paid the claimant a one-off bonus of £1,500.

135. The £1,500 bonus was clearly a discretionary payment, however having been paid, it falls within the definition of "wages" under section 27 of ERA.

136. The respondent, however, does not say in its pleadings that it has deducted that sum from the claimant wages. Instead, it seeks the tribunal to order the claimant to repay that amount. Therefore, in my judgment, it cannot now claim that it has made a deduction of that sum from the claimant's wages either as "an overpayment of wages" under section 14 of ERA or an "an authorised deduction" under section 13 of ERA.

137. However, if I am wrong on that, I shall deal with the issue of whether such deduction would have been permissible under section 14 of ERA as "an overpayment of wages".

138. I reject the respondent's contention that the bonus was paid under "duress". The claimant was not in the position to and did not coerce the respondent either by physical means or economic pressure to pay him a bonus against the respondent's will. Therefore, there was no "duress" in the true legal meaning of the term.

139. The claimant simply asked the respondent to pay him for what he claimed to be extra hours of work. His emails of 14/03/19 does not contain any threats of any kind. The respondent did not submit any other evidence to show that it was acting under duress in agreeing to pay the claimant £1,500 bonus.

140. The respondent refused to pay the claimant for the claimed overtime because the claimant was not entitled to it under the contract. However, it said it would pay a "one-off bonus of £1,500".

141. The respondent says that the claimant never worked extra hours and in fact worked far less than his contracted hours. It relies on evidence of Ms Banasiak and Mr Fernandez, who testified that the claimant rarely in the restaurant during the daytime.

142. While I accept that the claimant had exaggerated time and effort he devoted to working for the respondent in seeking to get a payment for overtime, this, in my judgment, does not mean that the respondent made the bonus payment against its will.

143. The respondent might have been misled by the claimant, as to the true time he spent working for the respondent and therefore made this payment operating under a mistaken belief. However, it still had the absolute discretion whether to make the payment. It has exercised its discretion and has made the payment.

144. Although, the respondent might be entitled in law to claim the money back as paid under mistake, subject to the usual defence of change of position, in my judgment, for the purposes of section 14 of ERA, when the monies were paid to the claimant, they were not paid "wrongfully". To hold otherwise, would mean that any bonus paid by an employer to its employee based on the employee's past performance can then be deducted by the employer from the employee's wages as "an overpayment of wages", if the employer subsequently discovers that the employee did not do as well as the employer had thought.

145. For these reasons, and to the extent the respondent seeks to set off the £1,500 bonus against the wages due to the claimant, I find the payment of the bonus was not "an overpayment of wages" within the meaning of section 14 of ERA.

"Authorised Deductions"

146. Having decided that for the purposes of determining whether the respondent has made unauthorised deductions from wages under section 13 of ERA, the "wages properly payable" are:

(i) the claimant's August 2019 basic salary of £2,750;
(ii) the seven days' salary retained at the start of his employment pursuant to clause 4.2 of the contract of £861.54; and
(iii) £2,372.13 for accrued holidays,

I now need to consider whether the deductions were authorised to be made by virtue of "relevant provisions" (ERA 13 (1)(a)), or whether on the date of the deduction (30 August 2020) there was in existence a written agreement signed by the claimant signifying his consent to the making of the deductions (section 13(1)(b).

147. The respondent's pleaded case is that "*it was a term of the Claimant's employment that a retention of wages would be made from the*

Claimant's entitlement to cover unexplained losses caused by or under the supervision of the Claimant."

148. I disagree. The claimant's contract does not say that the respondent is entitled to deduct from the claimant's wages the respondent losses if those were "unexplained" or happen to have occurred "under the supervision of the Claimant".

149. Clause 4.2 of the claimant's employment contract gives the respondent the right to deduct from the seven day's salary retained at the start of the employment "*any loss that [the claimant] might have caused to the Company in breach of [his] terms of employment*". Clause 4.4 allows the respondent to deduct from any money the respondent owes to the claimant "*any money [the claimant] may owe the Company at any time*".

