EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101571/2019

Held in Inverness on 27 and 28 June 2019

Employment Judge: I F Atack

Kenny Mackinnon	**Claimant** **Represented by:** **Mr F Lefevre** **Solicitor**
Inverness Golf Club	**Respondents** **Represented by:** **Mr C Robertson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is

1. That the claimant was not unfairly (constructively) dismissed in terms of section 98 of the Employment Rights Act 1996 and his claim is dismissed.

2. That the claimant did not suffer an unlawful deduction from wages in respect of non-payment of overtime contrary to the provisions of section 13 of the Employment Rights Act 1996 and his claim in respect of an unlawful deduction is dismissed.

3. That the claimant's claim for payment of nine days outstanding holiday is dismissed.

E.T. Z4 (WR)

REASONS

Introduction

1. In this case the claimant complains of unfair constructive dismissal, unauthorised deductions from wages in respect of a failure to pay for overtime in respect of hours he worked between 40 qnd 45 per week and a failure to pay him in respect of accrued but untaken holidays. The respondent denies that the claimant was dismissed, alleging that he resigned, and also denies that the claimant is due anything further in respect of payment for overtime or accrued but untaken holidays.

2. The parties produced a joint bundle of documents extending to 119 pages. Reference to the documents will be by reference to the page number in the bundle.

3. The claimant gave evidence on his own behalf and evidence was given for the respondent by Mr. Ewen Forbes, their secretary and manager, from Gordon Fyfe who had been the president of the respondent in the period 2015 to 2017 and from Joseph Campbell their current president.

4. The parties agreed the figures set out at pages 104-105 of the bundle quantifying the claimant's loss, in the event that the tribunal should find in his favour.

5. From the evidence led and the documents to which I was referred I found the following material facts to be admitted or proved.

Material Facts

6. The respondent is a private members golf club.

7. The claimant was employed by the respondent as executive head chef from 2 March 2015 until 25 November 2018 when his employment terminated.

8. The claimant was given a contract of employment, pages 31-37. The claimant did not sign the contract of employment but did not inform the respondent he did not accept its terms and conditions. That contract formed the basis upon which he was employed.

9. The claimant's duties were set out in paragraph 3, page 32. Apart from the main duties set out, the contract stated that the claimant's duties would include "*any other reasonable duties and responsibilities considered appropriate by management."*

10. The claimant's normal hours of work were 40 per week. The contract provided that in addition he might be required to work such further hours as may reasonably be necessary.

11. The employee's salary included payment for overtime required to perform his duties, with the exception of the month of December when overtime would be paid at the claimant's normal hourly rate.

12. It was subsequently with agreed the claimant that if he worked more than 45 hours a week he would be paid overtime for those hours exceeding 45.

13. The respondent's holiday year runs from 1 January until 31 December.

14. The claimant was entitled to 30 days holiday per annum including statutory, local and other public holidays.

15. The contract provided paragraph 8.3, page 33, "*The employee may not, without consent of the employer, carry forward any unused parts of his holiday entitlement to a subsequent holiday year."*

16. At the end of 2017 the claimant had accrued unused holidays. It was agreed with Ewan Forbes that the claimant could carry over the unused holidays into the year 2018 providing those holidays were taken by the end of January 2018.

17. The claimant did not take all of the holidays carried over from 2017 by the end of January 2018. At the end of that time he had accumulated 17 accrued but untaken holidays for 2017.

18. In about March 2018 the claimant had a discussion with Ewan Forbes about the unused holidays. He asked to be paid in respect of those holidays.

19. Mr. Forbes asked that that proposal be put in writing so that he could take it to the respondent's management committee for consideration.

20. The claimant had a meeting with Mr. Forbes and Joseph Campbell on 30 October 2018. The matter of outstanding holidays was discussed. The claimant advised he had 17 days untaken from 2017 and 26 days still to take for 2018. His position was that he did not think he could take off all the days and asked to be paid for them.

