Case No: 2601685/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr A MacGuire

Respondent: Mrs A Kaponas

FINAL HEARING

Heard at: Nottingham **On:** 15 to 17 July 2019

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: Mr T Powell, lay representative (claimant's partner)
For the respondent: in person, assisted by her son, Mr I Kaponas; no appearance on 17/7/19

REASONS

1. This is the written version of the Reasons given orally at the hearing for the decision of 17 July 2019 in the claimant's favour.

2. The claimant was employed from August 2010 to 6 June 2018 as a chef/occasional manager of the Cypriana Coffee House & Grill in Worksop (the "Café"), which is owned by the respondent. The claimant went through early conciliation from 13 June to 10 July 2018. His claim form was presented on 21 July 2018.

3. There have been two preliminary hearings for case management and some of the complaints originally made in the claim form have been withdrawn. The claims which I am left with are: unfair dismissal; wrongful dismissal (notice pay); underpayment of wages by failing to pay the national minimum wage; compensation for accrued but untaken holiday; failure to provide a statement of employment particulars pursuant to section 1 of the Employment Rights Act 1996 ("ERA").

4. The issues which I had to deal with are as follows:

   4.1 in relation to the failure to provide a statement of employment particulars, given that the claimant has succeeded in his claims for unfair dismissal and unauthorised deductions from wages, and given that the respondent has conceded that it failed to provide the claimant with such a statement, the only question is whether it

should be two weeks' or four weeks' compensation under section 38 of the Employment Act 2002;

4.2 in relation to the claim for compensation for accrued but untaken holiday under regulation 14 of the Working Time Regulations 1998 ("WTR"), the claim has been limited to the final holiday year and it is common ground that the respondent's holiday year ran from 1 January. The live factual issue is whether the claimant was or was not on holiday for a particular week in April 2018. He worked six days a week, Monday to Saturday so a week's holiday would be six days of holiday. The claimant had 28 days of holiday per leave year in accordance with the WTR. It is common ground that he took at least four days of annual leave in 2018, on bank holidays, so the respondent's case is that he took 10 days' of annual leave that year and his case is that he took only 4. As his employment terminated on 6 June 2018 (which is 43 percent of the way into the year), he had accrued 12 days of annual leave when his employment ended. It follows that, even on the respondent's case, he had taken less annual leave than he had been entitled to under the WTR. As a matter of arithmetic, on the respondent's case it owes him compensation for 2 days' accrued annual leave; the claimant's case being that he is owed for 8.

5. In relation to unfair dismissal and the claim for wrongful dismissal, the respondent concedes that it dismissed the claimant without notice or a payment in lieu of notice. The circumstances in which the claimant was dismissed were that, following an incident in the locality of the Café involving the claimant, which he describes as a homophobic sexual assault, there was ill-feeling towards him locally. In the respondent's words in the response form, "*We told Andrew that it would not be a good idea to return to work and we sent him a cheque for money that we believed he was owed*". The cheque was for £50 and it covered his work on 4 June 2018, which was his last working day.

6. The respondent's case is that the principal reason for dismissal was a reason relating to the claimant's conduct and/or some other substantial reason. I shall return to this later.

7. The first issue in relation to unfair dismissal is: what was the reason, or principal reason, for dismissal and was it a reason relating to the claimant's conduct and/or some other substantial reason in accordance with ERA section 98.

8. Turning to the claim for notice pay, the reality is that the respondent does not have a defence to this claim. However, at the start of the hearing, when discussing what the issues were with the parties, I suggested to the respondent that on the facts, her only possible defence to that claim would be to prove that the claimant had committed gross misconduct. At that point, the respondent suggested that that was indeed her defence.

9. The other unfair dismissal issue is so-called 'general reasonableness' under ERA section 98(4). Again, though, that is not really a live issue in this case because, on any sensible view, this was an unfair dismissal for procedural issues, even if for no other reason.

10. The claimant is seeking compensation only as his remedy for unfair dismissal. However, he is seeking only a basic award and not a compensatory award. At the second preliminary hearing in this case in March 2019 before Employment Judge Britton, the claimant was ordered to produce three schedules of loss, one of which was to include a statement setting out all the claimant's efforts at job-seeking up until he got new employment, including any proof of his efforts and, if he was complaining of continuing loss since he obtain new employment, he was ordered to set out his new wage and to provide payslips to date. He did not comply with that part of the order and he confirmed during the hearing that he was not seeking any compensatory award for unfair dismissal.

11. The fact that the claimant is not seeking a compensatory award means I do not have to deal with what would otherwise have been a very difficult issue, namely: if the claimant was unfairly dismissed, what reduction to any compensatory award should be made to reflect the possibility that the claimant might, in time, have been fairly dismissed come what may (what an employment lawyer would call the 'Polkey issue', after the case of Polkey v AE Dayton Services Ltd [1987] UKHL 8, which was explained to the parties during the hearing). The only unfair dismissal remedy issue is, in fact, whether the basic award should be reduced because of conduct or fault pursuant to ERA section 122(2).

12. In terms of issues relating to the national minimum wage claim, this is a claim made under the unauthorised deductions provisions of the ERA. The claimant says he was consistently underpaid throughout his employment, but the claim is necessarily limited, by virtue of ERA section 23(4A), to the two-year period prior to the date the claim form was presented, i.e. from 21 July 2016, to the claimant's last day of work, which was, as above, 4 June 2018.

