EMPLOYMENT TRIBUNALS

Claimant: Miss C Thorley

Respondent: 1. Mr Christian Donnelly t/a Acute Barbers
2. Cathays Barber Shop Limited t/a Acute Barbers

Heard at: Cardiff by video **On:** 15 November 2022

Before: Employment Judge R Russell

Representation
Claimant: Dr Neil Lancaster (HR Consultant)
Respondent: In person

RESERVED JUDGMENT

1. The Claimant was employed by Christian Donnelly trading as Acute Barbers (Respondent 1). The claims against Cathays Barber Shop Limited (Respondent 2) are dismissed.

2. The Claimant has a physical impairment of menorrhagia. This does not amount to a disability under the Equality Act 2010. She did not have a disability at the relevant time. The Claimant's claim for disability discrimination arising under section 15 of the Equality Act 2010 is dismissed.

3. The Claimant's claim of unfair dismissal is well-founded. Respondent 1 is ordered to pay the Claimant the gross sum of **£935.55** in respect of the basic award **and** a compensatory award of **£1,544.44** gross (consisting of £935.55 loss of earnings; £300 for loss of statutory rights; and a 25% uplift of £308.89 for Respondent 1's failure to follow the ACAS Code).

4. Respondent 1 failed to provide the Claimant with a written statement of employment particulars that satisfied the requirements of section 1 of the Employment Rights Act 1996. Respondent 1 is ordered to pay the Claimant the gross sum of **£623.70** for this breach.

5. Respondent 1 made an unauthorised deduction from wages by failing to pay the Claimant the National Minimum Wage. Respondent 1 is ordered to pay the Claimant the sum of **£331.90** being the gross sum unlawfully deducted.

6. The recoupment provisions do not apply to this judgment.

7. The **total gross sum** that Respondent 1 (Christian Donnelly trading as Acute Barbers) must pay the Claimant is **£3,435.59**.

REASONS

Background

1. This claim is about Acute Barbers' decision to dismiss the Claimant on 1 November 2021 when she did not attend work. The Claimant asserts that she has a disability by reason of endometriosis. She says that she was unable to attend work that day as a consequence of her disability. She asserts that Acute Barbers treated her unfavourably because of something arising in consequence of her disability, namely her non-attendance on 1 November 2021. She also claims that her dismissal was unfair, that Acute Barbers made unauthorised deductions from her wages and, in the alternative, that Acute Barbers breached her contract by not paying her the National Minimum Wage.

2. I received evidence from the Claimant and Clare Davies, the Claimant's mother-in-law and witness for the Claimant, in the form of witness statements. Only the Claimant was cross-examined. I considered the bundle of 75 pages. References to page numbers below are to page numbers in the bundle.

Issues to be determined

3. A preliminary hearing was held on 15 July 2022. The issues to be determined at the final hearing were set out in the Case Management Orders made by Employment Judge Howden-Evans and sent to the parties on 15 August 2022. I clarified the issues to be determined with the parties at the outset of the hearing. These were the issues noted in pages 10-14 of the Case Management Orders and included at pages 42-46 of the hearing bundle. The issues are appended to this judgment. There is also an issue about the identity of the Claimant's employer. The Claim was brought against Respondent 1 only. At the preliminary hearing, Employment Judge Howden-Evans concluded that it was in the interests of justice for there to be two Respondents to these proceedings – Christian Donnelly trading as Acute Barbers (Respondent 1) and Cathays Barber Shop Limited trading as Acute Barbers (Respondent 2) – so that the final hearing could determine who was the Claimant's employer. I also had to determine, as a preliminary issue, whether the Claimant had a disability at the relevant time.

The hearing on 15 November 2022

4. The hearing on 15 November 2022 was intended to be hybrid where the Claimant would attend by video and the Respondent would attend the hearing venue. On 14 November 2022 I ordered that the hearing be converted to video only. There were no facilities available at the hearing venue on 15 November 2022 to allow for a hybrid hearing. The parties were informed of this change on 14 November 2022. Shortly before the start of the hearing, I

was advised that Christian Donnelly (Respondent 1 and on behalf of Respondent 2) had attended the venue in person. He said that he had not received the amended notice of hearing. The hearing was postponed to 11:00 to allow him to travel home and attend the hearing by video. The Respondents were not ready to attend the hearing by 11:00. The hearing was postponed again to 11:40. At 11:20 the tribunal venue was evacuated due to a fire alarm. The video hearing began at 11:44. It ended at 15:25.

5. The Claimant attended the hearing. She was supported by Clare Davies, her future mother-in-law who was present with the Claimant and who was also a witness. The Claimant was represented by Dr Lancaster. Mrs Maguire attended with Dr Lancaster as an observer. Christian Donnelly attended as Respondent 1 and on behalf of Respondent 2.

6. The Respondents had provided no Response to the Claimant's claim. The original date for submitting a Response was 3 May 2022. Christian Donnelly accepted that he had received the Claimant's claim as both Respondent 1 and on behalf of Respondent 2. Employment Judge Howden-Evans ordered that he must send a Response on behalf of both Respondents to the Tribunal and Claimant by 26 August 2022. He did not do so.

7. Under Rule 21 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, where no response has been presented by the relevant time limit, a judge can decide whether a determination can properly be made of the claim on the basis of the available material. In this case it was not possible to decide the case without hearing evidence. On 28 September 2022 the Tribunal wrote to the parties. The parties were told that the Respondents may only participate in any hearing to the extent permitted by the Employment Judge who hears the case. I considered what participation, if any, the Respondents should be allowed. This was not a case where the Respondents had taken no part in proceedings. Christian Donnelly had participated in the preliminary hearing. I was also mindful that, despite having been given an extension of time to submit a Response, no Response had been received. On balance, I considered that it would be in the interests of justice to allow the Respondents to ask questions of the Claimant and to make a closing submission to the Tribunal but not to give evidence because of the Respondents' failure to provide a Response. I explained this to the parties at the start of the hearing.

Findings

Identity of the employer

8. The Claimant began working for Acute Barbers as a barber on 17 October 2018. There is no legal entity of Acute Barbers. Acute Barbers is a trading name given to a business which operates barbers in the Cardiff area. It operates a few shops including a site in Cathays. The business is run by Christian and Kyle Donnelly. They are brothers.

9. The Claimant found the job through a friend who was working for Acute Barbers. He recommended the Claimant to the owners through Facebook. At all times she considered her employer to be Acute Barbers in Cathays, owned by Christian and Kyle Donnelly. She thought that only Christian Donnelly was

her employer at the time she was dismissed. He was then in charge of the Cathays shop.

