EMPLOYMENT TRIBUNALS

Claimant: Nathan Baird

Respondent: Latcham Dowling

Heard at: **Watford Employment Tribunal by CVP**

On: **21 April 2023**

Before: **Employment Judge Annand**

Representation

Claimant: Mr Baird
Respondent: Mr Latcham

RESERVED JUDGMENT

1. The Claimant's claim for unauthorised deduction from wages, in respect of his entitlement to be paid National Minimum Wage, is well-founded. The Respondent is ordered to pay the Claimant the gross sum of £749.26.

2. The Claimant's claim for holiday pay under the Working Time Regulations is well-founded. The Respondent is ordered to pay the Claimant the gross sum of £49.73.

3. The Claimant's claim for breach of contract, regarding commission payments for sales he oversaw whilst employed, is well-founded. The Respondent is ordered to pay the Claimant the gross sum of £433.

4. The Claimant's claim for breach of contract, regarding his notice pay, is well-founded. The Respondent is ordered to pay the Claimant the gross sum of £426.87.

5. The above payments (which come to a total of £1,658.86) have been calculated on a gross basis, but the Respondent may make any appropriate deductions for tax and national insurance, if required, before paying the net amount to the Claimant.

REASONS

Introduction

1. On 16 May 2022, the Claimant started working for the Respondent as a Sales Negotiator. The Respondent is an Estate Agents based in St Neots. The Claimant's last day of employment was 1 August 2022.

2. By Claim form presented on 4 October 2022, the Claimant complains about four matters. Firstly, that he was not paid the National Minimum Wage over the 11 weeks and 1 day that he worked for the Respondent. Secondly, his holiday pay has been incorrectly calculated. Thirdly, that he is owed commission for the sales he oversaw while he was employed by the Respondent. Fourthly, that he is owed notice pay.

The hearing

3. I heard the Claimant's claims by CVP on 21 April 2023. By the time the hearing started, I had not been provided with any paperwork from the parties. I asked the Claimant and Mr Latcham for the Respondent to re-send any documents they had previously sent to the Tribunal. We took a short break, and the parties did this.

4. During the break, I was provided with a pdf containing 29 pages from the Respondent. I also received a witness statement from Mr Joe Willis on behalf of the Respondent, although Mr Latcham made it clear it was not intended that Mr Willis would be called to give evidence. I was provided with three emails from the Claimant, which contained a number of screenshots and three Word documents, one of which was a witness statement from the Claimant's mother, although it was also not intended that she would be called to give evidence. The Claimant had not provided a witness statement for himself but had written a letter to the Tribunal. It was agreed that this letter and the contents of the Claimant's ET1 Claim form would stand as his witness statement.

5. We took a further short break so that I was able to read the documents provided and to allow Mr Latcham an opportunity to consider what questions, if any, he wished to ask the Claimant when he gave evidence.

6. Before we heard the Claimant's evidence, we had a discussion about the Claimant's claim. I asked the Claimant if he had intended to bring a claim of discrimination on grounds of age as there were references in his Claim form to harassment and being concerned that he had been picked on as the

youngest member of the team. The Claimant clarified that he was not bringing a discrimination claim.

7. After we heard the Claimant's evidence, the parties made closing submissions, and I reserved my judgment.

Findings of fact

8. In April 2022, the Claimant applied for the role of Sales Negotiator with the Respondent estate agents. He had three interviews. On 14 April 2022, he was offered the role in an email sent by the Respondent's James Dowling. The Claimant was not given a formal written contract of employment, but the email contained the details of the offer. The email noted:

   "We are writing to confirm our job offer to you for the Position of Sales Negotiator at Latcham Dowling Ltd.

   Just to confirm the following points for you.

   Salary £18250 per year.
   5% on all personal sales. Paid upon completion.
   Bonus incentives from time to time. To be advised.
   4 weeks holiday per year.
   Hours – Monday to Friday 9am-5.30pm with one hour lunch break
   Saturday 9-1pm.
   Paid the last working Friday of each month.
   6 month probation period.
   Car needs to be insured for work. Certificate needs to be held here in the office."