150. The claimant signed the contract on 20 February 2018 and the deductions were made on 30 August 2019. Therefore, I find that these two clauses are "relevant provisions" under section 13(1)(a) of ERA and also by signing his contract of employment the claimant has signified in writing his consent to the making of the deductions in accordance with section 13(1)(b) of ERA.

151. However, to make deductions in reliance on those provisions without breaching section 13 of ERA, the respondent must show that a loss, in relation to which a deduction was made, was caused by the claimant acting in breach of contract, or that the monies deducted were otherwise owed by the claimant to the respondent. In my judgment, a mere fact that the claimant was not able to explain a loss is not sufficient for the respondent to make a lawful deduction.

152. I shall now examine whether the deductions made by the respondent were within the scope of the authorised deductions. It is for the respondent to prove that it was entitled to deduct the amounts it did deduct.

153. The total amount of the deductions made by the respondent is £5,983.67 = (£2,750 + £861.54 + £2,372.13). The respondent says it was entitled to deducted from the claimant's wages sums with respect of the following:

(i) £24,000 "overpayment of salary", which I found was not an overpayment and was not within the scope of the authorised deductions under clause 4.4;
(ii) £600 of cash allegedly taken by the claimant from the safe on 9 February 2018;
(iii) £700 cash from the Valentine's Day event in 2019 not banked by the claimant;
(iv) £350 of cash taken by the claimant in August 2019;
(v) £671.99 of unauthorised credit card refunds;
(vi) £2,664.20 loss on alcohol sales;
(vii) £4,963.26 in respect of unexplained Void transactions;

(viii) £420 cost of cash audit.

"Cash shortage or Stock deficiency"

154. Except for the £420 cost of cash audit, in my judgment, all other amounts are either "cash shortage" or "stock deficiency" within the meaning of section 17 of ERA. Therefore, under section 18 of ERA the deduction must be made not later than 12 months beginning with the date when the employer established the existence of the shortage or deficiency or (if earlier) the date when it ought reasonably to have done so.

"Relevant Period"

£600 of cash taken from the safe on 9 February 2018

155. On 9 February 2018, the respondent was notified by Mr Zuccaro that the claimant had taken £500 from the till and that £100 were missing from the safe. On the respondent's own case the monies were not banked, and the respondent had access and was able to monitor the bank account. Therefore, I find, that the respondent knew or at any rate ought to have known that there was "cash shortage" with respect to £600 on or around 9 February 2018.

156. It made the deductions on 30 August 2019, more than 12 months after that date, and therefore outside the relevant period. It follows, that it was not entitled to make a deduction in respect of £600 of cash shortage.

Other Deductions

157. I find that all other deductions fall within the relevant period. Further, because the deductions were made from the claimant's final instalment of wages, the restriction on the aggregate amount of the deductions under section 18(1) did not apply.

"Relevant Provisions"

158. Turning to the question of whether the types of the deductions made were within the scope of authorised deductions under the "relevant provisions" or to the making of which the claimant consented.

159. Clause 4.2 of the contract allows the respondent to make deductions from the retained seven days' pay for any loss caused by the claimant's breach of contract. Clearly, "cash shortage" and "stock deficiencies" would be a loss of the respondent, in relation to which it could make deductions from the retained sum. However, the respondent must show that it has actually suffered the loss claimed, and that the loss was caused by the claimant's breach.

160. Clause 4.4 of the contract is wider and allows the respondent to deduct from the claimant's salary and other payments due to him "*any money which [the claimant] may owe to the Company at any time*".

161. Therefore, the respondent would have been entitled to deduct from the claimant's August 2019 salary, the seven days' retained pay and his holiday pay sums of money which the respondent was able to prove the claimant owed it, including by reason of the respondent incurring a loss arising from the claimant's breach.

<u>£350 taken by the claimant in August 2019</u>

162. The claimant admits taking £350 from the respondent by way of a salary advance. The respondent says it never authorised the claimant to take the money and he simply stole from it. I will deal with this matter in more detail later. For the present purposes it suffices that the claimant acknowledges that he owes this amount to the respondent and therefore the respondent was entitled to deduct it from his wages.

