THE EMPLOYMENT TRIBUNAL

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE EMERTON (sitting alone)**

BETWEEN:

Ms A G Maycock-Frame

Claimant

AND

Scent & Colour Limited

Respondent

ON: **24 May 2019**

APPEARANCES:

For the Claimant: **In person**
For the Respondent: **Miss C Garcia-Rubio (Company Director)**

JUDGMENT having been sent to the parties on 3 June 2019 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim, and background to the hearing

1. On 19 November 2018, the claimant presented an in-time claim for unauthorised deduction of wages and for notice pay, arising from a short

period of employment in September/October 2018. She correctly completed early conciliation.

2. The factual allegation in the claim form was, in essence, that the claimant (born 1990) had worked for the respondent shop as a sales assistant, and had not been paid for any of the hours she worked. Having resigned on 21 October 2018, giving two weeks' notice, and had not been paid for the notice period. Her resignation had been accepted and she was told she did not need to work for the notice period, even though she was available to do so. She asserted that there was an oral contractual agreement for 21 hours per week (working on three days per week) and that the agreed wages were £8.00 an hour.

3. The respondent resisted the claim, making a number of assertions in the response as to the claimant's lack of competence, and suggesting that if the claimant had not resigned she would have been dismissed for misconduct, gross negligence or capability anyway. It was asserted that the claimant had resigned during her probationary period, when she did not need to give notice, and also that she was only entitled to national minimum wage, said to be just over £7 an hour. It was suggested that the claimant's incompetence had led to business losses [*but there was no employer's contractual claim*].

4. The claimant subsequently presented a written response to the respondent's case, challenging the information provided in the ET3 response form.

5. The case was listed for hearing, and standard directions were given in respect of jointly preparing a bundle and exchanging witness statements. The case was initially listed for one hour and then extended to three hours.

6. The parties partially complied with the orders, and although the claimant did not provide the respondent with a copy of her bundle, in fact all the documents within it were documents which the respondent can be expected to have seen already. The claimant did not provide a witness statement as such, but at the start of the hearing in fact sought to rely on the contents of her claim form and reply to the ET3, both of which would have been familiar to the respondent, together with her brief schedule of loss. The respondent emailed a copy of its bundle in advance, but did not provide a witness statement from Miss Garcia-Rubio, who owned and directed the respondent company.

<u>The hearing</u>

7. The parties were represented as set out above. At the start of the hearing (at 1005) the Judge was provided with documents by both parties. When he enquired as to what witness evidence would be called, noting the absence of a witness statement from the proprietor of the business, Miss Garcia-Rubio announced that she also wished to give oral evidence,

notwithstanding having failed to serve a witness statement on the claimant. It appeared to the tribunal that it was in the interests of justice to permit her to give evidence, provided that the claimant and tribunal had the opportunity to read the statement in advance. She had prepared a document setting out her evidence and some submissions, but had evidently not been expecting that the claimant or judge would wish to see it, notwithstanding directions as to witness statements. A single copy was handed up. The tribunal adjourned for copies to be taken, so that the Judge and the claimant could read the witness statement, and both parties could ensure that they were familiar with all the other documents relied upon. The adjournment was for 20 minutes, and in light of the limited issues in dispute and the fact that most documents were already familiar to the parties, the tribunal was content that this was long enough for all parties to insure they had read the relevant documents provided by the other party. Neither party asked for longer.

8. The tribunal spent some time confirming the issues in the case and reminded the parties that the evidence should all be relevant to those issues. The purpose of the hearing was not to determine any other points which might be in dispute between the parties. Most of the background facts appeared not to be in dispute. The Judge identified, with the agreement of both parties, that there were two claims:

   (1) A claim for **unauthorised deduction of wages** relating to the period up to the submission of the claimant's resignation; and

   (2) **Breach of contract**, for two weeks' notice pay.