21. Mr. Forbes and Mr. Campbell stated they would raise the matter with the management committee.

22. At the meeting the claimant complained about the staffing arrangements the respondent had made for running the bar and restaurant. He indicated that he was planning to leave the respondent's employment in the new year.

23. Following that meeting the claimant emailed Mr. Forbes and Mr. Campbell clarifying the holidays he claimed he was due, page 94.

24. In that email the claimant stated: "*Let me know what you decide with the holidays and I will update you both on the new chef/kp situation and also no need to worry about me leaving I will let you know asap (it will be in Jan/Feb) and two months' notice will be given but again that is if I decide to leave or in fact if you decide that."*

25. At the meeting on 30 October the respondent had suggested the claimant took holidays which were due and allow the number two chef to manage the kitchen. They were prepared to have a reduced or simpler menu to achieve that.

26. On 8 November the respondent's management committee met. Amongst the subjects discussed was the meeting which had taken place with the claimant on 30 October and the request he had made to be paid in lieu of accrued holidays.

27. The request that the claimant be paid for 43 days holiday was refused. It was agreed that the claimant would be paid for 8 of the 17 untaken holidays accrued from 2017 but the remaining nine days would be lost.

28. So far as the 26 days accrued in 2018 were concerned, it was agreed some should be taken before November 2018 and the remainder in January 2019, page 96.

29. On 12 November 2018 Mr. Forbes wrote to the claimant confirming the decision of the management committee, page 97. He also stated *"With regard to taking holidays, it is important for your well-being that you take your annual leave and it is essential that you plan for your holidays and let the second chef manage the kitchen when you are absent. If you have any concerns about maintaining the level of service and quality when you are away, then a reduced menu must be introduced."*

30. In about early November the claimant sent an undated letter to the respondent, page 98, in which he set out his proposals for taking accrued annual leave. He proposed that he took 43 days leave in that year commencing 22 November 2018 and returning to work on 24 January 2019.

31. He also proposed that as December was the busiest and most lucrative time of the year for the respondent that he provided his services to the respondent as executive chef from 23 November onwards through the medium of a company he had set up, Mackinnon Hospitality Limited.

32. Mr. Forbes responded to that letter on 15 November 2018, page 99.

33. The respondent rejected the claimant's offer to provide his services as executive chef through the medium of his company. They stated in the letter, *"You are already an employee of the club and as per our previous discussions and correspondence, it is important for your well-being that you take your annual leave and it is essential that you plan for your holidays and let the second chef manage the kitchen when you are absent."*

34. Mr. Forbes advised the claimant that he could not take holidays in the three weeks commencing third of December 2018. That was because the Christmas period is the busiest time of the year for catering at the respondent's golf club.

35. There was an expectation that the executive chef would be on duty at the busiest times of year.

36. On 18 November 2018 the claimant wrote to the respondent resigning from his post, page 100. He set out his reasons as follows:

1. refusal to pay five working hours, when not at a full staff complement;

2. deducting holiday allowances from my legal entitlement;
3. taking 11 months to decide there will be no payment in lieu of holidays for annual leave incurred in previous business year;
4. requesting additional responsibilities be undertaken beyond my position without formal or monetary recognition;
5. management decision making which directly and negatively affects my role and those of my subordinates without due consideration or consultation.

37. The claimant also alleged that the last straw upon which he relied was the manner in which the respondent dealt his holidays in November 2018 by their failure to adhere to an alleged pledge that he would not lose holidays he had accumulated during 2017 and 2018 by either allowing the claimant to take his full holiday entitlement or alternatively make payment to him for all untaken holidays.

38. By letter of 22 November 2018, page 102, the respondent accepted the claimant's resignation.

39. The claimant was paid for all holidays accrued but untaken in 2018 upon termination of his employment. He was paid up to 25 November. He was also paid for eight unused holidays from the year 2017.

40. There had been a meeting with the claimant and Mr. Forbes together with other officials on 2 November 2017. At that meeting the claimant had requested that he be paid for all hours worked over 40 in a week. That request was declined. A brief minute of the meeting is at page 113.