9. The Claimant accepted the offer and started working for the Respondent. He was 22 years old at the time of his employment. The Claimant's evidence was that during one of the interviews, he was told that to start with he would need to work every Saturday morning but that after a few weeks, he would be able to work one in every two Saturday mornings.

10. The Claimant claimed that when he started working for the Respondent, he was unable to take an hour for his lunch break as he was expected to be available to take calls. He said he worked a considerable amount of overtime in that he worked later than 5.30pm on Monday to Friday when he was required to show interested buyers the properties that they were marketing. He said this happened frequently as potential buyers would often be at work during the day. He said he also often worked beyond 1pm on a Saturday and had worked on some Sundays. I accepted the Claimant's evidence that he was unable to take an hour off for a lunch break and that he worked a considerable amount of overtime after 5.30pm on Monday to Friday and that

he sometimes worked after 1pm on a Saturday as well. These points were not disputed by the Respondent.

11. The Respondent accepted that the Claimant had worked on three Sundays throughout his employment, but the Respondent said in the ET3 Response form that on three Saturdays the Claimant did not have any appointments and so had not been required to come into the office on those days. The Claimant's evidence was that calls to the office phone were re-directed to his mobile phone and so even though he had not gone into the office on those Saturdays he had been working from home, receiving calls, and answering emails. He also said that on one of those Saturday mornings he had been distributing leaflets for the Respondent. I accepted the Claimant's evidence that in respect of those three Saturdays when he had not been required to attend the office he had still been working for the Respondent, either from home or distributing leaflets.

12. Despite the Claimant setting out that he had worked a considerable amount of overtime, he explained that he was not claiming in the Employment Tribunal for that overtime as he had not kept a record of the additional hours he had worked. Instead, the Claimant was claiming that he had not been paid the National Minimum Wage for the hours he had been required to work under the terms of his agreement with the Respondent. In other words, Monday to Friday 9am to 5.30pm and Saturday 9-1pm, so 8.5 hours per day for 5 days on Monday to Friday, plus 4 hours for the work on a Saturday, which came to a total of 46.5 hours per week.

13. The Respondent's position is that the Claimant's lunch hour was not paid, and so the agreement between the parties was that the Claimant would work 41.5 hours per week.

14. Neither party had a copy of the Claimant's payslips or the details of the Claimant's monthly gross or net income. However, the parties were agreed that the Claimant had been paid a gross amount of £4,024.34 in total during his employment the Respondent.

15. The Claimant and Mr Latcham both agreed that at the start of his employment the Claimant was told that he could earn commission payments. He was told that for each sale that he oversaw he would be paid 5% of the 1% that the Respondent made on each sale. When a property was sold by the Respondent, the sellers would pay the Respondent 1% of the price agreed for the property. The salesperson who oversaw the sale would be paid 5% of the 1% the Respondent received. The payment would be made to the salesperson in the month after the sale had completed and the Respondent had received its 1% payment. The Claimant's evidence was that he was not told that if he left the Respondent's employment before the sale had

completed, and the money had been received by the Respondent, that he would not receive the payment.

16. The parties were agreed that while the Claimant worked for the Respondent, he oversaw the sale of 7 properties. None of those sales completed before the Claimant left the Respondent's employment on 1 August 2022. After the Claimant left, three of those properties completed, and the parties agreed that for those three properties the commission payments (5% of the 1%) were £70, £220, and £143 respectively. During the hearing, the Claimant confirmed that he accepted the Respondent's evidence that the other four sales had fallen through and had not completed.

17. In July 2022, the Claimant had three days of absence from work due to a migraine. In the Respondent's ET3 Response form the Respondent wrote, "Mr Baird was off ill on the 25th, 26th and 27th of July. He was paid in full for these days."

18. The parties were agreed that throughout the Claimant's employment he did not take any holiday. The Claimant said he had requested leave, but it had been refused.

19. On 1 August 2022, at 8.10am, the Claimant sent an email of resignation to James Dowling and Gary Latcham. He noted in his email that he had woken up to a job offer which he had accepted. He noted, "I would like to thank you for the opportunity you have given me, however I am not happy working every Saturday and 6 days a week every week, hence why I have taken another position. As I have only 1 viewing booked in this week, would I be able to leave with immediate effect?". At 8.15am, James Dowling responded by email stating, "Unfortunately Joe is off and Gary is also off today and I would ask you serve your one weeks notice period meaning your last working day with Latcham Dowling will be Saturday the 6th of August." The Claimant responded by email, "No problem, I will be in as soon as I can today. My final working day will be Friday, we did talk about 1 in 2 Saturdays and I have worked every weekend."