9. The Judge confirmed that it was not in dispute that the claimant became an employee of the respondent on 4 September 2018, and that although her contractual hours were 21 hours per week (working Monday, Tuesday Wednesday) on the first week (by agreement) she was only required to work 14 hours. It is not in dispute that the claimant was entitled to wages (although the total sum was in dispute) but was never in fact paid any wages, whether in cash, postal order, by cheque, by bank transfer or other means. Although the respondent had complained that it had never received the claimant's bank details (disputed by the claimant), this was not a matter which need to be determined by the tribunal, because there is no legal requirement that wages be paid by bank transfer, and there had been many months after dismissal for the respondent to effect payment. The judge pointed out that the wages claim was bound to succeed, albeit the amount of any compensation payable was in dispute, because the respondent disputed the sums claimed by the claimant, and this part of the claim would require evidence.

10. There is a dispute as to whether the claimant was contractually entitled, under the contract of employment, to be paid wages for a short period of training which was arranged for the period ***before*** she became an employee.

11. It is in dispute as to whether the claimant was entitled to £8.00 an hour, as she asserted, or to the national minimum wage level, which was incorrectly identified by the respondent as being just over £7 per hour (whereas in fact, for a 28-year-old such as the claimant, the correct rate at the time was £7.83 per hour).

12. There being no written contract of employment or written particulars of employment, and the respondent relying upon an expressly non-contractual employee handbook, it is in dispute as to how much notice the claimant was required to give if she resigned during her probationary period. The claimant asserts that she had been told she must give two weeks' notice. The respondent asserts that the claimant was told that she could leave at no notice during the probationary period. Having examined the documentary evidence during the earlier adjournment, the Judge pointed the following out to the parties: the wording of the non-contractual employee handbook (relied upon by the respondent) appeared to be ambiguous in respect of the provisions relating to notice arrangements, but that in any event, (2) the lack of a *requirement* for an employee to give a period of notice does not as a matter of law prevent an employee from giving a longer period of notice. Also, notwithstanding lack of clarity in the respondent's case, it appeared to the judge that there was (3) the issue of whether the respondent had in fact brought the contract of employment to an end before the end of the claimant's notice period, and if so whether the respondent was able to dismiss the claimant without giving any notice, if the respondent's instruction to the claimant not to work her notice was to be seen as an express dismissal.

13. These matters having been raised by the judge, the respondent's case was somewhat confused, save that it is common ground that the statutory provisions at section 86 the Employment Rights Act 1996 would not imply a period of notice into a contract of employment (where there was not already a specified contractual notice period) for an employee with less than a month's service. However, the respondent relied upon the employee handbook, as guidance as to what should be seen as being the contractual terms, and this was silent upon the issue of how much notice the employer should give to an employee. It ***did*** make it clear that if a decision was made to terminate an employee's contract of employment during the probationary period (said to be the first 20 weeks of employment, and therefore covering the relevant period), specific procedures would be followed if there were concerns as to performance or conduct, and that these concerns would be raised with the employee, giving the employee an opportunity to respond. There would only be in exceptional circumstances "*including such breaches of contract as may be set out in disciplinary rules*" when an employee would not be given the opportunity to improve their performance to a satisfactory standard within a reasonable time period.

14. The Judge noted that the disciplinary procedures set out in the employee handbook are relatively conventional, setting out an indicative list of gross misconduct, but setting out formal procedures which would be followed.

There is no suggestion that this procedure would *not* be followed for employees during their probationary period.

15. The respondent asserts that the claimant had been guilty of gross misconduct, neglect of her duties etc, and that disciplinary procedures could have been followed, which could have led to summary dismissal. However, the respondent chose not to follow such procedures, and because the claimant had submitted her resignation, chose to take no action.

16. In respect of the facts of the case, as referred to above, the tribunal noted that the key evidential dispute related to: (1) The agreed hourly rate of pay (*as it turned out, there was no dispute as to the total hours worked during employment, up until resignation, and it was agreed that the claimant was entitled to be paid for all those hours*); (2) Whether there was any contractual entitlement to wages for the initial training; (3) The arrangements for giving notice (albeit the latter may not affect the legal position); (4) When employment ended – whether on 4 October 2018, the date relied upon by the claimant (when her notice expired), 19 September 2018 (asserted by the respondent to be the effective date of termination – the last day the claimant physically worked in the shop), 21 September 2018 (the date of the emailed resignation) or 23 September 2018 (the date that the respondent acknowledged the resignation and informed the claimant not to come back to work). The respondent has also raised the issue (5) of gross misconduct/ serious negligence etc: if the respondent is to be able to rely upon the claimant's gross misconduct (or similar) as justifying a dismissal, it must show on a balance of probabilities that the claimant was guilty of gross misconduct (or the alleged conduct), and as a matter of evidence would need to show what procedures would have been followed and how long they would have taken (this being in circumstances where the reality is the respondent chose not to follow any procedures at all, and gave no intimation of any intention of doing so). If the respondent's case is that it could have dismissed the claimant under the contract of employment anyway with no notice, during the probation period, it would need to set out a proper basis for that, as well as showing that it did in fact bring the contract of employment to an end early.

