EMPLOYMENT TRIBUNALS

Claimants:		**Respondent:**
(1) Miss K Kilday	v	JHM Building Services Ltd
(2) Mr J Bates		

Heard at: Nottingham (via CVP) **On:** 18, 19 & 20 July 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Mr N Arora (Counsel)
For the respondent: Mr T Hussain (Litigation Consultant)

RESERVED JUDGMENT

The first claimant – Miss Kilday

1. The first claimant was engaged by the respondent as a worker from 6 March 2019 until she became an employee on 3 July 2019. She was engaged for 2.5 days per week (eight hour days).

2. The respondent made an unlawful deduction from the first claimant's wages during the time that the first claimant was a 'worker', between 6 March 2019 and 30 June 2019. The first claimant was not paid for the time she was a 'worker' of the respondent, but is only able to claim from 5 June 2019 by operation of 23(4A) Employment Rights Act 1996, which means that she is entitled to be paid the claimed minimum wage hours in the sum of **£656.80.**

3. On 1 July 2019, the first claimant began working 40 hours per week, first as a worker and then as an employee. The respondent failed to pay the first claimant the National Minimum Wage throughout her employment as an 'employee' of the respondent, which contributes to a continuing and unbroken course of unlawful deductions from wages between 6 March 2019 and 15 February 2021. The first claimant worked 40 hours per week throughout her employment. It is found that:

3.1. The first claimant was paid £240.38 per week through PAYE from 3 July 2019 until 31 December 2020, leading to shortfalls of –

3.1.1. £88.02 £86.89 per week until 31 March 2020 (39 weeks), meaning a total shortfall of £3,431.65 for the period; and

3.1.2. £108.42 per week from 1 April 2020 to 31 December 2020 (40 weeks), meaning a total shortfall of £4,336.80 for the period.

3.2. The first claimant was not paid at all between 1 January 2021 and her effective date of termination on 15 February 2021, which amounted to additional unlawful deductions from wages due at 40 hours per week at national minimum wage and leads to an award of £2,232.32.

4. Consequently, the respondent is ordered to pay the claimant the sum of **£10,000.77** in respect of unlawful deduction from wages during her period as an 'employee', amounts representing less than the National Minimum Wage.

5. The first claimant is owed payments in respect of accrued and untaken holiday, found to roll forward year on year, in the total amount of 30 days over the course of her engagement by the respondent. These days are due at the relevant minimum wage rates at eight hours per day, meaning that the respondent must pay the first claimant the sum of **£2,138.40** in respect of holiday earned but not taken or paid during her time as a worker or employee of the respondent.

6. The respondent did not provide the first claimant with any particulars of her employment and in the circumstances it is considered just and equitable to order the respondent to pay her the higher amount of four week's pay under s38 Employment Act 2002, which is the sum of **£961.52.**

7. The **GRAND TOTAL gross amount that the respondent must pay to the first claimant in respect of all of her claims is £13,757.49.**

The second claimant – Mr Bates

8. The second claimant was engaged by the respondent as a worker from 1 April 2019 until he became an employee on 3 July 2019. He worked 5 days per week (also 8 hour days).

9. The respondent made an unlawful deduction from the second claimant's wages during the time that the second claimant was a 'worker', between 1 April 2019 and 30 June 2019. The second claimant was not paid for the time he was a 'worker' of the respondent, but is only able to claim from 5 June 2019 by operation of 23(4A) Employment Rights Act 1996, which means that he is entitled to be paid the claimed minimum wage hours for this period in the sum of **£1,183.68.**

10. On 3 July 2019, the claimant became an employee of the respondent working 40 hours per week. The respondent failed to pay the second claimant the National Minimum Wage throughout his employment as an 'employee' of the respondent, which amounts to a continuing and unbroken course of unlawful deductions from wages between 1 July 2019 and 15 February 2021. The second claimant worked 40 hours per week throughout his employment. It is found that:

10.1. The second claimant was paid £240.38 per week through PAYE from 1 July 2019 to 15 February 2021, leading to shortfalls of –

10.1.1. £86.89 per week until 31 March 2020 (39 weeks), meaning a total shortfall of £3,431.65 for the period; and

10.1.2. £108.42 per week from 1 April 2020 to 31 December 2020 (40 weeks), meaning a total shortfall of £4,336.80 for the period.

10.2. The second claimant was not paid at all between 1 January 2021 and his effective date of termination on 15 February 2021, which amounted to additional unlawful deductions from wages due at 40 hours per week at national minimum wage and leads to an award of £2,232.32.

11. Consequently, the respondent is ordered to pay the second claimant the sum of **£10,000.77** in respect of unlawful deduction from wages during his period as an 'employee', amounts representing less than the National Minimum Wage.

12. The second claimant is owed payments in respect of accrued and untaken holiday, found to roll forward year on year, in the total amount of 31 days over the course of his employment. These days are due at the relevant minimum wage rate for eight hours per day, meaning that the respondent must pay the second claimant the sum of **£2,209.68** in respect of holiday earned but not taken or paid during his time as an 'employee' of the respondent.

13. The second claimant's contract of employment contained the term that he would be paid £250 per week in dividends where dividends are able to be paid. In breach of that term, the respondent failed to pay those dividends from 1 January 2021 to 15 February 2021 and so it is ordered that the respondent pay the claimant the sum of **£1,500.00**

14. The second claimant's claim that his employment contract contained terms which entitled him to a 25% split of the profits of the business is not well-founded and is dismissed.

15. Consequently, the **GRAND TOTAL that the respondent is ordered to pay the second claimant is £14,894.13,** (of which £13,394.13 is subject to the usual PAYE deductions).

REASONS

Background and claims

1. The parties worked together for a time in the building trade. The claimants are also a couple. The respondent is the company within which the claimants were, for a time, shareholders. Mr and Mrs Hill, the respondent's witnesses, are the only two remaining directors and shareholders of the business. Mr Bates began working

with the respondent through his previous company, Oakvalley Roofing Limited. Over time, the basis for the arrangement changed and this has given rise to the beginning of the dispute.

2. The parties agree that the claimants and the Hills explored setting up another company where the four of them could drawn earnings in the construction industry. This fell through and, instead, the claimants began working for the respondent directly; they became holders of dividend only shares in the respondent. There was no written contract and so the case turns on the nature of the oral agreement reached, and the actual day-to-day working arrangements in place between the claimants and the respondent. These are disputed.

3. There was a fall out in late 2020, related in part to a disagreement about the terms of the arrangements between the claimants and the respondent. This led to a period of time where the claimants did not attend the office. They were ultimately dismissed on 15 February 2021 for being persistently absent without leave. The claimants say that they were not absent without leave, but worked from home and were not required to go into the office.

