EMPLOYMENT TRIBUNALS

Claimant: Mr P Duti

Respondent: Devran Kitchen Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: **01 October 2021**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In Person
For the respondent: Ms Acar, director

RESERVED JUDGMENT

(1) The start date of employment was 10 November 2019. The termination date was 5 July 2020.
(2) The Claimant was correctly paid his entitlements from the start of employment until 30 June 2020.
(3) In breach of contract, the Respondent also failed to pay the full amount of salary for the period 1 July 2020 to the termination date (paying only £50 for this period).
(4) The Claimant was dismissed in breach of contract and is entitled to damages for failure to give 1 week's notice from 5 July 2020. There was no failure to mitigate by the Claimant.
(5) The Claimant took no paid holiday during his employment. No payment in lieu of holiday was made on termination. He is therefore entitled to a payment of the full pro rata amount calculated in accordance with Regulation 14 of the Working Time Regulations 1998.
(6) The Respondent is ordered to make the following payments to the Claimant.
    (i) £139.52 as damages for failure to give notice.
    (ii) £49.68 for failure to pay full salary for 1 to 5 July 2020
    (iii) £511.60 as compensation in lieu of unused holiday

REASONS

Introduction

1. This is a matter which had come before me for a final hearing on 10 February 2021. On that occasion, the Claimant had been unable to access the video hearing room,

and I therefore postponed so that the matter could be listed in person. Coincidentally, it came back before me on 1 October 2021. It had been converted back from in person to video by another judge. The Claimant was again unable to access the video room fully. However, he was able to join by telephone. He could see the persons in the video room, but we could not see him. He could hear us and we could hear him.

2. I discussed with the parties whether it was appropriate to postpone again. Both sides preferred to continue the hearing and both were satisfied that the fact that the Claimant could not be seen by me, or the respondent's representative, or the witnesses, would not prevent a fair hearing.

3. I decided that it was not in the interests of justice to cause a further delay, especially as it was uncertain when there would be a physical room available for an in-person hearing and that we should therefore continue.

4. The tribunal was grateful for the assistance of Ms Seyidli who attended by video to interpret between Turkish and English. This was not for the benefit of the Claimant or the Respondent's representative, but for some of the Respondent's witnesses.

5. The claim was presented in time, following early conciliation. Based on the claim form and the contents of the Respondent's witness statements, I had drawn up the following list of issues which I sent to the parties after the aborted 10 February hearing. For this hearing, the parties agreed, and I was satisfied, that this was still correct.

The Claims and Issues

Unauthorised deductions

6. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 and if so how much was deducted?

Breach of contract

7. To how much notice – if any - was the claimant entitled?

8. What would the Claimant have earned during his notice period.

Factual issues that might need to be decided by judge

9. Is there any written contract?

10. Did the Claimant sign a furlough agreement?

11. Is there anything in writing to say when furlough ended?

12. What was the start date of the Claimant's employment?

13. Did the Claimant take any paid time off (as holiday, not furlough) between the start of his employment and 5 July 2020.

14. Does the Claimant accept that he received the payments as per the payslips at pages 66 to 70 in the bundle? If not, what payments did the Claimant receive for each month of his employment up to June 2020?

15. What hours did the Claimant work between start of his employment and 5 July 2020? In particular, what hours did he work in July 2020?

16. What happened on 5 July 2020?

    16.1 In particular, did the Respondent tell the Claimant that he was dismissed and if so, why?

    16.2 Did the Claimant tell the Respondent that he was terminating the employment and if so why?

    16.3 Did the Respondent tell the Claimant that he should work one week's notice if he wanted to be paid, and, if so, why did the Claimant not attend work after 5 July 2020?

The Hearing and the Evidence

17. The Respondent had prepared a 76 page electronic bundle (pdf format) which the Claimant had received and which the Claimant and the Respondent and I were each able to access during the hearing. Included within that bundle were the Respondent's written witness statements. These documents had all been available to the tribunal and the Claimant prior to 10 February and the Respondent did not seek to present any new witness statements after that date.

18. After 10 February, I had ordered the Claimant to prepare a witness statement by 10 March 2021 and to send it to the Respondent by 4pm on that day. My orders stated that his written statement must address the matters raised in the list of issues. My orders stated: "No additional witness evidence will be allowed at the final hearing without the Tribunal's permission". [The Respondent also had permission to provide additional witness statements by the same date.]