20. In his evidence, the Claimant said he attended work on 1 August 2022 and worked on his own in the office. He said at the end of the day he received a call from James Dowling saying that the Claimant did not need to come in again and that they could manage without him for the rest of the week.

21. In the Respondent's ET3 Response form, the Respondent noted, "It was clear by Mr Baird's attitude during the course of Monday the 1/8/22 he no longer wanted to be at work, I asked if he would prefer to go today to which he replied yes. he would like to leave immediately and understood that he would only be paid up until the close of business that and that he did not want to work his notice period." When asked about this at the hearing, the Claimant said his

attitude had not changed and he had not seen any of his colleagues that day so they would not have been able to witness a change in his attitude. He said he had received a call from a potential buyer who wanted to view a property that day, and although he could have explained there was no one available to carry out the viewing, he had agreed to do it himself that day. The Claimant said this demonstrated his attitude had not changed and that he continued to behave professionally. He said when he spoke to James Dowling at the end of the day by telephone he was not asked if he wanted to leave that day and he was not told that he would not be paid for the remainder of the week. The Claimant's evidence was that he was simply told they would be able to cope without him and that he did not need to return. There was no discussion about his pay. He said they had not discussed a notice period in the interviews or throughout his employment. I accepted the Claimant's evidence regarding the events of his final day of work for the Respondent.

22. After the Claimant left the Respondent's employment, he sent an email seeking payment for his petrol expenses. In an email sent in response, Gary Latcham stated, "Sadly though, none of the sales listed have completed and/or monies received, which is the basis on which commission is paid, therefore as you won't be employed by Latcham Dowling at the time of when they do hopefully complete/monies received, there is no commission owed."

23. On 29 August 2022, the Claimant contacted ACAS for early conciliation purposes. The early conciliation certificate was issued on 3 October 2022. As noted above, the Claimant submitted his Claim form on 4 October 2022.

The relevant law

Unauthorised deduction from wages

24. The statutory prohibition on deductions from wages is set out in section 13(1) of the Employment Rights Act 1996 (ERA 1996), which states that: 'An employer shall not make a deduction from wages of a worker employed by him.' However, it then clarifies that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — section 13(1)(a) and (b).

25. By virtue of sections 17 and 18 of the National Minimum Wage Act 1998 (NMWA 1998), a worker who has not been paid the National Minimum Wage (NMW) is deemed to be contractually entitled to the difference between what he or she is paid and the NMW. A worker can therefore bring a claim for unauthorised deduction from wages under the protection of wages provisions in order to enforce the right to the NMW.

26. The NMW for 22 year olds from April 2022 to April 2023 was £9.18 per hour.

27. In order to determine whether an individual is being paid the NMW, it is necessary to ascertain his or her hourly rate of pay. As the rate to be considered is the average hourly rate, there are two figures that need to be established:
    - the total pay received in the relevant pay reference period, and
    - the total number of hours worked during that period.

28. Regulation 6 of the National Minimum Wage Regulations 2015 SI 2015/621 (the NMW Regulations) states that the pay reference period is a month or, if the worker is paid by reference to a period shorter than a month, that shorter period.

29. Regulation 9(1)(b) of the NMW Regulations provides that any payments that are earned during one pay reference period (period A) but are received in the following period (period B) are to be allocated to the period in which they are earned (i.e. period A). The Department for Business, Energy and Industrial Strategy guide, 'Calculating the Minimum Wage', stresses that a payment delayed by more than one pay reference period cannot usually be referred back to the period in which it was earned but counts in the period in which it is paid. There is an exception for workers who are required to keep records of their hours worked, but that is not relevant to the facts of this case.

30. After determining the relevant pay reference period, the next step is to calculate national NMW pay, i.e. the pay received by the worker that goes towards discharging the employer's liability to pay the NMW. Gross pay (the pay the worker receives from the employer before deductions for tax and national insurance) includes basic salary and incentive payments, including commission payments and bonuses.