10. Christian Donnelly (Respondent 1) is the sole director of Cathays Barber Shop Limited (Respondent 2). Cathays Barber Shop Limited was incorporated as a private limited company on 11 January 2019. This was a few months after the Claimant commenced employment. He is also the sole director of another company called Donnelly's Barbers Limited, which was incorporated in July 2022. This was some months after the Claimant's employment ended. He asserts that Cathays Barber Shop Limited was trading as Acute Barbers and that it was the Claimant's employer.

11. Before she started employment, the Claimant knew that Acute Barbers operated from a premises inside the Cardiff University student union in Cathays. Cathays Barber Shop Limited has a registered office at Unit 17, Student Union Building, Senghennydd Road, CF24 4AG. This is where the Claimant worked.

12. The accounts of Cathays Barber Shop Limited dated 31 January 2020 state that its average number of employees is 1 (page 58). The Claimant says that there were three employees at Acute Barbers in Cathays. She was the only woman.

13. The Claimant told the Tribunal that she was unsure whether she had ever received any documentation referring to her employer as Cathays Barber Shop Limited. The Tribunal was not provided with any documentation showing the Claimant as being employed by Cathays Barber Shop Limited. There was no evidence provided to the Tribunal showing a transfer of the Claimant's employment to Cathays Barber Shop Limited when the company was incorporated in 2019. The Claimant received payslips at the end of each month. There were no copies of these in the bundle. The Claimant thought that her payslips stated her employer as Acute Barbers. She did not recall receiving a P45 at the end of her employment.

14. The only written evidence regarding the identity of the employer was a document the Claimant received shortly after beginning work. This was called 'Contract of Employment & Code of Conduct' (pages 65-72). The front page has a logo of Acute Barbers. The contract is unsigned and undated. It does not contain the Claimant's name. On the front page it states that the agreement is between 'Kyle Donnelly (Owner)' and '……(Employee')'. The space for writing in the name of the employee is blank. The agreement says: 'This contract sets out terms and conditions of employment which are required to be given to the employee under section 1 of the Employment rights act 1996'.

15. The Respondents' position is that this is a generic contract used across three different barber shops. Under the heading 'Working Hours, Pay and Holiday Entitlement', it states that 'All ACUTE employees are expected to carry out their duties at any of the ACUTE BARBERS branches' (page 66). The Claimant's position is that she always worked at the Cathays site.

16. In submissions, Christian Donnelly spoke of working with the Claimant first as a colleague then boss. He sent messages to the Claimant from a WhatsApp account named 'Chris Boss Man' (page 15).

17. The contract contains a clause stating: 'Any and all authorizations or disputes are to be obtained or reported to KYLE DONNELLY or CHRISTIAN DONNELLY' (page 72).

18. A few months after the Claimant's employment ended, Kyle Donnelly sent a WhatsApp message to her on 23 March 2022. He asked whether she was considering returning to barbering 'because yiuve got the skills that pay the bills lol' (page 20) and 'I was hoping to get you over roath evertually anyways' (page 21). During this message exchange, he also spoke of a site in Marshfield. On 7 April 2022 Kyle Donnelly sent a follow-up message to the Claimant saying 'what you saying then bra. Part time, full time' (page 21). The Claimant declined his offer.

19. Kyle Donnelly is not a Respondent to these proceedings and neither party argued that he should be included as a Respondent.

<u>Disability</u>

20. The Claimant asserts that she has a disability by reason of endometriosis. She provided the Tribunal with a copy of an eye examination report dated 28 September 2021 (page 59) and a partial copy of her medical records (pages 58-64). These records were printed on 26 July 2022 and cover the period from 1 January 2013 to 26 July 2022. The Claimant registered with this GP on 18 October 2016. The first entry is from 24 October 2016.

21. On 7 June 2017 the Claimant attended her GP for a 'pill check'. Her GP noted that the Claimant was getting irregular spotting. The Claimant did not visit her GP again in respect of her periods until 4 February 2020. She was accompanied at this appointment by Ms Davies, who has endometriosis. She thought the Claimant may have the same condition. The GP noted that this was the first presentation of menorrhagia (heavy periods) and that the Claimant's periods had 'always been heavy'. The Claimant's abdomen was described as 'non-tender throughout'. The Claimant was prescribed a dose of Tranexamic acid tablets to be taken for this period cycle and the next. The GP notes for the consultation end with the following comment: 'if ongoing – refer to Gynae?? Endometriosis'.

22. The Claimant did not attend her GP again until 1 October 2020. The record notes her 'struggles with heavy painful periods'. The possibility of having a coil fitted was discussed. The Claimant was continued on the contraceptive Cerelle. The record notes 'given 6 months of cerelle prior to having coil fit'. This is the last mention in the Claimant's GP records about problems with heavy periods.

23. On 9 April 2021 the GP notes record the Claimant as being 'happy on Cerelle'. She did not attend her GP again between April 2021 and 26 July 2022 (when the GP records were printed) except for a cervical screening test on 7 October 2021.

24. The Claimant has never received a formal diagnosis of endometriosis. She told the Tribunal that she was on a waiting list to be seen by a gynaecologist. There was no referral letter contained in her medical records. She told the Tribunal that she had been trying to follow things up with her GP. In her

disability impact statement (page 73), the Claimant said that she has 'tried contacting the DR but to no avail'. There is no mention in the GP records of the Claimant having contacted the surgery before 26 July 2022 to request further investigations regarding suspected endometriosis. If the Claimant has been placed on a waiting list to see a gynaecologist, this would have been after 26 July 2022. I find that the Claimant has a physical impairment of menorrhagia (heavy periods).

25. The Claimant was not on any medical treatment for her condition. She was prescribed 60 tablets of tranex acid on 4 February 2020. She takes over-the-counter painkillers such as Ibuprofen and Paracetamol if the pain is bad. She told the Tribunal that the GP has prescribed Co-codamol a few times for her condition. There is no mention in the medical records of the Claimant being prescribed Co-codamol for period pains. She was once prescribed Co-Codamol on 10 December 2018 for shoulder pain.

26. The Claimant says that her condition impacts on what she can do. In her impact statement, she said that the following activities of daily living were affected: walking, eating, standing up, and travelling. She said that she cannot look after herself in any way, that she experiences tiredness due to blood loss, and that she 'cannot walk for any distance'. In oral evidence, she gave further details of the impact of her condition. She said she carries spare underwear and leggings in case she needs to change including due to incontinence, particularly bowel incontinence. She described having problems with her bowels depending on how heavy her periods are. She has irregular periods and said that this could lead to her being off work for one week or two months. She could feel dizzy and have bad cramps and migraines. She could feel emotional and have mood swings. She told the Tribunal that her condition would affect her relationship, work, cooking, and looking after the dog. She said that she could throw up and be off her food for 3-4 days per month. She said that sometimes she would be so sick that she would need to take time off work. At other times, she would take painkilling medication at the start of her shift and again after 4 hours.