19. The Claimant failed to comply with the order. I was not satisfied that he had a good reason for that. However, it was not in the interests of justice to strike out his claim or to debar him from relying on oral evidence. I therefore allowed him to give evidence on oath by being sworn in, answering some questions from me (in which he stated that the contents of Box 8.2 of his claim form were true) and being cross-examined.

20. The Respondent's witnesses were: Elvan Acar; Erdal Kaya; Nazim Sahan; Kamila Tolkacz. The latter 3 each had produced a written statement, and were cross-examined and answered my questions. Mr Elvan Acar had also produced a signed statement. For the reasons which I gave at the time, that could not be treated as his evidence-in-chief and so his evidence-in-chief was given orally in response to questions from the Respondent's representative's and from me.

The findings of fact

21. The Claimant was not sure of his start date, but believed it was close to the 10 November 2019 date stated in the claim form. Given the fact that the payslip for December 2019 on page 67 of the bundle (the earliest one provided) shows "Year to date" earnings of £2147.65, and only £439.97 earned in December itself, the Claimant had earned approximately £1707.68 prior to December 2019. I therefore accept that the Claimant's alleged start date of 10 November 2019 is correct, and find that the Respondent's alleged start date of 13 December 2019 (and paragraph 2 of Elvan Acar's written statement) is incorrect.

22. The Claimant was not given a written contract. The Respondent's business is a restaurant and the Claimant was employed as a waiter. The person in day to day control of the restaurant was Mr Elvan Acar. Family members also contributed to the operation of the business, including his daughter, Ms Havva Acar, who represented the Respondent at the hearing. Employees of the restaurant included Mr Nazim Sahan (chef), Mr Erdal Kaya (chef), Ms Kamila Tolkacz (waitress).

23. The Claimant was aged over 25 at all relevant times. Therefore, the national minimum wage rate that was applicable to him was:

    23.1 from start of employment to 31 March 2020: £8.21 per hour

    23.2 from 1 April 2020 to end of employment: £8.72 per hour

24. In fact, the Claimant's salary was calculated based on £8.25 per hour by the Respondent for the entire duration of employment. The Claimant did not have any written agreement giving him fixed hours. He accepts that, for each of the payslips up to May, he did receive the amounts stated and that the hours stated in each were accurate. The payslips show the following:

    24.1 For November 2019, there is no payslip in the bundle. For the reasons mentioned above, my finding is that for the period from 10 November 2019 to 30 November 2019, he was paid £1707.68, from which I infer he was paid for 207 hours @ £8.25 ph.

    24.2 For December 2019, he was paid £439.97 (53.33 hours @ £8.25 ph)

    24.3 For January 2020, he was paid £571.97 (69.33 hours)

    24.4 For February 2020, he was paid £571.97 (69.33 hours)

    24.5 For March 2020, he was paid £527.99. The breakdown referred to 42.67 hours @ £8.25 ph (that is £352.03) plus "Furloughed pay @ 80% of £219.94", £175.96. Since £571.97 - £352.03 = £219.94, the Respondent was treating £571.97 per month as the Claimant's normal gross monthly salary and (i) treating him as having worked normally for 42.67 hours, and paid accordingly, and (ii) being entitled to a payment for the hours which he did not work that month, in comparison to a "normal" 69.33 hour, £571.97 month.

    24.6 For April 2020, the Claimant received £457.57. The payslip describes this as 0 hours @ £8.25 and "furloughed pay" of £457.57. Although not stated in the

payslip, 80% of 571.97 is 457.576, from which I infer that the Claimant did no work at all that month and was treated by the Respondent as being entitled to what it regarded as 80% of normal salary.

24.7 The payslips for May and June match that of April.

24.8 All of the payslips show that there were no deductions and the net pay matched the gross pay. I accept the Respondent's explanation that the Claimant's income during each of the two tax years was not high enough that they needed to make PAYE deductions.

24.9 Each of the payslips states that the Claimant was paid in cash on the 5th of the month following the month to which the payment related. Both parties accept that he was paid these sums up to including the payment for the month of May 2020. The "5th" was more of a notional date for the purposes of the written records, rather than the exact date on which payments were made. In fact, instalments were paid during the month such that the aggregate sum, paid by the 5th, was that stated in the payslip.

24.10 However, there is a dispute about what happened on 5 July, generally, and in relation to the payment of money for the month of June.

25. The Claimant and the Respondent had originally entered into an oral contract that the Claimant would be paid an hourly rate (of £8.25) for the hours actually worked, and there were no guaranteed minimum number of hours, or minimum rate of pay.