41. There was no agreement that the claimant would be paid in respect of overtime worked between 40 and 45 hours per week apart from what was stated in his contract relating to December.

42. The respondent had previously franchised the operation of their restaurant to an outside caterer. They decided to bring that operation back in-house in about 2015.

43. The claimant was employed as executive chef for that purpose.

44. The respondent experienced a few staffing issues in April/May 2018.

45. In about August 2017 the respondent was becoming concerned about the cost of providing their catering operation. A report, page 115, was produced for them by a friend one of the committee members, who owned three hotels.

46. The respondent was not aware that the claimant had cancelled bookings for two holidays in 2018.

47. The management committee decided to introduce a carvery to the restaurant. The claimant objected to that proposal. A compromise was reached whereby roasts would be produced but carved in the kitchen and in the normal way in front of diners. This new offering was described as *"a carvery with a twist."*

48. A waitress was promoted to the position of restaurant manager in October 2018.

49. The respondent regarded her as sufficiently experienced to take on that task and she was popular with the members. The claimant was of the opinion she should not have been appointed. That person is still in post and is well regarded.

50. In terms of his contract the claimant was entitled to participate in a bonus scheme. Paragraph 6, page 33 states "*The employee's remuneration will also include a bonus scheme. During the term of employment for each financial year of Inverness Golf Club, the employee shall be eligible to receive a bonus, based on 10% of the net profit from the catering accounts capped at a limit of £4,000 which will be paid to the employee annually."*

51. In 2017 the respondent's catering business was making losses. That was the reason why the report from experienced hotelier was requested.

52. The respondent introduced a 10% discount on food for members in 2017. This was to try to increase usage of the restaurant. The discount already applied to bar purchases. The discount was not to apply to functions where the pricing was always agreed with the claimant.

53. The introduction of the discount was accompanied by an increase in the cost of regular meals.

54. The introduction of the discount did not affect any bonus payable to the claimant as no bonus was payable as a result of the losses being made by the restaurant.

55. The accounts for the respondent's catering side of the business are independently audited.

56. There was no pledge by the respondent that the claimant would not lose accrued but untaken holidays from 2017.

57. The claimant was unwilling to leave the number two chef alone in the kitchen.

58. The respondent agreed to pay the claimant overtime if he worked more than 45 hours per week. There was no agreement he would be paid overtime between 40 and 45 hours worked per week, apart from the Christmas period.

59. On one occasion the claimant was paid for working overtime over 40 hours.

60. The respondent rejected the claimant's proposals, contained on page 98. They wanted him to take his holidays and could not understand how he could both take these and yet come to work for them as a chef working for his own company.

61. The respondent was concerned about the health and safety aspects of the claimant taking holidays from their employment but returning to work for them under the auspices of his company. They did not consider his proposals were acceptable.

62. When the person who had been running the bar and restaurant left the respondent's employment the claimant offered to oversee the restaurant. The respondent agreed that the claimant could do that additional duty until a new person could be appointed. The new person was appointed in about October 2018.

63. The respondent did not consider the grievance contained in the letter of resignation. They did discuss the points made by the claimant at their committee meeting at which his resignation was accepted.

64. The claimant endeavoured to find alternative employment following termination of his employment with the respondent. He was eventually able to find new employment commencing 22 April 2019. There is no ongoing loss.

65. The claimant did not receive any benefits during the period of his unemployment.

Submissions

Claimant

66. Mr. Lefevre submitted that the claimant had been entitled to resign for the reasons set out in the resignation letter at page 100. There had been an agreement, he said, to pay the claimant overtime when he worked more than 40 hours when there was not a full complement of staff. That agreement had not been honoured and the claimant had only been paid overtime for hours worked between 40 and 45 hours on one occasion.

