



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants
MS D FUDALA
MRS I FUDALA
MS B KOWALCZYK
MS A WOZNIKA

AND

Respondents
(1) SMACZEK (WREXHAM) LTD
(2) ZABKA WREXHAM LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: MOLD
COUNTY COURT

ON:

13TH TO 15TH JUNE AND 16TH
JULY IN CHAMBERS) 2018

EMPLOYMENT JUDGE R F POWELL

APPEARANCES: -

FOR THE CLAIMANTS:-

Ms D Fudala, in person

FOR THE FIRST
RESPONDENT: -

Not represented and did not attend

FOR THE SECOND
RESPONDENT: -

Mr M Cameron, consultant

JUDGMENT

The Judgment of the Tribunal is:

1. Ms D Fudala, Mrs I Fudala and Ms Kowalczyk were unfairly dismissed contrary to section 98 of the Employment Rights Act 1996.
2. Ms Woznicka's claim for unfair dismissal is dismissed.

3. All the claims of unfair dismissal contrary to section 104 of the Employment Rights Act 1996 are dismissed.

4. All the claims for unpaid annual leave are well founded in parts.

5. Ms D Fudala's claim for an unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 is well founded.

6. Ms Kowalczyk's claim for an unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 is dismissed.

7. All the claims in respect of the respondents' failure to inform and consult in accordance with regulation 13 and 13A of the Transfer of Undertakings (Protection of Employment) 2006 are well founded.

8. The claims of failure to provide written particulars of employment contrary to section 1 of the Employment Rights Act 1996 and section 38 of the Employment Act 2002 are well founded.

9. The claims of failure to provide itemised pay statements contrary to section 12 of the Employment Rights Act 1996 are well founded.

REASONS

Introduction

1. This case arises from the sale of a delicatessen in Wrexham in January 2017. The four claimants were employed by the first respondent prior to the sale and by the second respondent thereafter, albeit briefly.
2. The claimants are Polish and have been assisted by two Interpreters (Ms E Stadnik and then Ms M Savage) the second respondent is owned and run by Mr S Muradi who is of Kurdish origin and was assisted by the interpretation of Mr S Saleh. The first respondent did not attend and was not represented albeit the director of the first respondent, Mr H Addulraman, provided an unsigned witness statement in support of the second respondent's case.
3. The four claimants have presented claims which have a number of common themes although the facts of their respective cases differ. To introduce these claims I have summarised them in table form:

Unfair dismissal	S.94 ERA 1996 and Reg. 7 TUPE 2006	D Fudala I Fudala B Kowalczyk A Woznicka
Failure to provide written Terms and conditions and statements of pay	ss.1, 4,8 & 11 ERA 1996	D Fudala I Fudala B Kowalczyk A Woznicka
Failure to Consult TUPE	Reg. 13, 13A and 15 TUPE 2006	D Fudala I Fudala B Kowalczyk

		A Woznicka
Unlawful deduction from wages	Ss13-27 ERA 1996	B Kowalczyk (rate of pay) D Fudala (two days' pay)
Failure to Pay Statutory Holiday Pay		D Fudala I Fudala B Kowalczyk A Woznicka

4. The common aspects of the claims can be presented briefly. All four of the claimants gave evidence that they had not received any written documentation from the first respondent. They were paid weekly in cash and had not received holiday pay. The second respondent denied these claims but had no direct knowledge of the events which predated his ownership of the business and had not received, nor found, any documentation concerning the dates on which staff were appointed, the terms of their employment or their respective rates of pay.
5. All four claimants assert that the first respondent did not consult with them prior to the second respondent's purchase of the business. The second respondent asserts that he consulted with the staff on the 17th January 2017; on the first of his ownership of the business.
6. The claimants assert that they resigned on the 17th January 2017 in response to an alleged repudiatory breach of contract; a verbal assertion by the second respondent that their rates of pay would be reduced and their previously regular hours of work would not be guaranteed. The second respondent denies his conduct was repudiatory, he is adamant that his conduct was wholly reasonable; he guaranteed their current rates of pay and stated that hours of work would need to be reviewed.