31. Regulation 7 of the NMW Regulations provides that the hourly rate paid to a worker in a 'pay reference period' is determined when the renumeration in the pay reference period, determined in accordance with Part 4 of the Regulations, is divided by the hours of work in the pay reference period, as determined in accordance with Part 5 of the Regulations. The result is the worker's hourly rate of pay that should be compared with the applicable NMW rate. Broadly speaking, to calculate the worker's average hourly rate it is necessary to divide the total qualifying remuneration received in a given pay reference period by the total number of qualifying hours worked in that period.

32. Under the NMW Regulations the hours in respect of which a worker is entitled to be paid the NMW depend upon the type of work done. The Regulations identify four categories of work for these purposes, one of which is 'salaried hours work'. Under the amended version of Regulation 21, salaried hours work is work which is done under a worker's contract and which meets the following conditions:

- the worker is entitled under the contract to be paid an annual salary, or an annual salary and one or both of a 'performance bonus' and a 'salary premium',
- the worker is contractually entitled to that payment in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with the contract (the 'basic hours'),
- the worker is not contractually entitled to payment in respect of the basic hours other than the payments mentioned above, and
- the worker is contractually entitled to be paid, where practicable and regardless of the number of hours actually worked during the payment period, in instalments which are equal and occur not more often than weekly and not less often than monthly, or occur monthly and vary but have the result that the worker is entitled to be paid an equal amount in each quarter.

33. Regulations 21 to 29 apply to salaried hours work. The starting point is the 'basic hours' worked. In order to calculate whether the national minimum wage has been paid it is necessary to identify whether, in any pay reference period, the basic hours have been exceeded. Where the basic annual hours have been exceeded, but the worker is not entitled to be paid for those additional hours, and where no such payment was made, then the provisions of Regulations 23–28 come into play to ensure that the minimum wage is paid in respect of both the basic and the additional hours.

34. Under Regulation 23(1) the hours a worker is absent from work are to be subtracted from the hours of salaried hours work in a pay reference period if all of the following conditions are met (a) the employer is entitled under the worker's contract to reduce the annual salary due to the absence, and (b) the employer pays the worker less than the normal proportion of annual salary in the pay reference period as a result of the absence. This means that if a salaried worker is paid their normal salary while they are absent from work, (for example for sickness absence), the time of the absence counts towards the worker's time worked for NMW purposes.

35. Under Regulation 25(2), the "basic hours" in the calculation year are the basic hours ascertained in accordance with the contract at the start of the calculation year, unless there is a variation to the basic hours which takes effect in the calculation year.

36. To establish whether basic hours have been exceeded, there are three stages to the calculation.

    1) The starting point is to ascertain the relevant calculation year for the worker. Regulation 24(3)(b) states: "For a worker whose annual salary is payable monthly and who commenced the employment after 31st March 1999, then for so long as the worker continues in that employment… (b) if

the worker commenced employment on any other day of a month, the calculation year is (i) the period beginning with that day and ending with the day before the first anniversary of the first day of the next month;"

2) Once the calculation year has been ascertained, the next step is to calculate the basic hours for the year. This is done by reference to the worker's contract.

3) The next step is to ascertain whether those basic hours have been exceeded. This involves adding the number of basic hours actually worked in a calculation year with any other hours which fall within the categories set out in Regulation 26 (b)–(d). Under these provisions, some hours count even when the worker is absent (e.g., where he is off sick but paid in full), and hours which do not form part of basic hours, but which are unpaid (e.g., unpaid overtime) also count.

37. Regulation 29 relates to hours of salaried hours work if the employment terminates before the end of the calculation year. If a salaried hours worker leaves before the end of the year, and they have worked more hours than the basic minimum hours for the part of the year they were employed, they need to be paid the minimum wage for the excess hours. The excess hours are to be treated as having been worked in the worker's final pay reference period and should be paid for when the worker is paid for that period.

38. Section 28 of the NMWA 1998 reverses the burden of proof in NMW claims with the effect that Employment Tribunals must presume that a worker has been paid at a rate less than the NMW unless the employer can show otherwise.

