EMPLOYMENT TRIBUNALS

Claimant: Steven Beale

Respondent: Stormfront Retail Limited

Heard at: **London South (Ashford)** **On: 20 September 2018**

Before: **Employment Judge John Crosfill**

Representation
Claimant: In person (with assistance)
Respondent: Mr Daniel Evans, a Director

JUDGMENT

The Claimant's claim for unfair dismissal brought Part X of the Employment Rights Act 1996 is well founded.

The Respondent is ordered to pay the Claimant a basic award of **£720.00**

The Respondent is ordered to pay the Claimant a compensatory award of **£6,402.38**

There is no award under Section 38 of the Employment Act 2002

The Claimant's claim breach of contract brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds

The Respondent is ordered to pay the Claimant the sum of £**1,283.34** representing damages for arrears of wages and a further sum of **£25.66** representing a loss of pension contributions on that sum.

The Claimant's claim of wrongful dismissal succeeds but I make no separate award.

There is no uplift under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992

The Tribunal is satisfied that the Recoupment Regulations do not apply to the sums awarded.

REASONS

1. The Respondent is an independent retailer specialising in Apple products. The Claimant started working for the Respondent as a Store Team Member on 25 August 2014. On 22 January 2018, the Claimant resigned. In his resignation letter he (principally) complained of a failure by the Respondent to pay him for the time he says he spent working in the shop both before and after the shop closed. He says that this, together with the failure to acknowledge his right to payment, amount to a serious breach of contract entitling him to treat himself has dismissed. He has brought claims for unfair dismissal, unlawful deduction from wages, wrongful dismissal (a claim for notice pay) and makes an allegation that he was not provided with a statement compliant with section 1 of the Employment Rights Act 1996.

2. The parties had prepared a bundle of documents for use by the Tribunal in the hearing. The bundle did not follow the conventional form but nevertheless included many of the relevant documents and I am grateful to the parties for the effort of putting it together. Each party had prepared written submissions which were included in the bundle. I was provided with witness statements from a number of witnesses in the event only the following witnesses attended to give evidence. These were:

   2.1. Mr Stephen Beale, the Claimant

   2.2. Miss Jasmine Divina Marceau, a former Part Time Sales Advisor and Store Team Member

   2.3. Mr George Samuel Spencer, initially a Store Team Member and latterly a Floor Manager

   2.4. Mr Daniel John Evans, a Director of the Respondent.

3. The evidence of Miss Marceau and Mr Spencer went to the question of whether or not the Claimant had been required to start work and finish work on either side of the ordinary shop opening hours. Mr Evans indicated that he was prepared to accept their account of events and in those circumstances, I took the statements ‘as read’ and treated their evidence as being uncontested. I am grateful to them both for attending tribunal hearing.

4. The Claimant had obtained a number of additional witness statements from other team members whom he had worked alongside. They did not attend to give evidence. I read those statements and give them such weight as is appropriate in circumstances where the Respondent has not had the opportunity to challenge their evidence by cross examination. In fact, the statements did not go far beyond the witness statements of Miss Marceau and Mr Spencer the contents of which were ultimately agreed.

5. At the outset of the hearing I identified that both parties had made reference in both their pleadings and their witness statements to discussions they had had with the conciliation service ACAS. I considered that such discussions were inadmissible and informed the parties that I would have no regard to any evidence concerning their attempts to settle the dispute.

6. In advance of hearing from the witnesses I read all of the witness statements together with such documents as were referred to within them. I then heard from the Claimant and then from Mr Evans. The parties then elaborated on their written submissions. Given the volume of documentary evidence, and in particular the schedules of working hours that I needed to digest in order to decide the claims, I reserved my decision.

Findings of fact - liability

7. Having heard the evidence, I reached the following findings of fact.

8. The Respondent is a retailer of Apple products. The Claimant, who studied at Canterbury University, was employed by the Respondent on 25 August 2014. His position was as a Part Time Sales Advisor. His principle duties were in assisting customers and making sales. He was not initially given a contract of employment but was informed by an offer letter dated 2 August 2014 that he would be paid £6.08 per hour a sum equal to the minimum wage in force in 2011. In addition, he was entitled to share in a commission scheme. The ordinary shop opening hours were set out as 9.00am to 5.30pm Monday to Friday, 9.00am to 6pm on Saturday and 1.30am to 4.30pm on a Sunday. The letter included the following: *"Any additional hours you work which are as a result of extended shop opening hours or agreed out of hours work for stock control etc will be paid".*

9. The offer letter suggested that upon acceptance the Claimant would be given a contract of employment. I am satisfied that he was never issued a contract of employment. There is provision for recording the issue of such documentation on the 'New Starter Form" maintained by the Respondent and, whilst much of the form is complete, that section remains uncompleted.

10. Other than the matters referred to in these proceedings it appears that the Claimant was a valued employee who, having gained considerable experience, was diligent and competent. There were no disciplinary concerns whatsoever and on occasions he would act as the de facto deputy store manager.

11. The calculation of commission is opaque and seems to have varied. In some months substantial sums are earned. In others the commission is clearly calculated in order to lift the hourly rate from the stipulated £6.08 per hour to the prevailing rates of NMW (April 2015 being one example of this).

12. In 2016 the Respondent offered revised terms and conditions to its employees including the Claimant. It referred to this as 'retail 2'. In a letter sent to the Claimant on 8 December 2016 he was informed that:

> *"The Company will no longer pay commission to store staff, and instead will move to a fixed salary structure for permanent full time staff and casual hour contracted staff."*

13. The Claimant was informed that his 'salary' would become £12,480.00 based on an average 30 hour per week 'permanent part time contract'. What this meant in reality was that the hourly rate of pay was increased to £8.00 and the entitlement to commission had been removed.

14. On 5 January 2017 the Claimant signed a contract of employment that reflected the 'Retail 2' terms and conditions offered in the letter dated 8 December 2016.

The terms provided that the Claimant would be paid £12,480 per annum in return for working a 30-hour average week. The contract stipulated that hours worked in excess of the normal hours would be paid at a rate of £8.00 per hour. In addition, the entitlement to paid holiday was set out. The contract specified that the Claimant was entitled to the equivalent of 5.6 weeks paid annual leave. The leave year was 1 October – 30 September.

15. Throughout the Claimant's employment he was paid monthly in arrears. All payslips predating 1 January 2017 show an hourly rate of £6.08 being paid with commission on top. The payslips show that on every payslip the Claimant was paid holiday pay. It seems that the Respondent assumed that this would discharge its obligations under the Working Time Regulations 1998.

16. From 1 January 2017 the payslips show payment calculated as the product of the hours rostered at a rate of £8.00 per hour. No holiday pay was shown separately in any of the months where I have been provided with payslips other than the final payslip where a payment is made of £372.00 said to be 46.50 hours of 'holiday'. It does seem that in 2017 some shifts rostered were in fact taken as holiday.

17. The Claimant says and is supported by his colleagues' witness statements that from the outset of his employment he was instructed to remain in the shop after it had closed in order to carry out tasks such as vacuuming and moping the shop floor, cleaning demonstration screens, emptying bins and recycling cardboard, cashing up the tills and updating the merchandise.

18. The fact that the Claimant was asked to do this work was not disputed although the duration and frequency was. In order to resolve the other claims, I have had to grapple with the information that was provided to me. Other than the oral contentions of the Claimant there were the following sources of evidence.