4. The parties could not resolve their differences through the dismissal and grievance process, and so the claimants bring the following claims:

    4.1. Miss Kilday claims for: (1) unauthorised deduction from wages grounded in her not being paid the national minimum wage from 5 June 2019 to 15 February 2021 (the maximum two years prior to presenting her claim form), (2) accrued but untaken annual leave (said to roll over courtesy of the principles from *Kreuziger [2018] EUECJ C-619/16)*, and (3) a failure to provide written particulars of employment as required by *s1 Employment Rights Act 1996*.

    4.2. Mr Bates makes all the same claims as Miss Bates but also claims for (4) breach of employment contract through a failure to pay dividend payments, and (5) breach of employment contract through a failure to pay a profit share said to be due to Mr Bates, in the amount of 25% of distributable profits for the year 2020-2021.

5. The respondent denies the claims. It admits that the claimants were workers and then employees of the respondent, and that they were dividend only shareholders. It denies that there were any deductions from wages, and that the claimants have been paid for the period of time they were workers or employees, apart from the period of time before termination where the respondent was entitled to withhold wages because the claimants were absent without leave and therefore no wages were properly payable. The respondent says that the dividends paid to the claimants, by their agreement, throughout their engagement means that there has been no failure to pay the national minimum wage in practical terms. Finally, the respondent denies that there was any agreement about sharing the profits in the respondent.

6. Mr Arora of Counsel represented the claimants, and each claimant gave sworn evidence in support of their case. Mr Hussein, Litigation Consultant, represented the respondent and Mr Hill and Mrs Hill gave evidence in support of the

respondent. I also had access to a bundle of document running to 1,030 pages. Page references in this judgment relate to page references of that bundle.

The issues

7. The parties had not prepared a list of issues for the hearing, but in the preliminary discussion, and with references to the orders of Employment Judge Camp, the issues were identified as:

   7.1. What was the legal status with which the claimants were engaged with the respondent, on what dates were they so engaged, and for how many hours per week?

   7.2. Were the claimants paid for all the time they might have been workers prior to them becoming shareholders in the respondent?

   7.3. What was the contractual agreement in place between the claimants and the respondents from the time they became shareholders of the respondent?

   7.4. Does any contractual agreement form part of the employment contract or is there a separate shareholders' agreement?

   7.5. Do dividend payments count as wages for the purposes of the National Minimum Wage rules?

   7.6. If they do not, what shortfall is there?

   7.7. Did the respondent fail to pay Mr Bates a proportion of profit share when it was contractually bound to do so?

   7.8. Did the respondent fail to provide the claimants with written particulars of their employment?

   7.9. If the claimant received no written particulars, then should they be awarded two or four weeks' pay under the terms of *s38 Employment Rights Act 1996*?

Preliminary matters

8. The hearing started late on the first day. I was told there had been a lull in preparation due to without prejudice discussions, and so the parties needed some time to finalise documentation. I allowed this.

9. I refused an application from the respondent to add a document as evidence into the bundle on the first morning of the hearing. At 10:00am on the first morning of the hearing, Mr Hussain e-mailed to the tribunal and the claimant's solicitor a report produced by Scanlans surveyors. The covering e-mail made an application in these terms:

   "We would like to submit the attached report regarding 'the alleged defective roofing work', carried out by the claimant, Mr James Bates.

Whilst we do not wish to rely on the contents of this report in detail, we would be relying on the fact that complaints were raised with the Respondent as a result of the work carried out by Mr James Bates, with a significant possible liability against the Respondent".

10. Mr Arora objected to the application, submitting that it was submitted very late despite being dated 28 June 2022, and observing that it did nothing in terms assisting determination of the claims as described in the claims and issues section above. He said that he had been unable to take instructions on the document as it had arrived whilst on the hearing. When pressed, Mr Hussain explained that he had been in possession of the evidence since around 8 July 2022 but had needed some time to consider it and ultimately take instructions about whether to seek to rely on it in the hearing. He said that the claimants need not give detailed instructions on it because it was being used to support a contention about the credibility of Mr Bates and that he did not propose to go through the report in detail.

11. In my view, the report cited was irrelevant to the issues in this dispute and none of the contents has anything concerned with Mr Bates' pay, holiday, or wider contractual terms in his employment. The report is produced by an expert for the purposes of the respondent defending Court litigation relating to alleged defective works completed in 2020. It is noticeable that the report does not mention Mr Bates at all, and no allegations are made in the ET3 or any witness statement about his defective work. The case was not at all about the quality of any work completed by Mr Bates, and the report alone far from shows me that his work was defective even if it was relevant. It is not apparent to me that any supposed liability for the respondent about this contract can rest with Mr Bates; the respondent had made no counterclaim in these proceedings relating to Mr Bates' breach of contract. Consequently, I gave my decision to refuse to admit the document into evidence.

12. There was then a further adjournment to allow some time for me to read the material I had not previously had the opportunity to read, which included the witness statements (they were not finalised at the start of the hearing). Mr Hussain had expected the respondent's witnesses to be cross examined first but, as this was not an unfair dismissal case, the claimants fell to be cross examined first. Mr Hussain asked for some time to prepare for this, after sight of the claimants' witness statements once they had been page referenced. The time was given.

13. There may have been a settlement discussion which collapsed shortly before this trial was heard, but it does strike me that the parties should have been better prepared than they were for the first day of the hearing. The respondent's representative's organisation is reminded that on-going settlement negotiations, if there were any, are not a reason to ignore or delay compliance with case management orders.

The facts

14. The facts as I find them are as follows. Where I have been required to resolve conflicts of factual evidence, I explain why I have done so at the material point.

Discussions about new joint venture company

15. Prior to involvement with the respondent, Mr Bates operated a business called Oakvalley Roofing (**"Oakvalley"**). That business had a branded van which Mr Bates used for work, and it is not disputed that Mr Bates operated his business through that company on his own account. Oakvalley worked with the respondent in late 2018 and early 2019. The e-mails and documents from page 81 to 117 in the bundle show that the two companies completed project work together, and Mr Hill and Mr Bates confirm that this is how they came to work together and discuss formalising a work relationship.

16. The parties agree that, in early 2019, they started to discuss setting up a new company which would allow the services offered by Oakvalley and the respondent to be offered jointly under one brand. It was proposed that the new entity would be called 'J M Hill Roofing Services Ltd' (**"Roofing"**). On 28 March 2019, Mrs Hill e-mailed Matthew Higginson at APC Accountants to ask him to *"start the ball rolling with setting up J M Hill Roofing Services Ltd"* (page 118).