Contractual agreement between the parties

39. The relationship between employer and employee is governed at common law by a contract of employment. If an offer of a job is made in writing, which sets out the main terms and conditions on which the job is being offered, then once an employee has accepted an offer unconditionally, the contract is binding.

40. In *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)* [1998] 1 WLR 896, HL, Lord Hoffmann emphasised that a contract should be interpreted not according to the subjective view of either party but in line with the meaning it would convey to "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

41. In *Arnold v Britton and ors* [2015] AC 1619, SC, Lord Neuberger summarised the general principles that apply to the interpretation of express contractual

terms: “When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean” to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contractual agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.”

42. Where a contract of employment is in short form and contains only the bare bones of the agreement, it may fall to an Employment Tribunal to flesh out the details based on what they determine the parties’ intentions to have been when entering the contract (*Carmichael and anor v National Power plc* [1999] ICR 1226, HL). However, the Tribunal’s proper role is confined to that of interpreter, and it is not entitled to draw on surrounding evidence to create the bargain between the parties. In the absence of an express term, it is not, for example, entitled to imply a term into a contract based on an assessment of what it thinks would be a fair bargain (*Vision Events (UK) Ltd (formerly known as Sound and Vision AV Ltd) v Paterson* EATS 0015/13).

43. In *Brand v Compro Computer Services Ltd* [2005] IRLR 196, CA, the Court of Appeal held that the claimant, who had been summarily dismissed, remained contractually entitled to the payment of commission he had earned prior to the termination of his employment, notwithstanding a contractual clause that stated that he would “remain in full-time employment with [the employer] at all times in order to qualify for the commission payments”. In the absence of clear words making it plain that any accrued entitlement to commission was dependent on the claimant being in employment at the date on which the commission would be payable, it was not possible to accept that the parties had entered into a one-sided bargain that would have enabled the employer to avoid paying the employee commission that he had in fact earned merely by dismissing him before the date on which the commission fell to be paid.

Holiday entitlement and pay

44. Under the Working Time Regulations 1998 SI 1998/1833 (‘the Working Time Regulations’), workers are entitled to a minimum of 5.6 weeks of paid annual leave (consisting of four weeks’ basic leave and 1.6 weeks’ additional leave). The entitlement to 5.6 weeks’ leave is subject to a cap of 28 days.

45. The Working Time Regulations 1998 provide that a worker has the right to receive a payment in lieu of unused annual leave on the termination of his or her employment (Regulation 14). The Regulations approach the calculation of holiday pay by importing the concept of a 'week's pay' from sections 221-224 of ERA 1996.

46. The payment to be made in lieu of accrued unused holiday is the amount specified in a 'relevant agreement' covering this situation, or if there is no relevant agreement, the amount of holiday pay that would have been paid to the worker if they had already taken their accrued unused holiday entitlement as holiday, calculated according to a set formula: (A x B)–C, where:
    - A is the period of leave to which the worker is entitled under Regulations 13 and 13A
    - B is the proportion of the worker's leave year which expired before the termination date (expressed as a fraction), and
    - C is the period of leave taken by the worker between the start of the leave year and the termination date.

Notice period and pay

47. Section 86 of ERA 1996 sets out minimum periods of notice required to terminate a contract of employment. Where notice is given by an employee who has been continuously employed for one month or more, the notice required is one week. Where notice is given by the employer, the notice required is one week for employees who have been continuously employed for at least one month but less than two years.

48. If the employer cuts short an employee's notice period, this will convert the resignation into a dismissal unless the contract specifically allows the employer to do this (*Marshall (Cambridge) Ltd v Hamblin* [1994] ICR 362, EAT).

49. Section 86 does not affect the right of either party to waive their notice rights or the right of the employee to accept pay in lieu of notice (section 86(3)). However, an employee who waives the right to notice under this provision also waives the right to a payment in lieu of notice (*Trotter v Forth Ports Authority* [1991] IRLR 419, Ct Sess (Outer House)). According to Lord Coulsfield, when the right to notice has been waived, the termination of the contract of employment without notice does not constitute a breach of contract and therefore no damages are due to the employee. However, any purported waiver by the employee must be clear and certain and any ambiguity is likely to be construed against the employer who is seeking to rely on it (*Skilton v T and K Home Improvements Ltd* [2000] ICR 1162, CA).