67. The claimant had been denied payment in respect of accrued holidays.

68. The last straw was that he had been told he would not lose the holidays that he had accumulated from 2017 but had not been able to take, but no payments had been made to him in respect of those accumulated but untaken holidays.

69. When the claimant mentioned that he was thinking of leaving that should have been a huge warning signal to the respondent. The respondent made the decision to decline the claimant's offer and that is what led to his treating that refusal as the last straw.

70. Mr. Lefevre referred to the case of ***Kaur v Leeds Teaching Hospital NHS Trust*** 2018 EWCA Civ 978 and in particular to paragraphs 35- 55.

71. That case he said provided sufficient guidance as to what may constitute the last straw.

72. It was his submission that the employer rashly made a decision which they knew would lead to the loss of a valued employee.

Respondent

73. Mr. Robertson, for the respondent, provided written submissions upon which he briefly expanded.

74. He submitted that there was never any agreement to pay the claimant overtime hours between 40 and 45 hours. There was agreement to pay him when he worked over 45 hours and that was done. Overtime was included in the claimant's salary. He was also required to work such further hours as was reasonably necessary.

75. When the claimant advised the respondent that he been unable to utilize his annual holiday entitlement in 2016 he was told he could carry it over providing it was used by 31 January 2017. The issue arose again in about December 2017. The claimant was again told he could use the accrued but untaken leave by 31 January 2018. In about March 2018 the claimant informed Mr. Forbes that he been unable to use his annual leave and wished to receive a payment in respect of the outstanding entitlement. He was told to put that proposal writing so that Mr. Forbes could take it to the management committee. The claimant failed to do so.

76. The matter was raised again in October. At the meeting which was held the claimant indicated his intention to leave the respondent. The respondent declined the claimant's proposal but agreed to pay eight days of annual leave remaining from his 2017 allocation and that he would lose the remaining nine days which he had failed to take.

77. The claimant then requested to take annual leave during December although he was aware that was the busiest time of the year. His proposal was that he took his annual leave from the respondent but that a catering company owned by him be engaged to provide his services as executive chef to the respondent. That offer was rejected by the respondent.

78. Mr. Robertson submitted that any additional responsibilities taken on by the claimant were taken on at his suggestion.

79. Whilst the claimant may have objected to management decisions regarding the introduction of a carvery and the promotion of the waitress these were management decisions and which were implemented.

80. It was submitted that the claim of constructive unfair dismissal ought to be dismissed on the basis that neither the respondent nor any of its employees exhibited any behaviour or treated the claimant in any way which could be deemed to constitute a fundamental breach of the claimant's contract of employment or which showed the respondent no longer intended to be bound by one or more of the essential conditions of the contract.

81. Mr.Robertson also submitted that the claimant was relying upon an innocuous act as his last straw. He referred to the case of ***Waltham Forest v Omilaju*** [2004] EWCA Civ 1493 and to ***Western Excavating (ECC) Ltd v Sharp*** [1978] IRLR 27.

82. He invited the tribunal to dismiss all of the claimant's claims.

Decision

83. The issues for the employment tribunal were as follows: –

1. Has the claimant shown that the respondent has committed a fundamental breach of contract indicating that it no longer intended to be bound by one or more of the terms of the contract.
2. Was there any agreement to pay the claimant overtime if he worked between 40 and 45 hours per week.
3. Was there any agreement, which the respondent subsequently broke, to permit the claimant to carry forward accrued but untaken holidays beyond 31 January 2018.

84. These will be considered in turn:

Unfair Dismissal

85. The claimant claims that he has been constructively dismissed in terms of section 95 (1) (c) of the Employment Rights Act 1996. This states that there is a dismissal where the employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

86. ***Western Excavating (ECC) Ltd v Sharp*** (above) makes it clear that the employer's conduct must be a repudiatory breach of contract: **"A significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the terms of the contract**." It is clear that it is not sufficient that the employer's conduct is merely unreasonable. It must amount to a material breach of contract.