    18.1. The Claimant relied upon a large number of photographs that he had taken between July 2017 and January 2018 showing that he was present in the store after it closed. He had taken a photograph of the date and time displayed on computers within the store.

    18.2. The Respondent had produced a record of the time that the store alarm was set on each occasion that the Claimant worked a shift.

    18.3. Finally, the Respondent had records of when the Claimant had logged repairs on their computer system.

19. I accept that on the occasions where the Claimant has taken photographs at work he did so to demonstrate that he was still at work and took the photograph shortly before leaving. There are 55 occasions when photographs were taken. The average time shown is 25 minutes after the Claimant's shift was due to end.

20. The Respondent has suggested that where photographs are not available I should assume that the Claimant left on time. The Claimant has said that that is unfair as he would not always take a photograph. I find that it is likely that the Claimant took photographs when he was particularly irritated that he was working late. So whilst these may only be examples of when the Claimant was asked to work beyond the end of his shift they are likely to show some of the worst examples.

21. The Respondent has provided the times that the alarms was set on each day over the Claimant's employment. That includes days upon which the Clamant did not work. The Respondent has provided an analysis of the times that the shop alarm was set. The raw data from the alarm times shows that occasionally the alarm was set some hours after the store was due to close. The Respondent suggests that these are errors and that these events should be disregarded when asking how late the Claimant might have worked. In its analysis it has excluded all occasions where the alarm was set more than 30 minutes after the store was due to close. I see no warrant for that at all. The Respondent has accepted that the photographs provided by the Claimant show him at work. 12 of 55 photographs suggest that the Claimant was working 30 minutes or more after the store closed (by up to 10 minutes).

22. The Claimant has not suggested that he was required to work hours rather than minutes after the store closed. As such I find that the Respondent is justified in asking me to disregard some of the alarm entries but that a cut off of 30 minutes is arbitrary. The Respondents analysis (excluding photographed shifts) was as follows:

    22.1. On the Saturdays when the Claimant worked the alarm was set on average 20 minutes after the end of the shift but when 30 minute plus times are excluded 17 minutes.

    22.2. On the weekdays when the Claimant worked the alarm was set on average 30 minutes after the end of the shift but when 30 minute plus times are excluded 18 minutes.

    22.3. On the Sundays when the Claimant worked the alarm was set on average 29 minutes after the end of the shift but when 30 minute plus times are excluded 16 minutes.

23. Looking at the figures for the weekdays in detail I note that the Respondent has excluded numerous days when the alarm was set between 30 and 40 minutes after the store closed and a number of others just outside that bracket. There are 19 occasions where the alarm was not set until over an hour after the store closing time. These occasions are not likely to have been due to the clearing up work referred to by the Claimant although some particularly around the Christmas period are borderline. An average of the times less than 1 hour is just short of 21 minutes. That reinforces my view that the photographs show a somewhat worse picture than the norm. It does seem that the store was locked up more promptly on Saturdays but less so on Sundays.

24. The Claimant gave evidence that the staff would all tend to leave together with the manager who would set the alarm. I am prepared to accept that evidence as it is broadly consistent with his photographs and the evidence of his colleagues that they consistently were asked to carry out tasks after the store closed. As a matter of common sense there would be duties that would need to be done at the end of the day. I accept the evidence that was provided on the Claimant's side that the staff were expected to carry out some, but not always all, of those duties after the store closed. Certainly, there were a few days when the alarm was set just before or very shortly after the store closed.

25. I accept a point made by the Respondent that the Claimant's mere presence in the store before the alarm was set did not mean that he was working. The

Claimant accepted that it would take him a minute or two to gather up his possessions and to leave the store. He accepted that that could not be regarded as 'work' for which he was entitled to be paid. He suggested that it would take him a minute or two to gather his belongings and leave the store. The Respondent suggested 5 minutes but did not say why. I accept it would not take long to collect a coat and bag. I find it more likely than not that the truth is between those competing positions and I find that the last 3 minutes of every day would not be spent working as such.

26. I am required to make a finding as to how long the Claimant worked in the evenings. I have concluded that on average the Claimant left the building 21 minutes after his shift ended but had finished work 3 minutes before that. He was therefore working for an average of 18 minutes after his shift ended (where the shift ended at closing time).

27. The Claimant also maintained that he was expected to start before the store opened. He suggested that he was expected to arrive early for daily briefings and to open up the shop. He estimated that these tasks took an average of 5 minutes. There was no photographic evidence of that. The only documentary evidence I have in support of the Claimant's contentions is the alarm records. These tend to show that the alarm was de-activated between 10 or 15 minutes before the store opened. The Respondent called no evidence to dispute the Claimant's account that he was required to attend briefings and assist in opening up the store. Again, I find that it would take the Claimant at least 3 minutes to get ready for work. There was no evidence that he always followed the alarm key holder into the store. Doing the best that I can with the evidence that I have I accept that there was a requirement to attend the store a few minutes early. I find that on average that would equate to 2 minutes per shift (that started at opening time).

28. The Claimant told me orally and I accept that he had at least mentioned to his store managers that he was not being paid for any additional work. He was simply told that this was what was expected.

29. On 5 November 2017 the Claimant submitted a formal grievance to his then store manager Steven Smith who in turn forwarded it to the Respondent's Human Resources department. In that letter the Claimant complained that despite his contract of employment referring to a 'salary' he was in fact remunerated at an hourly rate. He said that he was not always provided with the 30 hours of work necessary to generate the salary set out in his contract. Finally, he complained that he was not being paid for the time he spent working outside of his shift times.

30. The Respondent's grievance procedure envisages that a formal grievance would be determined at 'stage 1' by the employee's line manager. Instead of this the grievance was investigated by the Area Manager Kesh Patel. He held a meeting with the Claimant on 10 November 2017. The notes of that meeting disclose that the Claimant explained the issues set out in his grievance letter. He was asked how many hours he had worked outside his contracted hours since the introduction of 'retail 2.0' and he suggested that it was roughly 28 hours. When asked what he wanted the Claimant asked for the pay that he considered he should have received. Kesh Patel suggested to him that he should have reported any underpayment at the time.

31. On 24 November 2017 Fabina Martin-Ratcliffe, an HR Assistant, wrote to the Claimant with the outcome of his grievance. This was a week later than the timescale envisaged in the grievance policy. In that letter the Claimant was told that the Respondent would ensure that he would be given a minimum of 30 hours work per week from then on. He was told that he would be paid for the shortfall between his contracted hours and the number of hours he had actually worked amounting to 35 hours. In relation to working outside of the store hours the letter stated that this had been discussed with the store manager and that in future any such duties would be scheduled and paid for. It was tacitly accepted that there had been a requirement that the Claimant had carried out those duties in the past. The Claimant's request to be paid for such work was refused on the basis that he should have raised any discrepancies at the time.

32. The Claimant replied to the letter sent by Fabina Martin-Ratcliffe on 1 December 2017. He complained that the Respondent was failing to follow their own grievance procedure. He asked for a breakdown of the sum of £280 that had been paid by the Respondent. He particularly questioned the decision not to pay him for working after the end of each shift. He asked for an explanation as to where the grievance process had got to and what would happen next.