27. The notes from the consultation with the GP on 4 February 2020 (when the Claimant first presented with heavy periods) note 'regular bleeding' and a history of migraine. There is no mention of other symptoms such as incontinence, inability to stand, or inability to walk.

28. The Claimant did not tell the Respondents that she considered herself to have a disability. Christian Donnelly knew that the Claimant had problems with her periods. She told him that she had suspected endometriosis at some point before the Covid lockdown in March 2020. This conversation likely took place around February 2020, after the GP consultation on 4 February 2020 when the Claimant was told that a referral to gynaecology may be necessary if her problems continued. The Claimant was upset during this conversation. Christian Donnelly asked her what endometriosis meant. She told him that she may not be able to conceive children. He hugged the Claimant and tried to reassure her.

29. The Claimant began a new job in retail on 22 November 2021. She began her training for her new job on 22 November and started working in the role on 29 November 2021. In her impact statement, the Claimant said 'Since I haven't started my new job, I have not been off with my menstrual cycle…' (page 73).

She clarified to the Tribunal that this sentence should have read 'Since I have started my new job, I have not been off with my menstrual cycle'. She told the Tribunal that she still had the symptoms she had been experiencing when working for Acute Barbers. She said that she had prepared the impact statement a couple of months before the hearing but had time off sick from her new job since then.

Claimant's role and working hours

30. In the Claimant's contract, under the heading 'Working Hours, Pay and Holiday Entitlement', it is written: 'You will be obligated to work any hours given to you up to a maximum of 40 hours per week'. The hourly rate of pay is stated to 'be equal to that of the National minimum wage in relation to your age and job title'. The contract also provides that 'You will be expected to work weekends if instructed and arrive 15 minutes prior to the start of your shift'.

31. In evidence, the Claimant told the Tribunal that she worked 35 hours per week on Mondays-Fridays with a one-hour lunch break. She understood her hours to be 9am-5pm. She said that she was required to attend from 8.45am-5pm. If the Claimant worked more than 35 hours, she would be paid overtime. She did not often work overtime but was always paid when she did. The 15-minute early arrival time was not considered overtime and was not paid. I find that the Claimant was engaged in time work for the purposes of the National Minimum Wage. This meant that she would not receive an annual salary but would be paid for the hours she worked. She usually worked, and was paid for, 35 hours per week.

32. The contract contains a further clause under the heading 'Arrive at the agreed location of work a minimum of 15 minutes before the start of your shift'. The clause is written in bold to signal its importance. It says:

> *'The 15 minutes should be used to make sure uniform is correct and the shop is ready and clean for business. Including lights on, doors open, music/computer on, tv/screens on, working area and tools clean and fully charged, Open signs and A boards in their correct places and any breakfast or coffees cleared away'.*

33. There was a dispute between the parties as to the nature of this 15-minute period. When questioning the Claimant, Christian Donnelly suggested that this was not work time. He did not dispute that employees had to arrive 15 minutes early but suggested to the Claimant that they did not have to engage in actual work during this time. The purpose of the clause was to ensure that colleagues did not arrive at work at the same time as the first customers. He put to the Claimant that during those 15 minutes, all that was required was for the lights to be turned on and for staff to change into uniform if they were not already wearing it.

34. The Claimant says that the 15-minute period was work time. She would often turn up 30 minutes before her shift and spend 15 minutes having a cup of tea and the other 15 minutes getting ready for the day. This involved ensuring that the shop was clean and tidy and that the till was cashed-up and ready for use. If she arrived after 9am, she would be docked wages for being late.

35. I find that this 15-minute period formed part of the Claimant's working hours. She was required to be available, and was available, to her employer during this time. The tasks that she could perform during this period would vary depending on whether the salon had been cleaned fully the night before.

36. The Claimant was placed on furlough during the Covid lockdown period. Her furlough payments were based on working 35 hours per week.

37. The Claimant did not complain to the Respondents, during her employment, about working these extra 15 minutes. She was not aware of any issue with this until her employment ended and she sought advice on her contract. The first that she raised the issue was on 1 November 2021 when her representative wrote to Christian Donnelly. He asked for 'details of payment of the '15 minutes' each day that Miss Thorley was required to attend before her shift started – to assess if there [are] outstanding wages to be paid'. The Claimant is claiming for 25 weeks in 2018/2019 and a further 31 weeks in 2020/2021. The Respondents have not disputed the figures put forward by the Claimant.

Claimant's attendance and events of 1 November 2021

38. Christian Donnelly regarded the Claimant as a friendly, talented barber. He considered her a close friend. He put to the Claimant that there were numerous occasions when, in his view, the Claimant's behaviour would have given him grounds for immediate dismissal. One occasion was where the Claimant was overheard bad-mouthing Acute Barbers to a customer. The Claimant accepted that this incident took place before the Covid lockdown in March 2020. Christian Donnelly suggested to the Claimant that there were other occasions where he would call the Claimant into the kitchen at work to discuss her performance including one occasion when he said that the Claimant refused to cut a particular type of hair and another when she told a maintenance man that Christian Donnelly had done a botched job. The Claimant could not recall these conversations. No written records were kept of any conversations between Christian Donnelly and the Claimant. I find that, in the context of a small, relatively informal workplace, Christian Donnelly did speak to the Claimant if he was unhappy about incidents at work. These were informal, verbal discussions. The Claimant had not been given formal warnings about her behaviour, attendance, or performance.

39. In submissions, Christian Donnelly told the Tribunal that what let the Claimant down was her attendance record. There was a dispute between the parties about the extent of the Claimant's absences from work and the reasons behind them.

40. When questioning the Claimant, Christian Donnelly suggested to her that she had a pattern of being off sick on Mondays. He said that in her first 12-14 months of employment, she had more time off than other staff members combined. He put to her that she had 10 days off with a burn and a further 17 days of Monday/Tuesday absences. The Claimant disagreed with the suggestion that a significant proportion of her absences were on Mondays. She said that there was no evidence to prove this or to prove that her attendance would give cause for concern. There was no written attendance record available to the Tribunal. I have had to rely on what might be inferred

from the Claimant's medical records and from a WhatsApp exchange on 1 November 2021 when matters came to a head.

41. The Claimant started working for Acute Barbers on 17 October 2018. She visited her GP on 10 December 2018 with shoulder pain. She described having been in pain for the past 3 days. She told the GP that she worked as a barber so lifts her arms up a lot throughout the day. She was prescribed Co-codamol and Ibuprofen and told to do gentle shoulder exercises. She next visited her GP on 9 August 2019 due to a large burn on her left hand and forearm. She attended her GP surgery for the wound to be dressed on 16 August 2019, 22 August 2019, and 28 August 2019. This is consistent with the suggestion put to the Claimant that she had sustained a burn and had time off work as a result.