The Evidence

7. The claimants gave evidence in accordance with their written statements and confirmed the content of their respective schedules of loss. I treated the statements in those schedules as the claimants' evidence of loss in respect of their claims of underpayment of wages and unpaid statutory holiday pay. They were cross examined by Mr Cameron.
8. A statement was produced by the second respondent in the name of Mr Horas Addulraman, director of the first respondent. It was unsigned and could not be tested in cross examination.
9. Mr Sarwar Muradi gave evidence in accordance with his written statement and was cross examined by Ms Fudala on behalf of all the claimants.
10. There was little documentary evidence in respect of the purchase of the business, the discussion leading to the claimants' resignation, the provision of particulars of the claimants'

terms and conditions or payslips. The content of the payslips which were provided were disputed by the claimants who asserted they were paid in cash from the till, received much higher payments because they worked many more hours than the first respondent stated and did not receive pay slips from the first respondent during their employment. A number of bank account statements were also provided by the claimants to identify when payments were made into those accounts and the amounts which the claimants stated were their net earnings.

Findings of Fact

11. The first respondent operated its business from 69 Chester Street in Wrexham. Its director and shareholder was Mr Horas Abdulraman. Mr Abdulraman ran a delicatessen called Smaczek, which specialised in Polish and Eastern European foods from the same premises and another business, called Eurodelicacy, in an adjacent shop.
12. The claimants had, at differing dates, commenced employment as shop staff for the first respondent and were broadly engaged in similar work; receiving deliveries, stacking shelves, serving customers and handling payments.
13. Ms D Fudala was promoted to manager which entailed all of the tasks of shop staff and responsibility for organising staff rotas, cashing up, calculation and payment of wages, management of holiday leave and identifying stock which needed to be ordered.
14. At an unknown date in 2016 the first respondent put Smaczek up for sale and engaged in discussion with Mr Muradi who later agreed to the purchase. Mr Muradi incorporated the second respondent on the 10th January 2017. It was also based at 69 Chester Street Wrexham. The second respondent took on the operation of delicatessen on the 17th January 2017.
15. There is no dispute between the claimants and the second respondent that the transfer of the business was a relevant transfer for the purposes of Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.
16. The first respondent employed all the claimants at the date of the sale of the delicatessen and all of the claimants commenced employment with the second respondent on the 17th January 2017.
17. The claimants all terminated their employment through their verbal resignations and their conduct in leaving the business part way through their working day on the afternoon of the 17th January 2017.

The dates on which the claimants commenced their employment with the first respondent

18. There is little direct contemporaneous evidence of the date on which the claimants commenced employment with the first respondent. I have considered the three-annual list

of employees produced by Rana & Co, a firm of accountants who acted for the first respondent. I note that Ms D Fudala's start date is recorded as the 16th February 2015 and the 6th April 2015. I further note that the first respondent pleaded her start date as the 24th June 2014. The first respondent pleads Mrs I Fudala's start date as the first January 2016 but Rana & Co record her start date as the 6th April 2015. In the case of Ms Woznicka, both documents are consistent and record the 1st January 2016. The documents are also consistent for Ms Kowalczyk; the 1st July 2016. The second respondent, as noted, has no direct knowledge and no documentary evidence save that which is before me.

19. In Mr Abdulraman's unsigned statement he sets out the dates of each claimant's commencement; three of the four dates are inconsistent with precise dates in the first respondent's ET3.
20. I accept the translation of text messages between Ms Kowalczyk and Mr Abdulraman's wife in December 2016. I also accept Ms Kowalczyk's evidence that Mr Abdulraman's wife was involved in the management of the first respondent. The texts identify two pertinent facts: that Ms Kowalczyk was asking for payslips from the commencement of her employment and that the first respondent was asking for the details her national insurance number, date of birth and address. Those details would normally be recorded by an employer at the outset of employment; without such detail the provision of payslips, and the correct calculation of national insurance and tax would be problematic.
21. By reason of the above I find the evidence offered by the first respondent to be unreliable. As Rana & Co, a firm based in Derby, were more likely than not reliant on information provided by their client, I can place no greater reliance on that source.
22. In the context of the above I find the direct oral evidence of the four claimants more reliable. I have noted Mr Cameron's observations that it is, at least, curious that a modest sized grocery store in a country town would simultaneously employ six members of staff each one working no less than fifty hours a week. However, my degree of doubt is not sufficient to lead me away from a conclusion that the claimants' case is more likely than not to be correct. I therefore find as follows:
 - a. Ms D Fudala commenced employment with the first respondent in August 2013.
 - b. Mrs I Fudala commenced employment with the first respondent in September 2014.
 - c. Ms Kowalczyk commenced employment with the first respondent on 4th July 2015.
 - d. Ms Woznicka commenced employment with the first respondent in September 2014.