26. The parties agreed to a variation of the contract in March 2020. The Covid 2019 pandemic caused the Respondent's business (as well as other restaurants and similar establishments) to have to close its doors to customers. Ms Havva Acar (Mr Elvan Acar's daughter and a director of the Respondent) sent a template letter (page 52 of bundle) and draft agreement (page 53) to the Claimant. Although there were no signed, personalised copies of those documents relating to the Claimant in the bundle, he confirmed his acceptance of the terms by his email of 21:54 on 26 March 2020 (page 51). The Respondent notified the Claimant that the business was temporarily closing and was intending to use the Government's Coronavirus Job Retention Scheme. It offered to pay the Claimant 80% of his salary during closure provided he agreed to the terms stated in the document "agreement for furlough leave", which he did.

27. I accept that Mr Acar genuinely believed that the effects of this variation were that it had no obligation to pay the Claimant until the Respondent was paid by the government. That is not what the agreement says. The written agreement is silent as to pay date, and – therefore – was not, in itself, effective to vary whatever contractual pay date was already in place.

28. That being said, in the Claimant's case, there was no contractually agreed pay date. Rather, prior to the pandemic, he was paid in cash in instalments on various dates during the month. Furthermore, while the written document was silent as to pay date, the Respondent made clear to the Claimant that it was only intending to pay him after it had received funds from the government. The exchange of emails

on 2 April 2020 between the Claimant and Ms Acar (pages 54-58 of bundle) shows that the Claimant was aware of that and accepted that was the position.

29. On 1 June 2020, the Claimant sent email to the Respondent chasing his payment in respect of May. On other occasions, the Claimant also chased his payments orally with Mr Acar and with the Respondent's accountants. In June (for the month of May) he was paid £50 on or around 1 June, and the balance of £407.57 on or around 3 June.

30. The restaurant re-opened around the start of July. That month the Claimant worked two shifts prior to 5 July, and also attended on 5 July until some time after 9pm. He did not complete the full shift that had been due to end at midnight. By 5 July, he still had not received the payment relating to the month of June. This led to a discussion between Mr Acar and the Claimant which escalated into an argument. The Claimant's position was that he should be paid the full amount that he was owed (being £457.57 furlough pay for June), or, failing that, some instalment, at least. Mr Acar's position was that the Respondent had no liability to make this payment until it received payment from the government, and that it could not afford to make the payment (for reasons including the cash flow problems caused by the pandemic and the resultant temporary closure of the restaurant).

31. There is a dispute about what happened during this argument. Each of Mr Acar and Mr Duti claim that they themselves acted reasonably and calmly and that the other acted unreasonably and aggressively. While I do not doubt the honesty and integrity of the other witnesses, I found their evidence of very little assistance in terms of the exact details of what happened during this argument; I am satisfied that none of them saw the whole event. Their personal opinions of Mr Duti did not help me (especially because, but not only because, it would not be realistic to expect them to be impartial between their then employer and a former employee who did not work at the business for very long prior to the March close down).

32. In terms of Mr Duti and Mr Acar, I am not satisfied in either case that their account was given based on a clear and calm recollection about what actually happened. They each were describing an incident which lasted for a few minutes about 15 months earlier, and I think each of their recollections is coloured by both (a) that they each think they were in the right and the other was in the wrong as far as the argument itself was concerned and (b) that they each think they are in the right and the other is in the wrong as far as the financial disputes before me are concerned. Put another way, they were each attempting to tell the truth as they now genuinely perceive it, but I do not find that the events were exactly in accordance with what either of them said.

33. Based on the two written accounts (Box 8.2 of claim form and Mr Acar's written statement), their respective oral evidence-in-chief and the wording of the answers given in cross-examination, and the impression I formed of the two witnesses during their oral evidence, I am satisfied that neither of them was entirely free from blame and that they each contributed to the escalation. Each of them had strong feelings that their own position was justified, and that contributed to their becoming angry that the other person was not agreeing with that position. In the Claimant's case, he was desperately short of cash, not having received a payment since early June and was now (unlike April, May and June) having to spend money on public

transport to get to work. In Mr Acar's case, he thought that the Claimant was asking for preferential treatment in comparison to other workers, and he perceived the Claimant as failing to understand that the business had numerous financial commitments which had to be met. They each lost their temper and shouted at each other, especially after the Claimant had spoken to Mr Acar's wife and asked her to intervene on his behalf. The confrontation became physical and, in effect, Mr Acar ejected the Claimant from the restaurant.