<u>£700 cash from the Valentine's Day event</u>

163. In its schedule of loss, the respondent makes a claim for missing cash from the Valentine's Day event on 14 February 2019. It claims that the claimant failed to bank around £700 of cash paid by the customers that evening. However, the only evidence the respondent submitted to support this claim is the statement of Mr Abadir and his email exchange with the respondent about the Valentine's Day event in 2018. The respondent's final submissions do not appear to mention that loss at all, and it is not clear whether it still pursues this claim.

164. If it does, taking at its highest the respondent's claim is that there should have been substantial cash payments made by customers during the event in 2018 and no cash was banked from that event. Mr Abadir asked the claimant whether some customers paid in cash and the claimant replied: "only few people paid in cash maybe 2 tables". I find this is wholly insufficient for me to find that the claimant took £700 of the respondent's money.

165. In any event, the respondent was or should have been aware of that in or around February 2018, which means that a deduction in respect of that cash shortage would fall outside the relevant period under section 18 of ERA and therefore would be unlawful.

166. There were no evidence presented to me by the respondent in relation to the alleged "missing cash" from the Valentine's Day event in 2019.

167. For these reasons, I find that the respondent was not entitled to deduct from the claimant's wages £700 of the alleged cash shortage from the Valentine Day events in 2019 or 2018.

<u>£671.99 of unauthorised credit card refunds</u>

168. The respondent's case is that the four credit card refund transactions were unauthorised and made by the claimant by sending money to his credit card. The respondent says that credit card refunds are very unusual, as it is a restaurant and not a retail goods business, where customer may wish to return purchased items. It further points out that one of such refunds was made on Monday, when the restaurant is normally closed. It says that the claimant failed to give an adequate explanation for the refund transactions and refused to provide his credit card statements to show that the monies were not sent to his account.

169. The claimant denies that he did the refund transactions. He says he does not know who did them. He does not accept that the refunds were unauthorised. He says, it is possible that these could be refunds of booking fees or for mistaken payments taken from a customer. He also says that over Christmas time the restaurant was open on Mondays for group bookings.

170. The respondent says that I should prefer the respondent's evidence because the claimant was not a credible witness. He was not open and candid, avoided answering direct questions, pretended not to be able to read documents and at one point refused to recognise his own handwriting.

171. The respondent further invites me to draw an adverse inference from the claimant's refusal to disclose his bank statements. However, the respondent's applications for specific disclosure of the claimant's bank statements were refused twice by the tribunal on the basis that they were akin to a "fishing expedition". The respondent was told that it could renew the application at the final hearing but did not do that. Therefore, I do not consider it would be just and appropriate for me to draw an adverse inference from the claimant not disclosing his bank statements voluntarily.

172. I accept and do take into account that in giving his evidence the claimant was often vague and confrontational. Instead of answering direct questions, he often replied with accusing the respondent's witnesses to be liars and praising himself for various achievements. I also accept that the claimant did not properly explain why the refunds had been made, and as the manager of the restaurant he was responsible to ensure that all monies were properly accounted for.

173. However, the respondent's evidence, in my judgment, are too circumstantial for me to find as a fact, applying the balance of probabilities test, that the refunds were unauthorised and improper, and that the claimant was responsible for making them to send monies to himself.

174. The respondent relies on the email of Mr Fernandez where he identifies these refunds and the fact that he could not locate the credit card machine reports for those dates.

175. In his witness statement Mr Fernandez does not specifically deal with the credit card refunds. He says, "*There were a number of*

transactions that I could not understand and which appear to show that receipts were changed. Nuncio and I identified as many of these as we could and passed these on to the owners and had no other involvement with that process." Assuming this reference includes the four credit card refunds, Mr Fernandez does not say that the refunds were improper, or that the claimant was responsible for making them. That is something that Mr Abadir concluded, because, in his view, there should be no refunds. He say that is because in restaurants if a customer is unhappy with a meal, they will get their bill reduced or cancelled before the payment is taken, and if the refunds were for reservation deposits, they would not have been in fraction of pounds, as the two refunds in 2018 were.