33. On 6 December 2017 Fabina Martin-Ratcliffe responded to the Claimant. She suggested that the Claimant's grievance had been dealt with only as an informal grievance. The fact that it had been dealt with by the Area Manager rather than the Claimant's manager was taken 'due to the nature of the grievance raised'. She provided a breakdown of how the Respondent had arrived at the sum of £280 as an underpayment (caused by a failure to offer work). She reiterated that steps had been put in place to ensure that the Claimant was paid for working after his shifts had ended in the future. She did not mention the Claimant's request to be paid for the times he had worked after his shift in the past.

34. He Claimant responded by letter of 7 December 2017 stating that he was not happy with the outcome of the grievance process. On 4 January 2018 the Claimant was invited to a meeting to discuss his grievance. The invitation specified that the meeting would take place at the Respondent's head office in Exeter. An offer was made to pay any associated travel costs. The Claimant was offered the opportunity to be accompanied. The letter was silent as to whether or not the Claimant would be paid for attending this meeting.

35. The Claimant was ill on 8 January 2018 with abdominal pain (and a suspected appendicitis). In response to a letter from the Claimant, Fabina Martin-Ratcliffe sent a further letter dated 19 January 2018. In this letter the Respondent offered to pay the Claimant for the time travelling to Exeter. She asked the Claimant to prepare a detailed breakdown of his claims for all of the times he said he had worked.

36. On 22 January 2018 the Claimant wrote to Fabina Martin-Ratcliffe and resigned from his employment. He stated that the grievance process had taken 11 weeks and caused him stress and anxiety. He complained that he had not been paid for the additional hours that he had worked including some worked in December 2017 (after the issue was ostensibly resolved going forward). He alleged that there had been a failure to pay him the National Minimum Wage. Thereafter he instigated the present proceedings.

Unfair dismissal – the law to be applied

37. Section 94 of the Employment Rights Act 1996 (hereafter "the ERA 1996") sets out the right of an employee not to be unfairly dismissed by her or his employer.

38. For the Claimant to be able to establish her claim of unfair dismissal he must show that he has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1006 and includes in Sub-section 95(1)(c) *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

39. ***Western Excavating (ECC) Ltd and Sharpe*** **1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

40. It is the employer's conduct that is relevant in a constructive dismissal issue, not the employee's reaction to it: ***Tolson v Governing Body of Mixenden Community School*** **[2003] IRLR 842, EAT.** In that case the failure by employee to use grievance procedure did not defeat a claim of constructive dismissal.

41. The **National Minimum Wage Act 1998** imposes an obligation on employers to pay a worker no less than the national minimum wage. It takes effect as an implied term of the contract of employment and, where that conflicts with any express term, the implied term overrides any other terms.

42. In ***Mahmood v BCCI*** **1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd*** **2002 IRLR 9**.

43. Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see ***Lewis and Motor World Garages Ltd*** **1985 IRLR 465** and ***Omilaju v Waltham Forest London Borough Council*** **2005 IRLR 35**.

44. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see ***Omilaju v Waltham Forest London Borough Council*** and ***Bournemouth University Higher Education Corpn v Buckland*** **[2011] QB 323**.

45. The question of whether a failure to pay wages on time or at all amounts to a serious breach of contract was addressed by the Court of Appeal in ***Cantor Fitzgerald International v Callaghan*** **[1999] IRLR 234** where Judge LJ said:

    45.1. At paragraph 36: *"In reality, it is difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms the employee offers his skills and efforts in exchange for his pay: that is the understanding at the heart of the contractual arrangement between him and his employer."*

    45.2. At paragraph 41: *"In my judgment, the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see for example Adams v Charles Zub Associates Ltd [1978] IRLR 551). If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand, if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory."*

    45.3. At paragraph 42: *"Where, however, an employer unilaterally reduces his employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined. Therefore, an emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory."*

    45.4. And at paragraph 43: "I very much doubt whether de minimis has any relevance in this field. If the amount at stake is very small, and the circumstances justifying a minimal reduction are explained to the employee, then the likelihood is that he would be prepared to accept new terms by way of mutual variation of the original contract. However, an apparently slight change imposed on a reluctant employee by economic pressure exercised by the employer should not be confused with a consensual variation, and in such circumstances an employee would be entitled to treat the contract of employment as discharged by the employer's breach.

46. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed -***Bournemouth University Higher Education Corpn v Buckland***.

47. The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach ***Nottinghamshire County Council and Meikle*** **[2004] IRLR 703**.The

employee need not spell out or otherwise communicate her reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were ***Weatherfield v Sargent*** **1999 IRLR 94**.

48. The proper approach, in the main distilled from the cases set out above has been set out by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] EWCA Civ 978** per Underhill LJ at paragraph 55.

> *"it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

49. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for "some other substantial reason". If it cannot do so then the dismissal will be unfair.

50. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

> '*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.'*

51. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be*

admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Discussion and conclusions – unfair dismissal

Issues

52. The key issue which I was required to resolve was whether the Claimant was dismissed. To determine that I needed to ascertain whether there was a serious breach of contract. The Claimant relied upon the failure to pay him in accordance with the terms of his contract together with the failure to remedy that through the stages of the grievance procedure that had taken place before his resignation. He says that there had been a failure to pay him the National Minimum Wage in many of the months he worked.

53. The Respondent's position was that the Claimant had not worked outside his shift times either as often or for as long as he suggested. Mr Evans complained that the Claimant had not provided all of his photographic evidence during the grievance process and because of this and because of the Claimant's resignation in advance of the further grievance meeting the Respondent had been unable to work out what if anything was due to the Claimant. The position taken by Mr Evans on behalf of the Respondent was that the Claimant had been premature in his resignation and that had the Respondent been given a greater opportunity he was confident that some accommodation would have been reached

Discussion and further findings

54. The Claimant's case was put in two ways, that he was not paid what had been agreed and/or he had not been paid the NMW. The effect of the National Minimum Wage Act 1998 is that it creates an implied term in every contract of employment that the rate of remuneration will not be less than the National Minimum Wage ('NMW'). That does not mean that the rate of pay must be in excess of the hourly rate prescribed by the legislation but whether the rate is paid over each 'pay reference period". In this case a pay reference period was 1 month. Accordingly, to see whether the Respondent was in breach of contract I need to consider:

    54.1. whether or not there has been any failure to pay the agreed wages and/or

    54.2. whether the sum paid is less than the NMW.

55. I have found above that throughout the Claimant's employment on shifts that lasted until the store closed he worked for an average of 18 minutes after the shift ended. Where he started at the opening time he worked for a further 2 minutes on average. It was common ground that the Claimant had been required to work after his shifts. He was supported by a number of witnesses. What is more, it is clear that when enquiries were made of the Claimant's manager after his grievance the fact that this had been the practice was recognised. I have had regard to all of the evidence and reached those

conclusions doing the best I could with the information available. Since 6 April 2015 regulation 59 of the **National Minimum Wage Regulations 2015** required employers to keep sufficient records to establish that the employee is being paid the NMW. There is no definition of what is sufficient but the guidance provided by the Department of Business Industry and Skills suggests that a record of the total amount paid and the total hours worked would be required. I cannot see that anything less would be 'sufficient' as these are the essential components of any calculation. If my assessment of the evidence has been unfair to the Respondent, then it has only itself to blame for failing to keep records of requests made to undertake work after the store closed.