87. The breach may also be the last in a series of incidents which justify the employees leaving.

88. The employee must then satisfy the tribunal that it was this breach that led to the decision to resign and not other factors. Finally, if there is a delay between

the conduct and the resignation, the employee may be deemed to have affirmed the contract and lose the right to claim constructive dismissal.

89. In this case the claimant has set out what he considers to be the breach of contract by the respondent. That is contained at pages 100 and 11a and 11b.

90. The claimant alleged that the respondent has refused to pay for five working hours each week whilst the staff was not at full complement. Both Mr. Forbes and Mr. Fyfe gave evidence that the claimant's request that he be paid for overtime between 40 and 45 hours was considered but rejected by the management committee. It was agreed that overtime be paid to the claimant after he had worked 45 hours and that fact did not appear to be in dispute. It is for the claimant to prove, on the balance of probabilities, that his contract of employment was altered to provide for his being paid overtime if he worked more than 40 hours up to 45 hours a week. The contract at page 33 was clear that the salary included any overtime required to perform his duties. In the absence of any further evidence in writing and taking into account the evidence of Mr. Forbes and Mr. Fyfe I concluded that the respondent was correct in stating that it had never been agreed that the claimant would be paid overtime between 40 and 45 hours worked. The claimant has failed to prove that the contract was altered as claimed It therefore follows that the respondent cannot have been in breach of contract by paying the claimant precisely in accordance with his contract.

91. The claimant's contract specifically states at paragraph 8.3 on page 33 that the employer may not, without the consent of the employer, carry forward any unused parts of his holiday entitlement to a subsequent holiday year. The fact that the respondent permitted him to carry forward into 2017 untaken holidays from 2016 does not alter the claimant's contract. Such consent was given in accordance with the contract.

92. The claimant was told that he could carry forward unused holidays from 2017 until 2018 but that those holidays must be taken by 31 January 2018. The claimant did not take those holidays and instead proposed to Mr. Forbes that instead of taking them he receive a payment in respect of them. That was something that Mr. Forbes could not agree on his own but he was willing to take it to the management committee providing the claimant put the request in writing. Although there were discussions with the claimant about holidays the request was not put in writing.

93. A meeting was held on 30 October 2018 with the claimant to discuss, amongst other matters, his ongoing holiday situation. The matter was then discussed at the meeting of the management committee on 8 November at which it was decided that the claimant would not be allowed to receive payment in respect of the full seventeen days holidays carried over from 2017 but would be paid for eight, the other nine being lost. The claimant was advised of this decision by letter of 12 November and told he should take some of the outstanding holidays for 2018 before the end of November and the balance in January 2019.

94. The claimant's response to that was to suggest taking immediate leave from 22 November and returning on 24 January. Alternatively, he offered as a solution that he would take his holidays in December and his services as executive chef would be provided by him through a company called MacKinnon Hospitality Limited. That request was refused by the respondent.

95. I considered that the respondent was acting in accordance with the claimant's contract of employment in dealing with his request regarding holidays and not in breach of it. The fact that the claimant had been allowed on two occasions to carry forward accrued but untaken holidays was in accordance with the contract which permitted the carrying forward unused holidays with the consent of the employer.

96. The claimant had been requested by Mr. Forbes to put his request for payment in lieu of holidays in writing but he failed to do so.

97. The claimant alleged that he been given additional responsibilities beyond his position without formal or monetary recognition. The evidence in respect of this allegation was clear in that the claimant had voluntary offered to take on the additional role of overseeing the restaurant staff before the appointment of a bar and catering manager. He had also offered voluntarily to oversee the management of the restaurant staff rota. There was no evidence that this task had been forced upon the claimant against his will.

98. The decisions of management which the claimant alleged adversely affected his role were with regard to the introduction of a carvery, the promotion of a waitress and the 10% discount on food. The claimant may well have disagreed with these decisions but they were in my opinion management decisions which the respondent was perfectly entitled to implement. Their implementation could not be regarded as a material breach of contract by the respondent.