176. The burden of proof that the refunds were unauthorised and improper, and therefore represent a loss and that the loss was caused either by the claimant's deliberate action or negligence or breach of contract is on the respondent. In my judgment the respondent has failed to produce sufficient evidence to discharge the burden. At its highest, the respondent's case is that the refunds were "irregular", and the claimant failed to properly explain what they were for. However, that, in my judgment, is not enough for me to conclude that they were in fact improper and that the claimant was responsible for making them to steal money from the respondent.

177. Further, the respondent discovered the refund transactions only after he had made deductions from the claimant wages, by failing to pay the claimant's salary and holiday pay in August, and therefore the deductions made could not have been in respect of this alleged loss.

178. Accordingly, I find that the respondent was not entitled to deduct from the claimant's wages the sum of £671.99.

<u>£2,664.20 loss on alcohol sales</u>

179. The respondent initially claimed £6,000 as loss of profits in alcohol sale. The respondent's rational is that between January and August 2019, the total value of alcohol sales was £12,200 against the cost of alcohol of £6,000, where the usual margins are set at 300%. Therefore, there, it says, there is a loss of £6,000, which it attributes to the claimant either misappropriating cash or stock.

180. Later the respondent amended its claim and now relies on the stock report produced by the claimant on 13 August 2019, which shows a loss of £2,664.20 against 78 units of "Open Drinks" sold in the period from 1/01/2019 to 8/08/2019. The respondent says that the claimant could not satisfactorily explain why "Open Drinks" were sold at a loss and therefore the only reasonable explanation is that the claimant misappropriated cash or stock resulting in a loss.

181. The respondent further claims that the claimant was in breach of his contact by not conducting regular stock taking, which he was specifically required to do under the terms of his contract.

182. The claimant denies that he was responsible for the alleged losses. It says that the report was incorrect as it failed to account for the fact that "Open Drinks" were entered into the system for "deals" where a drink was included in a set menu. Also, he says, some customers request not to show alcohol on the bill, in which case these are entered into the system as "Open Drinks".

183. I accept that the claimant failed to perform his duties properly by not conducting regular stock takings, as he was required to do. However, as with the respondent's claim for unauthorised credit card refunds, I find that the respondent has failed to present sufficient evidence for me to conclude, on the balance of probabilities, that it has sustained a loss (either the initially claimed amount of £6,000, or as in its amended claim of £2,664.20) and that loss was caused by the claimant's breach.

184. The respondent did not produce a detailed audit report to show why it says that there was a cash shortage or a stock deficiency in relation to alcohol sales. Instead, it relies on its broad assessment that the margin on all alcohol sales was lower than expected (200% instead of 300%) or, in the alternative, on the sales report of 13 August 2019, showing a loss against 78 units of "Open Drink" and the claimant's failure to provide an adequate explanation. From that it concludes that it has suffered a loss and the claimant has caused it. I find this, applying the balance of probabilities test, is not sufficient either to demonstrate actual loss or to show that it was caused by the claimant's breach.

185. Whilst the claimant's explanations for possible reasons of the negative margin on "Open Drinks" do not fully answer the respondent's question, the burden of proof is still on the respondent. Just because the respondent found the claimant's explanations inadequate, it does not mean that it has discharged its burden to show a loss and its cause. I find that it has failed to do so.

186. For these reasons I find that the respondent was not entitled to deduct £6,000 or £2,664.20 from the claimant's wages.

<u>£4,963.26 in respect of unexplained Void transactions</u>

187. The respondent relies on a report showing many unexplained voids during 2019, when the claimant was the manager. It also says that the claimant deliberately gave all staff members the same ID access code for entering transactions through the tills, so that a transaction cannot be linked to any specific person.