56. I shall deal firstly with the period prior to the introduction of 'retail 2.0' (the Claimant started work on 25 August 2014 and 'retail 2' took effect from 5 December 2016). It was somewhat exasperating attempting to work out how the Respondent calculated its wages. It is no surprise to me that the Claimant had no idea how commission was calculated. Only after spending a great deal of time (far longer than the hearing itself) with the pay slips did it become clear to me that the pay was calculated as follows:

    56.1. The basic pay was always stated as the shift hours rostered x £6.08

    56.2. There was always a payment of 'commission'.

    56.3. In some months the commission was plainly attributed to some sales activity.

    56.4. In some months a basic rate of commission was paid to top up the hourly rate of £6.08 to the prevailing rate of NMW

    56.5. Holiday was calculated as 12.07% of the hours rostered x the NMW rate.

57. I should say that there was no attempt by the Respondent to explain this to me and I have had to work this out for myself. It is entirely artificial to describe a top up to NMW as commission and the payslips are utterly misleading.

58. During this period the NMW for the Claimant (who was born on 14 June 1991) were

    58.1. Commencement to 30 September 2014 £6.31

    58.2. 1 October 2014 to 30 September 2015 £6.50

    58.3. 1 October 2015 –30 March 2016 £6.70

    58.4. 1 April 2016 – 30 March 2017 £7.20

59. The answer to the question of whether the Respondent was in breach of the express terms of his contract in failing to pay the Claimant for the occasions where he was required to work outside of his shift times is straightforward. The contractual terms are set out in the letter of appointment. He was entitled to be paid at his basic rate of pay for any 'additional hours'. I find that any instruction given by his store manager is attributable to the Respondent. The Claimant was not paid for this time at all and therefore on each and every occasion where he worked outside of his shift times the Respondent was in breach of contract for

not paying him.

60. The Claimant has suggested that there was also a failure to pay the NMW. If the implied term that the Respondent would pay no less than the minimum wage resulted in an entitlement greater than the express terms of the contract provided for then the Claimant would be entitled to the greater sum provided by the NMW.

61. The rate of basic pay was at this time less than the rates prescribed by the legislation. That would result in a failure to pay the NMW if the 'commission' was insufficient to make up any shortfall. Whilst it is clear that the Respondent has attempted to award 'commission' intended to top up pay to the NMW it has failed to do that accurately. The Respondent calculated pay between the 19th and 18th of the following month. In the pay slips for April and May of 2016 the 'Pre 1 April 2016 rate of £6.70 is applied to all shifts worked in those periods whereas the rate of £7.20 should have been applied to work done since 1 April 2016. Accordingly, even without any additional hours being worked the pay in April and May of 2016 was less than the NMW.

62. In the following months the commission paid was only just sufficient to meet the NMW on the basis that the Claimant worked only his rostered hours:

    62.1. March 2015

    62.2. April 2015

    62.3. June 2015

    62.4. July 2015

    62.5. August 2015

    62.6. June 2016

    62.7. July 2016

    62.8. September – December 2016

63. In addition, there were some months where the Claimant was paid marginally above the minimum wage. In each of the months identified above the Claimant was required to work some additional time. The effect of this was that the Claimant was paid less than the NMW in each pay reference period. I have set out my calculations below when dealing with the unlawful deductions from wages claims. I have concluded that there were a number of months where the Claimant was not paid the national minimum wage.

64. The situation following the introduction of 'retail 2.0' is more straightforward. The basic rate of pay at £8 per hour exceeded the NMW. The express terms of the contract provided that he was entitled to be paid at the same rate where 'additional hours' were worked. The Claimant was only paid for his rostered hours and not for the additional work he did outside those hours. This means that the Respondent was in breach of contract when it failed to pay him for that time.

65. One aspect of the Claimant's grievance was that he was not always offered 30

hours per week in accordance with his 'retail 2.0' contract terms and not paid for any shortfall. The Respondent accepted that was the case and made a payment of equal to 35 hours pay at £8 per hour. As such it accepted that it was in breach of the obligation to offer and pay for 30 hours work on average. The fact that the Respondent made payment does not mean that there had been no breach of contract but they have extinguished any claim for damages in that respect.

66. There is a degree of overlap between the complaints raised by the Claimant whilst working under 'Retail 2.0' terms. He complains of working in addition to his shift and at the same time complained that he was not offered and paid for 30 hours of work per week. The Claimant cannot recover damages on both of these claims as they overlap. I take this into account below when assessing what is due to the Claimant.

67. Once the hourly rate was increased to £8.00 per hour there was no month where the Claimant was paid at less than the NMW. The shortest shift worked by the Claimant was 5.5 hours for which the Claimant would have been paid £44.00. At the highest applicable rate of NMW (£7.50 from 1 April 2017) the hourly rate would have been above the NMW even if the Claimant had been required to work a total of 22 minutes in total outside of his shift. On a 7.5 hour shift the NMW would be paid even if the Claimant was required to work for 8 hours. I have found that on average the Claimant was required to work 20 minutes extra when his shift started and finished at opening and closing time. That is not to say that there were not occasions when the Claimant worked longer than that. However, the requirement to assess compliance with the NMW over a pay reference period of 1 month makes it more likely than not that the NMW was always paid. Even if I am wrong about that it makes no difference as the Claimant is entitled to be paid for this additional work during this period at a rate of £8.00p.h. and his rights under the express terms of his contract are better than those implied by the National Minimum Wage Act 1998.

68. I have therefore concluded that, whether as a breach of the express term of the contract, or (in respect of the pre-Retail 2 period) by reason of the implied term that the Claimant would be paid no less than the NMW the Respondent underpaid the Claimant's wages whenever it required the Claimant to carry out work outside his shift hours.

69. The issues that remain are to consider whether or not the breach(s) were sufficiently serious to entitle the Claimant to treat himself as dismissed and whether he resigned before affirming the contract. The Claimant is not required to give the Respondent an opportunity to take steps to 'remedy' any breach of contract and he would not lose the right to treat himself as dismissed if he did so (***Bournemouth University Higher Education Corpn v Buckland***). That said on the facts of the present case the Claimant had been instructed to do the unpaid additional work by a series of store managers. Taking a view perhaps overly favourable to the Respondent I consider it relevant to look at the grievance process to examine whether the failure to pay for the additional time worked was 'inadvertence' or a 'refusal' in the sense recognised in ***Cantor Fitzgerald International v Callaghan***.

70. It follows from my conclusions above that the Claimant quite properly raised the failure to pay him properly in his grievance. I am surprised that the Respondent did not treat the Claimant's letter of 5 November 2017 as a formal

grievance under their policy but I do not consider that it makes very much difference. It is quite clear that in investigating the Claimant's grievance Kesh Patel discovered that the Claimant's assertion that he was required to work outside of his shift hours was correct. That is implicit in the response to the Claimant. It is surprising to note the critical tone both of the investigatory interview and of the letter of 24 November 2017 where it is asserted *"As per your contract, any mistakes in pay, the Company expects to be notified immediately to arrange for the error to be corrected"*. I accept that the head office may not have realised what its local managers were doing in Canterbury but it is somewhat harsh to suggest that the Claimant was responsible for his own situation. The Head Office must have been aware that all staff were paid only for their shift hours. It should have been obvious that some tasks were likely to be completed after the store closed.

71. The retail 2.0 contract did include the term *"If a mistake is made in the payment of any monies due, the company expects to be notified immediately. The error will normally be corrected at the next available opportunity".* It is the Respondent's responsibility to pay the proper wages. I do not consider that thus term is capable of meaning that if there is any failure to notify an error then the right to that pay is lost.