17. Having confirmed the issues in the case, the tribunal went on to hear oral evidence. First of all, the claimant gave evidence, and as indicated adopted as her main evidence-in-chief the contents of her ET1 claim form, her written response to the ET3, and her schedule of loss. The judge then asked the claimant a number of open questions to ensure that she had covered the relevant factual matters. The claimant was then cross-examined by the respondent. The tribunal then heard the oral evidence of Miss Garcia-Rubio on behalf of the respondent. She adopted her witness statement and then gave further oral evidence-in-chief upon the relevant letters. She was cross-examined by the claimant. The tribunal then heard brief oral evidence on behalf the respondent from Ms S Cetinas (albeit it was only peripherally relevant to the issues to be determined). A brief, unsigned statement from a

Ms Harriet Dawe was also provided, which appeared to be of little relevance and to which the tribunal attaches little weight.

18. The tribunal then heard brief oral submissions from both parties in respect of liability and remedy. The parties had very little to add to what had been set out in the pleadings and witness evidence. The respondent asserted that it was accepted that 56 hours wages were playable, but this should only be at the national minimum wage rates and Miss Garcia-Rubio had offered to pay the sum of £384. it was asserted that the claimant was not entitled to notice pay. The claimant was not entitled to payment for attending training. The claimant's case was in essence that she considers she was entitled to her full wages and she gave notice and was entitled to be paid during the notice period.

19. After an adjournment for the tribunal to consider its judgement, the hearing resumed and the judge gave an oral judgment as to liability and remedy, giving full oral reasons. The judge explained the usual arrangements for publication of the judgement and for requesting written reasons, explaining that a judgment would be sent to the parties and pointing out that if written reasons were requested this this would be a document which would be posted on the website for all to read. He advised the parties to consider carefully before presenting any request for written reasons within the specified period. No request for written reasons was made at the hearing.

20. After the judge had delivered the all reasons for judgement, Miss Garcia-Rubio started aggressively to argue with the judge's conclusions. It was necessary to remind her that that was the end of the hearing and that she should leave the tribunal room.

21. The hearing ended at 1245.

22. Within 14 days of the judgment being sent to the parties, the respondent requested written reasons, by email on 12 June 2018. The respondent has also requested reconsideration, which is subject to a separate judgment.

<u>The evidence, and the factual findings</u>

23. The tribunal found both parties reasonably credible in some respects, albeit it was concerned that Miss Garcia-Rubio appeared to be running her business, and employing a small number of staff, with a rather confused idea as to her responsibilities as an employer or the nature of contracts of employment. In the case of this employee, Ms Garcia-Rubio had failed to provide any paperwork to back up her subsequent assertions as to the hourly rate of pay and the agreed arrangements for employment.

24. The tribunal considers that Ms Garcia-Rubio's evidence was somewhat muddled, including her repeated reliance upon a national minimum wage rate that was quite plainly well out of date, and well below the statutory level at the time. This suggests that there was considerable confusion in her own

mind as to the arrangements for paying wages, and indeed the contractual arrangements agreed with the claimant generally, which would have been likely to have been reflected in pre-contractual and contractual negotiations.

25. In contrast, the claimant was very clear that she had been offered, and had accepted the job, expressly on the basis of it being paid £8.00 an hour, as well as including some additional responsibilities which she thought would be useful for her CV, and which she understood had been reflected in wages being paid at more than the national minimum wage. The respondent's evidence was also that, during discussions, £8.00 an hour was indeed mentioned, but Miss Garcia-Rubio believed she had also made it clear to the claimant that such wages would only be *after* completion of a probationary period. The claimant disputes that, and her unambiguous case is that she accepted the job offer knowingly, and specifically, on the basis that her wages were £8.00 an hour from the start. The employer having failed to provide any paperwork whatsoever, whether in the form of a job offer, contract of employment, written particulars or a payslip, the tribunal must decide which oral account it prefers. The tribunal would expect an employer to be in a better position than a claimant to provide written evidence of the contractual agreement as to wages, but the respondent has not been able to do so.