188. The claimant says he does not know why there were so many voids in the report. He says these could be due to entry errors, miscommunication, discounts, and training (voids highlighted in pink

colour). He also says that some of those voids related to Mr Utip's wedding reception. He claims the system was not properly set up and he did not know how to create voids reports and had to seek assistance from a technician. He says that it would be impossible to do voids without being captured on CCTV. Finally, he says the respondent should seek explanations from other staff members as he personally never did any voids. The claimant did not give any cogent explanations why he had decided to change staff IDs for the tills.

189. The respondent claims that at least 15% of all the voids in 2019 (£33,088.40) were unauthorised and for which the claimant was responsible and therefore caused the respondent a loss of £4,963.26. The respondent, however, accepts that the transactions shown in the report in pink (training transactions) could be excluded from the calculation. The total value of void transactions in pink is £30,281.50, which leaves the balance of £2,806.90. I also note that many of "pink voids" are for the same value with the same time stamp. For example, five voids for £3,408.50 made on 30 July 2019 at 02:08:13.

190. There are also voids in blue, which the claimant says are for set lunches and messages sent to the kitchen and not regular voids. The respondent does not dispute that. The total value of such "blue" voids is £413.40. Therefore, the total value of regular voids in the report is £2,393.50.

191. The respondent's evidence is that before the claimant became the manager the level of voids had been in the range of £1,000 to £2,000. While the figure of regular voids in 2019 is higher than the respondent's estimate, I am not persuaded that the difference is such that I must concluded that those voids were false and unauthorised.

192. The respondent, in its closing submissions, refers me to the voids' report of 2018, which shows the total value of voids as £20,771.50. It does not have "pink" voids but does have some "blue" voids. The respondent however makes no claim in relation to the 2018 voids. Its claim is for 15% of the total sum of the 2019 voids. Therefore, I do not find, that to be relevant.

193. For these reasons, I find that the respondent was not entitled to deduct £4,963.26 from the claimant's wage.

<u>£420 cost of audit</u>

The respondent claims for the payment it made to its auditors. The respondent says that, having discovered that cash and stock were not properly accounted for, it instructed its accountants to conduct a cash audit. The respondent claims that part of that payment was attributable to "*increased fees incurred by the accountants*" due to the auditors having to wait for the claimant on the date of the audit. It claims the claimant was in breach of his contract by being absent from the restaurant on that date for four hours without a valid reason.

194. In his witness statement, Mr Utip repeats this claim. He says that the auditors had to wait four hours for the claimant to arrive and the respondent "counterclaims for such portions of these wasted costs". Mr Utip says that the audit team "tendered a bill of £420 for the exercise".

195. It is not clear from ET3 or Mr Utip's witness statement by how much the auditors' fees were increased due to the claimant's absence. The respondent did not submit any further evidence to show how much of the auditors' bill for £420 was attributable to the four hours of their waiting time.

196. In its closing submissions the respondent claims £420 as "loss of time as a result of audit", but again provides no particulars as to how that sum was calculated and attributed to the auditor's waiting time.

197. For these reasons, I find the respondent has failed to prove its claim that it suffered a loss of £420 and that loss was attributable to the claimant's breach of contract, namely his absence from the restaurant for four hours.

198. Therefore, I find that the respondent was not entitled to deduct the sum of £420 from the claimant's wages.

Summary – Unauthorised Deduction from Wages

199. In summary, the respondent owed the claimant the total of £5,983.67, being £2,372.13 (holiday pay) + £2,750 (salary for August 2019) + £861.54 (7 days retained salary at the start of the employment).

200. It was entitled to deduct from the claimant £350 of "salary advance" taken by the claimant.

201. Therefore, I find that the respondent has made an authorised deduction from the claimant's wages in the gross amount of **£5,633.67**. I order the respondent to pay this amount to the claimant and account to HMRC for taxes and NI due.

Itemised statement

202. Section 8 of ERA requires the employer to provide to a worker a written itemised pay statement, which must contain particulars of:

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

(b) *the amounts of any variable, and [ ] any fixed, deductions from that gross amount and the purposes for which they are made*.

203. Under section 11(1) of ERA, a worker who has not been provided with an itemised pay statement has the right to refer the matter to an employment tribunal.