72. I consider that the stance taken by the Respondent following the informal stage of the grievance did amount to a refusal to pay the Claimant for the additional work that he had done.

73. The position was thereafter exacerbated by the fact that, having promised the Claimant that he would henceforth be paid for any additional work there was no adjustments to his December pay. The Claimant's photographic evidence shows very clearly that the practice of requiring staff to work after the store closed continued as before. In fact, some of the worst examples are (unsurprisingly) around Christmas 2017. There were two further instances at least in January.

74. I have concluded that the failure to pay the Claimant for the work he did outside of his shift hours was a serious (repudiatory) breach of contract. There was a refusal by the Respondent to pay the Claimant for work. The basis for that refusal was the spurious argument that the Claimant had not brought their own breach of contract to their attention. In assessing the gravity of the breach I have particular regard that the Claimant was paid at best just above the NMW. Whilst withholding a few pounds a day might be insignificant to a highly paid employee it is much more significant for an employee who is earning very little. I am entirely satisfied that the Claimant resigned in response to that breach.

75. I have considered whether it could be said that the Claimant affirmed the contract. As the breach of contract continued through December and into January I am only looking at a period of about 3 weeks during which the Claimant is off sick. During that period the Claimant was continuing to protest that he had not been paid for the work that he had done.

76. I am surprised that the Respondent thought it appropriate to ask the Claimant to travel from Kent to Exeter to have his grievance heard. I am not at all surprised that the Claimant abandoned the grievance process when asked to do so. Pursuing a grievance about a contractual breach is inconsistent with affirming the contract of employment. I find that there was no conduct by the

Claimant that would have signalled that he had decided to 'soldier on' in the face of the Respondent's repudiatory breach.

77. I therefore find that the Claimant was entitled to treat himself as dismissed for the purposes of Section 95 of the Employment Rights Act 1996.

78. The Respondent did not specifically seek to suggest that any dismissal was for a potentially fair reason. It seems to me that it would be quite impossible to say that it was potentially fair to withhold part of the Claimant's contractual remuneration which on some earlier occasions meant that he was paid less than the NMW. Accordingly, I find that the Claimant was unfairly dismissed contrary to Section 94 of the Employment Rights Act 1996.

79. I note that the Respondent has now changed its software and record keeping to ensure that its employees are properly paid. It is to be congratulated upon that but that is immaterial to the present claim which underscored how important it was to have the proper records (required by statute) to ensure that the proper wages are paid.

Remedy

80. The Respondent did not seek to suggest that the Claimant could or would have been fairly dismissed in any event or that his employment would have ended for some other reason. Mr Evans did argue that the Claimant had failed to mitigate his losses. Principally it was said that having left retail employment paying the minimum wage the Claimant ought to have sought similar work and that if he had done so he would easily have replaced his income.

81. The duty to mitigate loss is not onerous. The proper approach is that set out in ***Cooper Contracting Ltd v Lindsey*** **UKEAT/0184/15/JOJ** where Langstaff J summarised the considerations as follows:

> *"(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.*
>
> *(2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of Tandem Bars Ltd v Pilloni UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle - which itself follows from the cases I have already cited - that the decision in Pilloni itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.*
>
> *(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow, Wilding and Mutton).*
>
> *(4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).*
>
> *(5) What is reasonable or unreasonable is a matter of fact.*

(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow, Fyfe and Potter LJ's observations in Wilding).

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

Additional findings of fact

82. The Claimant told me, and I accept, that since his resignation he has found some work acting as a studio assistant at a recording studio. The work is essentially freelance and is sporadic although he hopes to obtain more work in the future. I find that this is the sort of work most attractive to the Claimant as it flows from his degree and interest in technology. In addition, the Claimant has been working as a gardener on a self-employed basis. In the period between 22 January and the hearing date the Claimant had received income of £2,187.00 in total.

83. The Claimant had applied for just one retail job and that was with Halfords. He was not successful. He believed that retail employment was unstable. Mr Evans did not disagree with that proposition (he described the High Street as a "Bloodbath") but said that nevertheless there was work available.

84. I accept the evidence of both the Claimant and Mr Evans. I find that retail work at the moment is somewhat unstable but that there is work available. I find that a person with the Claimant's skills and experience would be able to find employment if they were prepared to look hard enough. I accept that it might take some time to find a job. I find that the Claimant has chosen not to do so preferring the self-employed work that he has found.

Discussion and Conclusions Unfair Dismissal - Remedy

85. There was essentially no dispute that the Claimant should be paid a basic award of £720.00 calculated on a gross weekly pay of £240.00 (30 hrs x £8ph). The Claimant has 3 years of continuous service and is entitled to a basic award of 3 x £240.00 = £720.

86. The Claimant claimed the conventional sum of £500 for 'loss of statutory rights'. I am bound by authority to make such an award and do so.

87. The key issue is whether the Respondent has shown me that the Claimant has acted unreasonably in electing to give up on a search for further retail employment whilst pursuing 2 strands of self-employment. The facts of this case are different to those in the case of **Cooper**. Mr Cooper had been self-employed prior to the employment where he was unfairly dismissed and had a

track record of success. The Claimant is attempting to forge a career as a studio assistant essentially from scratch. Mr Cooper rapidly generated an income whereas 9 months later the Claimant has only earned £2,137.

88. I find that it was not unreasonable for the Claimant to start out looking for replacement work on a self-employed basis but I am satisfied that after about 6 months having earned very little it became unreasonable to stick to that plan (or put differently not just and equitable to expect the Respondent to pay loss occasioned by that decision). Had he started to look for part time work at that stage I find that he would have been able to do so by the time of the hearing. On that basis it would not be just and equitable to award compensation beyond the hearing date itself.

89. Using a tax calculator and the code in his pay slips I have calculated the Claimant's nett pay to be £222 after his pension contributions of 2% are deducted. The Respondent paid pension contributions of 3%. It is appropriate to simply treat those pension contributions as earnings equal to 5% of £240 that is £12.00 per week. The weekly loss is therefore £222 + £12 = £234.00. The Claimant's schedule incorrectly added holiday pay but that was included under the Retail 2.0 contract.

90. There are 34.57 weeks between 22 January 2018 and 20 September 2018. The loss suffered by the Claimant is 234 x 34.47 = £8,089.38. From this sum must be deducted the sums the Claimant has earned of £2,187. That gives a loss of £5902.38.

91. Adding the sum of £500 for loss of statutory rights gives a compensatory award of <u>£6,402.38</u>

<u>The claim for wrongful dismissal</u>

92. It follows from my finding that the Claimant resigned without notice in circumstances where he was entitled to treat himself as dismissed that he should succeed in his claim for the failure to give contractual notice – that is he was wrongfully dismissed. He would have been entitled to 1 months' notice under the Retail 2 terms.

93. I have calculated the compensation for unfair dismissal from the date that the Claimant resigned rather than the expiry of any notional notice period. In the circumstances I make no separate award of damages in respect of the claim of unfair dismissal as it would result in double recovery.

<u>The claim for an award under Section 38 of the Employment Act 2002</u>

94. The Claimant, quite rightly, said that the offer letter issued to him when he started work in 2014 did not contain the particulars required by section 1of the Employment Rights Act 1996 it did not (it is missing for example the date on which the employment began and there is no detail of how holiday pay is calculated). The retail 2.0 contract issued to the Claimant did include all of the matters listed in sub section 1(3) & (4) of the Employment Rights Act 1996.