Conclusions

(1) Unauthorised deduction from wages claim: National Minimum Wage

50. The Claimant calculated that his agreed working hours were Monday to Friday 9-5.30pm and Saturday 9-1pm, which amounts to 46.5 hours per week (5 x 8.5 hours on Monday to Friday, plus 4 hours on a Saturday). He therefore calculated that he had worked 520 hours over the period he was employed by the Respondent. There are 11 weeks and 1 day between 16 May 2022 and 1 August 2022. The Claimant's 520 hours was calculated by multiplying 46.5 hours per week by 11 weeks between 16 May 2022 and 31 July 2022 (511.5 hours) plus 8.5 hours for working on Monday 1 August 2022. The parties are agreed the Claimant was paid a total gross amount of £4,024.34 over the period of his employment. £4,024.34 divided by 520 hours is £7.77 per hour, which is less than the NMW rate of £9.18 for 22 year olds in 2022. 520 hours multiplied by £9.18 is £4,773.60. The difference between what the Claimant was paid, £4,024.34, and what he says he was owed, £4,773.60, is £749.26, which is the amount the Claimant is claiming.

51. The Respondent's position is that the agreement between the parties was the Claimant would work Monday to Friday 9-5.30pm, but with an hour for lunch that was unpaid, and Saturday 9-1pm. This amounted to 41.5 hours of work per week.

52. I note that in the email sent to the Claimant offering him the role, the annual salary specified was £18,250. Divided by 41.5 hours per week, over 52 weeks of the year, comes to an hourly rate of £8.45, which is again less than NMW rate for the Claimant at that time.

53. I was provided with a document by the Respondent that set out how the Claimant's holiday pay entitlement had been calculated. The document suggested that the Claimant had worked a total of 431.6 hours over the period of his employment. When multiplied by £9.18, this comes to £3,962.08. Therefore, the Respondent's calculation shows the Claimant was paid more than minimum wage when he was paid £4,024.34. There are however some problems with the Respondent's calculation. Firstly, when calculating the hours worked, 41.5 hours per week has been multiplied by 11 weeks, which comes to 456.50 hours. However, there were no hours added for the work done on Monday 1 August 2022. Secondly, the person who has carried out the calculation has then deducted 24.9 hours for the three days the Claimant was off work sick on 25, 26 and 27 July 2022. This is based on a calculation which divided the 41.5 hours worked per week by 5 and then multiplied it by 3. However, the Claimant did not work 41.5 hours over 5 days because he worked Monday to Friday but also on a Saturday morning. The days he was absent fell on a Monday, Tuesday, and Wednesday, which on the Respondent's account (i.e., 7.5 hours per day) amounts to 22.5 hours.

However, the Respondent noted in the ET3 Response form that the Claimant was paid for his three days of sick pay in July 2022. This is consistent with the Claimant's evidence in the hearing that he was paid the same amount each month. In other words, no deduction was made for his three days of absence in July when he received his July salary payment.

54. In the Claimant's case, I consider the provisions of the NMW Regulations which apply in order to calculate the hours worked by the Claimant, are the Regulations which relate to 'salaried hours work'. Under the agreement between the parties, the Claimant was entitled to be paid an annual salary of £18,250, in exchange for working a set number of basic hours in a year which could be ascertained from the agreement. While the number of hours the Claimant was required to work annually was not set out in the agreement, it is possible to ascertain that figure because the agreement set out that the Claimant was required to work 9-5.30pm Monday to Friday, with a one hour lunch break, and 9-1pm on Saturdays. Under the terms of the Claimant's contract, he was not entitled to any payment for those basic hours other than his annual salary plus a bonus (which did not in fact materialise). The Claimant was also entitled under his contract to commission payments, but that was not payment "for those basic hours". Finally, the Claimant was entitled to be paid in equal instalments. The offer email said the Claimant would be paid the last working Friday of each month, and the Claimant's evidence was that he was paid the same amount each month.