204. If a tribunal finds that a worker has not received a pay statement, or that he or she has received one, but it does not contain the particulars required, it must make a declaration to that effect — (section 12(3) of ERA). Where the tribunal finds that any unnotified deductions have been made during the 13 weeks immediately preceding the tribunal application, it may also make a monetary award to the worker — section 12 (4) of ERA. The maximum award is the aggregate of unnotified deductions made during those 13 weeks. It is irrelevant whether the deductions were made in breach of contract.

205. Where deductions made by the employer were both unauthorised and unnotified the employee's right to make a complaint to the tribunal for unauthorised deduction from wages, does not prevent the tribunal to consider a reference under section 11 of ERA in respect of the employer's failure to comply with the requirements of section 8 of ERA to provide the employee an itemised pay statement. However, the aggregate of awards paid under the two sets of provisions in respect of a particular deduction must not exceed the amount of the deduction (section 26 of ERA).

206. I find that the respondent did not provide the claimant his August 2019 pay slip. It did not provide any other statement setting out the deductions made and the purposes for which they were made. None of such documents were included in the bundle. The claimant's evidence were that they had not been provided to him, and the respondent did not argue otherwise. Therefore, I find that the respondent was in breach of section 8 of the ERA.

207. Because I have awarded the claimant the full amount of the unauthorised deductions under section 23 of ERA, I make no monetary award for the respondent's failure to provide an itemised pay statement.

<u>Breach of Contract (wrongful dismissal)</u>

208. The claimant claims that the respondent was in breach of contract by dismissing him without notice or payment in lieu. He seeks damages in the amount corresponding to his one months' salary of £2,750, plus one month's tronc/service charge of £390 and for 2.33 days of holiday - £286.80, which would have accrued during his one month's notice period.

209. The respondent says that it dismissed the claimant for gross misconduct, as it was entitled to do under the terms of the contract and therefore the claimant is not entitled to his notice pay or any other money.

210. The respondent relies on the claimant's admission of taking £350 from the respondent. It says this amounts to theft and warrants summary dismissal. The respondent also relies on the same evidence in relation to its defence to the claims for unauthorised deduction from wages to show that the claimant was guilty of misappropriating the respondent's monies and stock and was also in fundamental breach of his duties under the contract by neglecting to properly account for cash and stock, and by not working his full contracted hours. It says that in the circumstances it lost

all trust and confidence in the claimant due to his conduct and therefore the dismissal was inevitable.

211. The claimant denies misappropriating the respondent's cash and stock or neglecting his duties. He, however, admits taking £350 as a "salary advance", which he says was authorised.

212. To determine the question of whether the dismissal was wrongful, that is in breach of the employee's contract, the tribunal should be not concerned with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (Enable Care and Home Support Ltd v Pearson EAT 0366/09)

213. Having considered all the evidence, I find that the claimant was in fundamental breach of his contract and therefore the respondent was entitled to dismiss him summarily.

214. I conclude this because, on the balance of probabilities, I find that the claimant took £350 without the respondent's authority and only informed the respondent of that when he had realised that the respondent would discover the shortage, and with him being suspended he could not put money back into the safe or simply did not have money.

215. When giving evidence he could not explain who and when had authorised him to take £350 as a salary advance. This could only have been Mr Utip or Mr Abadir. Both denied giving such authority and the claimant did not challenge their evidence on this.

216. In his closing submissions the claimant says that £350 "*was verbally authorised and was written in the column advanced made for that purpose on the payroll sheet including service charge and sent to the director for approval*". He did not explain who gave him the verbal authorisation. This statement is contradictory. If, as he claims, a verbal authorisation was given by his management, why would he need to seek their further approval?

217. The only document in the bundle where the claimant states that he took £350 as a salary advance is his email to Mr Abadir of 27 August 2019. That was after the claimant had been suspended. In the email the claimant does not seek a permission to take money as a salary advance and simply informs Mr Abadir that he had done so.