99. The claimant had alleged that he been told he would benefit from a profits related bonus but that the respondent allocated costs from other badly performing or lossmaking parts of the business into the catering side which adversely affected the profitability of the catering performance. Other than the claimant's allegation on this point there was no evidence to substantiate it. The allegation was denied by Mr. Forbes who stated that the accounts were independently audited each year and the allegation was false. In the absence of any refutation of the evidence given by Mr. Forbes I accepted his evidence on this point.

100. The claimant argued that the last straw was the manner in which the respondent dealt with his holidays in November 2018 by way of their failure

to adhere to a previous pledge that the claimant would not lose holidays that he had accumulated during 2017 and 2018 by way of either allowing the claimant to take his full holiday entitlement or alternatively make payment to him for all untaken holidays. The only evidence that there had been any such pledge came from the claimant himself. The evidence from the respondent was that no such pledge had been given. The evidence was that it had been made clear to the claimant both in 2016 and 2017 that if he did not take unused holidays by 31 January in the following year they would be lost.

101. In the case of ***Omilaju*** (above) it was held that where the alleged breach of the implied term of trust and confidence constituted of a series of facts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if it was relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history.

102. In ***Kaur*** (above) Underhill LJ referred to ***Omilaju*** and quoted with approval the following passages from the case:

"15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd*[1985] IRLR 465, [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:*

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? … This is the 'last straw' situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small

*things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.…*

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

103. In this case the respondent had made no such pledge to the claimant as alleged regarding the taking of unused holidays and accordingly the alleged final straw is a completely innocuous act. It does not add anything to the complaint.

104. Taken individually the various complaints made by the claimant in this case do not amount to a material breach of contract showing the respondent no longer intended to be bound by the contract. The claimant may well not have liked some of the decisions that does not make them a breach of contract.

Even taking them together they do not show an intention on behalf of the respondent to be no longer bound by the contract They do not amount to material breaches of contract. I accordingly find that the claimant was not constructively dismissed and his complaint in respect of that allegation is dismissed.

105. The next complaint is in effect a claim of an unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996. I was not addressed upon the scope of this section by either of the parties representatives but it was clear from the evidence of both the contract and the respondent's witnesses as set out above that there was no agreement to pay the claimant for overtime hours worked between 40 and 45 per week. It was the claimant's position that there had been such an agreement and he had not been paid. The onus is on the claimant to prove his case in this respect and in the absence of any other evidence I concluded that the evidence given on behalf of the respondent be accepted on the balance of probabilities.

106. Having concluded that the claimant had no legal entitlement to be paid in respect of overtime worked between 40 and 45 hours a week this claim is dismissed. There were no unauthorized deductions of the claimant's wages. There was no contractual right to be paid overtime for hours worked between 40 and 45 per week.

107. The final aspect of the claim is in respect of accrued but untaken annual leave. The matter of entitlement to annual leave is dealt with in the claimant's contract of employment. I was not addressed by either of the parties' representatives on the effect upon the contract of the Working Time Regulations 1998 or what effect, if any, those regulations might have upon the claimant's claim.

108. The claimant alleged that he had been given an assurance by Mr. Forbes in January 2018 that he would not lose any of his holiday entitlement in respect of untaken holidays from 2017. The onus again was on the claimant to prove that allegation, on the balance of probabilities.

109. The contract was clear that holidays could only be carried forward with the consent of the employer. There was no evidence in writing to indicate any pledge had ever been given by Mr Forbes that holidays carried forward from 2017 would not be lost and its existence was denied by the respondent's witnesses. I concluded that no such pledge had been given but that Mr Forbes had told the claimant to take his holidays by 31 January 2018. In the circumstances the claimant has failed to prove that he was entitled to carry over his holidays beyond the end of January and to be paid in respect of untaken holidays from 2017 upon termination of his employment.

110. Accordingly, his claim is dismissed.

Employment Judge: **Ian F Atack**

Date of Judgment: **10 July 2019**

Date sent to parties: **15 July 2019**