13. The respondent produced wage slips showing the claimant being paid 30 hours per week at the national minimum wage. However, by the end of the case the respondent agreed that those wage slips did not reflect reality. The claimant and the respondent now agree that the claimant was in fact paid £260 per week cash in hand, i.e. more than what would be payable for 30 hours at the national minimum wage rate.

14. There may be a slight issue over whether that £260 per week was a gross or net payment and I will return to that. The main issue is as to the claimant's hours of work. The respondent's case is that the claimant worked 30 hours per week and not a minute more. The respondent's evidence largely, but not entirely, fits with that.

15. The claimant's case in the claim form was a claim for 40 hours per week. The case at trial has been that it was 42 hours per week. The claimant called a witness who suggested that it was something like 37 hours per week and I will return to that too.

16. This is probably a convenient point to mention section 28(2) of the National Minimum Wage Act 1998 ("section 28"), which states:

    (2) *Where –*

    (a) a complaint is made –

> *(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 …*
>
> *it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.*

17. That is a provision about the burden of proof. What it means is that in normal circumstances, it is for the employer to prove that the national minimum wage has been paid rather than for the employee to prove that it was not paid. But how that provision should affect my decision in this case is not straightforward.

18. For reasons I shall explain later, I am satisfied that the claimant did not work the 42 hours that he is claiming for. The difficulty I have is that I am not sure precisely how many hours he did work. Section 28 cannot mean that unless the employer proves that the employee worked a particular number of hours, the tribunal has to accept the employee's claim in full – at least, it cannot mean that in a case like this one where I am satisfied that the employee's claim is exaggerated to an extent. Somehow, I must decide how many hours the claimant did work. In deciding how many hours the claimant did work, I have to bear in mind what section 28 says. I also have to bear in mind the legislation as a whole and the fact that within the legislation there is an obligation on the employer to keep sufficient records, and that that is an obligation which the respondent did not comply with in this case.

19. I think what section 28 requires me to do is, essentially, to give the claimant the benefit of the doubt. I still, though, have to make a decision as to how many hours he worked and I have to make that decision based on the evidence I have. Were it the position that I thought it was possible that he had done the hours he was claiming and were I not making a positive finding that he had not worked those hours, then section 28 would apply with full force and it would simply be a case of me awarding him what he has claimed.

20. I also note that in relation to the issue of what the claimant's working hours were, the respondent has created problems for herself not only by – as just mentioned – failing to keep proper records in accordance with the National Minimum Wage Act 1998, but by also failing to comply with the obligation to provide the claimant with a written statement of employment particulars in accordance with ERA section 1 (and also, potentially, a statement of changes in accordance with ERA section 4 every time the national minimum wage rate went up). If she had complied with her obligations as an employer and written down what the claimant's hours of work and pay rate was, then she would be in a much better position to defend this claim than she is.

21. Something else I think I should mention at this stage is that I do not think this is a case where anyone is wilfully lying to me. That does not, however, mean everything everyone told me is true. What it means is that they believe it to be true. In life generally, but particularly in litigation like this where emotions are running high and where both sides

feel personally hurt by what they think other side has done, people mishear, misunderstand and misremember things all the time. Human memory is very unreliable. People really can convince themselves that black is white.

22. In addition, although the claimant and the respondent disagree about many things, a lot of the relevant facts are not actually in dispute. Many of the things the claimant and respondent disagree about are not relevant to what I have to decide.

23. As was predicted by the Judges who dealt with the preliminary hearings in this matter, this has not been an easy final hearing to deal with.

24. Both parties were represented by individuals with, if I can put it this way, their own emotional investments in the case: the claimant by his partner and the respondent by her son. I am not criticising either of them by this but, at times, they perhaps allowed their anger on behalf of, respectively, the claimant and the respondent to get the better of them. I understand that it is that kind of case; but it does not make it easy to deal with as a Judge.

25. Neither party complied with their disclosure obligations properly. Right up to closing submissions, the respondent, in particular, kept pulling documents out of a bag and wanting me to look at them without them having been disclosed prior to the hearing or even mentioned during the evidence. I allowed one additional document from the respondent in by consent, but nothing else. No proper application was made at any stage by anyone. Nobody even began to explain why things had not been disclosed beforehand; no one had spare copies of any of these potential new documents.

26. The respondent wanted me to watch a video on her or her son's telephone. Again, I declined to do so on the basis that it needed to be disclosed properly and that if I was expected to watch it, she would have to provide proper equipment where it could be played in open court for everyone to see. I was also unpersuaded as to its relevance and as to whether, even if it was relevant, it would help me to any significant extent with my decision.

27. Neither party had done a proper witness statement, although the respondent came much closer in this respect than the claimant, who had not really made any attempt at one and on behalf of whom we had to cobble one together from various documents that he had submitted.