218. Further, immediately after being dismissed the claimant gave a different explanation to Mr Utip and Mr Abadir. On 31 August 2019, he wrote in his appeal email to Mr Abadir that on many occasions he had used his own money to pay the respondent's bills or buy goods for the respondent and therefore it should work "*both ways recalling all the work and stuff that [he has] done for [the respondent] for free*". He went on to say: "*After all as a manager why would i not be able to help some of my*

staff or myself if they need a small emergency cash advance after all there is 7 days deposit on their and my wages this also how you create at team and good environment for work." (my underlining)

219. On 10 September 2019, the claimant wrote to Mr Abadir again, stating: "*Regarding the 350 cash advance that was meant to be taken of my wages and appear on the payroll as I sent you there is no question about that, as I often spent money from my own pocket and done what I've done for this place. It didn't strike me that was a such a bad move to be dismissed but that I leave it to you*." (my underlining)

220. His explanation tells me that he knew that at the time of taking cash he had no such authority from the respondent and was trying to justify that retrospectively by the fact that in the past he had paid the respondent's bills out of his pocket. Therefore, I find that he was acting dishonestly in taking the respondent's cash without approval.

221. The respondent's Staff Handbook, which forms part of the claimant's contract of employment, clearly states that theft is gross misconduct for which the employee may be dismissed summarily.

222. The claimant did not say in his evidence that he intended to return cash, which means him taking the money would be theft. However, he subsequently informed the respondent that the sum should be treated as "advance on salary", which suggests that he was prepared to account for it. However, he did that only after he had been suspended and was required by the respondent to explain cash and stock shortage. Therefore, on the balance of probabilities, I find that when taking £350 he did not intend to return the money to the respondent and therefore was guilty of theft of £350.

223. In any event, I find, that his conduct was dishonest and breached the implied duty of trust and confidence, and therefore repudiated the contact. The respondent was entitled to accept his repudiation and dismiss him summarily.

224. It is a long-established legal principle (see Woods v WM Car Services (Peterborough) Limited 1981 ICR 666) that any breach of the implied term of trust and confidence is a fundamental breach of contract amounting to a repudiation because such breach necessarily goes to the root of the contract destroying the essential element of trust and confidence fundamental for and upon which the employment relationships are based.

225. For completeness, I shall say that I also find that the claimant was guilty of gross misconduct by being seriously negligent in performing his duties, which might have caused the respondent "unacceptable loss". I say that because I find that he failed to properly do stock taking and cash accounting, made changes to the respondent's systems and process, which caused them to be vulnerable to theft and unauthorised use. He could not give a reasonable explanation why he had made those changes.

He did not follow his contractual duties on cash handling. These breaches taken together were serious and might have caused the respondent losses.

226. Although I found that the respondent had failed to prove its losses for the reasons I explained above, nevertheless, I find that the claimant's conduct created a serious risk for the respondent of sustaining such losses.

227. For these reasons, I dismiss the claimant's claim for breach of contract (wrongful dismissal).

Counterclaim

228. My finding in relation to the claimant's claimed losses set out in paragraphs 153 to 201 are equally applicable for the purposes of the respondent's counterclaim.

229. Furthermore, under section 25(4) of ERA "*Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of a particular deduction or payment falling within section 23(1)(a) to (d), the amount which the employer is entitled to recover (by whatever means) in respect of the matter in relation to which the deduction or payment was originally made or received shall be treated as reduced by that amount.*"

230. The effect of this provision is that where an employer had made deductions from employee's wages, which deductions were then held to be unauthorised, the employer cannot pursue the employee for the same amount under a different head of claim, such a counterclaim for breach of contract.

231. It follows that the respondent's counterclaim in the amount of the unauthorised deductions it has made from the claimant's wages (£5,633.67) is barred by section 25(4) of ERA.

232. The remaining part of its counterclaim, for the amounts which the respondent purported to deduct from the claimant's wages, fails for the reasons set out in paragraphs 153 to 201 above.

233. The final element of the respondent's counterclaim is for £1,500 bonus. For the reasons I set out in paragraphs 134 to 145 I reject the respondent's claim that the payment was made under duress. I also find that the respondent failed to prove that in making the payment it operated under a mistake of fact.