26. On balance, the tribunal prefers the rather clearer and more consistent evidence of the claimant, and accepts her as a witness of truth and that she was quite clear that she accepted on the basis of £8.00 an hour. Although there is some doubt over the respondent's intentions, the rather less clear evidence from the respondent indicates to the tribunal it is more likely than not that the only sum of money referred to in the contractual discussions was the £8.00 an hour, and that it is more likely than not that even if Miss Garcia-Rubio had initially had it in mind to offer a lower sum during the probationary period, the actual job offer did not specify an lower initial hourly rate. On balance, the tribunal accepts that the job was offered at a rate of £8.00 an hour, was accepted on that basis, and that in consequence the agreed contractual rate from the start was £8 an hour.

27. In respect of the dispute over the arrangements for paying (or otherwise) for the claimant to attend for pre-employment training, the tribunal has also needed to make factual findings. The tribunal considers that this matter was left somewhat vague by both parties, neither of whom was able to be very specific as to what the agreed arrangement was, even if the claimant may have been left with an understanding that she was going to be paid something for coming to visit the business for training before her employment started. There was no suggestion that this affected her decision as to whether or not to accept the job offer. There is no need to find such a contractual arrangement in order to give business efficacy to the contract of employment. The tribunal does not consider that the evidence suggests that there was any clear agreement. In any event, it has not needed to resolve the point, as it relates to an agreement before employment started, which did not form part of the contract of employment. Employment only

commenced a few days later. The tribunal considers that the evidence called by the claimant does not sufficiently discharge the burden of establishing there was any specific agreement to pay the claimant any specific sum for attending training for employment started, but in any event even if there is an arguable case that some small sum of money might have been agreed, the tribunal considers that this falls outside the jurisdiction of the tribunal as it did not form part of wages properly payable under the contracts of employment. The tribunal has referred to some aspects of the law in these findings of fact, because it is difficult to disentangle law and fact, but the reality is that the tribunal cannot award compensation for this part of the claim.

28. In respect of the other factual issues, the tribunal's finding as to the effective date of termination, and whether the claimant was dismissed, is set out in its conclusions, and summarised below.

29. For the sake of clarity, the tribunal makes the following summarised findings of fact upon a balance of probabilities:

    a. The respondent is a small company owned and run by Miss Garcia-Rubio. It operates a small shop in Salisbury, selling fragrances and similar products. It would appear that it is run on a very informal basis.

    b. The company had adopted a company/employee handbook, which is apparently non-contractual. However, this sets out the procedures and arrangements which the employer expected to follow. It referred to a 20-week probationary period for all new employees joining the company. It also provided for a non-contractual discipline and grievance procedure. The handbook explained "that an employee could be dismissed without notice if the reason for dismissal is" gross misconduct, severe negligence and sound or if you commit a serious breach of your obligations as an employee, then termination of the probationary period will be effective immediately without notice." However, the hand that goes on to explain in detail that if the decision is made to terminate an employee's contract of employment during the probationary period, the employee would be informed in advance and given the opportunity to respond, and where appropriate alternative options for retraining would be discussed and the employee will have the opportunity to appeal. The handbook specified that if an employee wished to terminate the probationary period, they should inform the manager via email and that "*in this situation, notice period will not be necessary*".

    c. In respect of notice being given by the employer, other than in relation to gross misconduct or capability matters, the employee handbook does not provide for a special notice period during the probationary period. The employee handbook is somewhat infelicitously worded in respect of notice generally, when that notice is being given by the respondent. However, the section relating to notice periods, provided to

the tribunal, does not in fact set out any period of the notice to be given by the employer. It does not adopt the statutory minimum periods but the omission of specified periods from the handbook appears to have been an error. Had the respondent troubled to give the claimant a written contract or written particulars of employment (albeit she had less than two months service at the date of resignation), this matter might have been easily resolved. The wording of the handbook clearly implies that no employee would be dismissed without a period of notice, save for the specific circumstances when it is necessary to follow a penalty or disciplinary procedure.