42. In response to judicial questioning, the Claimant said that she did have sickness days but that they were not as bad as Christian Donnelly was suggesting. She accepted that she had time off for her burn in 2019 and probably had time off for her shoulder pain in 2018. She could not say how often she needed time off for her period issues. She suspected that this may be every month or every other month.

43. The Claimant had organised a house party the weekend before her employment ended. Christian Donnelly suggested to the Claimant in questioning that his last words to her before she left work on the Friday were 'don't let me down on Monday'. The Claimant accepted that she had hosted a party that weekend.

44. At 07:41 on Monday 1 November 2021 the Claimant sent a WhatsApp message to an account called 'Chris Boss Man'. This account belonged to Christian Donnelly. She wrote:

> *'Hey Chris I know your going to be mad at me but i can't make it to work sorry I really didn't think I was going to be this bad I'm not well at all I was a mess yesterday and I've woke up this morning and was sick straight away. I really thought I was going to be okay today..my stomach is killing me and I'm all shaky..I really can't get out of bed Chris. I'm soo sorry!'*

45. Mr Donnelly replied to this message at 07:44 to say:

> *'I'm not having this, not one sick day in a year while your job was easy..now all of a sudden the sickness is back and on Mondays too..you don't come in..I'm letting you go..I could do with the extra income to be honest anyway..'*

46. At 07:48 the Claimant wrote:

> *'What you can't do that..? It's in my contract I'm allowed sick days..and I was sick during the lockdown thank you but where I was off all the time it planed out well so I didn't miss work..what really after 1 sick day in 2 years and in sacked?'*

47. Mr Donnelly replied at 07:51:

> *'No, after 4 years of phoning in sick on Mondays because you'd had a good weekend..I can do what I like trust me..barbers are getting layed off left and right..there's not enough work..I've kept that shop open just to keep you in a wage..you have a house party and suddenly you're ill..don't come in and you're gone I'm sick of it..it's why you lost your last job as well I've recently found out'*

48. At 07:58 the Claimant replied:

> *'What I'm hardly ever sick the 1st year of working for you yeh I get that but the rest I've been good as gold working for you I've ran your shop not mine shop yours and no I was working to help you keep your shop open and pay your bills the government has been paying my bill for the last year lol but fine have it your way I will get my mother in law to take your contact to a tribunal but I haven't had no written warning..or verbal warning..and I was always honest about how I lost my last job I told you and Kyle did you forget..lol'*

49. The copy of the reply from Mr Donnelly at page 17 is incomplete. It begins:

> *'You were sick more in your first year than every other staff member combined,,I told you that you laughed..you've had all your warnings..crack on with all that legal shit..hope'*

50. In her witness statement, Ms Davies said that the Claimant was running a temperature and in severe pain on 1 November 2021. She said that she had taken the day off work to be with her. She described her as being 'so physically sick and losing so much blood'.

51. I find that Christian Donnelly was concerned about the Claimant's attendance record as reflected in the November WhatsApp exchange in which he expresses his frustration. The Claimant accepted that she probably took time off with her shoulder pain in 2018. She said that she took time off when she burned her left hand and forearm in 2019. The Claimant's medical records detail these complaints. On balance, I find that the shoulder pain and burn would have led to the Claimant taking time off work in her first year of employment and that this was reflected in Christian Donnelly's comment in the WhatsApp exchange that 'you were sick more in your first year than every other staff member combined'. The Claimant's initial message says 'I know you're going to be mad at me'. I find that the reason the Claimant expressed herself in this way was because she had been absent on a number of occasions, she had been spoken to by Christian Donnelly about her absence, and she had been told not to let him down after the party. She thought that he might be annoyed with her. She did not say that she was ill because of period pains. She said that her stomach was killing her. The response from Christian Donnelly a few minutes after the Claimant sent her message to him is clearly frustrated in tone and refers to previous absences especially on Mondays. I find that he wrote these comments at the time because he had been concerned about the Claimant's absence record, especially on Mondays.

52. The Claimant was dismissed on 1 November 2021 via WhatsApp. There was no formal dismissal meeting held. The Claimant was given no right to appeal. On the evening of 1 November 2021, the Claimant's representative emailed Christian Donnelly on her behalf. He stated that she wished to appeal and

requested various documents. He received no reply. He sent a further email to Christian Donnelly on 1 December 2021 requesting a response. He received no reply.

53. The Claimant was not paid for a period of notice. Her contract says that 30 days' notice must be given by employees. Under 'Duration of Employment' it states that the Claimant's employment will continue indefinitely 'subject to termination in accordance with the provisions of this agreement'. It states that employment may be terminated without notice 'if at any time the employee falls below company standards which are outlined in the code of conduct section of this document'. The code of conduct refers to issues of personal cleanliness and a 'code of cutting' about how employees should deal with customers. It does not deal with attendance.

54. ACAS early conciliation began on 13 January 2022. It ended on 26 January 2022. The Claim was presented on 27 January 2022.

<u>Remedy</u>

55. The Claimant was born on 23 January 1996. She was 25 at the effective date of termination. She had three complete years of service.

56. In the Claimant's Schedule of Loss (page 75), her gross weekly pay is stated as £305. She worked 35 hours per week. She was paid the National Minimum Wage. From April 2021 this was £8.91 per hour for those aged 23 and over. Her gross weekly pay at the time her employment ended was therefore £311.85 gross (35 x £8.91).

57. The relevant hourly National Minimum Wage rates for the time the Claimant was employed are £7.38 (1 April 2018-31 March 2019), £7.70 (1 April 2019-31 March 2020) and £8.72 (1 April 2020-31 March 2021).

58. The Claimant found a retail job after leaving Acute Barbers. Her ET1 states that she began work on 29 November 2021. She clarified to the Tribunal that training for the new job began on 22 November 2021 and she was paid for the training period. Her new job pays £342 gross per week. This is more than she earned with Acute Barbers. She has no ongoing loss.

Relevant law

<u>Identity of the employer</u>

59. As to the identity of the employer when it is in dispute, Choudhury P provided the following principles in *Clark v Harney Westwood & Riegels & Ors* [2021] IRLR 528:

    a. when the only relevant material to be considered is documentary, the question is one of law;
    b. where, as in most disputes, there is a mixture of documents and facts, the issue is a mixed question of law and fact and all relevant evidence must be considered;

c. the starting point will be any written agreement drawn up at the start of the relationship and the Tribunal will need to enquire as to whether that reflected the true intention of the parties;
d. if the agreement did reflect the true intention of the parties and it is now being asserted that another person was the employer, the Tribunal should consider whether there was a change in employment and, if so, how it happened;
e. look at how the parties seamlessly and consistently acted during the relationship.