The provision of statements of the terms of employment

23. The claimants deny receipt of any documents which set out the terms of their employment. The first respondent's unsigned witness statement is silent on this point and the second

respondent has confirmed in his evidence that he has not seen any documentation relating to the commencement of employment or the terms of employment for the staff of the first respondent.

24. I find that the claimants were not given, nor their attention directed to, any written statements of their employment particulars and, in the case of Ms D Fudala, she was not given a revised statement following her promotion to manager. There is no evidence of any written details save the pay slips of three of the claimants. The accuracy of the content and
25. the delivery of these is addressed below.

The claimants' hourly rate of pay

26. The first respondent, in section 6 of the ET3 form said of each claimant:

“The Claimant was always paid the hourly rate which was agreed which was higher than the minimum wage. The Claimants hours and wages varied but it is denied that the Claimant is entitled to receive any further payments from the Respondent.”

27. Each claimant has provided details, in their schedule of loss, of their weekly net income, their hours of work and then extrapolated their gross weekly wage. They have done so because they all accept that they received their weekly pay in cash and they all deny receipt of written pay statements. The pertinent figures are as follows:

- a. Ms D Fudala asserts a net weekly wage of £500.00 for 70 hours work. She asserts that her gross wage was £618.85.
- b. Mrs I Fudala asserts a net weekly wage of £325.00 for 50 hours work. She asserts that her gross wage was £385.20.
- c. Ms B Kowalczyk asserts a net weekly wage of £300.00 for 50 hours work. She asserts that her gross wage was £348.45.
- d. Ms A Woznicka asserts a net weekly wage of £390.00 for 60 hours work. She asserts that her gross wage was £480.87.

28. On a simple division of the weekly gross pay by the asserted number of weekly hours worked the gross hourly rate can be determined:

- a. Ms D Fudala: £8.84
- b. Ms A Woznicka: £8.01
- c. Mrs I Fudala: £7.70
- d. Ms B Kowalczyk: £7.70

29. These rates are, as pleaded by the first respondent, in excess of the “over 25” minimum wage rate of £7.20 per hour for 2016/17.

30. Ms Woznicka was 24 years old on the 17th January 2017. Her gross hourly rate was considerably in excess of the appropriate national minimum wage of £6.95 per hour. She was also the least senior of the four claimants and yet was paid more than her two peers; Mrs I Fudala and Ms Kowalczyk.
31. I note, as an aside that, if the two members of staff who did not present claims were paid at similar rates to the Mrs I Fudala and Ms Kowalczyk, the first respondent was paying an annual wage bill of circa £100,000.00 excluding employer's National Insurance.
32. The above figures are inconsistent with the pay slips which are asserted to have been produced by accountants instructed by the first respondent. The examples in the bundle for Ms Kowalczyk and Ms D Fudala show the relevant national minimum wage on every payslip.
33. The correspondence from Rana & Co Accountants Limited dated the 8th December 2017 has attached to it tables of employees for each financial year since 2014/15. Amongst other details the tables set out a number of options in respect of the hours of work for each member of staff; "0-16, 16-24, 24-30, 30+. Other". In respect of all the claimants, and for each year, the option "30+" has been ticked. This response is consistent with the hours recorded on the payslips for Ms D Fudala and Mrs I Fudala in the financial year 2016/2017. It is however inconsistent with the pay slips for earlier years. "30+" is, at the very least, not inconsistent with the hours stated by the claimants
34. Lastly, I note that the pay slips do not evidence a pattern of varying weekly hours.
35. Again, I have to balanced the imperfect evidence from the claimants with the absence of any reliable documentary evidence from the respondents and any direct witness evidence from the first respondent. Whilst I do have a degree of doubt as to the exact rates of pay I am satisfied that it is more likely than not that the claimants were paid an hourly rate in excess of the national minimum wage and that Ms D Fudala was paid at a higher rate than other members of staff.