34. The Claimant called the police. The Claimant accused Mr Acar of having assaulted him. The police declined to take any action over that (which I infer was because of lack of evidence, and because of conflicting stories in which each person blamed the other, rather than because the officers positively concluded that the Claimant was lying). I reject Mr Acar's account that there was no physical altercation at all and that the Claimant simply called the police for no reason other than that he wanted the police to decide that the non-payment of wages was criminal. I only accept the Claimant's account of the physical confrontation to the extent that I am satisfied that Mr Acar made some physical contact with the Claimant in the course of forcing him to leave the premises.

35. While the police were present, Mr Acar made a payment of £50 to the Claimant. The implication in the document produced as Mr Acar's written statement that he paid – or offered to pay – before the police were called is not correct. The Respondent's other eye witnesses state the payment was made after the police arrived. (Ms Tolkacz was not present at the time.) Further, in his oral evidence in chief, Mr Acar accepted the payment was made by being given to the officer. The Claimant did not re-enter the premises. On 9 July, the Respondent made a payment of £457.57 representing the furlough money for June 2020.

36. My finding is that it was entirely clear to both Mr Duti and Mr Acar on 5 July that the employment relationship was over. The Claimant did not state or imply that he was resigning. (He did say that he could not afford to come to work if he did not receive a payment, but that was simply a statement of fact. He was not saying that he would resign if he was not paid, just that he literally would be unable to get to the workplace. In context, he was making clear that he wanted to, and intended to, remain in employment.) Mr Acar, by his words and actions, made clear to the Claimant that if the Claimant was not willing to accept the decision that he had to wait to be paid, then the Respondent was not willing to continue to employ him. Mr Acar did not intend that he was only ejecting the Claimant for the remainder of the shift, and that the Claimant would come back the next day and work as normal. He intended, and made clear to the Claimant - and it would have been clear to any bystander - that the Claimant was being required to leave the premises and should not return in the future.

37. I reject, as wholly implausible, the Respondent's account that it told the Claimant to come back after 5 July and to work out his notice. At most, that assertion makes clear that the Respondent was not treating the termination of employment as a summary dismissal which was justified on the basis of any alleged gross misconduct.

38. There is a dispute between the parties as to whether the Claimant ever took paid time off. The Respondent says that he did, and the Claimant says that he did not.

The Respondent produced no documentary evidence. Paragraph 6 of the document produced as Mr Acar's statement refers to the Claimant having taken 4 days holiday in January. Since that document was not treated as his evidence in chief, I asked him to explain when he was asserting that the Claimant had taken paid annual leave. While he was considering his answer, he was prompted to say January by Ms Acar who was sitting next to him, sharing the same laptop. (She spoke in Turkish, but she did not dispute that that was what she had said.) As I mentioned at the time, this was very inappropriate. I do not draw an adverse inference from this particular incident, but it leaves the situation as being that the already weak evidence is weakened further by the fact that it seems Mr Acar had no direct and independent recollection of the matter by the time of the hearing before me. Paragraph 6 of the document dated 30 January 2020 (which is obviously an error, and presumably had been intended as 30 January 2021) reads:

> In relation to holiday pay as per his January pay slip, he was paid in full although he took 4 days annual leave which confirms that he was paid for the 4 days holiday in January. We are a small restaurant and keep verbal records of holidays and I only have my manual notes.

39. There is a contradiction between the claim that there are "manual notes" and only "verbal records". Either way, no records have been produced. There is no document showing the Claimant asking and being granted annual leave. There are no shift rotas for any of the months. There is no evidence that the Claimant actually worked fewer than 69.33 hours in January. I accept that it is entirely neutral that the January payslip does not expressly say "holiday pay" on it. On balance, I am satisfied that if it were true that the Claimant had worked X hours in January, and then been paid (69.33 – X) hours as holiday pay, the Respondent could and should have been able to prove that with contemporaneous documents. I think it is legitimate to – and I do - draw an adverse inference from the failure to produce these documents. It is not simply the fact that there is a legal obligation to keep records of working time; it is the fact that a restaurant needs to have some method of keeping track of which waiting staff are going to be on duty at a given time, in order to be sure that it is neither over-staffed or under-staffed for any particular dining session.

40. Furthermore, even without drawing that adverse inference, I am faced with the Claimant's own recollection about a matter which he would be likely to know about (ie whether he took leave and was paid for hours that he did not work). Against that, Mr Acar runs a business employing several staff. Some of the administration is clearly done by other people (eg his daughter, a director, liaised with staff over furlough arrangements). I am not satisfied that Mr Acar's recollection of the Claimant's presence or absence in January 2020 is superior to that of the Claimant. Furthermore, I have rejected as entirely implausible the suggestion that after the 5 July incident, the Respondent sought to persuade the Claimant to come to work to do some shifts to work out his notice.