60. The EAT also explained that the Tribunal should view with caution any documents created without one party's knowledge, which might point to one party's private intentions rather than what was agreed.

<u>Disability</u>

61. I have set out the law as relevant to my decision. The burden of proof is on the Claimant to show that she has a disability at the material time. This is the time of the alleged discriminatory act (*Cruickshank v VAW Motorcast Limited* [2002] ICR 729).

62. Section 6 of the Equality Act 2010 defines a disability as follows:

    "A person (P) has a disability if—
    (a) P has a physical or mental impairment, and
    (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

63. Further guidance is provided in Part 1 of Schedule 1 to the Equality Act 2010. Paragraph 5 of Part 1 provides that if measures including medical treatment are being taken to treat the impairment, an impairment is to be treated as having a substantial adverse effect on a Claimant's ability to carry out normal day-to-day activities but for that treatment.

64. In looking at a person's ability to carry out normal day-to-day activities, the EAT in *Goodwin v Patent Office* [1999] ICR 302 at 309 stated that "it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts". A person with a disability may be able to carry out an act but only with great difficulty.

65. The adverse effect that the impairment has on a person's ability to carry out normal day-to-day activities must be substantial. Section 212(1) of the Equality Act 2010 defines substantial as 'more than minor or trivial'.

66. Paragraph 9 of Appendix 1 of the EHRC Code of Practice on Employment (2011) states that 'account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy or motivation'. Paragraph 10 explains that 'an impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial long-term adverse effect on how they carry out those activities. For example…the person may have the capacity to do something but suffer pain in doing so…'.

67. In *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591, Langstaff P at paragraph 14 gave the following guidance on how to approach the issue of substantial adverse effect:

    > "It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other".

68. Section B of the Government's Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (the "Guidance") provides further guidance on the factors that may be considered when deciding whether the adverse effect is 'substantial'. These include the time taken to carry out an activity, the way in which an activity is carried out, the cumulative effects of an impairment, and the effects of a person's behaviour.

69. Paragraphs 14 and 15 of Appendix 1 to the EHRC Code give examples of normal day-to-day activities. These include activities relevant to working life and activities such as walking, driving, using public transport, eating, and cooking.

70. The substantial adverse effect must be long-term. Paragraph 2(1) of Schedule 1 to the Equality Act 2010 states that the effect of an impairment is long-term if:
    a. It has lasted for at least 12 months,
    b. It is likely to last for at least 12 months, or
    c. It is likely to last for the rest of the life of the person affected.

71. Paragraph 2(2) of Schedule 1 to the Equality Act 2010 provides that 'if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. The House of Lords (NI) in *Boyle v SCA Packaging Ltd* [2009] ICR 1056 and Paragraph C3 of the Guidance describe likely as 'it could well happen'. Paragraph C6 of the Guidance states that 'if the substantial adverse effects are likely to recur, they are to be treated as if they were continuing'.

72. Paragraph C9 of the Guidance provides that 'likelihood of recurrence should be considered taking all the circumstances of the case into account'.

Unfair dismissal

73. Section 94 of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed. In determining whether the dismissal is fair or unfair, section 98(1) of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and either that it is a potentially fair reason falling within section 98(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Potentially fair reasons can relate to the capability or conduct of the employee.

74. The Court of Appeal in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323 stated that the reason for dismissal is "… a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

75. Dismissals for persistent absences may be categorised as conduct, capability, or some other substantial reason depending on the circumstances (*Wilson v Post Office* [2000] IRLR 134). The question is what was in the employer's mind when taking the decision to dismiss.

76. If the Tribunal is satisfied that the Claimant was dismissed for a potentially fair reason, it must consider whether the dismissal was fair in all the circumstances, within the meaning of section 98(4) of the Employment Rights Act 1996. That provides that whether a dismissal is fair or unfair. "… depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [the reason] as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and substantial merits of the case".

77. The employment tribunal should take care not to substitute its own views (*HSBC Bank plc v Madden* [2000] ICR 1283). The test of whether an employer acted reasonably is an objective one and the Tribunal must not consider what it would have done had it been the employer.

78. When assessing the fairness of the dismissal, the Tribunal must be satisfied that appropriate procedural steps had been followed including the relevant provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

The National Minimum Wage and Unauthorised Deductions from Wages

79. With limited exceptions, by section 1 of the National Minimum Wage Act 1998 and Regulation 4 of the National Minimum Wage Regulations 2015, a worker has the right to be paid the national minimum wage. The hourly rate depends on the worker's age and the year when the work was carried out.

80. Regulation 17 of the National Minimum Wage Regulations 2015 sets out four different types of work, each with different rules for measuring the hours of work. Under Regulation 30(a), time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid by

reference to the time worked by the worker. Under Regulation 32(1), time work includes work when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

81. Under section 28 of the National Minimum Wage Act 1998, the burden of proof is reversed so there is a presumption that the individual bringing proceedings qualified for the national minimum wage and was underpaid (though the worker must still prove by how much they were underpaid). Section 17 of the National Minimum Wage Act 1998 sets out how arrears of pay should be calculated where the employer has not paid the national minimum wage. This is the difference between what the worker received during the pay reference period and what she would have received had she been paid at a rate equivalent to the national minimum wage.

82. A worker has the right under section 13(1) of the Employment Rights Act 1996 not to have an unauthorised deduction from wages. A worker may present a complaint to the Tribunal under section 23 of the Employment Rights Act 1996 that the employer has made a deduction from wages in contravention of section 13. The Tribunal shall not consider a complaint unless it is presented within three months beginning with the date of payment from which the deduction was made. If the complaint is brought after this time limit, the Tribunal may only consider the complaint if it is satisfied that it was not reasonably practicable for the complaint to be presented within the relevant time period and that that it was presented within such further period as the Tribunal considers reasonable.

83. Where a claim is made in respect of a series of deductions, section 23(3) Employment Rights Act 1996 provides that time runs from the date of the last deduction in the series. This is subject to the rule in section 23(4A) that a Tribunal is not to consider any part of a complaint relating to deductions made before the period of two years ending with the date of presentation of the complaint. This effectively gives a two-year limit on the backdating of claims.

84. When considering whether there has been a series of deductions, this is a question of fact. The Tribunal will consider whether there is a sufficient factual and temporal link between any underpayments. Gaps of more than three months will break the series (*Bear Scotland Limited v Fulton and another* [2015] ICR 221).

85. A complaint for breach of contract should be presented to the Tribunal within three months of the effective date of termination unless it is not reasonably practicable to do so.

Notice period

86. Section 86 of the Employment Rights Act 1996 provides that the employee has the right to a minimum period of notice. This is not less than one week's notice for each year of continuous employment i.e. 3 weeks' notice for 3 years' continuous employment. The duty to mitigate loss applies during the statutory notice period.