Holiday Pay

36. Mr Cameron conducted a detailed examination of the amounts certain claimants had paid into their bank accounts on a weekly basis. As the claimants were paid in cash on a Saturday the pattern of payments into one bank account would not be wholly reliable evidence of the amount paid to the employee by the first respondent; the employee might pay for groceries in cash or and so pay in a lesser sum.
37. It was possible to note from the extracts of bank accounts provided by three of the claimants that the amounts paid in by Mrs I Fudala and Ms D Fudala (excluding transfers between accounts) equated, (pro rata for the periods disclosed) to a full years pay. In Ms Fudala's case the from 5th January 2015 to 22nd December 2016 she paid in around £50,000.00 into her account. It was in this period she gave evidence of taking holiday.

38. On the evidence, in the years where they asserted they had taken holiday but without receipt of holiday pay, the evidence from their bank statement does not support that contention.
39. The above is balanced with the following evidence; neither Ms or Mrs Fudala gave evidence of taking their full statutory entitlement.
40. Ms Kowalczyk and Ms Woznicka gave evidence of taking no holiday leave and there was no documentary or witness evidence to contradict their accounts.
41. On the account of Ms and Mrs Fudala's the annual leave they had respectively taken in the financial year 2016-2017, since the last occasion of holiday leave, they would have accrued leave until the 17th January 2017. There is no evidence of any holiday pay received upon termination.
42. Based on the above I have reached the following conclusions of fact:
43. Each of the claimants was aware of an entitlement to paid holiday in respect of Ms Fudala and Mrs Fudala, it is more likely than not that Ms Fudala did make payments of wages for the weeks on which they were on holiday.
44. The holiday taken did not amount to their full annual entitlement and no payment has been made in respect of accrued but untaken holiday pay for the financial year 2016- 2017.
45. The evidence of Ms Kowalczyk and Ms Woznicka persuades me that it is more likely than not that they had not taken any paid annual leave in the years during their respective periods of employment.
46. Ms D Fudala's evidence of taking unpaid leave is not persuasive in light of her evidence relating to her bank account deposits. Mrs I Fudala's evidence is also unpersuasive. Save for any untaken leave in 2016- to 17th January 2017, the evidence leads me to conclude that it is more probable than not that Ms Fudala made payments of holiday pay in cash for weeks taken as annual leave.

Consultation with the employees of the first respondent.

47. The claimants assert that they were not informed of the impending sale of the first respondent's business and Ms D Fudala's statement evidenced that the first respondent, when asked about a rumour of an impending sale, denied it. Ms Fudala's statement is contradicted by the first respondent's defence as briefly set out in its ET3. Mr Abdulraman's unsigned statement makes no mention of any notice to his staff of a change of owner or any consultation. I prefer the direct evidence of the claimants, particularly that of Ms D Fudala on this issue.
48. Mr Muradi did not give evidence of any consultation prior to the transfer and his evidence of a failure by the first respondent to provide him with any written employee information

corroborates the claimants' account of an absence of effort by the first respondent to inform or consult with them.

49. In light of the above evidence I am satisfied that the first respondent wholly failed to inform the claimants and their two colleagues (referred to as Magdalena and Gosia in the course of the evidence) of the intended transfer of the business or to inform them of the likely consequences of such a transfer. I further find that there was no evidence of any circumstance which prevented the first respondent from fully complying with its duty under section 13A of the Transfer of Undertaking (Protection of Employment) Regulations 2006.

The claim of constructive unfair dismissal

50. The claim for unfair dismissal arises from the discussion between Mr Muradi and the employees on the 17th January 2017. It is common ground that the claimants walked out of the shop in the afternoon following the discussion between Mr Muradi and the staff on the first day of his management of the business.

51. It is common ground between the parties that two topics were part of that discussion; the hours which staff were expected to work and their rate of pay. The accounts of the parties are irreconcilable.

52. Mr Muradi's evidence, as set out in paragraph 6 of his statement states:

"I explained to the staff that I was the new owner and also that their terms and conditions would be on the same basis as the previous owner, that is the minimum wage and quite irregular hours. I knew that Daria was paid more than the rest of the staff because she was the manager and I explained to her that all the staff wages would be on the same terms and conditions as they had been prior to my taking over"

53. Ms Woznicka, who worked the early shift on the 17th January, accepted that Mr Muradi made a positive initial statement: "He said nothing would change and that we will get along fine". Ms Kowalczyk, who worked with Ms Woznicka on the early shift gave similar evidence: "After some time he told us our terms of employment will stay the same."