d. In the summer of 2018, the company advertised for a sales assistant. The claimant applied and was offered the job on the basis of working three days a week with 21 hours per week, at a rate of £8 an hour. The tribunal accepts that because of the claimant's low earnings she would have fallen below the minimum threshold for paying income tax. The claimant would work on Mondays, Tuesdays and Wednesdays, but in the first week the claimant would only work on the Tuesday and Wednesday because it was agreed that employment would commence on Tuesday, 4 September 2018.

e. The was discussion about completing training before employment started, and the tribunal has found that there was no clear agreement as to whether and in what way the claimant would be remunerated for this. The tribunal has found, in any event, that the short period of training did take place but it was completed prior to the claimant becoming an employee, and any agreement as to the training arrangements did not form part of the contract of employment.

f. In the first week of her employment the claimant worked 14 hours and was entitled to be paid for these hours.

g. In the second week of her employment the claimant worked 21 hours and was entitled to be paid for these hours.

h. In the third week of her employment the claimant worked 21 hours and was entitled to be paid for these hours.

i. The tribunal accepts that the employment did not go entirely according to plan and there were some concerns on both sides as to whether the right decision had been made.

j. On Friday, 21 September 2018 (having completed her working days for that week), the claimant decided to resign from her employment. Her understanding was that she was expected to give two weeks' notice which was the period she had understood from her discussions prior to accepting the employment. In any event, the claimant wished to give two weeks' notice and was expecting to work her notice, noting also that she did nit have another job to go to during that period. She

emailed Miss Garcia-Rubio on the morning of 21 September 2018, resigning with notice, and specifying that the final day of her employment would be 4 October 2018. This would have entailed two further working weeks at 21 hours per week before her employment terminated.

k. On Sunday, 23 September 2018 Miss Garcia-Rubio replied to the email on behalf of the respondent, in the following terms "*Received. Do not worry about coming back. Please leave the keys in the shop tomorrow through the letterbox*."

l. Although the claimant had been expecting to return to work the following morning, on receipt of the email she understood that she was not expected to come in to work and she therefore returned the keys. She did not physically carry out work for the respondent on any subsequent day.

m. The tribunal finds that employment ended on 4 October 2018, the date that the claimant's notice expired. This was the effective date of termination.

n. Miss Garcia-Rubio did not at any point inform the claimant that she would be subjected to any form of capability or disciplinary procedures or that she had failed her probationary period. She never indicated to the claimant (until very much later) that she had been, or would be, dismissed.

o. The claimant was paid no wages at all, and was given no notice pay. As at the date of the hearing, the claimant had still been paid no wages or notice pay.

Conclusions

30. Many of the tribunal's conclusions flow directly from the findings of fact, and this is a case which very much turns on its own facts.

Wages in respect of pre-employment training:

31. In respect of the training before the claimant commenced her employment, this claim is brought as unauthorised deduction of wages under sections 13(3) of the Employment rights Act 1996, although it would also be arguable as a sum outstanding under the contract of employment at termination. However it is brought, the tribunal considers that it relies, as a starting point, upon whether sums were due under the contract of employment, and is plainly brought primarily as a wages claim. The key issue is whether, on a specified occasion, the wages payable were "*less than the wages properly payable to the worker… on that occasion*" (section 13(3)), within the statutory definition of wages under the contract of employment.

32. The facts of this case are slightly unusual, in the sense of it being a case brought on the basis of wages payable under the contract of employment, but relating to something which happened before the claimant became an employee. The tribunal's conclusions are that whatever may have or may not have been agreed between the claimant and Miss Garcia-Rubio during their pre-employment negotiations, the reality is that at the time the claimant carried out some preliminary training she had not become an employee and she was not a worker providing any sort of service or services to the respondent; therefore, in terms of a claim in the Employment Tribunal, the tribunal has not got jurisdiction to deal with the matter. As to any possible sums of money which might have been agreed, the tribunal considers that the evidence is not sufficiently clear for it to be able to make a finding in the claimant's favour in relation to the preliminary training. As indicated above, this is not a matter which came under the contract of employment, which related to the wages payable on and after 4 September 2018. The tribunal has no jurisdiction to hear this part of the claim. That said, the tribunal has in any event concluded that the claimant's evidence is not sufficiently cogent to establish that there was any contractual agreement giving rise to a liability to pay a specified amount in respect of this training.