28. People kept talking over each other; arguing with each other in open court and with me; interrupting other people's evidence and other people generally, including me, and prompting their own witnesses. When the respondent was giving her evidence, her son kept prompting her and answering for her to such an extent that the fairness of the trial began to be threatened. A number of times during the hearing he also turned around and started conversing with the claimant's witness in what did not seem to be a particularly friendly manner. Because he was representing the respondent, I had no power to exclude him from the hearing. I explained that if he continued, I might reach a point where all I could do was to strike out the respondent's case, or at least exclude her

evidence. In light of this, he voluntarily absented himself from the tribunal room for the last hour or so of the respondent's evidence. He then came back in again and continued to represent her; in fact, things went much more smoothly on day two than they had done on day one.

29. Both parties found it very difficult to focus on the issues in the case and kept referring to irrelevant things and, in cross-examination, asking irrelevant questions. Neither party was able to cross-examine effectively. The questioners made speeches instead of asking questions. When questions were asked, half a dozen questions were rolled up into one. The questioners sometimes, or often, did not allow the witness to answer. Both sides needed a lot of help from me and I had to ask a lot more questions than I would normally have done, simply to ensure a fair trial, for example, putting the parties' respective cases to each other and putting to the parties documents which appeared to undermine their own cases.

30. There were allegations of witness intimidation both in and out of tribunal and of people recording the hearing. There was a verbal altercation between the respondent and the claimant's witness at lunchtime on day one, which resulted in a security guard threatening to bar the respondent from the tribunal building.

31. Many cases I have sat on have had some of these kinds of features, but no previous case has had all of them, all at once. The morning of day one was possibly the most difficult hearing I have had in my eight or nine years as an Employment Judge. However, we got to the end of the evidence and submissions at lunchtime on day two without any major incidents.

32. What was odd, though, was that by the end of the evidence, when the only people physically left in tribunal other than me were the claimant and his representative (his partner) and the respondent and the respondent's son, the parties seemed partially to have rediscovered their friendly relationship and to be chatting amicably. For all the evident volatility in the working relationship and the acrimony that had been on display during the hearing, it is clear that the claimant and respondent were, for a time at least, friends. Both regret that matters between them should have ended up like this, and it is a crying shame that they have been unable to settle this case. But they have not and therefore I have to make a decision.

33. In terms of the law, I don't think it is necessary to do more than to refer to the relevant legislation, which I have already mentioned, but I shall go a little further.

34. In relation to unfair dismissal, I note that it is for the respondent to show that the principal reason for dismissal was a potentially fair one and that if she does so, I then have to examine fairness under ERA section 98(4) in the round. I have considered the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which I may also call the "*band of reasonableness*" test, applies in all circumstances, to both procedural and substantive questions.

35. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and to remind myself that only if the respondent acted as no reasonable employer could have done was the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration simply to be a matter of procedural box-ticking.

36. In relation to the issue of fairness under ERA section 98(4), I also take into account the ACAS Code of Practice on Disciplinary and Grievance procedures, at the same time bearing in mind that compliance or non-compliance with the Code is not determinative of that – or any other – issue.

37. In relation to ERA sections 122(2) and 123(6), I seek to apply the law as set out in paragraphs 8 to 12 of the decision of the EAT (HH Judge Eady QC) in Jinadu v Docklands Buses Ltd [2016] UKEAT 0166_16_3110.

38. As already mentioned, the only live issue in relation to the complaint of wrongful dismissal [breach of contract in failing to give notice of dismissal or pay in lieu of notice] is: did the claimant fundamentally breach the contract of employment by an act of gross misconduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed gross misconduct.

39. There is no particular magic in the words, "gross misconduct". They are just a convenient shorthand for [something like]: conduct of the employee so serious it constitutes a fundamental or repudiatory breach of the contract of employment. A fundamental or repudiatory breach is one going to the root of the contract; one (to use the language of some of the cases) evincing an intention on the part of the contract-breaker no longer to be bound by the contract's terms. I find it helpful to think of it as conduct on the part of the employee that breaches the so-called trust and confidence term, i.e. conduct without reasonable and proper cause that is calculated or likely to destroy or seriously to damage the relationship of trust and confidence term between employer and employee.

40. I start with the most straightforward of the claims: the claim for accrued but untaken annual leave. As I have already explained, the sole issue is whether the claimant took off six days in April 2018. I find that he did not. His clear evidence is that he did not. The respondent's own evidence on the point was not clear. She did not say anything to the effect that she personally remembered him taking this time off. She appeared (although even this was opaque) to be relying on what holidays the claimant was scheduled to take.

41. The respondent placed considerable reliance on a signed and undated note from someone called Tracey Colton, apparently a member of staff. But that note supports the claimant's case. It states: "*The last holiday he* [the claimant] *had was in May last year …*

before was last September …". The claimant agrees he took holiday in May 2018: he had both bank holidays off. Tracey Colton does not mention any holiday in April 2018.

42. In those circumstances, the claimant is entitled to 8 days' pay: the 12 days that he had accrued less the 4 which he agrees he took.

43. That brings us to the national minimum wage claim and the question: what does a day's pay mean?

44. Before we get into how many hours the claimant worked, I need to work out how much he was paid and split the nearly 2 year period to which this claim relates into manageable chunks by reference to the dates when the rate of payment of the national minimum wage changed.

45. The first of those 'chunks' is Tuesday, 21 July 2016 to Friday, 31 March 2017. This is a period of 36 weeks and 2 days, which is 218 working days, during which the national minimum wage hourly rate was £7.20.