95. The material parts of Section 38 of the Employment Act 2002 say:

38 Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

> *(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and*
>
> *(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change [or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday]),the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.*

(3) If in the case of proceedings to which this section applies—

> *(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and*
>
> *(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 [or under section 41B or 41C of that Act], the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.*

96. The effect of these sub sections is that Section 38 of the Employment Act 2002 applies if, and only if, the Claimant has succeeded in a relevant claim (unfair dismissal is one such claim). Section 38(3) applies where the tribunal have made an award (which I have). Sub section 38(3)(b) starts with the words "*when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996"*. It seems to me that the proper interpretation of that phrase is that the tribunal is required to ask whether any statement compliant with Section 1(1) of the Employment Rights Act 1996 has been served before the proceedings are brought even if such a statement had not been served within the time limit set out in section 1(2) of the act. If the requirement to comply with the time limit was implicit in the breach of the section 1(1) duty then the words "when the proceedings were begun" would not have any additional meaning.

97. As the Respondent had complied with its section 1(1) Employment Rights Act 1996 by the time the proceedings were brought then I cannot make any award under Section 38.

<u>The claim for wages for the periods worked outside of rostered hours</u>

98. As the Claimant's contract has been terminated he is entitled to advance his wages claim either as a claim for breach of contract under the **Employment**

Tribunals Extension of Jurisdiction (England and Wales) Order 1994 of as a claim under Part II of the **Employment Rights Act 1996**. In his ET1 the Claimant has said he is claiming breach of contract. The former claim is more favourable to the Claimant as he can recover all arrears rather than be limited by the **Deduction from Wages (Limitation) Regulations 2014**. Accordingly, I shall treat the Claimant's claim for arrears of pay as being claims brought under the breach of contract jurisdiction.

99. As I have stated above it is necessary to distinguish between the period prior to the retail 2 contract and the period afterwards. In the earlier period, where the Claimant was required to work outside his contracted hours he is contractually entitled to be paid £6.08 per hour for each hour worked. However, where his remuneration for the period actually worked in any pay reference period (her one month) was less than the NMW he is entitled to be paid the NMW. Section 17 of the **National Minimum Wage Act 1998** provides that where there has been a failure to pay the National Minimum Wage any arrears should be paid at the prevailing rate of £7.83 per hour and not the rate that was in force at the time.

100. I shall deal with each month in turn as it is the only way I can calculate the pay due to the Claimant. In undertaking these calculations, I am using the average figure I calculated above for the Claimant working outside his rostered hours. That will not produce an exact result but, given that the Respondent bears the burden of proof in establishing that it paid the NMW (Section 28 of the **National Minimum Wage Act 1998** and given its failure to keep accurate records I consider that my methodology is proportionate and reasonably accurate. In my calculations:

100.1. I have taken the 'my shift' data as being an accurate record of the shifts worked; and

100.2. I have taken the pay slips as being accurate. I have assumed that the two occasions where 'back pay' was paid relate to the month that the payment is made.

100.3. I have taken the hours actually worked (rostered hours plus additional time worked) and then added the amount of annual leave notionally taken by multiplying by 12.07%.

101. My calculations are as follows:

101.1. In September 2014 there were 18 occasions when the Claimant was present when the store opened and 18 occasions when the store closed. That is a total of (18 x 2 + 18 x 18 minutes) = 6:00 hours. The shift hours for the whole month were 141. Total hours worked were therefore 147. The notional holiday adds 17.74 hours. The Claimant was entitled to be paid for 164.74 hours. The NMW rate at the time was £6.31. He should have been paid at least £1,039.53. In fact, he was paid £1,012.28. He was therefore paid £26.23 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £26.23/£6.31 x £7.83 = **£32.57**

101.2. In October 2014 there were 2 occasions when the Claimant was present when the store opened and 6 occasions when the store closed. That is a total of (2 x 2 + 6 x 18 minutes) = 1.87 hours. The shift hours for the whole month were 99. Total hours worked were therefore 100.87. The

notional holiday adds 12.17 hours. The Claimant was entitled to be paid for 113.04 hours. The NMW rate at the time was £6.50. He should have been paid at least £ 734.76. In fact, he was paid £994.19. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 1.87 hours = **£11.37**

101.3. In November 2014 there were 3 occasions when the Claimant was present when the store opened and 1 occasion when the store closed. That is a total of (3 x 2 + 1 x 18 minutes) = 0.6 hours. The shift hours for the whole month were 105.5. Total hours worked were therefore 106.1. The notional holiday adds 12.8 hours. The Claimant was entitled to be paid for 118.9 hours. The NMW rate at the time was £6.50. He should have been paid at least £ 772.85. In fact, he was paid £1,058.61. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 0.6 hours = **£3.64**

101.4. In December 2014 there were 20 occasions when the Claimant was present when the store opened and 20 occasions when the store closed. That is a total of (20 x 2 + 20 x 18 minutes) = 6.66 hours. The shift hours for the whole month were 154.5. Total hours worked were therefore 161.16. The notional holiday adds 19.45 hours. The Claimant was entitled to be paid for 180.61 hours. The NMW rate at the time was £6.50. He should have been paid at least £ 1173.98. In fact, he was paid £1,243.64. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 6.66 hours = **£40.49.**

101.5. In January 2015 there were 19 occasions when the Claimant was present when the store opened and 19 occasions when the store closed. That is a total of (19 x 2 + 19 x 18 minutes) = 6.33 hours. The shift hours for the whole month were 158. Total hours worked were therefore 164.33. The notional holiday adds 19.83 hours. The Claimant was entitled to be paid for 184.16 hours. The NMW rate at the time was £6.50. He should have been paid at least £1197.04. In fact, he was paid £2,139.02. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 6.33 hours = **£38.48**.

101.6. In February 2015 there were 14 occasions when the Claimant was present when the store opened and 15 occasions when the store closed. That is a total of (14 x 2 + 15 x 18 minutes) = 4.97 hours. The shift hours for the whole month were 136.5. Total hours worked were therefore 141.47. The notional holiday adds 17.07 hours. The Claimant was entitled to be paid for 158.54 hours. The NMW rate at the time was £6.50. He should have been paid at least £ 1030.51. In fact, he was paid £1,202.22. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 4.97 hours = **£30.22**.

101.7. In March 2015 there were 8 occasions when the Claimant was present when the store opened and 9 occasions when the store closed. That is a total of (8 x 2 + 9 x 18 minutes) = 2.97 hours. The shift hours for the whole month were 83. Total hours worked were therefore 85.97. The notional holiday adds 10.38 hours. The Claimant was entitled to be paid for 96.35 hours. The NMW rate at the time was £6.50. He should have been paid at least £626.25. In fact, he was paid £604.62. He was therefore paid £ 21.63 less than the NMW. He is therefore entitled to additional

remuneration under Section 17 of £ 21.63/£6.50 x £7.83 = **£26.05**

101.8. In April 2015 there were 8 occasions when the Claimant was present when the store opened and 9 occasions when the store closed. That is a total of (8 x 2 + 7 x 18 minutes) = 2.37 hours. The shift hours for the whole month were 70. Total hours worked were therefore 72.37. The notional holiday adds 8.73 hours. The Claimant was entitled to be paid for 81.1 hours. The NMW rate at the time was £6.50. He should have been paid at least £527.18. In fact, he was paid £509.92. He was therefore paid £ 17.26 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £ 17.26/£6.50 x £7.83 = **£20.79**