    Wages in respect of days worked between 4 September 2018 and 21 September 2018:

33. It is common ground that the claimant did actually work a total of 56 hours, and was never paid any wages, whatever the reasons for the respondent's failure. On that basis, this part of the claim is clearly well founded, and is bound to succeed. In statutory terms, as the claimant was paid nothing, clearly she was paid less than the sums "properly payable" under section 13(3) of the 1996 Act. Quite plainly, it is not open for employer to fail to pay wages, unless a deduction is permitted under some other statutory provision (which has not been argued here).

34. The main underlying issue, which is in dispute, is what wages were "properly payable". In effect, that means that the evidential issue is what the contractual hourly rate was, albeit the difference between the parties is by no means very great (only 17p an hour difference, but the respondent has chosen to dispute the claimant's figure). As set out above, the tribunal has preferred the claimant's figure of £8.00 an hour.

35. On the factual basis found, as it is agreed that the claimant worked for a total of 56 hours during her employment, the sum properly payable would be £448. That is a gross sum, liable for deductions from tax and national insurance, albeit it may well be that the claimant's low earnings would mean that no deductions need to be made.

    Breach of contract: notice pay

36. In respect of the contractual claim, it is not in dispute that the claimant resigned, and that she gave two weeks' notice, expiring 4 October 2018. If

she was contractually entitled to notice pay, this would amount to an entitlement to 42 hours at £8 an hour, namely £336.

37. As indicated above, there has been argument between the parties as to whether there was or was not a contractual agreement as to the required notice period. The tribunal has found the employee handbook somewhat vague on the point, but whatever its construction, and whatever its impact on the contract of employment, what it does ***not*** say is that during the probationary period of an employee must resign with zero notice. It provides, effectively, that an employee who resigns during the probationary period is ***not required*** to give a period of notice.

38. The tribunal considers that the respondent has left the position somewhat unclear, when it could have clarified the matter in writing at the time, but in any event, takes the view that this is a somewhat academic point. The reality was that when the claimant resigned on 21 September 2018, expressly giving two weeks' notice, she stated that her final day of employment would be 4 October 2018. She remained available to work, and it was clear that her resignation was intended to take effect at the end of that period. The claimant did make reference to the two-week notice period in her resignation email, but Miss Garcia-Rubio's reply acknowledged the resignation, but did not seek to suggest that the two-week notice period was mistaken, but what it said was "do not worry about coming back".

39. The tribunal considers that the correct legal approach under contract law is that the claimant had given notice that her employment would come to an end after her final working day of 4 October. Plainly, the specified notice was on the basis that employment would not end before that date. There is nothing in the law generally, and nothing in any contract of employment agreed between the parties, preventing the claimant from giving a longer period of notice than any stated minimum. Indeed, as a matter of common sense (and indeed as Mss Garcia-Rubio herself acknowledged), it is usually helpful to give as much notice of any change as possible, so that the employer can plan accordingly. As a matter of law, the claimant was perfectly entitled to give advance warning of an intention to leave, even if there was no requirement to do so. This does not mean that the notice is in some unspecified way "invalid". It was notice validly given, and the claimant made it clear that she could work her notice.

40. This was an important point in the determination of the breach of contract claim, and Miss Garcia-Rubio had clearly had the notion in her mind that if the claimant was not ***required*** to give notice, the two weeks' notice which she in fact gave must therefore be invalid and unenforceable. The judge was at pains to point out that this was a mistaken understanding of the law, and in his oral reasons for the judgment made this matter very clear.

41. The respondent had accepted the claimant's resignation, and might have expressly sent the claimant on garden leave for the notice period and continued to pay her, or have given pay in lieu of notice (both of which

would be consistent with the wording of the employee handbook), or, of course, have expected the claimant to work her notice. Or, the respondent might have chosen to dismiss the claimant during her notice period, providing that dismissal did not breach the contract of employment.