46. The next chunk is Saturday, 1 April 2017 to Saturday 31 March 2018. This is a period of 52 weeks and one day, which is 313 working days, during which the rate was £7.50.

47. The third chunk is Sunday, 1 April 2018 to Monday 4 June 2018. This is a period of 9 weeks and 2 days, which is 55 working days, where the rate was £7.83.

48. The next question is: what did the claimant get paid over those periods? That ought to be straightforward. He was paid £260 per week, which is £43.33 per working day. However, that was what the claimant received in his pocket, and I have to ask myself: was that a net or a gross payment?

49. The respondent has produced wage slips. They are inaccurate ones, but still. Apparently, there are P60s, but neither party has put them in evidence. The respondent has produced a P45, again inaccurate (but still), and the claimant has not included within his complaint (as I am sure he would have done, had this been an issue) that the respondent was not paying tax and national insurance on his behalf to HMRC. The evidence suggested that the respondent has been interacting with HMRC (albeit, again, not providing accurate information). The respondent has an accountant. It appears that the claimant was on PAYE. Neither party's evidence on this was unequivocal, but I accept, on the basis of the admittedly unsatisfactory evidence I have, that the respondent was paying tax and national insurance on the claimant's wages in accordance with the claimant's inaccurate wage slips. What that means in practice is that the claimant was being paid, gross, slightly more than £260 per week; he was being paid £260 per week plus the tax and national insurance shown in the wage slips.

50. So: using the claimant's final wage slip and the final wage slip for the tax year 17/18, between April and June 2018, on behalf of the claimant, there was £0 in tax and £69.60 in national insurance. The claimant's gross pay for that period – taking the £260 per week and adding on £69.60 – was: £2452.93.

51. Between April 2017 and March 2018, we have £26 in tax and £427.44 in national insurance. The claimant's gross pay over that period was therefore £14,016.77.

52. Finally, we have to look at the period from 21 July 2016 to 31 March 2017. We have a wage slip for 4 weeks to 22 July 2018 and a wage slip at the end of that tax year. Total tax and national insurance for that year, shown on the final wage slip, was £61.20 in tax and £401.04 in national insurance. We take off from those figures the total tax shown on the wage slip to 22 July, giving a figure of £288.28 total tax and national insurance. That is, in fact, out by 2 days because that does not account for tax and national insurance paid in respect of wages on 21 and 22 July. They have to be taken into account. There was negligible tax in respect of those days and national insurance was £1.23 per day for those 2 days. Putting all of that together, we end up with gross pay, including tax and national insurance, of £9737.41 for that period.

53. What should the claimant have been paid? That depends on how many hours he worked. I found both parties' evidence on this a little unsatisfactory. My dissatisfaction begins with the fact that the respondent appears to have been under-declaring the claimant's income to HMRC and the claimant appears to have been going along with this. The claimant says he complained about this, but there is no evidence that he did. Be that as it may, no one has suggested that the claimant's contract was tainted by illegality or anything like that, and I still have to decide what hours the claimant worked. But the difficulty that that issue of under-declaring to the HMRC gives me is that, frankly, the parties' honesty and integrity in relation to the claimant's wages is called into question. If the respondent is prepared to tell lies to HMRC, and the claimant is prepared to go along with those lies, why should I believe anything that they tell me that is not independently corroborated? Putting it like that may sound a bit harsh, but that is what it amounts to.

54. This is more a problem for the respondent than the claimant in relation to this issue of underpayment of wages because of section 28, and also because it is the respondent who has been making misrepresentations to HMRC, not the claimant. In another case this might have left the respondent without a leg to stand on, but, fortunately for the respondent and unfortunately for the claimant, the claimant's own evidence on this issue is unsatisfactory.

55. I have already mentioned the fact that the claimant's claim form says that he worked 40 hours per week and that that changed in his schedule of loss and his written evidence to 42. I asked the claimant to explain that change and he could not. Where did 42 hours per week come from? He says he worked Monday, Tuesday, Thursday 08:30 to 15:30 (7 hours per day) and Wednesday, Friday, Saturday 08.30 to 16:30 (8 hours per day). This gives a total of 45 hours per week, minus what the claimant described in his written evidence as half hour unpaid breaks.

56. However, in his oral evidence, the claimant put his case on his breaks as him having three a day; one of 20 minutes and two of 15 minutes, making 50 minutes in total (the respondent's case is that the breaks totalled one hour per day). So, straightaway, we can reduce the claimant's claim by 6 x 20 minutes: 2 hours. That would take the claim down

to the 40 hours. This is what he originally claimed, and that would be all well and good and would not give me much cause for concern about the accuracy and reliability of the claimant's evidence if he had explained the discrepancy between the 42 and 40 hours in this way, or given some explanation for why his written evidence referred to half hour unpaid breaks when, on his own case, he never had breaks of half an hour or breaks totalling half an hour per day. He did neither of these things, so it does give me considerable cause for concern, I am afraid.

57. I have also already mentioned the fact that the claimant had a live witness. Her name is Karen Robinson. She worked for the respondent, with the claimant, for some months around late 2015 / early 2016. She had, and seemingly still has, her own issues with the respondent. Amongst other things, she alleges that she was underpaid for her work to the tune of £1,500. She is the person who had a verbal spat with the respondent at lunchtime on day one where security got involved. When she gave her evidence, she was visibly angry with the respondent and the respondent's son and representative. I reject any suggestion that she gave the evidence she gave because she was intimidated. If anything, as best I can judge, what happened between her and the respondent and the respondent's son strengthened her resolve.