Written particulars of employment

87. Section 1 of the Employment Rights Act 1996 requires an employer to provide a worker with a written statement setting out particulars of employment. These particulars include, amongst other things, the names of the employer and worker, the date when employment again, the normal working hours, and the place of employment.

88. If an employer fails to provide a statement or provides a statement that does not set out the required particulars, section 38 of the Employment Act 2002 provides that the Tribunal must increase any award of compensation made. The increase can be of either 2 or 4 weeks' pay.

Conclusions

The Claimant's Employer

89. The Claimant asserts that she was employed by Acute Barbers at its Cathays site. The Acute Barbers logo appeared on the front page of the generic contract she was given after starting work. This was unsigned, undated, and did not contain the Claimant's name. It states that Kyle Donnelly is the owner of Acute Barbers. The Claimant says that both brothers, Christian and Kyle, owned Acute Barbers. At some point during the Claimant's employment, Christian Donnelly ran the Cathays site on his own while Kyle ran sites at Marshfield and Roath. Although a few barbers' shops operated under the umbrella of Acute Barbers and the contract mentions that employees may be asked to work at any site, the sites were operated separately day-to-day. The Claimant only ever worked at Cathays. The separation is also clear from Kyle Donnelly's WhatsApp messages to the Claimant in March 2022 when he offered her employment at one of the other sites he runs. Kyle Donnelly is not a Respondent to these proceedings. Neither party suggested that he be made a Respondent. The question for me was whether the Claimant's employer was Christian Donnelly or Cathays Barber Shop Limited.

90. Acute Barbers is not a legal entity. Christian Donnelly says that Cathays Barber Shop Limited trades as Acute Barbers. The Claimant says that Christian and Kyle Donnelly trade as Acute Barbers. As such, she says that Christian Donnelly was her employer.

91. The Claimant's employment could not have initially commenced with Cathays Barber Shop Limited on 17 October 2018. The company did not exist at that time. It was incorporated in January 2019. The Tribunal was provided with no evidence to show that the Claimant's employment had transferred to Cathays Barber Shop Limited when it was incorporated. Neither party argued that there had been a relevant transfer.

92. The Claimant was employed by Christian Donnelly, Respondent 1, trading as Acute Barbers. As such, the proceedings against Cathays Barber Shop Limited, Respondent 2, are dismissed.

Did the Claimant have a disability at the relevant time?

93. The burden of proof is on the Claimant to show that she had a disability at the material time. The Claimant must first show that she has a physical or mental impairment. She asserts that she has a disability by reason of endometriosis. The medical evidence she provided did not support this. She was told by her

GP in February 2020 that she could be referred to a gynaecologist if her symptoms continued to see whether she has endometriosis. She has not been seen by a gynaecologist. The Claimant has not shown that she has the asserted physical impairment. In the alternative, I considered that menorrhagia (heavy periods) is a symptom of suspected endometriosis. The Claimant has menorrhagia. It is first mentioned in the Claimant's medical records on 4 February 2020. On balance, I concluded that the Claimant does have a physical impairment. It is not endometriosis as claimed but is menorrhagia.

94. I considered carefully whether the Claimant had the impairment at the date of the act complained of being 1 November 2021. The Claimant's evidence was that her condition and symptoms were continuing and that she was on a waiting list to see a gynaecologist. There was no mention of a specialist referral in her medical records or in her own impact statement. Painful periods are noted in the medical records on 1 October 2020 when she is prescribed Cerelle (a contraceptive). By April 2021 she told her surgery that she was happy with Cerelle. She mentioned no ongoing issues with menorrhagia. In October 2021 when she attended her surgery for a smear test, no issues with menorrhagia were discussed. There are no records of her visiting or contacting her surgery since then. While I concluded that the Claimant's condition may have settled down by November 2021, I considered that the nature of heavy periods is such that the condition is likely to be continuing. Overall, I concluded that the Claimant had a physical impairment of menorrhagia at the material time.

95. In addition to the question as to whether the Claimant had been referred to a specialist, there were several other inconsistencies in the Claimant's account of the impact of her condition. In her one-page impact statement, she said that the day-to-day activities that were affected were walking, eating, 'looking after myself in any way', standing up and travelling. The statement was vague as to how these activities were affected except for the fact that she said that she cannot do them during what she described as a crisis. In her oral evidence, she expanded on the activities that are impacted. She said she has issues with incontinence (particularly bowel incontinence). This could be so significant as to require a change of clothes and could happen every other period. Bowel incontinence is not recorded in discussions with her GP despite the Claimant's future mother-in-law attending the consultation with her in February 2020 as support. It is not mentioned in her impact statement.

96. The Claimant's condition must be assessed based on how she would be without medication or treatment for the condition. The Claimant is not on prescribed treatment for her condition but does take over-the-counter painkillers when she has a heavy period. The Claimant told the Tribunal that she had been prescribed Co-codamol for her condition. This is inconsistent with the medical records. These record that she was prescribed tranex acid for two months only from February 2020. She was prescribed Co-codamol for shoulder pain in 2018.

97. When considering the inconsistences in evidence, I acknowledged the fact that the Claimant said that she found it embarrassing to discuss her symptoms and that she did not like to visit her doctor. I noted the difficulties she described in contacting her GP over lockdown. I also considered that it is not uncommon during a tribunal hearing for claimants to expand on the

evidence given in an impact statement. Overall, however, there were several inconsistences between the Claimant's account in her impact statement, her oral evidence given to the Tribunal, and her medical records that affected the weight I could give to the Claimant's evidence of the impact of her condition. I concluded that particular emphasis should be placed on the medical evidence. The medical records made no reference to impaired walking, standing, cooking, eating, travelling, or continence. The nature of the Claimant's work would require her to do some of the things she said that she struggled to do such as stand. In my view, these normal day-to-day activities were not adversely impacted. In the alternative, the impact on these normal day-to-day activities was not substantial.

98. Having determined that the Claimant's physical impairment did not have a substantial adverse impact on her ability to carry out normal day-to-day activities, I did not need to consider whether any affect was long-term.

99. The Claimant did not have a disability at the material time. Her claim for disability discrimination arising under section 15 of the Equality Act 2010 is dismissed.

<u>Unauthorised deductions from wages</u>

100. The Claimant was engaged in time work. She was paid the national minimum wage for every hour she worked. She typically worked, and was paid for, 35 hours each week.

101. The Claimant was required to be at work 15 minutes before each shift. The contract she was given when she started is clear on this point. The Respondent expected that she would be available for work during this period and that she would also be working. Not all the tasks contained in the contract (applying to all Acute Barbers shops) needed to be performed at the Cathays site. There were, however, some work tasks that needed to be performed in those 15 minutes including ensuring that the work area was clean, the till was prepared, and staff were ready for customers. This amounted to work time and the Claimant was entitled to be paid for this.