42. The emailed response did not expressly dismiss the claimant, or even suggest that there was or might be any sort of dismissal, immediate or otherwise. This may well have reflected Miss Garcia-Rubio's own lack of knowledge of the contractual arrangements. Instead, her email said "*don't worry about coming back*". The tribunal considers that the practical effect of that could have been one of three possibilities: either (1) the claimant had been sent on garden leave and the contractual entitlement to wages would continue during the notice period: the claimant would still be an employee, and as there was no suggestion that she was not entitled to wages, she would still be entitled to her wages if the respondent decided to send her home on leave. She would still be entitled to her notice pay, and the claim would succeed. An alternative interpretation, (2) would be that the respondent was intending to give pay in lieu of notice, instead of a period of garden leave, but in any event did not need her to return to the shop. This would have an identical financial outcome for the claimant. The final possibility (3) is that the respondent had dismissed the claimant, by effectively and impliedly suggesting that the contract of employment had come to an end and that the claimant should no longer treat herself as an employee. An alternative possibility (4) is that Miss Garcia-Rubio was not at all sure what the claimant's entitlement was, but hoped that if the claimant was not required to give notice, she might be able to not be liable to provided with notice pay. If (4) may have reflected the reality of her belief at the time, that was not set out in the wording of her emailed reply, and would not in fact have any impact, as a matter of law, on the claimant's legal entitlement.

43. The matter is somewhat unclear, but tribunal has concluded, on balance, that in the absence of anything suggesting an immediate dismissal, anything expressly contradicting the claimant's stated final date, or mentioning pay in lieu of notice, the respondent's words should be given the most obvious interpretation as indicating that, with effect from the date of the email (23 September 2018), the claimant was effectively on garden leave and would no longer needed to attend at the workplace.

44. The effect of that conclusion is that the tribunal finds that the claimant remained an employee until 4 October 2018, albeit she would only need to be paid up to Wednesday 3 October 2018. That is consistent with the wording of the resignation, and does not require any special meaning to be read into the respondent's email beyond the obvious meaning of the words actually used. As the respondent never paid the claimant, and never sought to provide a P45, there was no document prior to the ET3 response purporting to set out an alternative date of termination, and even the date relied upon in the ET3 makes little sense, because it suggests that

employment ended before the date that the claimant emailed her resignation.

45. The effect of the above conclusions is that the breach of contract (notice pay) claim is well-founded. It could, in the alternative, have been brought (and would have succeeded) as a deduction of wages claim, on the basis that the claimant remained an employee, on garden leave, and was not paid the wages properly payable under section 13(3) during that notice period.

46. Because the tribunal accepts that, on one construction (albeit one which has been rejected), Miss Garcia-Rubio's email of 23 September 2018 *might* be taken as an express summary dismissal (which the tribunal considers would be reading in more than can reasonably be inferred by the words used), the tribunal has considered what its conclusions would be, in the alternative, had it found that to be the case. The rather ambiguous case at the hearing was that Miss Garcia-Rubio considered the claimant to be guilty of gross misconduct or negligence and could have dismissed her, even if she did not seek to do so at the time. The tribunal has found, on balance, that the claimant was *not* dismissed with immediate effect on 23 September 2018, but had it done so, the following conclusions would apply, noting that it has not been suggested that there would have been any contractual basis for suspending the claimant without pay pending a disciplinary investigation.

47. The respondent's express case as put forward at the litigation, is effectively that employment came to an end on the date that the claimant last worked, although a more logical interpretation would be that it was from the date of the resignation email, or the date of the respondent's reply. However, as the tribunal accepts that as the claimant only worked three days a week, the precise date that termination came into effect between the end of the last working Wednesday and the following working Monday, is perhaps unimportant. In any event, the argument which the respondent relies upon to defend the claim, is to assert that the claimant was guilty of gross misconduct (or gross negligence), with a rather unclear argument that the respondent would have been entitled to dismiss the claimant without notice.