58. Her evidence was that she worked at the Café between 08:30 hrs and 15:30 hrs Monday to Friday and until later on Saturdays. Initially, she said the Café sometimes opened until as late as 16:30 on Saturdays. When she was specifically questioned about this, she changed her evidence saying that it definitely opened until 16:30 every Saturday. When she was specifically questioned about whether the Café opened until 16:30 on Wednesdays and Fridays, she said without hesitation that it did not. In short, she corroborated the claimant's evidence to an extent, and contradicted it to an extent.

59. Other evidence that contradicts or undermines the claimant's case on the hours that he worked includes a business sale prospectus produced on the Café in 2014 for the respondent, who has been wanting to sell up. That prospectus shows the trading hours as being 9 am to 3 pm Monday to Friday and 9 am to 3.30 pm on Saturdays. Although it dates from 2014 and the claimant's claim relates to a period from July 2016, and although the respondent's case is that it is slightly out of date in that, according to the respondent at least, the Café no longer opens to 3.30 pm on Saturdays, the claimant's case is that the opening hours were the same in 2014 as in 2016 to 2018. The question I have which the claimant was unable to answer is: why would the respondent put false information in business sale prospectus about its opening hours; what possible advantage would the respondent gain from doing so?

60. I also heard evidence from a witness for the respondent, a Mrs Bartrop. She worked in the café from when it opened in 1972 until January 2016 when, unfortunately, she had a stroke. Like everyone who gave evidence – and this is not a criticism or anyone, it is just a fact – she is obviously a biased witness, in her case as someone loyal and friendly towards the respondent. People cannot help being biased, but there were not any neutral witnesses before me. Also, by her own admission, her memory is not what it was. Nevertheless, her evidence was categorically to the effect the claimant worked until 3 pm and 3 pm was when the Café closed.

61. My main concern about her evidence was that she seemed to have allowed her desire to support the respondent to have affected what she told me. I say this because in her written evidence, she wrote about important things which she had no personal knowledge of. For example, she stated that the shop opens at 9 am and closes at 3 pm most days, "*and I can confirm that these are the hours that Andrew* [the claimant] *worked*". She is, though, in no position to confirm any such thing, because she did not herself start work until 10 am, and so cannot comment on when he started work. She also wrote, "*I can also confirm that he received all the holidays which he was entitled to*". However, she left in January 2016, so has no knowledge relevant to the holiday pay claim. I also note that she used the phrase "*most days*" in her written evidence when discussing the opening hours, which was unexplained in oral evidence. Orally, she was insistent that the Café was open 9 to 3 every day.

62. The respondent also relies on ten or so supportive letters from various individuals, most of them signed and some of which say something about the Café's opening hours. I am afraid that they are of very limited evidential value indeed. None of the people who wrote a letter (or, I should say, seemingly wrote a letter), was cross-examined on what they wrote. I do not know the circumstances in which they were written; whether they were told what to say; whether words were put in their mouths; whether, like Mrs Bartrop, they were stating as facts things that they have no personal knowledge; or whether, also like Mrs Bartrop, they have made potentially significant mistakes (Mrs Bartrop wrote in her statement that she worked at the café until 2017 when in fact it was 2016. She corrected this, but not until she gave her oral evidence).

63. The letters are just letters. They are not remotely close to formal statements, in relation to which I could have some assurance that the writer knew they were going to be put before a Judge as the gospel truth. It is entirely possible that if compelled to give evidence on oath, the people who wrote them would backtrack from some or all of what they had written. Most of them read as if the writer has a personal issue with the claimant. Some of them have a very strong smell of homophobia about them, made worse by the fact that the writer clearly has no notion that what they are writing and/or describing is, in my view, plainly reflective of (probably unconscious) homophobic prejudice of the writer and of the people involved in the incident being described. At least one of them reads as if the writer believes the claimant to be a paedophile. I am concerned that others might have written what they wrote because they believed the stories about the claimant that were circulating around the time of his dismissal.

64. Many of the letters describe incidents that supposedly happened without saying when they happened, but in circumstances where, from other evidence, they are most probably describing things that occurred years before the claimant was dismissed. Most of them contain a lot that is irrelevant to the issues in this case and amount to no more than that the writer did not like the claimant and/or thinks that the claimant is not a very nice man.

65. The letters' many weaknesses as pieces of evidence are, though, more important in relation to the claimant's wrongful dismissal claim and whether to make a reduction of the basic award under ERA section 122(2) than they are to the question of what hours

the claimant worked. In relation to that question, what is important in these documents is that, to the extent that they address that issue at all, and most of them do not, they do not support the claimant's case.

66. In summary, there is precisely zero support in the evidence other than the claimant's own evidence (which I have general concerns about the accuracy of, as I have already explained) for his suggestion that the Café opened until 4.30 pm three days a week.