234. Furthermore, it did not plead its case as a claim for restitution and therefore the claimant was not given a proper notice and opportunity to meet such a case. The respondent's ET3 does not make any claim in relation to this amount. The first reference to the bonus is in the

respondent's schedule of loss dated 3 July 2020 and in Mr Abadir's witness statement, which was exchanged shortly before the hearing.

235. The bonus payment was made in April 2019. The claimant is most likely to have spent the money and therefore would have been able to argue a change of position defence if the respondent had properly advanced his claim as a claim for restitution. For these reasons, I dismiss the respondent's counterclaim for the repayment of £1,500 bonus.

236. For completeness, I shall note that, although not specifically pleaded in such terms, it appears that the respondent purported to set off its alleged losses against the claimant's wages by way of equitable set-off. This was not a remedy open to it. In my judgment, allowing an employer to make such equitable set-off against his employee's wages would be contrary to the statutory regime enacted to protect workers' wages.

Financial Penalty

237. Finally, I need to decide whether there were any aggravating features to the respondent's breach of the claimant right not to suffer an unauthorised deduction from wages and, if so, whether I should exercise my discretion and impose a financial penalty in accordance with section 12A Employment Tribunals Act 1996.

238. Section 12A of the Employment Tribunals Act 1996 ("ETA") provides that in a claim involving an employer and a worker, the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim itself) if it:

(a) "concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features".

239. Subsection 5 of section 12(A) of ETA, applies where the tribunal makes a financial award against the employer on a claim and also orders the employer to pay a penalty in respect of the claim. In such case, the amount of the penalty shall be 50% of the amount of the award, subject to a minimum of £100 and the maximum of £20,000.

240. Having found that the respondent had breached the claimant's right not to suffer unauthorised deductions from wages and having made an award against the respondent on that claim, I shall now consider whether the respondent's breach had "one or more aggravating features", and if so, whether I should exercise my discretion and make a penalty award.

241. I take into account that the respondent is a small employer without a dedicated HR function. I also find that the respondent genuinely

believed that the claimant was guilty of dishonestly misappropriating its property and was grossly negligent in performing his duties causing the respondents substantial losses, and that the respondent had reasonable grounds to hold that view.

242. I found that the claimant was in fundamental breach of contract and was dishonest. However, for the purposes of deciding whether the respondent's breach had aggravating features, I must look at the conduct of the respondent in all the circumstances of the case.

243. Stepping back and looking at all the evidence available to the respondent at the time of it making the unlawful deductions, I find that the respondent acted very hastily in refusing to pay the claimant his salary and accrued holiday pay, and without properly applying its mind to the question as to whether in the circumstances it was entitled to do so. It did not provide the claimant with an itemised pay statement explaining how the deductions were calculated and on what basis those had been made. In making such "wholesale" deduction it left the claimant in a position where he could not properly understand on what legal basis the respondent withheld his salary and holiday pay.

244. Although the respondent does not have a dedicated HR function, Mr Utip, who is the respondent's director, is a solicitor and he advised the respondent and acted for it throughout. It was his and Mr Abadir's decision not to pay the claimant his wages and holiday pay. I find that the decision was made without a proper investigation and analysis for the respondent to reasonably conclude that it was within its rights to make the deductions. It should have been obvious to both of them, and Mr Utip in particular, that by refusing to pay the claimant his wages the respondent would be acting in contravention of his statutory rights, unless it had a solid statutory ground for making the deductions. I find they did not engage in a proper analysis and acted more in retaliation and not because they held a genuine but mistaken belief that they were legally entitled to withhold the claimant's wages.

245. For these reasons I find that the respondent's breach had aggravating features and I consider it will be proper or me to exercise my discretion and to order the respondent to pay a penalty to the Secretary of State of **£2,816.84**, being 50% of the award for unlawful deduction from wages.

Employment Judge P Klimov
8 March 2021

Sent to the parties on:

09/03/2021.

For the Tribunals Office

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