48. The tribunal considers that argument, even if correct, would not be enough for the respondent successfully to resist the breach of contract claim. The burden of proof is upon the respondent, in the first place, to show that the claimant was guilty of gross misconduct or repudiatory breach of contract, if it wishes to rely on an entitlement to summary dismissal. It its case is that it was entitled to dismiss the claimant anyway, without notice, during the probationary period, that requires and explanation, and evidence that the claimant had been dismissed. The evidence provided by the respondent falls some way short of showing the sort of misconduct, negligence or lack of capability required in the employee handbook, and is hotly disputed by the claimant. The background evidence does suggest some shortcomings in the way that the claimant was conducting her duties (and the claimant herself had clear come to the conclusion that in the longer term she would be better off working elsewhere). If there were capability matters, the

employee handbook suggests that the procedure which would be followed during the probationary period would effectively be to give a warning and guidance, and the employee would be given an opportunity to remedy the situation. The employee handbook does however suggest that if there is gross misconduct during the probationary period, the disciplinary procedures would be followed. If specified procedures are required for capability or conduct matters during the probationary period, it would be very strange if (in the absence of such concerns) the respondent could dismiss a competent and well-behave employee instantly.

49. The reality is, that whether or not there were grounds for commencing disciplinary procedures for misconduct, or capability processes, the respondent *did not in fact do so at the time*. The fact that there had been some previous discussion about workplace issues is not enough.

50. Of particular significance, there is nothing in the respondent's reply to the resignation email, which reads as a purported dismissal of the claimant for gross misconduct, or indeed any other reason at all. This particular issue was raised for the first time in response to the ET1 claim form, on the basis that the respondent *could* have taken such a course of action. But it did not.

51. The tribunal's key conclusions are that the respondent has not established that the claimant was in repudiatory breach of contract, but that in any event there was no dismissal, and in consequence the claimant's notice should be taken to have run to 4 October 2018.

52. In any event, in considering what the position might have been if the respondent had had justification for commencing disciplinary or capability procedures, the tribunal notes the following: The tribunal accepts that the disciplinary procedures were non-contractual, and that Miss Garcia-Rubio had not needed to have recourse to them in the past, and would have been unfamiliar with their operation (which might itself have triggered a delay, whilst she researched the point, and perhaps took advice). However, they set out a conventional disciplinary procedure which accords with the ACAS Code of Practice on disciplinary procedures. The tribunal considers that it should be implied into the contract, taking account of the guidance in the disciplinary policy (which the respondent sets out how it would deal with such cases), that if the respondent wished to dismiss for gross misconduct (or indeed gross negligence or any of the other matters raised), it would have followed its own procedures. The dismissal, if such it had been, would not have been in accordance with the contract of employment, and as such would be invalid. Because the respondent did not seek to follow any procedures prior to the final date given by the claimant, it is a slightly academic point but the tribunal notes that if Miss Garcia-Rubio had considered going down the disciplinary route the reality was that as she herself admitted she was extremely busy at the time, it is difficult to see how she would have found the time to carry out proper disciplinary procedures in a short space of time. It is far more likely that, in any event, she would have taken the view that if the claimant was leaving anyway there was simply no

point in spending a lengthy period of time (which she did not appear to have) in following a proper disciplinary procedure. That said, it is perhaps a slightly academic point, as in fact the respondent took no formal action, save for telling the claimant that she need no longer come into work.

53. On any analysis therefore, the tribunal considers that the claimant was entitled to give advanced notice of the date that her employment was going to end. She was entitled to be paid for those two weeks as her notice period, even if the respondent decided to send her on garden leave. If the respondent did not wish to use her services in the shop, then that would not mean that the notice (or wages) was not still payable. If the respondent made an error of law on that point, that does not extinguish the legal liability. The tribunal has found that the claimant was not dismissed, but in any event the respondent has not made out a case justifying a dismissal prior to the end of the notice period.

54. The breach of contract (notice pay) claim is well founded. The claimant is contractually entitled to her notice pay in the sum of £336.

Confirmation of remedy

55. As set out above, on the basis of the finding of wages being £8 an hour, rather than national minimum wage, it is uncontroversial that the claimant is entitled to £448.00 as compensation for unauthorised deduction of wages. As indicated above, this is the gross sum, which is liable for lawful deductions for tax and national insurance, albeit it may well be that on the facts of this case it would payable as a gross sum.

56. Similarly, on the basis of the findings above, it is uncontroversial that the claimant is entitled to her notice pay of £336.00. This is usually ordered as the net sum, but in the absence of the respondent producing payslips or setting out any alternative basis of calculation, the tribunal considers that there is no evidence suggesting that the net sum would be any lower than the gross sum. The tribunal therefore orders payment of £336.

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Employment Judge Emerton
Date: 23 June 2019