67. However, I also have concerns about parts of the respondent's evidence in relation to this hours of work issue. The respondent was insistent that the Café opened at 9 am but that the claimant did not work before 9 o'clock. She would not even accept that in order to open at 9 am to customers, the Café would have to be staffed and got ready beforehand, by a few minutes at least. When pushed on this, she suggested that there were never any customers at 9 am, which begged the question: why open at 9 am, then? She also put forward in evidence, and relied on, the letters I mentioned earlier, including one of them where the writer refers to the claimant apparently complaining about the writer's car being parked in front of the Café before 8.30 am because, it seems from the letter, the claimant was wanting to open the Café then.

68. I am afraid I found the respondent's evidence about this literally incredible; unbelievable. If you are a café and you start trading at 9 am, you must be expecting *some* customers at 9 am and, in order to open and start serving customers at 9 am, you have to go in before 9 am in order to set everything up. The respondent was the only person who gave direct evidence from her own knowledge on this point on the respondent's side. It may be that others (her son, for instance) could have given evidence on this point, but they did not. The respondent's son and representative, Mr Kaponas, said all sorts of things in court in submissions and during cross-examination of the claimant, but none of that was evidence from him. He did not give evidence.

69. The final nail in the coffin for the respondent's case here is what she wrote, or what was written on her behalf, in one of the documents that was used as her witness statement at this final hearing. This was a document described as a "minimum wage statement of fact", which the claimant confirmed on oath was true at the start of her oral evidence. What she wrote was this: "*We request all staff turn up before their shift time as they are expected to be ready for work at 9 am, therefore we would ask them to arrive between 8.30 and 8.45.*" That is entirely consistent with the claimant's evidence and entirely inconsistent with the respondent's oral evidence.

70. The only people who gave potentially believable evidence on this point were the claimant and Mrs Robinson. Section 28 comes into play here. In the absence of that section, I would be troubled by this point because although it stands to reason to me that the claimant would have to start work before 9 in order for the Café to open at 9, it does not follow that he would always have to be there half an hour earlier. However, giving the claimant the benefit of the doubt, as section 28 obliges me to, and in the absence of any credible evidence from the respondent's side as to the claimant's start time, I shall carry out my minimum wage calculation based on the claimant starting work at 8.30 am.

71. There is a further general point in relation to this part of the claim. Given that the Café was not doing particularly well financially and given that the respondent was not 'officially' paying the claimant any more than the national minimum wage (at least in the wage slips that were produced), why would the respondent pay the claimant more than that if those wage slips accurately reflected the hours that the claimant was working, i.e. why pay the claimant £260 per week rather than the amounts shown in the wage slips, e.g. 30 hours at the national minimum wage rate of £7.20 per hour (£216) up to 31 March 2017? One obvious potential answer to this question is that the respondent knew that the claimant was working more than 30 hours per week and that the wage slips were no more accurate about the claimant's hours of work than they were about how much he was being paid.

72. The next issue is as to the length of lunchtimes. As with the allegation that there was late opening on Wednesdays and Fridays, the only evidence to support the claimant's case is his own evidence and he has seriously undermined his own credibility on this issue by putting forward contradictory evidence. All the evidence from the respondent's side is to the effect that breaks were one hour in total. Even the claimant himself now concedes that he had 50 minutes' worth of breaks. On balance, notwithstanding section 28, I accept the respondent's case in relation to the length of breaks. For similar reasons, I accept the respondent's case that there was no late closing on Wednesdays and Fridays.

73. The next issue is: was regular closing, Monday to Friday, 3 pm or 3.30 pm (or, indeed, some other time)?

74. I have similar problems with the respondent's case in relation to this as I have in relation to whether the claimant worked before 9 am. A café with an official closing time of 3 pm would, from time to time, have customers who are finishing up their coffee or whatever at 3 who, following good customer service practices, cannot just be thrown out onto the street the moment the clock strikes. Moreover, I simply do not believe that if trading hours ended at 3, those working in the Café could simply shut up shop and walk out of the door at one second past the hour. I appreciate that one tidies up as one goes along, but even so.

75. I put this to the respondent during her oral evidence and initially she seemed to concede that the claimant might have worked until, say, 5 or 10 past 3, just to finish off the day and to allow the last customers to leave. However, following unhelpful and improper intervention from her son (I touched on this earlier), she reverted to insisting that the claimant never worked after 3 o'clock and had no reason to do so because the Café shut at 3 o'clock, on the dot, every day. It would have been better for her case had she not gone back on her concession because I would then have had some sensible and realistic evidence from the respondent's side. Mrs Bartrop's evidence was similarly unrealistically to the effect that the claimant never worked one second after 3 o'clock. Again, the respondent's case is undermined by her minimum wage statement of fact, which states: "*Some days Andrew would not leave until 4 pm but most days, especially when we were quiet, he was sent home early with no deduction to pay*".

76. This was not put to the claimant by the respondent or her son in cross-examination and I did not put it to him either because it did not seem to be the case that the respondent was wanting to advance. But, nevertheless it is part of the evidence she gave on oath and it contradicts other parts of her own evidence, and to an extent supports the claimant's case to an extent.

77. Yet again, I am left with the only people giving potentially believable evidence on this point being the claimant and Mrs Robinson, and section 28 comes into play. I shall do my minimum wage calculation based on the claimant working until 3.30 pm, Monday to Friday.