41. For these reasons, it is my finding that, during his employment, he had no period which was treated as paid holiday. The hours shown on the payslips are hours which he actually attended work.

42. For the purposes of calculating the Claimant's pay entitlement, I note that both parties treated his "normal" monthly salary as being £571.97 during the furlough period. This was based on the fact that he earned that amount in each of January and February, his salary in each of December and November 2019 having been significantly different.

43. On that basis, my finding is that the Respondent was treating the Claimant's weekly pay for furlough purposes as [£571.97 x 12]/52 = £132 per week. This equates to 16 hours per week at £8.25 per hour which is consistent with the weekly number of hours mentioned in the Grounds of Resistance (pages 25 and 26). The national minimum wage increased on 1 April 2020, and the Respondent did not factor that in to furlough pay. There was no contractual agreement between the parties that his furlough pay would increase. However, after he resumed actual work in July, the respondent was obliged to apply NMW rates.

44. In relation to the number of hours worked by the Claimant in July 2020, there is a lack of reliable evidence. The Respondent maintained in its the Grounds of Resistance that the Claimant had not worked at all in July, having been asked to come in and having refused. It suggested that on 5 July 2020, the Claimant had not come to work a shift, but simply had turned up to demand a payment. (The Respondent's case more generally being that the Claimant had either resigned and refused to work his notice, or else had refused to accept work when it was available and therefore was not entitled to be paid for the notice period). The Respondent's position as per its Grounds of Resistance is inconsistent with the document which was presented as Mr Acar's written statement which states that the Claimant did commence work on a shift on 5 July, and had been supposed to work until midnight until, part way through the shift, the argument arose at around 9pm. In his oral evidence in chief, having recounted that the Claimant was demanding payment for 3 days work in July, Mr Acar stated that, in fact, the Claimant had only done one and a half days' work that month.

45. In the circumstances, I accept the Claimant's account that he had worked two shifts in July prior to 5 July. However, he was unsure of the specific hours worked.

The Law

46. There is no dispute between the parties that employment terminated in July. However, there is a dispute about whether it was an actual dismissal (as alleged by the Claimant), or a resignation (as alleged by the Respondent). The Claimant does not allege that there was a resignation which should be treated as a constructive dismissal. The Respondent alleges that the resignation by the Claimant was accompanied by a refusal to work out his notice; it does not allege that the Claimant was dismissed in circumstances in which there was no obligation to give notice.

47. The test I have to apply when deciding whether there was either a dismissal or a resignation is whether any arguably ambiguous words or conduct amounted to, as the case may be, either a resignation or a dismissal or not. It is an objective test. All the surrounding circumstances must be considered. If the words are still ambiguous even in light of the surrounding circumstances then the tribunal needs

to ask itself how a reasonable employer or reasonable employee would have understood the words in the circumstances.

48. For breach of contract, the law is that an employee who is dismissed by the employer is provisionally entitled to receive notice which is the longer of the contractual notice period (if any) or the statutory minimum. In this case, the statutory minimum is eight weeks. An employee is not entitled to notice if they have fundamentally breached the contract of employment (for example, by an act of so-called gross misconduct). This breach does not necessarily have to be something which the employer had in mind when terminating the contract and the respondent can rely on information and evidence which it only acquired after termination. If, however, the respondent has affirmed the breach after knowing about it, then it cannot reply on that particular breach as justification for not giving notice.

49. Damages for failure to give notice are assessed in accordance with normal contractual principles and - subject to mitigation - the normal measure is the net amount that the employee would have earned during the notice period.

50. Holiday pay can be governed by contractual terms: workplace agreement and/or specific agreement with the individual employee. The employee is entitled to rely on whichever is more generous to him out of the Working Time Regulations 1998 and any specific contractual agreement. Put another way, the Working Time Regulations provide a guaranteed minimum entitlement, not a maximum.

51. Regulation 14 deals with compensation to be paid to an employee on termination of employment for any leave that has been accrued during the leave year in which they leave. It gives a formula.

> (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 X 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.