54. On the claimants' case during this brief exchange Mr Muradi did not express, and was not asked, what he understood were the claimants' terms of employment.

55. Ms D Fudala and Mrs I Fudala joined their colleagues at around 12pm. The account of all four of the claimants is that Mr Muradi subsequently discussed their hours and rates of pay. The conversation was primarily with Ms D Fudala. It took place on the shop floor and was audible by others.

56. I note that Mrs I Fudala was very much dependant on Ms D Fudala's translation of the discussion with Mr Muradi and that whilst Ms Woznicka and Ms Kowalczyk could speak better English they were also partially reliant on Ms D Fudala's account as she was their manager and taking the lead in the discussion.

57. There is a substantial dispute between the parties which I address below but I first record the following:
58. On the claimants' case, which I have accepted, all of them were paid in excess of the national minimum wage. Secondly, on the evidence before me all of the claimants had a close to stable number of weekly hours; the variations were modest and were within a predictable degree. Thus, a statement from Mr Muradi to the effect that; "... their terms and conditions would be on the same basis as the previous owner, that is the minimum wage and quite irregular hours..." would have been far from welcome to the three junior claimants and Ms Fudala would also have been reasonably concerned about uncertain hours.
59. In cross examination Mr Muradi stated that he believed the minimum wage was £7.85 per hour. I accept that was his belief at the date of his oral evidence but I do not accept he communicated a specific figure on the 17th January 2017. At that date the minimum wage was £7.20 per hour or £6.95, depending on age. Thus, any communication which clearly stated that the claimants would be paid the minimum wage would amount to notice of a reduction in their hourly pay.
60. Unlike Mr Abdulraman Mr Muradi intended to take an active role in the day to day management of the business; he was going to be active on the shop floor. That was bound to have an impact on the number of hours of work per week he required from staff. which would further disappoint them. However, an overall reduction of hours is rather different from telling staff that from the 17th January 2017 they would be working "quite *irregular* hours".
61. The claimants' evidence is more forceful; that around 3 pm Mr Muradi indicated that the staff from the morning shift should finish as the afternoon shift had started work. This was not the normal practice for the first respondent and it meant the morning staff would earn less than normal. This prompted Ms Fudala to speak with Mr Muradi about the pay and hours of the staff. The claimants evidence stated that Mr Muradi spoke of reducing the hourly rate to £5.00 or £6.00 an hour and that work would be offered on day by day basis according to the needs of the business. The claimants were unhappy with that and in response to their challenge, voiced primarily by Ms Fudala, Mr Muradi said words to the effect; "the door is open...I can manage the business myself".
62. I have not found any of the witnesses to be entirely reliable. I find that this discussion was conducted in English by people whose primary language were Polish or Kurdish and that it was a conversation which was conducted on the shop floor whilst the shop was open, Further Ms Fudala was translating what Mr Muradi was saying for Mrs Fudala and aiding the understanding of Ms Woznicka and Ms Kowalczyk.
63. I take into account that four witnesses have given a broadly similar account. I balance that with the risk of a degree of common self interest and that at least one person, Mrs Fudala, had no independent way of understanding Mr Muradi's statements because she relied on her daughter's translation.

64. I have also taken into account Mr Cameron's submission that the claimant's may have been benefitting from an overly generous approach to pay by Ms Fudala which would come to an end with their new employer.
65. On the balance of probabilities, I have concluded that it is more likely than not that Mr Muradi, relying on verbal statements from Mr Abdulraman, told the staff he would be paying them the national minimum wage and that their hours of work would be irregular; based on the needs of the business.
66. When Ms Fudala protested that the staff terms were more generous than the national minimum wage and that they had regular shifts Mr Muradi did not alter his position.
67. Mr Muradi found the reaction of the staff hostile and he was not minded to agree higher rates of pay or have his management of the business restricted by continuing or offer the number of hours staff had previously worked. This led to an impasse, which led to his indication he could manage without staff who did not want to work on his stated terms.
68. In my judgment the claimants' resignations were a reaction to the unexpected statement that their hourly rate of pay was being reduced and their future pattern of work was likely to entail fewer, and less predictable, hours of work.