102. The weekly wages paid to the Claimant were less than they should have been. She was paid for 35 hours. She should have been paid for 36 hours and 15 minutes per week. This deduction was not required or authorised by statute. There was no express provision in the contract requiring or authorising the deduction. The contract simply made clear that employees must report for work 15 minutes before their shift and listed the work tasks that must be completed during this period. The Claimant was given a copy of the contract shortly after her employment commenced but she did not sign it. She did not agree in writing to the deduction before it was made. In sum, the Respondent made an unauthorised deduction from the Claimant's wages.

103. The Claimant first raised an issue about the 15-minute period when her representative wrote to Christian Donnelly on 1 November 2021. He asked for details of the work to assess whether outstanding wages were due. He received no reply to his request. The first complaint about unauthorised deduction from wages was raised in the Claim submitted on 27 January 2022. The deductions all relate to the 15-minute early arrival period. The deductions

were consecutive and made on every workday. There was a sufficient factual and temporal link between each of the underpayments for them to be considered a series of deductions. The last of the series of deductions was made on Friday 29 October 2021, which was the last day the Claimant attended work. The Claimant was paid at the end of each month. She was paid up to and including 31 October 2021. The time limit runs from the last deduction in the series, being 31 October 2021. The Claim was made to the Tribunal within three months of the last in the series of deductions.

104. The Claimant provided a Schedule of Loss in which she claimed 25 weeks of unauthorised deductions between 1 April 2018 and 31 March 2019 when the hourly National Minimum Wage rate was £7.38. Section 23(4A) of the Employment Rights Act 1996 (giving effect to the Deductions from Wages (Limitation) Regulations 2014), gives a two-year limit on the backdating of unauthorised deductions claims from the date the Claim was presented to the Tribunal. The Claim was brought on 27 January 2022. The Tribunal cannot back-date before January 2020 and so this element of the unauthorised deductions claim fails.

105. The Claimant is not claiming for unauthorised deductions for those weeks when she was furloughed. I was not provided with precise dates when the Claimant was furloughed. This is likely to have been for a period in 2020 and again in late 2020 to early 2021 when Wales entered another lockdown. Her claim is for 31 weeks of unauthorised deductions from 1 April 2021 at £8.72 per hour. This period was not disputed by the Respondents. The hourly National Minimum Wage for the Claimant's age group was £8.91 with effect from 1 April 2021. There were 149 workdays between 1 April 2021 and the last deduction in the series on 31 October 2021. The Claimant was paid 15 minutes less than she should have been on each of those days. This amounts to 37 hours and 15 minutes. Respondent 1 must pay the Claimant the gross sum of **£331.90** being the **unauthorised deductions** from her wages (37.25 hours x £8.91).

The dismissal

106. The Claimant was dismissed. Christian Donnelly accepted that she was dismissed. The effective date of termination was 1 November 2021.

107. The Claimant says that she was dismissed as a consequence of taking time off due to her alleged disability. She says that Christian Donnelly wanted to save money. In submissions, Christian Donnelly said what let the Claimant down was her absence (poor attendance) record.

108. The Claimant was not told the reason for her dismissal in a dismissal letter. No Response was sent to the Tribunal giving the reason for dismissal. I have therefore had to consider what was in the mind of Christian Donnelly at the time he took the decision to dismiss, which is evidenced in the November WhatsApp exchange. Saving money may have been one factor but the primary reason for dismissing the Claimant was her attendance record. This is clear from Christian Donnelly's initial response, when he wrote 'now all of a sudden the sickness is back and on Mondays too…I'm letting you go… I could do with the extra income to be honest anyway'. Later in the exchange he mentions '4 years of phoning in sick on Mondays because you'd had a good weekend…you have a house party and suddenly you're ill'.

109. There were a variety of reasons underlying the Claimant's absences. In one WhatsApp message Christian Donnelly says 'you were sick more in your first year than every other staff member combined… I told you that and you laughed'. The Claimant experienced shoulder pain and suffered a burn in her first year of work. The absence on 1 November 2021 was due to the Claimant's bad stomach. In sum, what was in Christian Donnelly's mind at the time he took the decision to dismiss was the Claimant's attendance record, which in his view was a poor one. It was not the Claimant's underlying health but her attendance record, and his frustration about the Claimant calling in sick on Mondays, that motivated his decision to dismiss. Although Christian Donnelly did not label the reason for dismissal as some other substantial reason, I am satisfied that a poor attendance record could amount to some other substantial reason, which would be a potentially fair reason to dismiss.

110. Turning to the question of fairness under section 98(4) of the Employment Rights Act 1996 and considering the fact that the Respondent is a very small employer, Christian Donnelly did not act reasonably in all the circumstances in treating the Claimant's poor attendance as a sufficient reason to dismiss. The Claimant had never received any formal warnings about her attendance. There is no attendance policy setting out the Respondent's expectations. Christian Donnelly did not attempt to find out the reasons behind the Claimant's absence on 1 November 2021. She was not invited to a meeting to discuss her non-attendance. She was not given an opportunity to explain herself before being dismissed. Her representative told Christian Donnelly on 1 November 2021 and again on 1 December 2021 that the Claimant wished to appeal. She was not invited to an appeal hearing. The requests for an appeal were not answered. There was no fair process followed. Overall, I am satisfied that this was an unfair dismissal and the claim for unfair dismissal succeeds.

111. The Claimant's gross weekly pay was £311.85. The Claimant has a new job. She does not wish to be reinstated to her old job or re-engaged by the Respondent. Compensation for unfair dismissal is in two parts. The first is a basic award which is calculated according to a formula in section 119 of the Employment Rights Act 1996 based on age, length of service and gross weekly pay. The Claimant had three complete years' service as at 1 November 2021. In each of those years she was aged 22 or over. She is therefore entitled to a total of 3 times a week's pay (3 x £311.85). I order Christian Donnelly to pay the **basic award** of **£935.55** to the Claimant.

112. The second element of compensation for unfair dismissal is a compensatory award under section 123(1) of the Employment Rights Act 1996. This requires me to award such compensation as is just and equitable to compensate the claimant for losses resulting from her unfair dismissal. Her weekly loss of earnings is £311.85. The Claimant found new employment with effect from 22 November 2021 at a higher wage. I am satisfied that the Claimant took reasonable steps to replace her lost earnings by finding and starting a new job within three weeks of being dismissed. The period of loss is three weeks.