101.9. In May 2015 there were 8 occasions when the Claimant was present when the store opened and 8 occasions when the store closed. That is a total of (8 x 2 + 8 x 18 minutes) = 2.66 hours. The shift hours for the whole month were 66.5. Total hours worked were therefore 69.16. The notional holiday adds 8.34 hours. The Claimant was entitled to be paid for 77.5 hours. The NMW rate at the time was £6.50. He should have been paid at least £503.80. In fact, he was paid £492.49. He was therefore paid £11.31 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £ 11.31/£6.50 x £7.83 = **£13.63**

101.10. In June 2015 there were 5 occasions when the Claimant was present when the store opened and 6 occasions when the store closed. That is a total of (5 x 2 + 6 x 18 minutes) = 1.97 hours. The shift hours for the whole month were 49. Total hours worked were therefore 50.97. The notional holiday adds 6.15 hours. The Claimant was entitled to be paid for 57.12 hours. The NMW rate at the time was £6.50. He should have been paid at least £371.29. In fact, he was paid £356.94. He was therefore paid £14.35 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £ 11.31/£6.50 x £7.83 = **£17.28**

101.11. In July 2015 there were 16 occasions when the Claimant was present when the store opened and 16 occasions when the store closed. That is a total of (16 x 2 + 16 x 18 minutes) = 5.33 hours. The shift hours for the whole month were 121.5. Total hours worked were therefore 126.83. The notional holiday adds 15.3 hours. The Claimant was entitled to be paid for 142.14 hours. The NMW rate at the time was £6.50. He should have been paid at least £923.90. In fact, he was paid £885.07. He was therefore paid £38.83 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £ 38.83/£6.50 x £7.83 = **£46.77**

101.12. In August 2015 there were 14 occasions when the Claimant was present when the store opened and 15 occasions when the store closed. That is a total of (14 x 2 + 15 x 18 minutes) = 4.97 hours. The shift hours for the whole month were 121. Total hours worked were therefore 125.97. The notional holiday adds 15.2 hours. The Claimant was entitled to be paid for 141.17 hours. The NMW rate at the time was £6.50. He should have been paid at least £917.63. In fact, he was paid £881.43. He was therefore paid £36.20 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £ 36.20/£6.50 x £7.83 = **£43.61**

101.13. In September 2015 there were 19 occasions when the Claimant was present when the store opened and 19 occasions when the store closed.

That is a total of (19 x 2 + 19 x 18 minutes) = 6.33 hours. The shift hours for the whole month were 141.5. Total hours worked were therefore 147.83. The notional holiday adds 17.84 hours. The Claimant was entitled to be paid for 165.67 hours. The NMW rate at the time was £6.50. He should have been paid at least £1,076.88. In fact, he was paid £1,155.96. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 6.33 hours = **£38.49**

101.14. In October 2015 there were 20 occasions when the Claimant was present when the store opened and 20 occasions when the store closed. That is a total of (20 x 2 + 20 x 18 minutes) = 6.66 hours. The shift hours for the whole month were 152.5. Total hours worked were therefore 159.16. The notional holiday adds 19.21 hours. The Claimant was entitled to be paid for 178.37 hours. The NMW rate at the time was £6.70. He should have been paid at least £1,195.08. In fact, he was paid £1,411.45. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 6.66 hours = **£40.49**

101.15. In November 2015 there were 19 occasions when the Claimant was present when the store opened and 19 occasions when the store closed. That is a total of (19 x 2 + 19 x 18 minutes) = 6.33 hours. The shift hours for the whole month were 141. Total hours worked were therefore 147.33. The notional holiday adds 17.78 hours. The Claimant was entitled to be paid for 165.11 hours. The NMW rate at the time was £6.70. He should have been paid at least £1,106.25. In fact, he was paid £1,458.66. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 6.33 hours = **£38.48**

101.16. In December 2015 there were 21 occasions when the Claimant was present when the store opened and 21 occasions when the store closed. That is a total of (21 x 2 + 21 x 18 minutes) = 7 hours. The shift hours for the whole month were 157.5. Total hours worked were therefore 164.5. The notional holiday adds 19.86 hours. The Claimant was entitled to be paid for 184.35 hours. The NMW rate at the time was £6.70. He should have been paid at least £1,235.18. In fact, he was paid £1,357.93. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 7 hours = **£42.56**

101.17. In January 2016 there were 16 occasions when the Claimant was present when the store opened and 19 occasions when the store closed. That is a total of (16 x 2 + 19 x 18 minutes) = 6.23 hours. The shift hours for the whole month were 147.75. Total hours worked were therefore 153.98. The notional holiday adds 18.58 hours. The Claimant was entitled to be paid for 172.56 hours. The NMW rate at the time was £6.70. He should have been paid at least £1,156.19. In fact, he was paid £1,438.67. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 6.23 hours = **£37.88**

101.18. In February 2016 there were 21 occasions when the Claimant was present when the store opened and 21 occasions when the store closed. That is a total of (21 x 2 + 21 x 18 minutes) = 7 hours. The shift hours for the whole month were 163.5. Total hours worked were therefore 170.5. The notional holiday adds 20.57 hours. The Claimant was entitled to be paid for 191.08 hours. The NMW rate at the time was £6.70. He should have been

paid at least £1,280.23. In fact, he was paid £1,260.87. He was therefore paid £19.36 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £ 19.36/£6.70 x £7.83 = **£22.62**

101.19. In March 2016 there were 11 occasions when the Claimant was present when the store opened and 11 occasions when the store closed. That is a total of (11 x 2 + 11 x 18 minutes) = 3.66 hours. The shift hours for the whole month were 104.5. Total hours worked were therefore 108.16. The notional holiday adds 13.06 hours. The Claimant was entitled to be paid for 121.22 hours. The NMW rate at the time was £6.70. He should have been paid at least £812.17. In fact, he was paid £968.41. He was therefore paid more than the NMW. He is therefore entitled to be paid at the contractual rate of £6.08 for 3.66 hours = **£22.25**

101.20. In April 2016 there were 10 occasions when the Claimant was present when the store opened and 10 occasions when the store closed. That is a total of (10 x 2 + 10 x 18 minutes) = 3.33 hours. The shift hours for the whole month were 100. Total hours worked were therefore 103.33. The notional holiday adds 12.47 hours. The Claimant was entitled to be paid for 115.80 hours. The NMW rate at the time was £7.20. He should have been paid at least £833.77. In fact, he was paid £800.88. He was therefore paid £32.89 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £ 32.89/£7.20 x £7.83 = **£35.76**

101.21. In May 2016 there were 12 occasions when the Claimant was present when the store opened and 13 occasions when the store closed. That is a total of (12 x 2 + 13 x 18 minutes) = 4.3 hours. The shift hours for the whole month were 118.5. Total hours worked were therefore 122.8. The notional holiday adds 14.82 hours. The Claimant was entitled to be paid for 137.62 hours. The NMW rate at the time was £7.20. He should have been paid at least £990.88. In fact, he was paid £931.41. He was therefore paid £59.47 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £59.47/£7.20 x £7.83 = **£64.67**