52. Part II of the Employment Rights Act 1996 (sections 13 to 27) deals with “Protection of Wages”. Section 13 (alongside the exceptions set out in Section 14) deals with the right not to have unauthorised deductions made from wages. Other than deductions authorised by statute (which is not an issue in this case), for a deduction to be authorised it must either be one which is authorised by the contract of employment (with either the term itself being part of a written agreement, or else the term itself being something which the Respondent has explained to the Claimant in writing, before the date of the deduction) or be one which the employee has agreed to in writing (such agreement occurring after the date of the specific event which is said to be the reason for the deduction, but before the deduction itself. As per section 13(3), a shortfall (other than one due to computation error) in

the sums properly payable to the worker is to be regarded as a deduction even if the employer does not refer to it as a deduction.

53. In accordance with section 1(1) of the National Minimum Wage Act 1998

> A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

Analysis and conclusions

54. For the reasons stated in my findings of fact, I am satisfied that there was not a resignation and that there was a dismissal.

    54.1 I accept the Claimant's account that he was telling Mr Acar that he needed some money to pay for transport so that he could come to work on 6 July. I do not accept that he stated or implied that he intended that 5 July was his last day of employment and that, for that reason, he was not going to come to work the following day.

    54.2 Mr Acar's conduct amounted to an unambiguous dismissal. There is no dispute between the parties that Mr Acar was in charge of the restaurant, and that the Claimant was aware of that. Mr Acar had both actual and ostensible authority to dismiss the Claimant. His response to the Claimant's asking for money was as described in the findings of fact. He did not dispute that the Claimant was owed money, but rather he was angered by the fact that the Claimant was seemingly unwilling to wait until the business had received the government funding. Regardless of which of them raised their voice first, there was an on-going discussion. After Mr Acar had given a firm "no", the Claimant went to speak to Mrs Acar which further aggravated Mr Acar. He did not have a moment of calm reflection followed by an utterance of words such as "you are fired", or similar. His reaction was more along the lines of "get out now", which he demonstrated by forcing the Claimant off the premises and refusing to allow him to re-enter. He intended that the Claimant would not resume work on a later date, and the Claimant correctly understood that that was Mr Acar's intention. The employment relationship came to an immediate end.

55. The Respondent has not proved that the Claimant conducted himself in such a way as to deprive himself of entitlement to notice. The Claimant did not physically assault Mr Acar (and that is not the Respondent's assertion in any event; the Respondent's assertion being that there was no physical altercation). The Respondent maintains that customers observed the argument. I am not persuaded that that is the case, given the inconsistencies in the evidence about what happened and where. However, in any event, the Respondent does not allege that it dismissed him for such a reason. Rather, the Respondent's own position is that it wanted the Claimant to work after 5 July. Therefore, regardless of what (if anything) customers did see and hear, on the Respondent's own case, the Claimant's conduct was not so bad that it amounted to the type of breach of contract for which it thought summary dismissal was justified.

56. When the Respondent dismissed the Claimant on 5 July 2020, it was obliged to give him the statutory minimum notice period, being 1 week. It did not do so, and

is therefore obliged to pay him damages of 1 week's salary. As per my findings of fact, although no fixed hours had been agreed at the start of the contract, the parties had, in 2020, treated the agreement as being that the Claimant would work 16 hours per week. The National Minimum Wage rate was £8.72 per hour, and so I assess his damages as being 16 x = £139.52. His entitlement is to damages equivalent to the net sum which he would have received, but, in this case, the net sum and the gross sum are the same.

57. For unpaid salary up to 5 July, in the absence of any reliable evidence of the exact number of hours worked – and the disagreement about whether 5 July was the third day he had worked that month, or the second – my decision is that the Claimant should be awarded damages for breach of contract assessed at 5/7 of £139.52 [which is £99.68] minus the £50 paid on 5 July. So that is £49.68. I award it as damages for breach of contract rather than as unauthorised deduction from wages. However, that makes no difference to the tax situation in these particular circumstances.

58. 10 November 2019 to 5 July 2020 is 239 days. A full year's entitlement was to 5.6 weeks leave. The Claimant's weekly pay as of the termination date was £139.52 per week. He had used none of his entitlement to paid time off under the Working Time Regulations. He was therefore entitled to be paid a sum in lieu of his unused entitlement which was:

$$239/365 \times 5.6 \times £139.52 = £511.60$$

59. That is, he is entitled to the sum of £511.50 for holiday entitlement.

60. I do not award anything for the fact that, at 16 hours per week at NMW rates, 80% of the Claimant's salary would have been more than he was paid as furlough pay. The parties reached no agreement that furlough pay would increase on 1 April 2020.

Employment Judge Quill

Date: 22 December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

29/12/2021

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FOR EMPLOYMENT TRIBUNALS