17. On 3 April 2019, Mr Bates sent Mr Hill an e-mail which contained four images of his Oakvalley branded work van (page 119). On 8 April 2019, Mrs Hill sent an image of Mr Bates' van to ask for a quote for removing the existing signage and replacing that signage with *"JMH logo and J M Hill Roofing Services"*. On 9 April 2019, Mr Hill followed this with an instruction that *"JM Hill Building Services would like to request a new installation for the below vehicle for Monday 15th April"*. From this date onwards, Mr Bates' van was subsumed into Roofing's activities and he did not have an Oakvalley van to use on his own account.

18. Mr Hill says that there was an agreement not to take any wages during the period of setting up Roofing. Mr Bates says that, during the period of setting up Roofing, he was working entirely on the respondent's contracts. Roofing was incorporated on 17 April 2019 but was not successfully launched. There is some disagreement about the reasoning for this, but in essence the new venture either cost too much to run or was not able to win contracts as a new entity. The respondent took over the roofing side of the business which was going to be run through Roofing. Roofing completed only one contract, for LGG Projects Ltd, and an invoice for that work was generated on 22 December 2019. The £41,369.19 demanded by the invoice was paid into the respondent's bank account.

19. The last e-mail in the bundle from Mr Bates' Oakvalley e-mail account, about project work, was from 4 April 2019 (page 121). The later e-mails from that account were in relation to invoices which Mr Bates told me, and I accept, relate to earlier project work done by Oakvalley jointly with the respondent. Mr Bates says that these amounts remain outstanding, but I make no finding about that because that is a matter for a different court and does not relate to this employment dispute.

The claimants' engagement by the respondent directly

20. Whilst Mr Hill says that Mr Bates agreed not to take any wages during the set-up of Roofing, the claimants say that they were engaged as workers by the respondent. For the purposes of winning all of their claim relating to deduction from wages, each would need to establish that they were at least workers by 5 June 2019. The claimant rely on three core pieces of evidence to show that they were workers of the respondent prior to 5 June 2019 (in addition to their witness testimony):

20.1. Mr Bates relies on the tracking records of his telephone (produced from page 541 to 1030) showing his almost daily journeys to the respondent site and home from 5 February 2019 to17 March 2020, and the summary of those records at pages 535 to 539;

20.2. Miss Kilday relies upon the evidence of work she was doing in the form of e-mails from the respondent's e-mail account; and

20.3. Both claimants rely upon the respondent's willingness for her to complete NVQ courses relating to the respondent's work.

Tracking evidence

21. I am satisfied from the tracking evidence that Mr Bates was engaged on a full-time basis, doing something, at the respondent's site between 5 February 2019 and 17 March 2020. This is because the tracking maps are clear that the journeys usually started at his home and ended at the respondent at around 8:00am, with the return journey beginning somewhere between 3:30pm and 5:00pm. Mr Kilday also told me that he worked from home outside of these times, and this is supported by the evidence offered in relation to later lockdown working. Further, I find as a fact that Mr Bates was engaged in work activities for the *respondent* during this time. This is in conflict to the evidence offered by Mr Hill, which is that Mr Bates was setting up Roofing without pay. I prefer the claimant's contention because:

21.1. Mr Hill's evidence was that Roofing was not trading throughout this time;

21.2. Mr Bates was unable to trade on his own account unless he did so from a JMH/Roofing branded van, which strikes me as inherently unlikely; and

21.3. Nothing about Mr Bates' evidence about this period seemed to me to be implausible or unbelievable, unlike Mr Hill's position as it outlined below.

E-mail account evidence

22. In his evidence, Mr Hill was very clear that the only people who had access to the *office@jmhbuild.org* e-mail address would be those working in the office of the respondent. He explained that this would only cover himself, Mrs Hill, and someone called Tania who worked there. He admitted that Miss Kilday might have had later access after she began working for an employed by the respondent.

23. On 18 April 2019, an e-mail was sent from the office@jmhbuild.org e-mail address, which read (page 129):

> *"Hi Matt*
>
> *Please find attached March invoice for Healdswood. This is a 60/40 split: 60% labour and 40% material.*
>
> *Kind regards,*

Kelly"

24. On 17 May 2019, an e-mail was sent from *"John Hill*" with the respondent's e-mail footer, which read (page 137):

> *"Hi Richard*
>
> *Please find attached RAMS for 84 Dulverton Vale.*
>
> *Regards,*
>
> *Kelly"*.

25. On 22 May 2019, an e-mail was sent from the office@jmhbuild.org e-mail address, which read (page 138):

> *"Hi Kate,*
>
> *We've received the invitation to tender for Sudbrooke plit 69-72 via the Procore system (sent to Oakvalley Roofing).*
>
> *In addition to the drawings do you have a spreadsheet of quants? Like the one we received for Eastcliff Road?*
>
> *Thanks*
>
> *Kelly"*

26. These e-mails are sent by Miss Kilday prior to 5 June 2019. This last e-mail plainly relates to work which may otherwise have been followed up by Oakvalley. In this e-mail, Miss Kilday is effectively diverting that work into the respondent by picking up the request from the respondent's e-mail address with the respondent's footer.

27. On 23 May 2019, an e-mail was sent from the office@jmhbuild.org e-mail address, which read (page 139):

> *"Hi Lee,*
>
> *I'll send Daz tomorrow, he must of missed that bit of debris on the second lift.*
>
> *Guttering – Max 100% cleaned the gutters out, I watched him doing it. It must be fresh from the tree above but I'll get Daz to give them a quick once over whilst he's out there tomorrow.*
>
> *Thanks*
>
> *James"*

28. 'James' is Mr Bates' first name and so I find that, as he claimed, Mr Bates sent this e-mail from the respondent's office e-mail account which Mr Hill assured me was

only used by three individuals at this time – all of whom worked directly for the respondent. A further e-mail was sent by that account from Miss Kilday on 30 May 2019 (page 140). An e-mail was sent to that account addressed to Miss Kilday on page 142.

29. Mr Hill was plainly in difficulty trying to explain these e-mails in a way which did not admit that the claimants were working on the respondent's projects and systems prior to 5 June 2019. He suggested that Miss Kilday was on site to learn how to use the computer during the set up phase for Roofing. Even if this were true, it does not get around the fact that these e-mails related to the respondent's work and so Miss Kilday was working on respondent projects when dealing with these e-mails. I find it extremely unlikely that Miss Kilday was in the office to learn the systems setting up Roofing, and that was all she was doing. Unless the e-mail were dictated to Miss Kilday, which was not suggested, then Miss Kilday would need to have known of the matters about which she was writing. That would take some time and understanding.