101.22. In June 2016 there were 13 occasions when the Claimant was present when the store opened and 15 occasions when the store closed. That is a total of (13 x 2 + 15 x 18 minutes) = 4.93 hours. The shift hours for the whole month were 154. Inconsistently with the manner in which pay was calculated 37.5 of those hours are marked as holiday. Despite this the Claimant is paid for these hours AND given holiday pay in respect of them. This apparent error (or change in policy) took the remuneration above the NMW. He is therefore entitled to remuneration at the contractual rate of 4.93 x £6.08 = **£29.97**

101.23. In July 2016 there were 20 occasions when the Claimant was present when the store opened and 20 occasions when the store closed. That is a total of (20 x 2 + 20 x 18 minutes) = 6.66 hours. The shift hours for the whole month were 147. Total hours worked were therefore 153.66. The notional holiday adds 18.54 hours. The Claimant was entitled to be paid for 172.20 hours. The NMW rate at the time was £7.20. He should have been paid at least £1,239.89. In fact, he was paid £1,186.16. He was therefore paid £53.73 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £53.73/£7.20 x £7.83 = **£58.43**

101.24. In August 2016 there were 19 occasions when the Claimant was present when the store opened and 19 occasions when the store closed. That is a total of (19 x 2 + 19 x 18 minutes) = 6.33 hours. The shift hours for the whole month were 139.75. Total hours worked were therefore 146.08. The notional holiday adds 17.63 hours. The Claimant was entitled to be paid for 163.71 hours. The NMW rate at the time was £7.20. He should have been paid at least £1,178.72 In fact, he was paid £1,141.73. He was therefore paid £36.99 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £36.99/£7.20 x £7.83 = **£40.23**

101.25. In September 2016 there were 20 occasions when the Claimant was present when the store opened and 21 occasions when the store closed. That is a total of (20 x 2 + 21 x 18 minutes) = 6.96 hours. The shift hours for the whole month were 160.5. Total hours worked were therefore 167.47. The notional holiday adds 20.21 hours. The Claimant was entitled to be paid for 187.68 hours. The NMW rate at the time was £7.20. He should have been paid at least £1,351.29 In fact, he was paid £1,295.08. He was therefore paid £56.21 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £56.21/£7.20 x £7.83 = **£61.13**

101.26. In October 2016 there were 20 occasions when the Claimant was present when the store opened and 22 occasions when the store closed. That is a total of (20 x 2 + 22 x 18 minutes) = 7.26 hours. The shift hours for the whole month were 164.25. Total hours worked were therefore 171.52. The notional holiday adds 20.70 hours. The Claimant was entitled to be paid for 192.22 hours. The NMW rate at the time was £7.20. He should have been paid at least £1,384.00 In fact, he was paid £1,321.32. He was therefore paid £62.68 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £62.68/£7.20 x £7.83 = **£68.16**

101.27. In November 2016 there were 19 occasions when the Claimant was present when the store opened and 19 occasions when the store closed. That is a total of (19 x 2 + 19 x 18 minutes) = 6.33 hours. The shift hours for the whole month were 140. Total hours worked were therefore 146.33. The notional holiday adds 17.66 hours. The Claimant was entitled to be paid for 163.99 hours. The NMW rate at the time was £7.20. He should have been paid at least £1,180.74 In fact, he was paid £1,129.67. He was therefore paid £51.07 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £51.07/£7.20 x £7.83 = **£55.54**

101.28. In December 2016 there were 18 occasions when the Claimant was present when the store opened and 18 occasions when the store closed. That is a total of (18 x 2 + 18 x 18 minutes) = 6 hours. The shift hours for the whole month were 134. Total hours worked were therefore 140. The notional holiday adds 16.89 hours. The Claimant was entitled to be paid for 156.90 hours. The NMW rate at the time was £7.20. He should have been paid at least £1,129.66. In fact, he was paid £1,081.25. He was therefore paid £48.41 less than the NMW. He is therefore entitled to additional remuneration under Section 17 of £48.41/£7.20 x £7.83 = **£52.65**

102. As I have said above the issue from the beginning of January 2017 forwards is more straight forward. The increase in pay meant that the NMW was always

paid from that point. However, the Claimant is entitled to be paid for the hours he worked outside his shift times. I have therefore counted the number of times throughout his remaining employment he started and finished at the opening and closing times. There are 173 times when he arrived for opening time and 200 times when his shift finished at closing time. Using my findings of fact set out above that equates to 173 x 2 mins + 200 x 18 mins = 65.77 hours.

103. The Claimant is entitled to be paid for that time spent working at a rate of £8.00 per hour. **That is a total of £526.13 for this period**. From that sum I must deduct the sum of £280 that the Respondent paid on the basis that it had not offered the Claimant the work he was entitled to under his contract (unbeknown to head office he was being asked to work outside his shifts). That means that the sum due to the Claimant during this period is reduced to **£246.13**.

104. The total sum due to the Claimant is **£1,283.34** (The Respondent may be obliged to make statutory deductions of tax from that sum as it represents wages).

105. The Claimant correctly identifies that had he been paid correctly the additional sums would have attracted an additional employer's pension contribution. It appears that the Respondent provided only the minimum pension required by law paying 2% on 'qualifying earnings' only. Nevertheless, the Claimant would have been entitled to that contribution as his earnings had reached the basic threshold and he has suffered a further loss of 2% of £1,283.34 = **£25.66**

106. The Claimant sought interest on any sum awarded. I have no jurisdiction to award interest under the Tribunal's breach of contract jurisdiction. Whilst Part II of the ERA 1996 and in particular Section 23 does allow me to award consequential loss (for example if the failure to pay wages has resulted in bank charges or interest) I heard no evidence that would permit such an award in this case.

<u>An uplift under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992</u>

107. The Claimant has argued that he should be awarded an uplift because of the manner in which the Respondent conducted the grievance process. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 permits an uplift of up to 25% where there has been an unreasonable failure to comply with any provision of a statutory code of practice.

108. It is important not to conflate the Respondents own procedure or my own view of 'good practice' with the words of the statutory code. The Code is not onerous. The Employers responsibilities having received a grievance are to call a formal meeting (para 33), to permit the employee to be accompanied (para 34), to give a decision in writing) para 40 and to permit an appeal (further meeting and written outcome) (paras 41 – 45).

109. Save that the 'informal' meeting with Kesh Patel did not provide for the Claimant to be accompanied it did comply with the other initial stages of the code. When the Claimant expressed dissatisfaction, he was invited to a meeting and given the right to be accompanied. He chose not to attend that meeting. I have found above that it was unreasonable to expect the Claimant

to travel to Exeter from Canterbury to attend that meeting despite the offer of travel and accommodation. I would accept that an employer would not comply with the code by offering a meeting in a plainly inaccessible place even if that met the letter of the code. That said, it was not impossible for the Claimant to attend that meeting. I consider that Section 207A awards are closer to a penalty than they are to compensation. As such I should be cautions in placing any gloss on the words of the Code itself and importing my view of how far it might have been reasonable to expect the Claimant to travel. I also note that the Code itself requires the employee to take 'every effort' to attend a grievance meeting.

110. In the circumstances I am not satisfied that there was a breach of the ACAS code (despite my findings as to the reasonableness of requiring an 11hour round trip). Even if I am wrong about that I consider than where the Respondent has offered travel and time costs it would not be just and equitable to give any uplift.

111. I note that the systems that the Respondent has now put in place should prevent a repetition of the wrongdoing in this case. It is unfortunate that the Respondent took so long to realise the perils of paying so close to the minimum wage and maintaining an opaque commission structure.

_____

Employment Judge John Crosfill

Date 14 January 2019