55. As there was no formal written contract of employment between the parties, the only written evidence of the contract between the Claimant and the Respondent is the job offer email sent to the Claimant on 14 April 2022. In the email, it is noted that the Claimant will be paid a salary of £18,250 per year. In the email, it noted, "Hours – Monday to Friday 9am-5.30pm with one hour lunch break. Saturday 9-1pm." I accept that the natural and ordinary meaning of the language used in the job offer is that the Claimant would only be required to work 41.5 hours per week. The language used suggests the Claimant would not be required to work for one hour each day during the week, as he would be permitted to take a one hour lunch break. I accept therefore that under the Claimant's contract of employment his basic hours were 41.5 hours per week. This amounts to a requirement to work 2,158 hours per year.

56. However, I accept the Claimant's evidence that he was in fact obliged to be available to take calls throughout his lunch breaks. The evidence that the Claimant was not able to take a one hour lunch break each day was not disputed by the Respondent. I accepted, as a result, the Claimant worked excess hours such that he did work a minimum of 46.5 hours per week throughout his employment.

57. As the Claimant was paid for his three days of sickness absence in July 2022, then under the NMW Regulations, the Respondent cannot deduct the hours he was absent from work on those three days when working out how many hours the Claimant worked over the relevant period. As the Claimant was paid for them at the time, then they are counted as hours he worked under his contract.

58. I have not been provided with the Claimant's payslips by the Claimant or the Respondent and therefore I do not know how much the Claimant was paid each month throughout his employment (that being the relevant pay period), and neither party has kept records of the hours the Claimant actually worked. On this basis, I am unable to use the formula provided in the NMW Regulations to carry out an assessment of the hourly rate paid to the Claimant in each pay reference period. However, the evidence presented to me, as summarised above, does suggest that the Claimant was not paid the NMW rate of £9.18 per hour over the period of his employment. By virtue of section 28 of the NMW Act 1998, and the reverse burden of proof in NMW claims, I must presume that a worker has been paid at a rate less than the NMW unless the employer can show otherwise. In this case the Respondent has not shown otherwise and therefore I uphold the Claimant's claim for unauthorised deduction from wages on the basis that he was not paid the NMW of £9.18 per hour over the period of his employment.

59. Below I set out my finding that the Claimant is entitled to a payment of £433 in commission payments. These payments cannot be added to the amount the Respondent paid to the Claimant each month for his salary for the purposes of working out if he was paid the minimum wage. This is because while commission payments can be taken into account when calculating the gross pay paid to the Claimant, this is only where it is paid in the relevant pay period, or the following pay period. In this case, as the Claimant was not paid any commission payments throughout his employment, those payments cannot be added to his income to assess if he was paid the minimum wage during his employment.

60. In terms of calculating what is owed, I accept the Claimant worked at least 46.5 hours per week for 11 weeks and an additional 8.5 hours on Monday 1 August 2022. This amounts to 520 hours. Multiplying 520 hours by £9.18 equals £4,773.60. The Claimant has already been paid £4,024.34, and therefore the Claimant is owed the gross amount of £749.26.

(2) Working Time Regulations claim: Holiday pay

61. The parties agree that the Claimant has received a payment for holiday pay of £415.93. The Claimant says he was owed a total of £567.17, and so having received only £415.93, he is still owed £160.24.

62. The Claimant's holiday pay calculation has been done by working out 12.07% of 520 hours then multiplying it by £9.18, which comes to £567.17.

63. As noted above, the Respondent's calculation was based on the Claimant working 41.5 hours per week for 11 weeks (456.5 hours) and then deducting 24.9 hours for the Claimant's three days of sickness absence, which came to a total of 431.6 hours. The Respondent then calculated 12.07% of 431.6 hours and then multiplied that figure by £9.18, which came to £478.18. Deducted from this amount was the amount the Respondent claimed the Claimant had been paid in excess of the NMW (£62.25) and therefore the total amount paid to the Claimant for holiday pay was £415.93. However, the problems with the Respondent's calculation method have been highlighted above in paragraph 53.

64. As the Claimant worked at least 46.5 hours per week and was entitled to a NMW rate of £9.18, his weekly pay should have been £426.87. £426.87 divided by 5.5 days worked per week equals a daily pay rate of £77.61. The Claimant worked for the Respondent for 78 days, which is 21.36% of the 365 days in a year. 21.36% of the annual entitlement of 28 days of annual leave, comes to 6 days. 6 days at a rate of £77.61 comes to a total holiday pay entitlement of £465.66. As the Claimant has already been paid £415.93 in holiday pay, he is owed £49.73.