30. Mr Hill also suggested that Miss Kilday was in the respondent's office at the direction of Mr Bates, and this arrangement is part of the respondent's pleaded case. If that were so, then the respondent's case would be that Miss Kilday was working on the respondent's contracts at the behest and instruction of Mr Bates. It seems difficult to argue that, on the one hand, to explain away Miss Kilday's presence, but also deny that Mr Bates had any attachment to or authority within the respondent itself on the other hand. Either Mr Bates is not attached to the respondent, or he is and he is able to direct Miss Kilday to do come to the respondent's office and do the respondent's work. This seems to me to be highly unlikely. I cannot sustainably find a fact that Miss Kilday's presence was directed by Mr Bates and related to the set up of Roofing.

31. Mr Hill did not offer an explanation as to why Mr Bates would have sent an e-mail from that address – and an e-mail which indicated that Mr Bates was on a project in May 2019 and not simply involved with setting up and launching Roofing. That project was communicating through the respondent's e-mail address. I consider on the balance of probabilities, therefore, that it was a respondent project and not a Roofing one.

NVQ course evidence

32. On 4 April 2019, Mrs Hill included Mr Bates on an e-mail to other workers of the respondent in relation to NVQ covering removal of hazardous waste licences (page 122). Mr Hill says that Mr Bates was included as part of the setting up of Roofing whilst Mr Bates contends that Roofing's work would not have involved the removal of hazardous waste. On the same date, Mrs Hill was in discussion about 'three ladies' who might do a business admin NVQ. On page 124, Mrs Hill named Miss Kilday along with herself and Tania as the three ladies who would like to do the course on 11 April 2019. On 11 April 2019, Mrs Hill texted Miss Kilday at 07:25am to remind her to bring two forms of ID. I am satisfied that this was for the proposed course on the same date. At 08:27am, Mrs Hill asked Miss Kilday if she could pick up some milk (page 128).

Other evidence

33. There is also external evidence indicating that the claimants were engaged by the respondent directly in the summer of 2019. On 2 July 2019, APC Accountants sent an e-mail to Mr Hill asking whether the claimants should be added *"to this pay run or wait until they have had a chance to discuss"* (page 145). This indicates that the respondent's accountants were aware that the claimants might need to be included in the pay run for July 2019. The pay slips in the bundle (eg. Page 485) show that the respondent's pay date is the third of the month. In my view, what the accountants are really asking is whether the claimants should be paid for the period of time from 3 June 2019 to 2 July 2019. The question has come on the day prior to pay day. This means that the accountants were aware that the claimants may be entitled to pay for the period – they were aware there was an engagement where the claimants were doing work for the respondent alone.

34. Mr Bates' records at the respondent record that he became an employee on 17 April 2019, and Miss Kilday's records record that she became an employee on 9 July 2019 (page 222). The payroll form for Mr Bates, signed by Mr Hill on 3 July 2019, shows the same start date of 17 April 2019 (page 146). The payroll form for Miss Kilday, signed by Mr Hill on 3 July 2019, also shows a start date of 9 July 2019 (page 147). On 15 October 2019, Mr Bates became a director of the respondent (page 155).

35. There is limited evidence about the hours which Miss Kilday was present on site during this period. In her claim form, Miss Kilday sayd that she worked on a 50% basis from 6 March 2019 to 1 July 2019, when she began working full time hours. Miss Kilday left another employment to enable her to be available full time. The respondent refutes that Miss Kilday ever worked full time, and said that she used to leave early for childcare purposes. In reply, Miss Kilday notes that she would often travel to the respondent with Mr Bates and so relied on his tracking evidence to that extent. On 13 January 2021, APC Accountants sent an e-mail to Mrs Hill which confirmed that Miss Kilday's annual salary was £12,500 per year *"and this is based on a 40 hour working week"*.

36. There is a conflict in the oral evidence on this point and I consider that the written evidence is inconclusive. On the balance of probabilities, I prefer Miss Kilday's evidence to that of the respondent's. I find as a face that Miss Kilday was working on a full-time basis from 1 July 2019, as she said she did. This is because:

    36.1. I consider that Miss Kilday left her previous employment to take up the role at the respondent;

    36.2. Miss Kilday was paid the same amount as Mr Bates when they were both receiving remuneration, which would be unlikely if she was working fewer hours than him;

    36.3. I found Miss Kilday's evidence to be more simple and presented in a way which seems inherently more likely than the evidence provided by the respondent, whose witnesses seemed to me to be giving answers which they thought suited their case rather than what they could honestly recall (as with the e-mail exchanges above);

36.4. The written evidence on page 356 confirms that this is the basis upon which Miss Kilday was paid, even if not direct evidence about what Miss Kilday actually worked.

The terms of the agreement relating to pay and profit share

37. The respondent admits that Mr Bates was engaged as an employee director from 3 July 2019 and that Miss Kilday was employed as an administrator on the same date. Whatever the engagement between the parties before 1 July 2019, the parties agree that an employment relationship began on 3 July 2019. It is agreed that the claimants were to be paid through a mixture of PAYE salary and dividends. Each were to be paid £1,041.66 per month and receive a weekly dividend of £250. In other words, on the respondent's case, Miss Kilday would receive a total package of £25,499 in her role as an administrator, and Mr Bates would receive a total package of £25,499 in his role as an employee director managing work on projects and operating as a director of the business. To enable the payment of dividends, the claimants were each given 25% shares in the respondent. Those shares were dividend only shares and had no ownership of voting rights. Mr Hill says he would not have given away half of the respondent to the claimants after years of building the business.

38. The claimants say that the respondent's position is not correct. They say that there was an additional agreement that they would receive 25% of the share of the profits of the respondent as well as the terms outlined above. In this case, only Mr Bates has pleaded an entitlement to 25% of the profit share but, in my view, the facts will apply equally to both of them. The claimants are clearly under the impression that they were entitled to 25% of the profits of the respondent to reflect the shareholding they understood they have received. In cross examination, Mr Bates queried why else he would have agreed to be paid so much less than those he was supervising unless he was going to receive a share of the profits in the respondent. He was clear in his evidence that the couples were going to go in 50-50 together as had been the plan for Roofing.

39. The parties agreed that the respondent would not pay dividends during the Covid-19 lockdown, although it is accepted that the respondent conducted some work activity where allowed and I accept that the claimants completed some work during the period where restrictions applied. Pages 249 to 263 show e-mails and text messages between the parties during this period.