113. The House of Lords established in *Polkey v A E Dayton Services Limited* [1988] ICR 142 that the Tribunal must consider what would have happened had the Respondent acted fairly. This requires the Tribunal to

assess whether there is a chance that the Claimant would have been dismissed anyway had a fair process been followed and whether the compensation should be reduced to reflect that likelihood. If Christian Donnelly had acted fairly, he would have met with the Claimant to discuss the reasons for her non-attendance and given her the opportunity to improve. I am not satisfied that this is a case where it can be said that the Claimant would have been dismissed in any event had a fair process been followed. In the alternative, even if I were so satisfied, it is likely that the Claimant would have continued in her current employment until 22 November 2021 to allow each stage of a fair process to be conducted including inviting the Claimant to a meeting and providing her with the opportunity to appeal her dismissal. The Claimant is therefore entitled to be compensated in full for the three weeks' **loss of earnings**. This amounts to **£935.55** (3 x £311.85).

114. I am awarding **£300** for **loss of statutory rights** to compensate the Claimant for the fact that in a new job it will take her two years to build up unfair dismissal protection.

115. The ACAS Code of Practice on Disciplinary and Grievance Procedures applied to the Claimant's dismissal. The Tribunal may apply an uplift to the compensatory award of up to 25% for any unreasonable failure to follow the Code. The Code sets out a number of elements for a fair procedure. These include informing the employee of any problems with conduct or performance, inviting the employee to discuss her conduct/performance at which she has the right to be accompanied, and offering the opportunity to appeal. As I stated in my findings above, the Respondent failed to follow any elements of the ACAS Code. I considered the fact that the Respondent is a small employer however this was not a case where some elements of the Code were followed. A fair process had been ignored altogether. The failure was not inadvertent but deliberate. This was demonstrated by Christian Donnelly telling the Claimant to 'crack on with all that legal shit'. The Claimant asked to appeal. The Respondent did not reply. Overall, the failure to follow the Code was unreasonable. An **uplift** of the maximum 25% is justified in this case. This amounts to **£308.89** (£935.55 + £300 x 25%).

116. As this is a case where the claimant received no state benefits following her dismissal, the recoupment regulations do not apply. The total compensatory award amounts to **£1,544.44** (£935.55 + £300 + £308.89). I order Christian Donnelly to pay the **compensatory award** of **£1,544.44** to the Claimant.

117. The generic contract of employment given to the Claimant does not contain all the required written particulars of employment and does not comply with section 1 of the Employment Rights Act 1996. This breach requires me to award a minimum amount of two weeks' pay. If I consider it just and equitable in the circumstances, I may award a higher amount of four weeks' pay. The question as to who employed the Claimant had to be resolved by the Tribunal. This could have been avoided had the matter been set out clearly in the statement of written particulars. This was not, however, a case where the Respondent was attempting to conceal the employer's true identity at the outset. The Respondent is small with no HR department. It had provided some of the information required by section 1. On balance, I considered that two weeks' compensation was appropriate. This amounts to **£623.70** (£311.85 x 2). I order Christian Donnelly to pay **£623.70** to the

Claimant being an uplift for **failing to provide a statement of written particulars** in accordance with section 1.

118. The Claimant did not plead expressly that she was owed notice pay. This was not an issue for me to determine. The Claimant has included loss of notice as a separate item in her Schedule of Loss in addition to loss of earnings for three weeks (page 75). For completeness, I have already concluded that the Claimant is entitled to be compensated in full for the three weeks' loss of earnings. Had I to determine the issue and conclude that the Claimant was entitled to be paid the statutory three weeks' notice under section 86 of the Employment Rights Act 1996, this would cover the same period. She would not be entitled to be paid twice for this three-week period (so as to avoid double recovery).

119. I order Christian Donnelly to pay to the Claimant the total gross sum of **£3,435.59** comprising of:

a. Basic award - £935.55
b. Compensatory Award (with 25% uplift) - £1,544.44
c. Failure to provide section 1 statement - £623.70
d. Arrears of pay - £331.90

Employment Judge R Russell
Date 26 January 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 27 January 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

APPENDIX

The Issues

1. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 14th October 2021 may not have been brought in time.

1.2 Was the unauthorised deductions made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
1.2.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 Was the Claimant dismissed?

2.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

2.3 Was it a potentially fair reason?

2.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

3. *Remedy for unfair dismissal [only if the Claimant succeeds with this claim]*

3.1 The Claimant commenced employment with a new employer on 29th November 2021 and is not seeking reinstatement or re-engagement.

3.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.2.1 What financial losses has the dismissal caused the Claimant?
3.2.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.2.3 If not, for what period of loss should the Claimant be compensated?
3.2.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.2.5 If so, should the Claimant's compensation be reduced? By how much?
3.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.2.7 Did the Respondent or the Claimant unreasonably fail to comply with it?
3.2.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

3.2.9 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
3.2.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
3.2.11 Does the statutory cap of fifty-two weeks' pay apply?

3.3 What basic award is payable to the Claimant, if any?

3.4 *Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?*

4. **Disability**

4.1 Did the Claimant have a disability, as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did she have a physical impairment: endometriosis?
4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
4.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.1.5.2 if not, were they likely to recur?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 Dismissing the Claimant

5.2 Did the following thing arise in consequence of the Claimant's disability:

5.2.1 the Claimant's inability to attend work on 1st November 2021?

5.3 Was the unfavourable treatment because of that thing? ie Did the Respondent dismiss the Claimant because of her inability to attend work on 1st November 2021?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6. *Remedy for discrimination [only if the Claimant succeeds with this claim]*

6.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the Claimant?

6.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the Claimant be compensated?

6.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.6 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8 Did the Respondent or the Claimant unreasonably fail to comply with it?

6.9 If so is it just and equitable to increase or decrease any award payable to the Claimant?

6.10 By what proportion, up to 25%?

6.11 Should interest be awarded? How much?

7. Unauthorised deductions

7.1 Was the Claimant required to be at work 15 minutes before each shift?

7.2 Was the Claimant entitled to be paid for this extra 15 minutes per day (by reason of it being “time work” for the purposes of the National Minimum Wage Act 1998) or any other reason?

7.3 Were the wages paid to the Claimant less than the wages she should have been paid?

7.4 Was any deduction required or authorised by statute?

7.5 Was any deduction required or authorised by a written term of the contract?

7.6 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

7.7 Did the Claimant agree in writing to the deduction before it was made?

7.8 How much is the Claimant owed?

7.9 What is the impact of the cap of 2 years’ back pay (Deductions from Wages (Limitation) Regulations 2014)?

8. Breach of Contract

8.1 Did this claim arise or was it outstanding when the Claimant’s employment ended?

8.2 Did the Respondent do the following:

8.2.1 Fail to pay the Claimant the National Minimum Wage (as set out in the National Minimum Wage Act 1998)

8.3 Was that a breach of contract?

8.4 How much should the Claimant be awarded as damages?