78. The only remaining minimum wage issue is: what were the claimant's working hours on Saturday? The prospectus suggest that, at least at some stage, the Café closed later on Saturdays, albeit it does say 3.30 rather than later than that and, as I said earlier, I cannot think of any reason why the prospectus would contain false information about this. Karen Robinson agrees with the claimant that there was later closing on Saturdays, albeit, as I have already explained, she did change her evidence slightly part way through, going from initially saying that the claimant sometimes worked until 4.30 pm on Saturdays to saying that he always worked until then.

79. I also have the respondent's submission in her minimum wage statement of fact that sometimes the claimant did not leave until at least 4 pm.

80. Against this we have the respondent's and Mrs Bartrop's firm evidence to the effect that the Café closed at 3 pm on Saturdays, the same as every other day.

81. Taking all this evidence into account, as well as section 28, I am satisfied that the claimant worked later on Saturdays, but until 4 pm and not 4.30 pm, and I shall do my calculations on this basis.

82. The claimant's working hours were therefore 7 hours per day, less one hour of breaks, Monday to Friday, and half an hour more on Saturdays. That is 6 hours x 5 days, which is 30 hours, plus 6½ hours x 1 day: 36½ hours a week.

83. The arithmetical calculation is a little bit complicated – as ever in a minimum wage case, the time it took to do the sums when preparing this decision was disproportionate – and I am going to whip through it.

84. The claimant should have been paid:

    84.1 dealing first with the period from 21 July 2016 to 31 March 2017 – that is 36 weeks and 2 days, so what I have to add up is 36 weeks x 36½ hours x £7.20 = £9460.80, plus 2 days at 6 hours per day at £7.20 per hour, making a grand total of £9547.20. As I have already said, the claimant was actually paid £9737.41, so there is no shortfall for the first period;

    84.2 the second period is 1 April 2017 to 31 March 2018. This is 52 weeks and one working day, that working day being a Saturday, so we need 6½ hours for that

extra day. £7.50 x 6½ hours = £48.75, and we add that to 52 weeks x 36½ hours x £7.50. That produces a grand total of £14,283.75. The claimant was actually paid £14,016.77, so there is a shortfall of £266.98;

84.3 finally, Sunday 1 April 2018 to Monday 4 June 2018, which is 9 weeks and one working day (a Monday), for which the claimant should have been paid £7.83 x 6 hours = £46.98, plus 9 weeks x 36½ hours x £7.83 = £2619.14. We actually need to add to the figure mentioned earlier for what the claimant was actually paid an extra little bit – £7.66 – because the claimant was paid £50 and not £43.33 for his last day. That produces a shortfall of £158.55.

85. The total minimum wage unauthorised deduction award is therefore £266.98 plus £158.55, which equals £425.53.

86. Those calculations also give us a relevant daily and weekly rate of pay – 36½ hours x £7.83 = £285.80. To get a daily rate, we divide that by 6. That produces £47.63, so that means we can work out holiday pay, which is 8 x £47.63 = £381.04.

87. I now turn to the unfair dismissal claim. I really do not think it is necessary to spend any time on liability for unfair dismissal at all. Even if I assume in the respondent's favour that the principal reason for dismissal was a potentially fair one, there is no question that this was unfair under ERA section 98(4) anyway because of the total absence of anything approaching a fair procedure. I would be making a legal mistake – I would be erring in law in lawyer's terms – if I found anything else.

88. If the principal reason for dismissal was conduct (I do not actually think it was), then whatever the particular alleged misconduct was, it needed to be investigated by the respondent, at least to some extent, and the claimant needed to be told what it was and to be given a chance to defend himself. There was, on the evidence, no investigation by the respondent; there was no disciplinary hearing; there is no evidence before me that the claimant was even told why he was being dismissed.

89. I actually think the principal reason for his dismissal would come within some other substantial reason under section 98. What I find happened, based on the limited evidence I have, is something like this.

89.1 On 4 June 2018, there was an incident in the public toilets near the Café involving the claimant and a teenage male (I have been told he was 15). The claimant was accused of being a voyeur. The claimant was filmed in the toilet cubicle and was assaulted. He was reported to the police and he reported the person who had assaulted him to the police. The police ultimately, for whatever reason, took no action against either party.

89.2 The video that had been taken was posted on Facebook and much shared amongst people in the locality. A small mob, apparently intent on an anti-paedophile witch hunt, formed. Someone phoned up the Café threatening dire consequences if the claimant was seen working there.

89.3 The respondent was scared and perhaps thought that there was some truth to the local rumours that the claimant was a paedophiliac voyeur. When she spoke to the police about her fears, on the morning of 6 June 2018, she told them that she was not intending to have the claimant back at work and they said something to the effect that if that was the case, she would have nothing to worry about. I do not accept any suggestion that the police told the respondent, or encouraged her, to dismiss the claimant. The police do not do that. Even if they had encouraged her to do it, she was not obliged to do it without any semblance of fairness in terms of procedure.

89.4 The respondent then contacted the claimant and ended his employment. The main reason she did this was her concerns around the incident, in particular about the ill feeling that had been generated towards the claimant in the local area. I think this comes within "*some other substantial reason*" in ERA section 98.

90. What the respondent should have done, of course, and what any reasonable employer in that situation would have done, was something along these lines: tell the claimant to stay away from the Café for at least a few days to see if everything calmed down, as inevitably it would, and then have a meeting with him to discuss the situation. All it would have taken was something as simple as that. Just sacking the claimant, without warning or discussing the situation with him or anything of that kind, cannot possibly be fair.