40. There are no written particulars of employment and nothing contemporaneous in writing which outlines the terms upon which the claimants were due to be paid. On 3 June 2020, Mr Bates sent Mr Hill an e-mail which raises in writing some of the issues with pay which give rise to this claim. That e-mail is at page 247 and 248. As well as ask for payments for the work done prior to the employment beginning, Mr Bates queries payments due to Oakvalley for the previous projects. This e-mail does not mention any impending or understood profit share. In cross examination, Mr Hill said that there is no reply to this e-mail because he spoke to Mr Bates and *"squashed it"*, by which it appears he means that he ended the conversation because there was nothing in it.

41. The conversation must have re-emerged because, on 18 November 2020, Mr Hill and Mr Bates exchange messaged about having a chat and being sent an e-mail later in the afternoon (page 264). That e-mail was sent the same day, and attached a document called *"Full accounts 2020"* and *"bonus calculation"*. The e-mail is at page 265. Mr Bates asked for a meeting to discuss the documents but was unable to meet with Mr Hill, who suggested conversing by e-mail or over the telephone (page 266). I was told that the 'bonus calculation' was at page 351 of the bundle. This document indicates that net profits at the respondent were £43,714.72, of which 70% was proposed to be retained in the business and £13,114.42 were to be distributed. This would mean that £3,278.60 would be due to Mr Bates.

42. It is apparent from the correspondence and the claimants' cases that the claimants were under the impression that they each owned 25% of the respondent. This belief is reiterated by the Croner Consultant's recommendations in relation to the claimants' grievance (page 370). Mr Bates raises the question of 'share splits' in correspondence. On 11 December 2020, Mr Bates wrote an e-mail to Mr Hill (page 331 to 333) which includes the sentences:

> *"You lead me to believe I was a shareholder of JMH, you had me read a document that stated I had 25-50% financial control, this was submitted to companies house but was changed in March 2020. You even paid half of mine and Kelly's wages as dividends. If I didn't own a single %, then why would I want half of my wages as dividends?"*

43. I consider that Mr Bates was referring in this e-mail to his initial filing as a Person of Significant Control of the respondent, which was removed in March 2020. The Companies House documents show that Mr Bates and Miss Kilday only ever held dividend only shares. I am satisfied that the claimants had an understanding that they would own 25% of the respondent. This is clear to me from the documentation and the oral evidence, including Mr Bates' very poignant observation that absence of such an ownership and profit share would mean he was earning less than those he supervised. Whether these facts and that understanding is enough for Mr Bates to make out his claim that a profit share formed part of his employment contract is considered and explained below.

The claimants' absence from the respondent's site prior to termination

44. The proposal from Mr Hill was triggered by a meeting on 16 November 2020. The claimants arranged to meet with the Hills to air their grievances about payment terms and issues relating to Oakvalley. There was no agreement and the claimants left the site at the conclusion of the short meeting. There is a dispute between the parties about whether it was agreed the claimants would leave in order to cool down, or whether the claimants left unilaterally. In her witness evidence, Mrs Hill said that the claimants left unilaterally and never returned – being classed as absent without leave from this point onwards. I do not consider that the claimants were absent without leave because there is evidence that they completed some work activity after 16 November 2020. To that end, how the claimants came to leave the site on this day does not have direct application to the issues in the case. Additionally, the claimants were paid as usual for the working month of November 2020 and December 2020, which further reinforces that the

respondent did not in fact consider that they were absent without leave at that point in time.

45. The conversation continued after 16 November 2020, in the form of the proposal e-mail and requests for meetings outlined above. The parties were unable to reach immediate agreement about the proposal for a 'bonus' or 'share split'. Page 268 shows a text message from Mr Bates to Mr Hill, in response to a work enquiry, which includes the words *"Plus we are locked out the emails so it's difficult to do anything"*. The date is not clear, but the following message was sent on 24 November 2020 and so the claimants must have lost e-mail access prior to that date. Mr Hill said that the e-mail passwords were changed after 16 November 2020 but that the claimants were not informed because he expected them to return. I accept this explanation.

46. It is clear that the claimants continued to work for the respondent after the meeting on 16 November 2020. There are a number of screenshots of e-mail exchanges about work from page 280 to page 350, dated between 25 November 2020 and 22 December 2020. These include Mr Bates referring to completing site visits and surveys, including on 1 December 2020 when he told Mr Hill *"I'm surveying these roofs all week and they're all over the place"* (page 304).

47. The respondent says that it was sending bits of work to the claimants to entice them back into work. Mr and Mrs Hill both said that Mr Bates would complete such work using Google Maps and that the work given would not require full-time hours. The claimants refute this. At no point during any of this correspondence in this bundle does the respondent tell the claimants they are required to come into the site to work, or that their working from home rather than on site constituted an absence without leave.

48. The respondent entered its customary two week shut down for Christmas 2020. The claimant say, and I accept, that there is no evidence of them completing work after the shutdown because they were not sent any work to do. I also find as a fact that they were not asked to attend the site for work immediately after Christmas either.

49. On 13 January 2021, Mr Hill wrote to the claimants to invite them to a face to face meeting with Croner in order to investigate their grievances (pages 359 to 362). The claimants engaged with this process, attending meetings as directed by the respondent. They met with Croner on 19 January 2021 and discussed their grievance. The report dated 5 February 2021 dismissed their grievances because, in Croner's opinion, they did not relate to the employment relationship. The report is at pages 365 to 372. On page 370, Croner recommends that the claimants are invited to return to work.

The claimants' termination of employments

50. The Croner report was sent to the claimants on 12 February 2021 (pages 381 to 382). On the same date, the claimants were invited to return on Monday 15 February 2021 (the next working day). The letters state that the claimants had been absent from work since 16 November 2020, notwithstanding that the claimants had in fact completed work from home and engaged with the grievance

process. The letter informed them that their employment may be terminated if they did not attend on 15 February 2021.

51. The claimants appealed the grievance outcome on 14 February 2021 and attended the site as instructed on 15 February 2021, when they were dismissed with notice for what the respondent characterised as unauthorised absence from 16 November 2020.

52. The claimants were not paid for the month of January 2021 or the portion of February up to 15 February 2021. The claimants were paid one week in lieu of notice and what the respondent considered was the outstanding holiday pay. The claimants contend that more holiday was due to be paid because is was accrued but untaken and should have rolled over. This is a question of law and is resolved below.

53. Mr Bates was terminated as a director of the respondent on 31 March 2021 (page 416).

Holiday entitlement at termination

54. Miss Kilday says that she had 30 days outstanding in accrued but unpaid holiday at the termination of her employment, even after the respondent paid her in respect of holiday entitlement. Mr Bates says that he had 36.5 days outstanding in accrued but unpaid holiday pay at the termination of his employment, even after the respondent paid him in respect of holiday entitlement. The respondent says that the claimants took all of their holiday entitlement. The claimants' pay slips do not appear to record holiday pay taken. The claimants have produced screenshot of the respondent's HR app at pages 296 to 299. This appears to be an app in use, as it is possible to see sickness and holiday logs. The app shows that allowances remain of 20 days and 18 days for the claimants as at the end of calendar year 2020, against a holiday entitlement of 28 days.

55. The respondent says that the app is not an accurate record as it is not in regular use. It relies on the holiday request sheet shown at page 352. That sheet has entries for "James and Kelly" which has various dates entered. In the bottom column, the document records that "James and Kelly" took a total of 13 days in 2019 and 26 days in 2020. I am wary of this evidence, not least because it is not clear to me how the respondent can accurately record the individual claimants' holiday on one joint sheet. It seems to me unlikely that the claimants both took leave on exactly the same day for two years running, and indeed the claimants do not claim to have the same entitlement owed. The same document also seems to show that "Charlie 20" only took three days of holiday in January 2020, and four days of holiday in December 2020, without any days leave in between. This seems unlikely to me, and so I consider that this document is less likely to be an accurate representation of the respondent's annual leave position than the app which the claimants have told me was used to log leave.

56. For those reasons, I find as a fact that at the end of the employment, Mr Bates had 31 days of holiday untaken and unpaid and Miss Kilday had 30 days of holiday untaken and unpaid. Whether the entitlement from one year rolled into the next is a matter of law which is explored below.

57. I am satisfied from the cross examination that the respondent did not remind the claimants that holiday would not carry forward and did not encourage the claimants to use their holiday entitlement.

The law

Employment or worker status – the claimants' status between 5 June 2019 and 3 July 2019

58. The starting point in relation to considering the employment status of an individual is to consider the wording of the relevant statute. *Section 230(1) to Section 230(3) Employment Rights Act 1996* provides:

> ***"230 - Employees, workers etc.***
>
> *(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a)a contract of employment, or*
>
> *(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;"*

59. There is no single set of guidance provided by case law about how to determine a person's employment status. Each case falls to be determined on its own particular facts and often there are factors pointing in each direction which complicate the determination. The usual approach requires all aspects of the relationship to be considered and then I should ask the question whether the claimant was carrying on a business on their own account (*O'Kelly v Trusthouse Forte plc [1983] IRLR 369 CA*). I must consider how the relationship operated in reality to determine the employment status of the claimants (*Autoclenz Ltd v Belcher [2011] UKSC 41*; *Uber BV v Aslam & others [2019] UKSC 29*).

60. *Section 230(3)(b)* outlines requirements for someone to fulfil to be considered a 'worker' under the legislation. Those requirements are set out in the legislation itself: (1) there is a contract between the individual and the employer; (2) the individual must be required to work personally for the employer; and (3) the

individual must not be working for someone who is in reality their customer or client. This last part is important because it is common for people to provide services under a contract to customers or clients without them benefitting from the protections offered by a 'worker' status. If all three elements are present, then it does not matter if the person is operating their own business (*Hospital Medical Group Ltd v Westwood [2012] IRLR 834 CA)*.

61. Part (1) of the legislation is self-explanatory. In the usual way, the contract may be written or may be found to have been agreed orally with terms found through the conduct of the parties. Part (2) requires the contract to not allow the person claiming to be a worker the ability to substitute with someone else who would complete the work. An employer-worker relationship is a personal one. If there is a right of substitution, then it tends towards the person not being a limb (b) worker. If that right of substitution is in reality forbidden or excessively curtailed in some way, then it is possible that the person might still be found to be a worker (*Pimlico Plumbers and another v Smith [2018] UKSC 29)*.

62. Part (3) of the legislation is one of central issue in this case and it is often determinative of the question whether a person is a worker or not. The determination of whether or not a person offers services to a client or customer includes consideration of other sources of income (*Johnson v Transcopo UK Ltd [2022] ICR 691 EAT*). The level of integration is also important. Where a person is held out externally as belonging to an organisation, it is more likely that they will be considered a 'worker' and not someone providing services to a client (*Hospital Medical Group Limited v Westwood [2013] ICR 415 CA*).

Orally agreed employment contracts

63. The parties agree that an employment relationship ensued from 3 July 2019 but they disagree about the terms of the contracts. The disagreement does not affect Miss Kilday's claims as she brought no claims for unpaid dividends or profit share. For Mr Bates to be successful in those claims, he must show that his employment contract contained terms that he would be paid £250 in dividends and be entitled to a 25% share of the profits of the respondent. There are no written contracts of employments, and so where there is a divergence, it is for Mr Bates to satisfy me on the balance of probabilities that he is correct about the terms of his employment.

64. The difficulty is in proving that a particular oral promise was made. A party may be able to show near contemporaneous documentation which confirms the promise (*Whitney v Monster Worldwide Ltd 2010 EWCA Civ 132 CA)*, or have independent third party confirmation that the promise was made *(Elliston v Glencore Services (UK) Ltd 2016 EWCA Civ 407 CA)*. It is also important to remember that the terms of an employment contract must relate to the employment relationship. Matters which relate to the ownership of a corporate entity, or disputes about shares, are not ordinarily the remit of the Employment Tribunal unless the position is clear that the parties intended such a term to be in an employment contract.

National Minimum Wage and dividends

65. The national minimum wage sets the minimum amount that a worker or employee can be paid for the work they do for an employer, and the regime is governed by

the *National Minimum Wage Act 1998* and the *National Minimum Wage Regulations 2015 SI 2015/621*.

66. The relevant rate from June 2019 to April 2020 for each claimant was £8.21 per hour. The relevant rate from April 2020 to 15 February 2021 was £8.72 per hour.

67. There are rules about what counts towards the national minimum wage. Central to the provisions are that the payments which are caught as part of the national minimum wage are directly related to the work done in the course of the employment. Payment of share related dividends are not explicitly included or excluded by the Regulations. *Regulation 10* covers payments and benefits which do not form part of a worker's remuneration in the context of national minimum wage. *Regulation 10(k)* hives out

> *"payments paid by the employer to the worker attributable to a particular aspect of the working arrangements or to working or personal circumstances that are not consolidated into the worker's standard pay unless the payments are attributable to teg performance of the worker in carrying out the work"*.

68. It is well understood law that the right to receive a dividend stands independently of wages and pay. A individual does not need to do work at all, or to a certain standard, to receive a dividend when dividends are paid, so long as they hold shares which are paid the dividend. HMRC guidance appears to reinforce this point. HMRC Guidance NMWM06240 states –

> *"Shareholders can receive payment from a company via the payment of a share dividend. Such a payment is not paid in respect of any work undertaken by the individual in the capacity of a worker. Therefore, a payment by way of a share dividend does not count towards the payment of the National Minimum Wage even if the shareholder is also a worker of the company in which he is a shareholder".*

69. Consequently, it seems clear that, unless the dividends can be withheld through poor performance, there is no way that dividend payments can be counted as remuneration for the purposes of the national minimum wage.

Unlawful deduction from wages

70. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction (*section 13(3)*). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*.

71. In *Hussman Manufacturing Ltd v Weir [1998] IRLR 288 EAT*, Mr Weir brought a claim alleging unlawful deduction when his shifts were altered lawfully (though under protest), which led to a reduction in his earnings because he was moved to

day shifts which did not carry the premium he used to earn. The EAT held that the fact that a lawful change or circumstance might have a negative impact on the economic situation of the employee affected does not mean that there has been an unlawful deduction from wages. The wages 'properly payable' to Mr Weir on his new shift pattern were the same as the others on his pattern; he was not entitled to keep his shift premium once he was not working shifts which attracted a premium.

72. Where an employee who offers services in line with their contract is not allowed to work and is not paid, then they will suffer an unlawful deduction from wages (*Beveridge v KLM UK Ltd [2000] IRLR 765)*. Tribunals are able to consider that a breach of contract claim which results in reduced pay can be treated as if a claim for unlawful deduction from wages (*Capek v Lincolnshire County Council [2000] IRLR 590*). This means that, in practice, where an employee is available and willing to work in the time that the employer is obligated to give work, then the employee ought to get paid whether they work or not (such wages being properly payable).

Rolled over holiday pay

73. In *Kreuziger v Berlin ECJ (C-619/16) [2016]*, the ECJ held that workers should be entitled to be paid accrued holiday, rolled forward over subsequent holiday years, where the employer does not take adequate steps to make the workers aware that they would lose their holiday if they do not take them. In *Kreuziger*, the Court outlined that it is for the employer to show that it had adequately informed of the need to 'use or lose' the holiday, and also provide the opportunity to take that leave.

Failure to provide written particulars

74. *Section 1 Employment Rights Act 1996* provides that employees must be given written particulars of their employment. *Section 38 Employment Act 2002* requires the Employment Tribunal to give an award for failure to provide written particulars where (1) proceedings have been issued and there are still no written particulars, (2) where the claimant(s) is/are successful in at least one of their claims, and (3) there are no compelling reasons not to give an award. The award is either two or four weeks' pay, depending on what is considered to be just an equitable in the circumstances.

Discussion and conclusions

Were the claimants workers of the respondent between 5 June 2019 and 3 July 2019?

75. The respondent submits that the claimants were doing work relating only to the setting up of Roofing during this time period, and that they had no contract in place with the respondent. This submission does not survive the factual findings that the claimants were both working on respondent contracts during this period. I am satisfied that the claimants worked for the respondent during this period as a consequence of this factual finding.

76. I accept that the way in which the claimants came to work directly on respondent projects may have been informal in nature. I accept that the original intention was

to set up Roofing, but that this then fell by the wayside once work was not being generated through it. At some point, in my view prior to 5 June 2019, the claimants began working on the respondent's projects. In my judgment, Mr Bates was unable to work on his own account from 15 April 2019, when his van was given over to the JMH businesses (and was used for the respondent's work in the absence of Roofing). Similarly, Miss Kilday was clearly sending respondent e-mails, from an address with a restricted authorised user list, from as early as 18 April 2019. I have rejected the contention that Miss Kilday was doing such work at Mr Bates' instruction.

77. Each of the claimants would need to know about commercial matters relating to the respondent in order to do the roles they did prior to 3 July 2019. Both would need to be acting with the authority of the respondent, also. In my view, the respondent's explanation in evidence that these tasks were being done voluntarily does not hold water. I find that there was an agreement in place for the claimants to do these tasks, Mr Bates full time and Miss Kilday at 50% FTE. It was not open to the claimants to freely substitute the work with another person. Mr Bates was integrated into the respondent's activities through the project work and was authorised himself to do the work. Miss Kilday could not freely assign someone else access to the respondent's office and systems. I do not consider that either claimant was offering services to the respondent as if it were a client or customer. I have accepted that neither claimant offered services anyone else in this line of business. Further, the discussions at this time centred around a joint venture and working closely together, not a model where the claimants contract in their services as self-employed individuals.

78. Consequently, I find that both claimants were workers between 5 June 2019 and 3 July 2019. They were entitled to be paid for the work during that time, but whether they are awarded pay for that time period depends on whether I consider that each suffered an unbroken chain of deductions from 5 June 2019 to three months prior to the presentation of their claim form.

The terms of the employment contracts

79. I have found as a fact that the claimants were working full time from 1 July 2019, and so I consider that these are the hours worked under the employment contracts from the point at which the parties agree the claimants were employees. The remuneration terms were not simple, but the agreement was as outlined above. The claimants were to be paid around £12,500 per annum through PAYE and then receive an additional £250 per week in dividends. Miss Kilday has not claimed for the missing dividend payments and no application to amend the pleading was granted.

80. I have no difficulty in accepting that the agreement between Mr Bates and the respondent in relation to his employment contained the term that he would be paid £250 per week in dividends, subject to the usual company law stipulations about dividends being able to be properly paid. This part of Mr Bates' payment terms is not disputed, is accepted by the respondent, and further explained by the respondent's accountants. This means that a failure to pay those dividends, where properly payable, whilst the employment contract is in force, is a breach of that contract. The employment relationship has ended, and so I have jurisdiction to

make an award for breach of contract. The claimant was not paid dividends for the period 1 January to 15 February 2021. The respondent was contractually obliged to pay him those amounts, and so I award Mr Bates a payment equivalent to six weeks of dividend payments (£1,500).

81. Regarding Mr Bates' claim for 25% share in the profits of the respondent, it is clear that there is a dispute about shares and ownership. The question I have to answer, though, is whether there are terms which might form part of the employment contract. Mr Bates' case is that he was contractually entitled to a 25% share of the profits. That phrase about 'profit share' does not appear in any of the correspondence from the time. Mr Bates' focus is very much on recovering payments for Oakvalley. Throughout, including in the e-mail from 11 December 2020, Mr Bates is focusing on his 'ownership' of the respondent. It is not pleaded that the ownership of shares was part of the employment contract. These points, though similar, are essentially different. Perhaps there was a contractual agreement relating to the shareholding which would bring profit share and dividends. But that would be a commercial arrangement outside of the employment contract and there is no jurisdiction for the Employment Tribunal to award such a claim. In my judgment, do not consider I can find that Mr Bates' *employment contract* had a term which conferred a right to a *profit share*. The right he may have had stems from an agreement about *ownership*, not his *employment*. Consequentially, I can make no award under this head of claim.

Unlawful deductions and National Minimum Wage

82. The respondent's submission on this point is that the dividend element of their pay was an agreed part of their remuneration package, structured with the claimants understanding and consent, which means I should consider that they were at all times paid above the minimum wage level. I have also reviewed a letter from APC Accountants which informs the tribunal that it is common for small businesses to remunerate shareholders through the payment of a salary up to the personal allowance, and then top up with dividends. Unfortunately for that submission, the legislation and rules relating to national minimum wage outlined above do not leave open an exception for the employee agreeing to receive less than the national minimum wage.

83. Further, dividend payments do not arise from the work completed by an employee. They arise from a share in the ownership of the business and HMRC explicitly excludes dividend payments from national minimum wage calculations. Even dividend only shares bring rights to a dividend when a dividend is paid to that class of share, which on its face is not at all related to any work being done. There is no suggestion that the payment of dividends to the claimants was bonus related or would be affected in any way by their performance. Consequently, I do not consider that the dividend payments made to the claimants are 'wages' as is defined by any of the applicable legislation.

84. It follows that the respondent has failed to pay the claimants the national minimum wage for all of their employment, where wages were properly payable.

What payments were due to the claimants from 1 January 2021 to 15 February 2021?

85. During the hearing, the respondent produced evidence indicating that Mr Bates had set up and become involved with another business prior to his dismissal which might have competed with the respondent. It was said that this indicated that Mr Bates considered he had left the respondent and so he should not be entitled to be paid wages for the period that he was not attending the office. I do not consider this point to be persuasive. There was not written terms of Mr Bates' employment and so he was not subject to any clauses which would stop him from doing as it appears he has done. It is quite possible for an individual to have, in effect, two jobs even where one of them is full time. Mr Bates' explanation, which is that he was not being paid at this time and he needed to earn to work, makes sense to me. I consider that, if the respondent was paying the claimants their wages, it is unlikely that Mr Bates would have engaged with any new start-up venture.

86. The claimants were dismissed for absence without leave said to begin on 16 November 2020. In my judgment, this is an incorrect conclusion drawn from the facts of the case. The claimants were not bound to work on site at the respondent. The respondent sought to argue that its policies and procedures required on site work, but produced no evidence that that policy was binding on the claimants. In any event, the claimants were well able to work from home during the lockdown and the respondent was aware of this. The claimants were working from 23 November 2020 through to 22 December 2020, and were paid for that work. It does not matter if that work was sufficient hours to occupy them full time because, applying ***Beveridge***, the claimants are entitled to be paid according to their contract if they are ready and available to work – which I consider that they were.

87. The parties agree that the claimants were not sent project work following Christmas. There is no evidence that the claimants were asked to attend the respondent site after the Christmas break prior to the appointment of Croner. The claimants had shown that they were willing and able to work, and did work when asked to, but the respondent failed in its obligation to provide that work. When the claimants were instructed to engage with the Croner process to investigate their grievances, they did so. I am not clear why the respondent did not consider that the time taken to engage with a work grievance process was 'work time', but in my judgment it plainly was. The claimants did all that was asked of them during the period following Christmas.

88. The claimants returned to the site on the morning of 15 February 2021, as they were instructed to do. This is the only time in all of the evidence that the claimants were instructed to attend the respondent's site after the meeting of 16 November 2020, and they did so notwithstanding their disagreement with the grievance process outcome. They were, in any event, dismissed despite complying with this instruction.

89. In conclusion, the claimants were available to work their usual hours throughout up until their dismissal on 15 February 2021. Consequently, I consider that wages for the period of January and half of February were properly payable to them. The respondent erred in not providing the work they were obliged to provide. It follows that any failure to pay the claimants is an unlawful deduction from wages, and they are entitled to be paid for that period.

90. This finding also means that the chain of unlawful deductions running back to 5 June 2019 is unbroken, and so the claimants are entitled to be paid for all of the deductions outlined above.

Holiday pay

91. I have found that the claimants did not take their holiday in each year as claimed. In cross examination, Mr Hill confirmed that he did not publicise a 'use it or lose it' policy and did not explicitly invite the claimants to take any unused holiday, nor would he usually do so. In those circumstances, I consider that the respondent did not publicise that the claimants cannot carry forward holiday. There is no written contract and so there is no term highlighting an inability to carry over holiday.

92. Consequently, I find that the claimants are owed the holiday pay that they claim.

No written particulars

93. The respondent accepts that it provided no written particulars of employment to the claimants in contravention of *s1 Employment Rights Act 1996*. The claimants have been successful in at least one of their claims, and so I have no discretion but to make an award under *s38 Employment Act 2002.* I consider that much of the balance of this claim would have been solved if clear written particulars of employment had been provided. Then, the parties would have been clear about the basis of remuneration, holiday, and requirements in respect of places of work, amount of work, and the application of policies and procedures. For that reason, I consider that it is just and equitable to award the higher amount of four weeks' pay to each claimant, in order that the respondent can appreciate the importance of giving its employees written employment contracts as soon as the employment begins.

Disposal

94. The claimants have succeeded in their claims for unlawful deduction from wages relating to (1) the time prior to their employment, (2) the shortfall in their pay under the national minimum wage, and (3) the periods in January 2021 and February 2021 where pay was deducted. They have also succeeded in respect of their claims for holiday pay. Mr Bates has succeeded in his claim that he was entitled to £250 dividend payments under his employment contract. He not succeeded in his claim that the payment of dividends or a share of the profits formed part of his employment contract. This is a matter beyond the remit of the Employment Tribunal and the claimants' recourse for those claims lies in the County Court, along with any outstanding claim relating to Oakvalley.

95. The national minimum wage applies for all of the deductions and calculation of weekly pay, and the awards given should reflect that.

Final point

96. I must conclude with an apology for the delay to the promulgation of this judgment and reasons. The Regional Employment Judge and the President of the Employment Tribunals (England and Wales) are aware of the reasons for the

delay. In short, as the parties were informed, I have been dealing with some personal matters which had an impact upon me. I am sorry to the parties for the length of time they have been waiting for this document.

Employment Judge Fredericks

26 January 2023

Sent to the parties on:

30 January 2023