(3) Breach of contract: Commission payments

65. The Claimant is claiming commission payments which he says he earned whilst working for the Respondent. The parties are agreed that the Respondent's commission scheme worked so that the salesperson who oversaw the agreement to purchase a property would be paid 5% of the 1% paid to the Respondent by the property sellers on completion. The Respondent claims that the Claimant was not entitled to the commission payments he oversaw because once the sales had been completed, and the Respondent had been paid, he was no longer working for the Respondent. The Claimant says he was never told that to be paid the commission payments he had to still be working for the Respondent. The Respondent's Mr Latcham said in closing submissions that the natural assumption to be made, and the common-sense approach, is that someone needs to still be employed to be paid the commission payments. He noted they did not say the Claimant would not get the commission payments if he left because they had no knowledge he planned to leave at that time. The parties are agreed that the commission payments owed on the properties which have completed are £70, £220, and £143. Together these payments come to £433.

66. I find that it was a term of the Claimant's contract of employment that he would be paid a commission payment of 5% of the 1% paid to the Respondent on completion of a property sale. I do not find that it was a term of the contract

that the Claimant would only be entitled to the commission payment if he were still employed by the Respondent at the time the completion occurred, and the 1% payment was paid to the Respondent. This was not set out in writing and the Claimant was not informed of this orally. I do not accept it was obvious such that the Claimant should have appreciated this without being told.

67. I also take into account the Court of Appeal decision in *Brand v Compro Computer Services Ltd*, where the Court of Appeal held that in the absence of clear words making it plain that any accrued entitlement to commission was dependent on the claimant being in employment at the date on which the commission would be payable, it was not possible to accept that the parties had entered into a one-sided bargain that would have enabled the employer to avoid paying the employee commission that he had in fact earned merely by dismissing him before the date on which the commission fell to be paid. Likewise, in this case, where there was no clear wording setting out that the commission payments would not be payable if the employment terminated, I do not accept that the parties entered into such a one-sided bargain. I therefore uphold the Claimant's claim for breach of contract and find that he is owed a gross amount of £433 by the Respondent.

(4) Breach of contract: Notice pay

68. The final aspect of the Claimant's claims is a claim for breach of contract in respect of the notice pay which he says he is owed.

69. The emails between the Claimant and James Dowling on 1 August 2022, show that the Claimant resigned, and asked to be released immediately. In other words, he asked to be allowed to resign without being required to work his notice period. However, James Dowling refused this offer, and said he required the Claimant to work until the end of the week.

70. As noted above, I have accepted that at the end of the day on 1 August 2022, the Claimant received a call from James Dowling saying that the Claimant did not need to come in again and that they could manage without him for the rest of the week. I accept the Claimant's evidence that there was no discussion about whether the Claimant wanted to be released immediately and knew he would not be paid for the remainder of the week. I accept that this was simply not discussed. I do not therefore accept the Respondent's argument that the Claimant waived his right to notice, and therefore notice pay.

71. Following the case of *Marshall (Cambridge) Ltd v Hamblin*, as the Respondent cut short the Claimant's notice period, this converted the Claimant's resignation into a dismissal. There was no term in the employment contract which specifically allowed the Respondent to do this. As the Claimant was dismissed at the end of the day on 1 August 2022, he is owed one week

of notice pay under section 86 of ERA 1996. As noted above, as the Claimant worked at least 46.5 hours per week and was entitled to minimum wage of £9.18, his weekly pay should have been £426.87. Therefore, the Claimant is owed a gross payment of £426.87.

Summary

72. In total, the Claimant is owed a gross payment of £1,658.86, made up of (1) £749.26 for the Claimant's claim for unauthorised deduction from wages, in respect of his entitlement to be paid National Minimum Wage, (2) £49.73 for holiday pay, (3) £433 for commission payments, and (4) £426.87 for notice pay. The Respondent is ordered to pay the Claimant this sum, although the Respondent may make any appropriate deductions for tax and national insurance, if required, before paying the net amount to the Claimant.

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Employment Judge Annand

Date: 8 May 2023

JUDGMENT SENT TO THE PARTIES ON

17/5/2023

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