The Parties Submissions

69. There were no submissions on behalf of the first respondent
70. Mr Cameron made a number of points concerning the reliability of the claimant's witnesses. As examples he pointed to the inconsistencies of Mrs Fudala's evidence regarding payments into her bank account which, he argued, undermined her reliability concerning the regularity of her pay and clouded her case in respect of not being paid when she had taken annual leave. He emphasised the lack of evidence in respect of the holiday pay claim, the lack of any evidence of permission to "carry over" untaken leave.
71. He emphasised the need for employees to have the requisite length of service for claims for unfair dismissal contrary to section 98 of the Employment Rights Act 1996 and questioned whether there was evidence of each, or any claimant acting in a manner which would provide them with the protection of section 104(4)(e) of the same act.
72. Mr Cameron pointed to the difficulties facing Mr Muradi, as the new employer, who had not been provided with the information which would be expected in a transfer.
73. Mr Cameron challenged whether the motivation for the resignations was really the conduct of the second respondent or was a consequence of pressure from Ms Fudala, a misunderstanding of what Mr Muradi had said (through Ms Fudala's translation) or for some other motive; as noted above, that an overly generous approach to pay rates and hours of work had come to an end now the staff were to be directly supervised by a more attentive owner.

74. Mr Cameron argued that the claimants' assertions of their average weekly hours was an exaggeration; they had taken the highest number of hours and expressed that as an average for their own advantage. He argued that there was no evidence of a failure to pay the claimants for work on the 16th and 17 January nor that any claimant has been paid below the national minimum wage.
75. Ms Fudala's submissions centred on the credibility of Mr Muradi and the reliability of documents produced by the first respondent. She emphasised the evidence that the payslips in the bundle had not, according to the witness evidence, been provided until after the 17th January 2017 and were not accurate in respect of the hours worked or the rates of pay.
76. Ms Fudala analysed elements of Mr Muradi's answers in cross examination and submitted that his account evidenced a number of inconsistencies which should lead me to conclude he was a less than reliable witness in respect of the events on the 17th January 2017.

Conclusions

The alleged failures to provide statements of the terms of employment and payslips during employment

77. I have concluded that the first respondent did not provide the claimants with any written statement of their initial terms and conditions of employment nor did it provide Ms D Fudala with a revised statement upon her promotion to manager. Similarly, I have accepted the evidence of the claimants that the payslips produced to the tribunal were not made available until after the termination of their employment.
78. I have applied the above facts to the law set out as follows:

Section 1 states:

"Statement of initial employment particulars.

- (1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.
- (2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

79. Subsections (3) and (4) set out a list in information to be provided.

80. On the evidence before me none of the claimants had received an initial statement, in whole or in instalments at the date of the termination of their employment.

81. This complaint is well founded.

82. When Ms D Fudala was promoted to manager her level of remuneration was increased and, according to her evidence, which I accept, her hours increased to enable her to accomplish her additional responsibilities. These were material under section 1(4)(a) and (c).

Section 4 states:

“Statement of changes.

(1) If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the employee a written statement containing particulars of the change.

(2) For the purposes of subsection (1)—

(a) in relation to a matter particular of which are included or referred to in a statement given under section 1 otherwise than in instalments, the material date is the date to which the statement relates,

(b)...

(c)...

(3) A statement under subsection (1) shall be given at the earliest opportunity and, in any event, not later than—

(a) one month after the change in question, or

83. In this case no statement, in any format, or by reference to any other document was provided to Ms Fudala in forming her of the material changes.

84. I find this allegation to be well founded.

85. Section 8 of the ERA 1996 states:

“Itemised pay statement.

(1) An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

(a) the gross amount of the wages or salary,

(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,

(c) the net amount of wages or salary payable, and

(d)where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

86. I am satisfied that the first respondent did not provide the prescribed written statements in respect of any employee at or before the time at which any payment was due throughout the course of their employment. In accordance with section 12(3) I find these complaints to be well founded.

Unlawful deductions from Pay

87. Ms Kowalczyk alleged that her hourly pay fell below the national minimum wage and that the first respondent had thereby made an unlawful deduction from her wages contrary to section 13 of the ERA 1999.

88. Ms Kowalczyk was over 25 years of age at the material time. From the 1st April 2016 the relevant national minimum wage was £7.20 gross per hour.

89. I have made a finding of fact, based on her own assertions in her Schedule of Loss, that her gross hourly rate of pay was £7.70 per hour in the relevant period.

90. I find that there is no evidence of a deduction from the claimant's wage.

91. I find this claim is not well founded and is dismissed.

92. Ms D Fudala claims two days pay in respect of the 16th and 17th January 2017.

93. I am satisfied that Ms Fudala attended work on both days. Her evidence was that her net pay did not vary with her hours and that she was in effect a salaried employee.

94. Neither the first nor second respondent have given oral evidence of a payment to Ms Fudala in respect of the two days. Neither has denied that she attended work on these days (albeit she left after working only four hours on the 17th January 2017).

95. I find that the claimant was contractually entitled to pay on both days and that the failure to make payment in respect of her work on those two days amounts to a deduction from her pay.

96. I find the claim to be well founded.

Holiday Pay

97. These claims are brought under regulation 30 of the Working Time Regulations 1998. The claimants had no express contractual entitlement to holiday pay and consequently their

entitlement is derived from regulations 13 and 13A. Each claimant was entitled to a total of 28 days paid leave in their respective “holiday year”.

98. Two of the claimants had taken no paid leave at all and had received no payment in respect of accrued leave.

99. Ms D Fudala and Mrs I Fudala received pay during the holidays they took in the two years prior to the termination of their employment but the total amount taken was less than the amount to which they were entitled and, in respect of the twelve months prior to the 17th January 2017 no payment was made for holiday which had accrued but was untaken.

100. For these reasons I have found that the claims of each claimant are well founded but the loss of each claimant is far from certain. The calculation of any loss is complex; each employees “holiday year” will start on a separate days; regulation 13(3)(b)(I) and there is a tension between the authority of *Fulton & others v Bear Scotland* and the decision of the Court of Justice of the European Union in C-214/16 *King v The Sash Windows Workshop Limited* which certainly applies to the regulation 13 entitlement of 20 days but its application may not be entirely certain in respect of the regulation 13A entitlement.

101. A detailed assessment of remedy will be undertaken at the hearing listed on the 4th September 2018.

Compliance Regulation 13A of the Transfer of Undertakings (protection of Employment) Regulations 2006

102. The second respondent accepts that the sale of the business by the first respondent to the second respondent amounted to a relevant transfer with in the meaning of Regulation. The first respondent’s response in section 6 of the ET3, refers expressly to “TUPE” and pleads that written notification would have been given to the employees, if they had stayed on as employees. In light of the concession by one respondent and the absence of a denial by the other I do not set out a detailed explanation of my conclusions save to state that, in the absence of the aforesaid representations, I have concluded that the transfer of the premises, goods, goodwill and staff of the business which continued to trade as the same business in all but name would fall within the regulations.

103. Regulation 13A indicates the required standard of information and consultation for a “micro business” of which the first respondent, having six employees, was one.

104. In respect of the duties upon the respondents, as transferee and transferor, there was no evidence compliance with the Regulation 13 duty to inform and consult prior to the transfer. Further there was no evidence of any special circumstance which rendered it not reasonably practicable to perform their respective duties.

105. I find that both respondents failed to comply with their respective duties under subsection (1) to (7) and the complaint is well founded.

Constructive unfair dismissal

106. To establish that a resignation from employment amounts to a dismissal within the meaning of section 95(1)(c) of the ERA 1996 it is necessary for a claimant to prove the following:
- a. The respondent's conduct amounted to a repudiatory breach of the contract of employment.
 - b. That the claimant accepted the repudiatory breach.
 - c. That the repudiatory breach was the effective cause of the claimant's resignation.
107. In my judgement the reason the claimants' resigned was the conduct of Mr Muradi who, based on the information from Mr Abdulraman, stated that he had decided to pay the employees at the national minimum wage and to determine their hours of work on a "demand" basis rather than a fixed rota. This was, in the minds of the claimants, a unilateral reduction in their pay.
108. In the case of the three junior staff faced a reduction in their hourly rate was between 50p and £1.06 per hour. The hourly loss was greater for Ms D Fudala. The change from a rota which gave the employees a substantial degree of uncertainty as to the days on which they would work and, more importantly, the number of hours of work they would do a week also indicated a loss of income. I am satisfied that a reduction in hours would occur because Mr Muradi was intending to work in the shop; that of itself would reduce the need for a number of hours of Ms Fudala's management time and staff serving time. It was also evident from his actions in informing staff on the "morning shift" to leave before the end of their rotaed shift that he was implementing the changes.
109. On consideration of *RF Hill v Mooney* 1981 IRLR 258 EAT and *Cantor Fitzgerald International v Callaghan & others* 1999 ICR 639 I find that the conduct of Mr Muradi was a repudiatory breach of contract. It is unfortunate that he and Mr Abdulraman did not undertaken their duties in respect of consultation, had they done so this dispute might have been avoided.
110. I am entirely satisfied that the effective cause of the claimants resigned was their acceptance of the decision of the second respondent to reduce their hourly rate of pay and to reduce, to an unknown extent, the number of hours a week they would be working.
111. In these circumstances I find that the resignations amounted to a dismissal within section 95(1)(a) of the ERA 1996.
112. The Respondent has not advanced evidence or argument in respect of a potentially fair reason for dismissal. Accordingly, I find that the claimants were unfairly dismissed on the 17th January 2017 contrary to sections 94, 95(1)(c) and 98(4).

Section 104 ERA 1996.

113. It is common ground between the parties that the claimants must be able to demonstrate that they have two years continuous service with the second respondent or, establish that, in this case they are employees whose dismissal falls within section 104 of the ERA 1996.
114. On my findings of fact Ms Kowalczyk, whose employment commenced with the first respondent on 4th July 2015, lacks the requisite two years' service. An employee shall, by virtue of section 104 of the ERA 1996: be regarded as unfairly dismissed because the reason (or if more than one, the principal reason) for the dismissal is that the employee alleged that the employer had infringed a right which was a relevant statutory right, which under subsection (e) includes the rights conferred by the Transfer of undertakings (Protection of Employment) Regulations 2006.
115. It is sufficient that an employee, without specifying the right, made clear to the employer what the right claimed to have been infringed was; ss104(3).
116. Several issues of fact have been raised by Mr Cameron on behalf of the second respondent; whether Ms Kowalczyk personally expressed any view at all, whether Ms D Fudala's representations fell within in subsection 104(3). However, in my judgment the determining fact arises from the character of the dismissal; the claimants' acceptance of the second respondent's repudiatory breach of contract. Thus, the essential question is this; have the claimants shown that the repudiatory conduct related to the employee's assertion of a statutory right?
117. I have made a finding of fact that Mr Muradi had decided, based on information from the first respondent, that the employees were entitled to the national minimum wage and that the first respondent had employed them to work irregular hours. He settled upon that decision before meeting with the staff on the 17th January 2017. Mr Muradi had informed the two "morning shift" staff that they would finish their work earlier than they expected (thereby acting upon one aspect of his decision) before the discussion with Ms D Fudala began.
118. I have found that the discussion with Ms D Fudala on the 17th January 2017 did not alter Mr Muradi's view; his decision, formulated before he spoke to the staff, remained the same. It was this decision which caused the subsequent argument that the claimants assert was protected within section 104 of the ERA 1996.
119. For these reasons I have concluded that the second respondent's repudiatory breach preceded the claimants' assertion of a statutory right.

120. Although not argued by the claimants, I considered whether the conduct of the second respondent, by remaining fixed in his view, was a consequence or related to the assertion of the statutory right. I have concluded that is less than likely. In my judgment Mr Muradi had a fixed view based solely on the information given to him by the first respondent.

121. By reason of the above I have reached the conclusion that the repudiated breach was not related to nor consequent to the assertion of a statutory right. In these circumstances I find the claims brought under section 104 of the ERA 1996 are not well founded.

122. For Ms Kowalczyk the consequence of my judgment is that her claim for unfair dismissal is not successful.

Remedy

123. The Remedy Hearing, as provisionally listed on the 15th June, will take place on 4th September 2017.

**Judgment entered into Register
And copies sent to the parties on**

21 August 2018

EMPLOYMENT JUDGE

Dated: 8th August 2018

for Secretary of the Tribunals