91. The basic award, before any deduction, is 10 weeks' pay (because the claimant was 47 when he was dismissed and had between 7 and 8 years' service): £2858.00

92. The only real issue in relation to unfair dismissal is ERA section 122(2). That overlaps to a considerable extent with the live issue in the notice pay claim.

93. The respondent's case on wrongful dismissal (the notice pay claim), as it developed during this hearing, is that, whether the claimant was dismissed for a reason relating to his conduct or not, he had actually committed gross misconduct prior to being dismissed and therefore the respondent was entitled to dismiss him without notice. It is the wrongful dismissal claim I shall turn to now.

94. The respondent relies on a rather sprawling set of allegations against the claimant, mainly concerning rudeness to customers and allegedly putting people off coming into the Café. The letters referred to earlier mainly relate to this kind of thing. I have already commented on the inadequacy of those letters as pieces of evidence. But that is not the respondent's main problem in relation to wrongful dismissal.

95. The respondent's main problem in relation to wrongful dismissal is the total absence of evidence about anything that happened in vague temporal proximity to the date of dismissal that could conceivably constitute gross misconduct, even taken in combination with anything else. There are some warning letters in the file of documents that I have been provided with by the respondent. The claimant denies ever having got them, but let us assume for present purposes that they are authentic. The respondent says that there were twelve – I think it was a dozen – warnings that the claimant was given over the

years. The fact is that the respondent did not dismiss the claimant, for whatever reason. Whatever concerns the respondent may have had about the claimant, he continued to work in the teeth of a dozen warnings; the respondent continued to employ him for seven years.

96. The last of the warnings I know about dates from nearly a year before dismissal. There is no substantial evidence before me of the claimant doing anything seriously wrong in connection with his employment in the six months – I say six months but really at any time, but certainly in the six months – leading up to his dismissal. I do not count the allegations made in the letters in this respect. I certainly do not count the allegations concerning what happened in the public lavatory on 4 June 2018. If the respondent was really relying on that as gross misconduct, then the evidence in relation to that being anything that could conceivably be gross misconduct is quite inadequate.

97. Indeed, I have been unable to identify what the respondent thinks specifically was gross misconduct. The respondent's case has been put forward in a very general way. It is for example suggested that over the years the claimant put various customers off. Even if that were so, the respondent was well aware that these customers were being put off because the respondent had apparently issued a dozen warnings. The respondent, in legal terms, affirmed the contract of employment. What we have here is, at best for the respondent, something which, had it been properly investigated and the investigation produced proper evidence and had the respondent gone through a proper procedure, the respondent could conceivably have used as the basis for dismissing the claimant at some future date.

98. That does not help the respondent from the point of view of the wrongful dismissal claim. The respondent has to satisfy me that there was some fundamental breach of contract by the claimant – what we normally call gross misconduct. What is the particular act of gross misconduct the claimant supposedly committed which took place after the contract of employment was affirmed? I simply do not know. The respondent has singularly failed to discharge the burden of proof which is on her. Any fundamental breach of contract caused by gross misconduct was a very long time indeed before the respondent dismissed the claimant and the contract was affirmed long since. Therefore, the wrongful dismissal claim succeeds. The wrongful dismissal claim is 7 weeks' pay at £285.80 per week: £2000.60

99. That brings me on to ERA section122(2). For similar reasons to those applicable to the wrongful dismissal claim, I am not satisfied that there was any blameworthy conduct of the claimant that was sufficiently close in time to dismissal to make it just and equitable to reduce the claimant's basic award to any extent. Again, the respondent has the burden of proof here; again, the respondent has not discharged the burden of proof. Therefore, I award the basic award without any reductions. I have already explained what the amount of the basic award is.

100. The final issue is section 38 of the Employment Act 2002. That is the provision that says that where an award is made (it can be an unfair dismissal award; it can be an unauthorised deductions award; I have made both) and before the proceedings were

brought, the employer had failed to comply with the duty under ERA section 1 to produce a statement of employment particulars, the tribunal is obliged to award 2 weeks' pay and may award 4 weeks' pay. It is effectively a punishment; it is one of the rare things instances where a tribunal awards something other than compensation; it is a form of civil penalty, if you like. I have 'ummed' and 'ahed' with myself as to whether it should be 2 weeks or 4 weeks. Ultimately, I have gone for 2 weeks.

101. I do not think this is a 4 weeks case. If it were possible for me to award 3 weeks I would award 3 weeks but it is not; it is binary – it is either 2 or 4. The reason I do not think it is a 4 week case is that a 4 week case is generally one where you are dealing with a large employer who really should know better and/or an employer who does know better and just cannot be bothered to comply with their obligations. That is not what we are dealing with here. We are dealing with a very small business. In terms of the failure to provide a statement of employment particulars, I do not think for a minute that Mrs Kaponas thought, 'I am obliged to do this and I just cannot be bothered to do it'. I think she was too busy running her café to think about that sort of thing.

102. Given the smallness of her business, and given that she has had no prior involvement with employment tribunals that I am aware of, I think this is a 2 week case rather than a 4 week case. Therefore, I award £571.60 under that head.

Employment Judge Camp

19 August 2019

SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE