EMPLOYMENT TRIBUNALS

Claimant: **Miss J Sutton and Mr L Bartlett**

Respondent: **Liral Veget College Ltd**

Heard at: **Cardiff** **On: 2 March 2020**

Before: **Employment Judge Harfield (sitting alone)**

Representation:
Claimant: In person (both represented by Ms Sutton)
Respondent: Mr Ijezie (Solicitor)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the respondent made unauthorised deductions from the claimants' wages and failed to pay accrued but untaken holiday pay on the termination of the claimants' employment.

(a) Ms Sutton is awarded the gross sums of £553.52 holiday pay and £177.70 unpaid wages;

(b) Mr Bartlett is awarded the gross sums of £553.52 holiday pay and £421.50 unpaid wages;

(c) I decline to order a financial penalty under Section 12A Employment Tribunals Act 1996.

REASONS

Introduction

1. The claimants' claim forms were presented on 27 July 2018 (Ms Sutton) and 1 August 2018 (Mr Bartlett) complaining of constructive unfair

dismissal and unpaid wages. In short form the claimants said that that they were owed a full wage for June 2018 including holidays and that the respondent had unlawfully deducted £297.50 (Ms Sutton) and £1256.00 (Mr Bartlett) from sums due on the termination of employment. The respondent filed response forms denying the claims.

2. References in brackets [ ] in this judgment are references to page numbers in the hearing bundle.

3. A case management preliminary hearing took place before Employment Judge P Davies on 20 November 2018 where initial case management directions were made. A preliminary hearing took place before Employment Judge Cadney on 26 February 2019. He dismissed the claimants' unfair dismissal complaints as they did not have sufficient qualifying service. He refused the claimants' applications to amend their claims to include complaints of age discrimination and to expand their unauthorised deduction from wages claims to allege they had been underpaid throughout their employment. Judge Cadney allowed the original claims for unlawful deduction from wages and unpaid holiday to proceed. He refused the respondent's application for a strike out or deposit order.

4. A full hearing was due to take place on 20 November 2019 but was adjourned on the day by Employment Judge Brace for the reasons set out in her case management order [3 – 12]. Judge Brace made further case management orders. The case then came before me on 2 March 2020. I clarified the issues with the parties. I listened to audio footage of a meeting that took place on 21 June 2018. I received written and oral evidence from the claimants, Ms Feonna Bartlett and Ms Eneanya-Bonito. I was given a hearing bundle extending to 403 pages. Due to time limitations it was agreed that the parties would provide written closing submissions and judgment was reserved to be delivered in writing. I received written submissions from both parties which I have taken fully into account when reaching my decisions.

5. There was an issue with Mr Bartlett's statement having been annotated with Ms Sutton's digital signature rather than his own, and the narrative of the statement not having been changed to his own first person account. I was told the claimants had written their statements together with the intention that their evidence would be largely the same and that Mr Bartlett's statement had originally been correct, but somehow a mistake had crept in. The claimants had acted in consort throughout, which is understandable as they were together much of the time during the relevant events. In employment tribunal proceedings it is the adoption of a written witness statement having given an oath or solemn affirmation which matters rather than the signing of a statement of truth. Mr Bartlett

gave an affirmation and confirmed the substantive content of the statement was the evidence that he wished to give. I therefore accepted it as such at the time. The respondent had the opportunity to cross examine him and suffered no prejudice. I therefore reject the argument now made in the respondent's closing submissions that Mr Bartlett's evidence should be rejected.

The issues to be decided

6. Judge Brace's case management order clarified that the background to the dispute was as follows:

(a) Ms Sutton's claim was for:

- Unlawful deduction from wages of £513.51 (£900 gross monthly wage less £236.49 (received on 6 July 2018) less £150 (clothing grant)
- Holiday pay - £284.61 (26 hours 51 minutes at £10.60 an hour).

(b) Mr Bartlett's claim was for:

- Unlawful deduction from wages £810.00 (£900 gross monthly wage less £150 clothing grant)
- Holiday pay £796.94 (75 hours 11 minutes at £10.60 an hour).

(c) The respondent accepted that there were in principle unpaid wages but disputed the amount as the effective date of termination of employment of Ms Sutton was in dispute and it was not accepted that a full month's wages were due;

(d) The respondent accepted that there was unpaid holiday pay;

(e) However, the respondent also denied that ultimately any amounts were due to the claimants as a result of deductions being authorised by the claimants (which in turn is disputed by the claimants).

7. Judge Brace identified that the issues to be decided were:

Unpaid annual leave – Working Time Regulations 1998

(a) What were the dates of the Claimants' leave year?
(b) How much of the leave year had elapsed at the effective date of termination?

(c) In consequence how much leave had accrued for the year under Regulations 13 and 13A WTR 1998?
(d) How much paid leave has each Claimant taken in the year?
(e) How many days remain unpaid?
(f) What is the relevant net daily rate of pay?
(g) How much pay is outstanding to be paid to each claimant?

Unauthorised deductions – Employment Rights Act 1998

(a) What was the effective date of termination of each claimant?
(b) Was the respondent authorised to make a deduction from wages of the claimants under either:
    (i) s13(1)(a) ERA i.e. was the deduction required or authorised to be made by virtue of a statutory provision or a "relevant provision" of the claimants' contract ("relevant provision" is defined in s13(2) ERA); or
    (ii) s13(1)(b) ERA i.e. had the claimants previously signified in writing their agreement or consent to the making of the deduction?
(c) Did the respondent make unauthorised deductions from the claimants' wages (Section 13 ERA) and if so, how much was deducted?
(d) If it is established that there is a statutory or contractual provision or a written agreement/ consent authorising the type of deduction in question:
    (i) what was the scope of that authorisation?
    (ii) Was the actual deduction made, in fact, justified?

8. Judge Brace directed the further provision of schedules of loss and counter schedules. The claimants' figures in their updated schedules of loss differ slightly to those figures identified in Judge Brace's case management order. In summarising the latest figures claimed, I have interposed in bold text a summary of the respondent's position taken from their counter schedule [129 – 134].

9. Ms Sutton [110 – 111] seeks:

(a) Unpaid wages for the period 1 June 2018 to 15 June 2018 based on a contract to work 15 hours a week (totaling 32.5 hours for that period) at £10.60 an hour totaling £344.50.

(b) Unpaid wages for the period 18 to 20 June 2018 based on having worked 25 hours over those 3 days but capped at 15 hours for the week: £159.00. **The respondent says that the claimant is owed £236.60 for her total June wage. This is based on both claimants jointly undertaking 17 days and 1 hour of farm keeping works up to 21 June 2018 and housekeeping works**

from 1 June to 15 June 2018 of 32.5 hours (totaling 152.50 hours) at £7.28 an hour. My understanding is that the respondent says that the total sum produced of £1110.20 should then be split with £236.60 being allocated to Ms Sutton.

(c) The claimant accepts she received a payment of £236.49 on 6 July 2018. **The respondent says this sum was paid by mistake and seeks to now offset it against any sums owed.**

(d) Therefore the claimant seeks the net sum of unpaid wages of £303.41.

(e) The claimant complains that the respondent made deductions from her wages for June 2018 of £297.50. She accepts that a £150 deduction was lawful in respect of clothing. **The respondent asserts that it was authorised to make multiple deductions from the claimant's wages, as set out below.**

(f) Ms Sutton states she was also owed 31 hours and 50 minutes holiday pay at £10.60 an hour totaling £333.90. **The respondent calculates the sum of £339.20.**

(g) Taking it all into account Ms Sutton seeks the sum of £250.82. **The respondent says that no sums are owed.**

10. Mr Bartlett [112 – 113] seeks:

(a) Unpaid wages for the period 1 June 2018 to 15 June 2018 based on a contract to work 42 hours a week (totaling 91 hours in that period) at £10.60 an hour totaling £964.60.

(b) Unpaid wages for the period 18 to 21 June 2018 based on having worked 35 hours and 40 minutes over those 3 days: £375.24. **The respondent states that Mr Bartlett is owed £873.60 for the period 1 June to 21 June. This is based on the claimants jointly undertaking 17 days and 1 hour of farm keeping works up to 21 June 2018 and housekeeping works from 1 June to 15 June 2018 of 32.5 hours (totaling 152.50 hours) at £7.28 an hour. My understanding is that the respondent says that the total sum produced of £1110.20 should then be split with £873.60 being allocated to Mr Bartlett.**

(c) Mr Bartlett complains that the respondent made deductions from his wages for June 2018 of £1256.00. He accepts that a £150 deduction was lawful in respect of clothing and a further £40 for guinea fowl. **The respondent asserts that it was authorised to**

make multiple deductions from the claimant's wages, as set out below.

(d) Mr Bartlett states he was also owed 75 hours and 15 minutes holiday pay totaling £796.59. **The respondent calculates the sum of £797.65**

(e) Taking it all into account Mr Bartlett seeks the sum of £1943.43. **The respondent says that no sums are owed.**

11. The respondent's counter schedule of loss sets out 27 matters in which it is said that the claimants caused loss to the respondent and which the respondent says they are entitled to deduct from any sums owing. They total £14,173.14 (jointly against both claimants). I should add that this is in places different to and expands upon the actual deductions that were made shortly after the termination of the claimants' employment.

Relevant findings of fact

12. There are many facts in dispute between the parties in this case traversing a wide range of issues that are heartfelt on both sides. To decide this case, I do not need to make findings of fact about the vast majority of these contentious issues and therefore I do not do so. Much of the narrative of what happened between the claimants and the respondent is not directly relevant to the issues that I have to decide. For those parts of the narrative I therefore only set out here a brief summary of what happened by way of background.

13. The claimants started working for the respondent at Nantsidyll Farm on 2 February 2018. The property is a farm with animals and three holiday lodges. Mr Bartlett's mother is Feonna Bartlett. She was, at least at the time of the start of the claimants' employment, a friend of Ms Eneanya-Bonito who is Managing Director/Chief Executive Officer of the respondent. Ms Bartlett also separately worked for Ms Eneanya-Bonito on a self-employed basis. It was through Ms Bartlett that the claimants met Ms Eneanya-Bonito.

14. The basic terms of the job offer were discussed with Ms Eneanya-Bonito, in a meeting or interview in the latter part of January 2018. To my knowledge there are no written records of that discussion. There is a dispute or at least some uncertainty about the nature of the deal that was struck. One possibility is that Ms Sutton was engaged to work 15 hours a week part time as a housekeeper and Mr Bartlett engaged to work 42 hours a week as a farm keeper. The other possibility is that they were both jointly engaged to work 57 hours a week undertaking farm keeping and housekeeping work (with the anticipated proportions of work within

that being 42 hours farm keeping and 15 hours housekeeping, at least when the holiday lodges were in occupation). The issue is relevant to determining what wages and holiday pay (before consideration of deductions) were due to the claimants on termination of employment. I return to point this below.

15. There is also a dispute about how much detail Ms Eneanya-Bonito went into at that initial meeting about things like entitlement to holiday pay, sick pay and pension entitlement. Ms Eneanya-Bonito says that she covered these things. The claimants said that she did not. On this particular point, I do not find it established on the balance of probabilities that these particular issues were discussed. In reaching my decision I have taken particular account of the fact that there are issues that the claimants raised questions about later. I do not consider they would have done so, or would have done so in a different way, if that initial discussion with Ms Eneanya-Bonito had taken place in such detail.

16. What is not in dispute is that the salary was offered on a joint basis, initially at £17,000 together with the provision of onsite accommodation in a caravan and some utilities. The claimants negotiated this up to £18,000 with some improvement on the provision of utilities.

17. On 31 January 2018 AS, the respondent's HR Manager emailed the claimants [172] saying that he understood that Ms Eneanya-Bonito has verbally offered the positions of Farm Keeper and House Keeper. AS said he needed the claimants' addresses to send an offer letter. On 1 February 2018 the respondent wrote to the claimants with an offer of employment [176 and 139 – 140]. The position is said to be "Farm Keeper and House Keeper". The offer was for basic joint pay of £17,000 a year. Free accommodation was to be provided and utility bills paid for except gas and telephone. A joint job description was attached [143 – 144] which gives one post title of "Farm Keeper and House Keeper". The joint job description does not separate out the duties between the two roles.

18. Ms Sutton replied [175] the same day querying the improved salary and utilities provision that had been agreed with Ms Eneanya-Bonito. She said that with those alterations the claimants would happily accept the offer. AS replied on 2 February 2018 [175] to attach an amended offer letter [141 – 142] and requesting referee details which Ms Sutton provided by email again that same day. There is not, within either version of those two offer letters dated 1 February 2018, an expressed right to make deductions from the claimants' wages. Both offer letters state that once references were received the claimants would be issued with a "Statement of Main Terms of Employment" (a contract)" within two months of work commencement. The offer letter does not itself cover some of the matters

that would be in a statement of particulars of employment such as (but not limited to) holiday pay, sick pay and pension entitlement.

19. The respondent seeks to rely on terms set out in its Employee Handbook. Extracts from the handbook are at [150 – 171B]. It is addressed to "LVC London School of English" and much of the content appears to be focused on Liral Veget College. It talks about employees also receiving an "Individual Statement of Main Terms of Employment" for matters such as holiday entitlement and sick pay. Paragraph 8.1 is concerned with "Wastage" and states:

"*8.1.1 We maintain a policy of "minimum wastage" which is essential to the cost-effective and efficient running of all our operations.*

8.1.2 You are able to promote this policy by taking extra care during your normal duties by avoiding unnecessary or extravagant use of services, time, energy etc

8.1.3 The following provision is an expressed written term of your contract of employment:

8.1.3.1 Any damage caused by you that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repaid or replacement, as decided by the Management

8.1.3.2 Any loss occurred to us that is resulted out of your failure to observe rules, procedures or instruction, or is a result of your negligent behaviour or your unsatisfactory standards of work, will render you liable to reimburse to us the full or part of the cost of the loss, as decided by the Management.

8.1.3.3 In the event of a failure to pay, we have the contractual right to deduct such costs from the employee's pay."

20. Paragraph 17.2 addresses "return of property" and says:

"On the termination of your employment, you must return all company properties including uniforms and protective clothing provided, if any. Failure to do so will result in the cost of the property or the cost of recovering the property being deducted from any last wage due to you. This is an expressed written term of your contract of employment."

21. Paragraph 17.4 is headed "Repayment of outstanding monies" and says:

"On the termination of your employment, we have the right to deduct from any final wages due to you, any monies collected by you on our behalf

and any advances of wages or any loans that we may have made to you. In a case where company properties are damaged or found to be missing, we have the right to deduct the cost of purchase/ repair of these properties form the final wages due. Any cost incurred by the company due to negligence of duty or carelessness shall be deducted from the final wages due to you. The above is an expressed written term of your contract of employment."

22. The claimants say that they did not receive this handbook during their employment and only learned of its existence in February 2019 during these ensuing employment tribunal proceedings. The claimants therefore do not agree that the handbook gives the respondent any power to make deductions from their wages. They also allege that the handbook or the purported sending of it to them is a "forgery" to justify the deductions after the event.

23. The respondent states that the handbook was emailed to the claimants on 5 February 2018 together with other policies and procedures for new staff. [173] is a pdf image of an email allegedly sent by AS at 11:04 on 5 February 2018 saying: "*Further to your email of 02/02/2018 confirming your acceptance of the conditions contained in the offer letter dated 1st February 2018, please find attached the relevant policies you are required to familiarise yourself with. It is our standard procedure to send these policies to all LVC employed staff. If there are any other policies you require, please let me know and I will send them to you."* There is a further (disputed) email at 11:22 [also at 173] that same day saying: "*in my previous email with attachments, I omitted our Staff Handbook which I have now attached with this email. If you require any clarification, please do let me know."*

24. [174] is a further copy of the disputed 11:04 email which has an attachment field not visible in the version at [173] showing attachments for policy documents such as a grievance policy, complaints policy, and whistleblowing policy.

25. It has not been possible for anyone to see the original versions of these emails together with their properties. The respondent states that in order to save on server space emails are regularly physically printed out, put in a paper archive and the original emails themselves then deleted. I am told that the copies that we have are pdf images of the emails as physically printed out on to paper. The respondent says that the claimant is deliberately denying receipt of the handbook. The respondent says that the claimants deliberately deleted the emails of 5 February 2019 and deleted the handbook from the respondent's laptop before handing it back to try to defeat the respondent's right to make deductions. The claimants

deny this and assert that the handbook was never on the work laptop. I return to the laptop issue below.

26. This is a key issue of factual dispute between the parties with strongly levelled arguments and accusations passing both ways. I have not repeated all of the arguments the parties make here but I have taken them into account. On balance, weighing the evidence before me and applying the balance of probabilities, I do not find it established that the claimants received the two emails from AS of 5 February 2018. I did not hear evidence from AS about any practice, for example, of requiring read receipts or delivery receipts for this kind of email which had attached to it a potentially important contractual document. There is no digital evidence of that kind before me showing that the emails were safely delivered. The original emails and their properties cannot be examined. In reaching this finding I take particular note of the fact that the claimants tended to conscientiously and carefully consider potential contractual documents and respond with queries. They did so in relation to the original offer letter [179] and the later proposed amended terms in May 2018 [236B – F]. Jumping forward briefly to that May 2018 period I note that in the May monthly report Ms Sutton commented that she had spent much of Saturday 26 May reading the contract and writing a response [208]. I consider it likely that if the claimants had received the email with the handbook they would have read its content and it is likely that would have triggered them to respond with queries about such matters as their annual holiday entitlement [158] or what was their entitlement to sick pay [159]. They did not raise these queries until 2 June 2018 and that was in the context of responding to the amended May offer not in response to the handbook [236F].

27. I do not consider it established on the balance of probabilities that the emails of 5 February 2018 were forged. I have not heard from AS on the issue. The timeline does troubles me as to why the emails were apparently printed and the originals deleted sometime around 11 -13 February 2019[1], when the respondent's solicitor apparently first drew attention to the rights under the handbook to make deductions on 14 February 2019 [396] and sent the pdf copy on 20 February 2019 [390]. But overall, I am not satisfied on the evidence before me on the balance of probabilities that this demonstrates that the emails were "forged." As I have said, I am not satisfied that the claimants received the emails. I do not need to make a finding as to why that was. There can be a variety of reasons as to why emails are not received, particularly those containing attachments.

[1] See email from Easyspace at [388] on 20 February 2019 where they refer to the data having been deleted "early last week."

28. On 15 February 2018 Ms Eneanya-Bonito asked Ms Sutton if the wages should be paid into one bank account or split "since it is one salary." Ms Sutton replied to say it should be paid separately [180]. The email exchange does not talk about how the wage is to be split. However, the claimants were each paid monthly gross pay of £900 which they did not, initially at least, quibble. £1800 is one twelfth of the annual joint pay of £21,600. The claimants were always paid this higher sum (and not £18,000) although it is not entirely clear to me how and when this arrangement came about. The respondent states that it was to ensure, once benefits in kind were taken into account, the claimants received the living wage. The claimants dispute the validity of that calculation but that is not a matter before me to decide.

29. Weighing up the evidence before me on the balance of probabilities, and whilst the parties may have said different things over time as the employment relationship fractured, I find it likely that the original agreement reached was that the claimants agreed to jointly work 57 hours a week between them with provisionally 42 hours being allocated to farm keeping duties and 15 hours allocated to housekeeping (if there was sufficient housekeeping work or otherwise farm duties would be undertaken.) The broad intention in the discussions between the parties was that Mr Bartlett would concentrate on the farm keeping work and Ms Sutton on the housekeeping work but ultimately they were jointly responsible for both and for working the collective hours. This is the evidence Ms Eneanya-Bonito gives at paragraph 7 of her witness statement. This finding is also supported by issuing of the joint job description found at [143 – 144] which does not differentiate the duties between the two posts. It is also supported by the fact that when Mr Bartlett had an operation in March 2018 Ms Sutton took steps to cover all the hours (with some assistance from Ms Bartlett) and also with the equal splitting of the pay. The claimants also say as much in their closing submissions.

30. In March 2018 Ms Eneanya-Bonito stayed at the farm for a few days. She gave the claimants a laptop to be used for work purposes. She undertook an induction with the claimants. Their initial induction in February had been undertaken by Ms Bartlett as Ms Eneanya-Bonito was absent from work at the time.

31. The respondent's position is that the handbook and a short cut to it were placed on the laptop by the respondent's IT officer. The claimants deny that the handbook was ever on the laptop and state it was empty when they received it. I did not hear any evidence from that IT officer. When challenged in cross examination Ms Eneanya-Bonito's initial response was that if her HR managers told her something had been done then she believed that it had. She later said that she knew what she had passed

over on the laptop. In my judgment, the former is the more likely position. It is likely that Ms Eneanya-Bonito was relying on what she says she was told either by HR or IT to the effect that handbook was on the laptop as opposed to it being in her direct knowledge or indeed her physically showing it to the claimants at the induction meeting. I note in that regard that on 26 March 2018 Mr Bartlett described the induction meeting as: "*When you visited here, we didn't really have a lot of time to spend with you as the meeting was short due to the architect, and then you needed your time for the electrician and to sort plumbing etc.."* [186]. Weighing all of these factors into account I do not find it established that the handbook was there on the laptop or that Ms Eneanya-Bonito showed it to the claimants.

32. In reaching that decision I have taken into account that on the termination of their employment the claimants deleted material from the laptop, including for example, information about the farm animals in their monthly reports. The claimants were told to return the laptop in the same condition it was provided to them in. In my judgment the claimants' behaviour in deleting material was probably a combination of panic in trying to get everything together so that they could quickly leave (which meant it was easier to mass delete items), combined with a sense of pique as to how the work relationship had deteriorated (such that they felt justified in taking an overliteral interpretation of the instruction they had been given). I do not consider, given the pressures they were under at that time, or indeed bearing in mind that the issue of deductions had not yet raised it head, that they deliberately set out to delete a handbook to remove references to the power to make deductions.

33. Ms Eneanya-Bonito also said that she told the claimants orally of the right to make deductions in the induction meeting. The claimants dispute this. Again, on the balance of probabilities and on the evidence before me I do not find this established. As above, I do not find it likely that the meeting went into that level of detail.

34. On 8th May 2018 a further meeting took place [131 – 134]. By this time there were ever growing tensions in the employment relationship. In very short form, Ms Eneanya-Bonito was dissatisfied with elements of the claimants' work whereas the claimants felt that they were working hard, being unnecessarily micromanaged and their work was undervalued. In that discussion about pay the claimants asked to have their contract amended with the correct wage figure inserted as it was still showing as £18,000 and with no calculation of the value of the benefits package.

35. In their April monthly report, the claimants reported that two guinea fowl, whose wings had not been clipped, had died. One flew into the pig pen and the other flew away. There was not, at the immediate time, a demand

for payment to replace the birds or an indication that the loss would be deducted from the claimants' wages.

36. On 15 May 2018 the claimants were sent an offer letter with further terms [145 – 149 and 197]. The covering email said:

"Please find attached the following documents relating to your employment:

- *Offer letter – further terms*
- *Non disclosure agreement (to be signed and returned to our London office via post)*
- *Joint job description*
- *Work schedule*

You are required to carefully read the attached documents and send an email confirmation of your understanding and acceptance of the terms by Monday, 21st May 2018."

37. The amended terms did correct the joint basic pay to the figure of £21,600. It also contains information about the total benefits package said to be on offer, taking the claimed value up to a figure of £31,440. It says based on 52 weeks a year and 57 hours a week this would produce a notional hourly rate (including benefits) of £10.60 an hour.

38. The offer letter had various other changes and additions. It purported to give the right to terminate the contract in various circumstances including where the work schedule is not followed, misusing the letting accommodation for anyone other than paying guests, redundancy, under-performing to the standards recruited for, grave misconduct, breach of trust, management reasonably concluding that the farm has been left in danger and neglect, loss of animals due to unnecessary carelessness or any other reason without proper evidence to support the reason for loss of animals, and using farm equipments for any purpose over than LVC use. There were confidentiality terms in a non disclosure agreement that I have not had sight of.

39. The amended offer letter also says:

"Any unexplained absence from the farm when you are supposed to be at work will lead to dismissal and any time spent not working will be calculated and removed from any wages/salary due…

LOSS OF ANIMALS

Where there is loss of animals due to unnecessary carelessness or any other reason without proper evidence to support the reason for loss of animal, Management reserves the right to terminate your employment with immediate effect.

FARM EQUIPMENTS

Farm equipments must be used and handled with care. They must not be used for any other purpose apart from LVC use. If Management finds evidence that farm equipments are used for any purpose other than LVC use, this contract will be terminated with immediate effect.

Tools and equipment must be locked away, if there is any loss or damage to the equipments due to careless use, no explanation will be accepted; the cost of buying a new one will be borne by you."

40. The same day AS emailed Mr Bartlett about a request to work outside of the farm part time for another employer [198]. That email granted the request subject to conditions, one of which being "*if at the end of any month, we find out that the work schedule has not been followed; your employment will be terminated with immediate effect*." Ms Sutton responded asking the respondent to review the hours they believed should be spent on the farm and whether the job was actually for two people on two separate wages and saying that she understood it was also to be discussed with Ms Eneanya-Bonito at the end of the month once the latest work schedule was completed. She said that the claimants were working solely at the farm and did not want to agree to anything until they had spoken to Ms Eneanya-Bonito at the end of the month as already discussed.

41. To decide this case, I do not have to make findings of fact about the legitimacy of Ms Eneanya-Bonito's concerns abouts the claimants and I therefore do not do so. However, the differences between the offer terms of 1 February 2018 and 10 May 2018 I do accept were in large part due to Ms Eneanya-Bonito wanting to tighten her controls over the claimants and their employment due to mounting concerns over these kinds of issues some of which were discussed in the meeting on 8 May [316 – 319]. It was also borne of the fact the claimants asked to have the contract amended with the wages figure updated [318]. By this time the claimants were also extremely concerned, particularly bearing in mind the content of both emails sent to them on 15 May, that they could be headed towards having their contract terminated meaning the loss of both of their livelihoods and their home.

42. The amended terms sent on 15 May asked the claimants to confirm their acceptance by 21 May 2018. They did not in fact reply until 2 June 2018

[236]. Ms Sutton sent an email to the respondent attaching the claimants' queries about the new contract. Within the accompanying document, amongst other things, Ms Sutton again raised concerns about working hours and pay. She asked to be given an amended contract with a minimum of 30 hours a week or to move to being self-employed. She also raised a query saying holiday pay, sick pay and any pension scheme seemed to be missing and asked what their entitlements were. The email also disputed the calculation of the benefits package. It also questioned right to terminate, particular where the work schedule is not followed. There was no particular dispute or query about the two potential powers to deduct.

43. AS was away at the time on annual leave, due to return on 11 June. On 13 June Ms Sutton sent a long email to Ms Eneanya-Bonito [225 to 227]. It referred to her earlier email querying some pointers in the contract and also about her hours and wages. Ms Sutton said again she was proposing to go self-employed and book the respondent for her hours or have a contract with a minimum of 30 hours a week.

44. Ms Bartlett voiced her own concerns on 16 June [231] – [236]. Ms Bartlett by that time was in her own dispute with the respondent about issues such as her own working hours. A dispute had also arisen of payment of an invoice for electrical work undertaken by Mr Bartlett's father [224].

45. AS responded on 18 June [237 – 238]. He said that no changes would be made to the job offer and a contract would not be issued until the respondent had confirmation of acceptance of the offer. He said that the claimants were not obliged to work for the farm and if they felt so dissatisfied about the job or the offer given they had the choice to resign. He said that confirmation of acceptance was required by 21 June and if it was not received the offer would be withdrawn and the claimants' services terminated. He said the claimants were entitled to 4 weeks paid holiday (pro-rated) and statutory sick pay.

46. The next day Ms Sutton responded to state that both claimants were resigning [239 – 242]. The email said: "*We cannot and will not accept the conditions of our employment with you.*" It said that on their calculation Mr Bartlett was entitled to 88 hours and 16 minutes holiday and Ms Sutton 31 hours and 31 minutes.

47. AS responded to state that the claimants' options were to give 24 hours' notice or to work 2 weeks' notice. The email stated: "*when leaving the farm, please note that the premises must be clean and all company properties (computer, printer etc) and equipments must be left in the same condition as they were handed over to you."* Ms Sutton confirmed that they would work the 2 weeks' notice [239].

48. The claimants did not complete working their notice period and left at lunchtime on 21 June 2018 following a fractious meeting with Ms Eneanya-Bonito which culminated in Mr Bartlett calling Ms Eneanya-Bonito a bully [255, 256]. In the circumstances the claimants left without an official handover being completed. They did, as already discussed above, handover the laptop.

49. There is a dispute about the nature and amount of the work undertaken by Ms Sutton in the last week of employment. In this regard I accept and find as a matter of fact that Ms Sutton did the work on 18, 19 and 20 June 2018 outlined in her schedule of loss at [110]. I accept her evidence on that point

50. Matters deteriorated further with the claimants seeking to anonymously make a report about alleged health and safety issues in the holiday lodges to the letting accommodation. The holiday company disclosed where the complaint came from to Ms Eneanya-Bonito. It is not a matter that I need to go into detail about but Ms Eneanya-Bonito complained to the police about Mr Bartlett. The claimants say that the legal advice they had in response was that it would not be wise to attend at the property again.

51. On 22 June 2018 AS emailed the claimants about the death of animals saying that three turkeys, the baby geese and the guinea fowl were all dead with no reasonable explanation. He said that two ducks had died and nine piglets out of thirteen. AS said:

"*We will be deducting money from what remains outstanding to you to compensate for all these losses. Animals were on the Farm placed in your care and they died because of your negligence.*"

The email also referred to a missing shepherd crook, rakes and a goat foot bath plastic container. It said that the claimants had to clarify the issues and that as soon as a satisfactory explanation was received the respondent would liaise with the accountant and remit to the claimants anything that was outstanding.

52. The claimants sent a long response found at [262 – 267]. They were very upset that they were now being blamed for numerous matters including the death of a variety of animals. The claimants asked for full payment of their wages and holiday pay. The claimants said they were prepared to accept some responsibility for the loss of the two guinea fowl as they had not prioritised the task of clipping the wings.

53. On 4 July AS sent a further email [276 – 277] saying that the respondent would not be paying Ms Sutton for the last week of employment as she

had told Ms Eneanya-Bonito that she had been helping Mr Bartlett with farm duties and not her housekeeping duties for that week. The email said that deductions would be made in respect of Ms Sutton of:

- Clothing £150
- TV and DVD £100 (half of £200)
- Garden tool £35 (half of £70)
- Garbage collection £12.50 (half of £25)

Totalling £297.50

54. The email said that in respect of Mr Bartlett deductions would be made for:

- Clothing £150
- TV and DVD £100
- Garden tool £35
- Garbage collection £12.50
- Turkey x 3 at £80 each = £240
- Piglets x 9 at £20 each = £180
- Guinea fowl x 2 at £20 each = £40
- Duck x 2 at £30 = £60
- Baby geese x 1 at £20
- Goat x 1 at £50
- Plastic footbath £178
- Ear tags for animals £35
- Water leak detector £78
- Horse food £17.50
- Rakes x 3 at £20 each £60

Totalling £1256

55. The email said the claimants would be paid for June as per the number of hours in the offer letter and that if items were returned to the farm they would be removed from the total deductions.

56. The claimants responded as at [271 – 276]. On the issue of the work undertaken by Ms Sutton the claimants pointed to an email previously sent to her (not before me) saying that as two of the cottages were unoccupied she should work on the garden and the vegetable patch and that she had worked her 15 hours that week including sheep shearing, foot bathing and gardening. The claimants responded to the individual items refusing any deduction other than in respect of the guinea fowl.

57. On 5 July AS emailed the claimants to say that Ms Bartlett had been in contact with Ms Eneanya-Bonito to say Ms Bartlett was in possession of some of the disputed items but that they were company properties that should be in the tools store at the farm. It was said if any of the listed

items were returned they would adjust the deductions. He added that a shepherd's hook was missing and that this would increase the deduction made. Ms Sutton replied to say that any property in the possession of Ms Bartlett was nothing to do with them and that they had never seen or used a shepherd's hook [282]. The claimants they allowed £40 to be deducted as long as a receipt was provided for the purchase of the replacement guinea fowl [274]. The other purported deductions were not authorised.

58. On 6 July 2018 AS emailed the claimants again to say the deductions to Ms Sutton remained at £297.50 and increased to £1336 for Mr Bartlett. The cost of the piglets was reduced to £160 but new items were added for a shepherd's hook at £25, and fitting of a dismantled gate at £75. Ms Sutton was paid the now disputed sum of £236.49. As I have already said above, during the progress of the ensuing employment tribunal proceedings the respondent has since changed and expanded further the deductions that they seek to make which now cover matters such as alleged losses to the respondent as a result of the deletion of material from the laptop.

59. The claimants said again in an email of 8 July that they did not agree to the deductions other than the guinea fowl and the clothing grant [287]. They asked to utilise the respondent's grievance procedure. AS told them that management believes a fair decision was taken and that they could not utilise the grievance procedure as it only applied to current staff.

60. Ms Sutton ultimately received the now disputed partial payment and Mr Bartlett receiving nothing. At some point post termination, the claimants further reported the respondent to the council for alleged health and safety concerns and also to animal welfare. These actions were not directly relevant to the proceedings and I heard very little evidence about them. They are not something that I found it necessary to make detailed findings of fact about and I did not consider them helpful in resolving other factual disputes in the case that I needed ultimately to decide; which turned ultimately principally upon the contractual situation. They were also not matters for which deductions were made at the actual time the respondents finalise the claimants' final pay but were added during the course of these proceedings.

The relevant legal principles

Unauthorised deduction from wages

61. Section 13 of the Employment Rights Act 1996 ("ERA") provides the right not to suffer unauthorised deductions. The relevant parts state:

"13(1) An employer shall not make a deduction from wages of a worker *employed by him unless –*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction

(2) In this section "relevant provision" in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of that in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion…

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified…"

62. Section 14 disapplies section 13 in certain circumstances. In particular, where the purpose of a deduction is reimbursement of an overpayment of wages or overpayment in respect of expenses incurred by the worker in carrying out his employment.

63. Section 23 ERA provides the right for a worker to complain to the employment tribunal that his employer has made a deduction from his wages in contravention of section 13. Under section 24 where an employment tribunal finds a complaint is well founded it must make a declaration to that effect and order the employer to pay to the worker the amount of any deduction made in contravention of section 13.

64. Section 27 sets out the meaning of "wages" for that part of ERA. The relevant sections state:

"27(1) In this Part "wages", in relation to a worker means any sums payable to the worker in connection with his employment, including –

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under this contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992…

But excluding any payments within subsection (2)….

(5) For the purposes of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is –

(a) of a fixed value expressed in monetary terms, and
(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or any combination of two or more of those things)."

Holiday pay under the Working Time Regulations

65. Regulation 13 of the Working Time Regulations 1998 gives a worker an entitlement to 4 weeks' annual leave in each leave year. Unless set out in a relevant agreement the leave year runs from the date their employment commenced. Regulation 13A provides an entitlement to a further 1.6 weeks annual leave in each leave year with an aggregate maximum of 28 days.

66. Under Regulations 14 and 15A, where the proportion of leave taken by a worker is less than the proportion of the leave year which has expired, the employer must make a payment in lieu of leave in accordance with the calculation method set out at Regulation 14(3). Under the Working Time Regulations the amount of any payment is also set by reference to a week's pay for each week's leave under sections 221 to 224 of ERA 1996, excluding sections 227 and 228. How a week's pay should be calculated has been subject to litigation in the European Court and domestic tribunals and courts. I do not need to go into the detail here save to say that it imports a notion of entitlement to normal remuneration for the leave period in question, at least in respect of the 4 week entitlement protected by the European Working Time Directive. I say no more about the detail because the respondent accepts that in respect of holiday pay the claimants were entitled to the hourly rate of

£10.60 which incorporates the respondent's valuation of the claimants benefits package on top of their wages. The claimants also utilise £10.60 an hour in their own calculations.

67. Regulation 30 provides a method of enforcement for claims under the Working Time Regulations 1998, this includes a complaint that an employer has failed to pay the worker the whole or any part of any amount due to him under regulation 14(2) or 16(1). Where a complaint is held to be well founded the tribunal must make a declaration to that effect and under regulation 30(5) must order the employer to pay the worker the amount which it finds to be due.

Discussion and Decision

Wages properly payable for June 2018

68. The first issue to determine is the gross amount properly payable to the claimants by way of outstanding wages at the termination of their employment (leaving to one side in the first instance the question of any deductions from those sums). Under section 13(3) ERA a failure to pay wages that are properly due can of itself potentially be an unauthorised deduction.

69. This question requires determination of what wage the claimants were entitled to for the work undertaken. It is not necessarily a straightforward question because of the unusual nature of their joint contract of employment. Neither party suggested that it was not a contract of employment.

70. I have already made a finding of fact that the agreement reached was for the claimants to jointly work 57 hours a week between them (which is 9.5 hours a day). For this they were paid joint wages of £21,600 a year. There is a dispute as to the hours worked by Ms Sutton in particular in the last week of employment.

71. In relation to the work undertaken in the last week of employment in June 2018, the respondent challenges whether all the housekeeping work they wished to be undertaken had been undertaken by Ms Sutton and they therefore refuse to pay wages to Ms Sutton for the period 17 June to 20 June. I have already made a finding of fact that Ms Sutton did the work on 18, 19 and 20 June 2018 outlined in her schedule of loss at [110] which totals some 25 hours. It is not all housekeeping work, but as set out above she had joint responsibility too for the farm keeping work and indeed the hours were to be spent on farm keeping if there was no housekeeping work to do. I also do not find that the housekeeping work necessary would have gone undone that week if the claimants' employment had continued; the claimants had discretion as to how they worked their hours. I therefore accept that Ms Sutton did work and is entitled to be paid for the disputed period of 17 to 20 June. In relation to

Thursday 21 June both parties accept there is only 1 hour's work to be paid to the claimants.

72. My calculation is therefore that there were 162.50 hours worked to be paid for June 2018. This is 17 days at 9.5 hours a day plus the additional 1 hour on 21 June. Under section 27(5) ERA when calculating the wages due I cannot take into account non-monetary benefits such as accommodation and utilities. I therefore accept the hourly rate set out by the respondents at £7.28 [129] is the correct one. This gives the joint gross wages due for June 2018 for the claimants of £1183.00.

73. In the parties' schedules of loss and counter schedule of loss they split the wages with a greater proportion being given to Mr Bartlett. However, I have found the nature of the bargain reached was that there was joint responsibility for the combined jobs which the wages split equally. I there split the sum equally between the claimants because they had joint responsibilities. The gross wages properly due for June 2018 (before consideration of deductions) was therefore gross **£591.50** to each individual claimant.

Were deductions authorised by a relevant provision of the claimants' contract?

The original offer letter

74. The original written terms offered contained no provision for the respondent to deduct any sums [139 – 144]. The document refers to "a Statement of Main Terms of Employment (a contract)" being issued within 2 months of commencing work, however, no composite document with that type of heading was in fact produced during the claimants' employment.

The handbook

75. The respondent's handbook does contain various potential provisions, said to be express terms of the contract of employment, which would seem to authorise deductions. However, I have already made a finding of fact that the claimants did not receive that handbook.

76. The content of the handbook therefore cannot authorise deductions from the claimants' wages. Applying section 13(2)(a) the content of the handbook did not become a written contractual term. To do so would require agreement by the claimants. Whilst agreement does not necessarily have to be in writing, and can potentially in certain circumstances be implied, that cannot be the case where the term has never made it to the claimants' attention. Nor did the respondent give the claimants a copy before the deductions were made, again because I have found it was never received. Likewise, under section 13(2)(b) the relevant content of the handbook were not contractual terms and their

existence and effect had not been notified to the claimants in writing before the deductions were made.

Oral agreement subsequently notified in writing?

77. Ms Eneanya-Bonito said that she personally told the claimants of the right to make deductions in her induction meeting with them in March 2018. I have already found as a matter of fact that this did not occur. There was therefore no oral contractual term to that effect.

Offer letter – further terms

78. This document is dated 10 May but was sent to the claimants on 15 May 2018. There is no dispute that it was received. As set out above in short form it says that (i) time spent on unexplained absence from the farm will be removed from wages due and (ii) if there is loss or damage to equipments due to careless use the cost of buying a new one would be borne by the claimants.

79. I have to determine whether the claimants accepted these terms. They clearly did not do so expressly. The respondent argues agreement can be implied through the claimants' conduct. In particular that the claimants delayed in responding whilst carrying on working and also when the claimants did respond they did not query (when querying other terms) the particular terms that would authorise deductions.

80. The claimants did not reply about the amended offer terms at all until 2 June. I do not consider that their taking 18 days to respond (which I acknowledge was after the requested response date of 22 May 2018) amounts to an implied acquiescence to all the changes. The vast majority of the changes were unfavourable to the claimants. These were not changes that had an immediate impact on the claimants (as would, for example, an immediate change in the rate of pay). I do not consider that the fact the claimants carried on working during the period until 2 June was only referable to them having accepted the new terms set out in the letter. Employees decisions to remain in employment are influenced by many factors such as here very genuine concerns about the implications of both claimants jointly losing their livelihoods and their home. They had also been intending to have further discussions with Ms Eneanya-Bonito.

81. The claimants did then raise some queries in their email of 2 June 2018. Those queries did not directly relate to the two terms relating to deductions. However, I do not consider that this amounted to acquiescence to those particular terms. Objectively looking at the totality of the situation, the claimants were raising queries or objections to those matters which caused them immediate concern whilst holding back on agreeing to the amended terms as set out in the offer letter of 10 May as a whole in full. Ms Sutton in

particular was saying that she wanted a new contract with a minimum 30 hour working week or to move to being self-employed. The respondent itself, when in receipt of the email of 2 June said that no changes would be made to the document, and that if the claimants did not accept the offer by 21 June they would terminate the claimants' services, i.e. the decision was to accept all the terms or none.

82. The claimants therefore did not impliedly or expressly consent to the variation of their contracts to include the two entitlements to make deductions in the further offer letter. It therefore cannot serve to authorise deductions under section 13(2)(a) or 13(2)(b) ERA as the provisions did not become contractual terms.

An implied overarching wide right to make deductions?

83. The respondent argues that because the claimants admitted that they authorised the respondent to deduct the cost of the guinea fowl because they accepted that the guinea fowl were lost through their carelessness (in not acting more expeditiously in clipping their wings) that this gives a basis on which to imply a wide or overarching right to make deductions for negligent and careless losses in general.

84. The decision of the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & another [2015] UKSC 72, as relied on by the respondent, sets out the following principles to be applied when considering whether to imply a term into a contract:

(1) it must be reasonable and equitable;
(2) it is necessary to give business efficacy to the contract; so that no term will be implied if the contract is effective without it;
(3) *or* it must be so obvious it "goes without saying";
(4) the term must be capable of clear expression;
(5) it must not be contradictory to any express term of the contract;
(6) it is not dependent on proof of the actual intention of the parties when negotiating the contract but what notional reasonable people in the position of the parties at that time would have agreed;
(7) a term should not be implied merely because it appears fair or merely because the court considers the parties would have agreed it if suggested to them

85. In JN Hipwell & Son v Szurek [2018] EWCA 674 the following approach was suggested:

(1) The starting point is to determine whether there is any provision in the agreement in question which expressly covers the point: only if there is not can the implication of a term be appropriate;

(2) The Court must take into account the possibility that the parties deliberately decided not to include the term sought to be implied: it is tempting but wrong to fashion and interpolate a term simply to reflect the merits of the situation as they appear when the issue arises;
(3) The question whether a term is to be implied is to be judged at the date when the contract is made;
(4) The test is necessity, not reasonableness; but "absolute necessity" may put the bar too high, and it may be more helpful to ask the question whether without the term the contract would lack commercial or practical coherence;
(5) Although the process of construction and the process of implying terms both involve determining the scope and meaning of the contract, the process of implication involves a rather different exercise from that of construction and calls for strict restraint.

86. I have found that the express written terms produced at the time the contract of employment was agreed did not include the kind of term the respondent seeks to imply. I have also found, rejecting Ms Eneanya-Bonito's evidence on this particular point, that she did not orally tell the claimants of any right to make deduction for negligent or careless losses. It therefore was not an express oral term either.

87. I do not find that the implication of the term is necessary to give business efficacy to the contract. The contract does not lack commercial or practical coherence without the term. The contracts of employment as a whole when originally agreed was perfectly workable without such a term. A reasonable reader of the employment contracts at the time they were formed knowing its provisions and surrounding circumstances would not have considered the term to be necessary for business efficacy.

88. I also do not consider that a reasonable reader of the contract, at the time it was formed, and knowing its provisions and surrounding circumstances, would have considered the term so obvious that it went without saying. A wide overarching power given to an employer to make deductions (even if they had to be considered justified deductions) for losses due to negligence and/or carelessness in the conduct of the employee's duties would not be considered by the "reasonable reader" standing in the shoes of the parties at the time the contract was formed, as being so obvious it went without saying. Instead it would be considered something, bearing in mind the potential liabilities and the already inherent imbalance of power in an employment relationship, that would require careful consideration. Even if the respondent were correct to say that the claimants would have agreed to the overarching term (which in fact I consider unlikely as it is very different to agreeing to bear the cost of two guinea fowl at £40) it is not a sufficient basis by itself to imply the term. That it may have been subjectively desirable to the respondent to include a term is also not the test or indeed are the merits of the situation as they ultimately turned out to be.

89. Moreover, even if there were an overarching implied term under section 13(2)(b) its existence and effect has to have been notified to the claimants in writing before the deduction is made. The existence and effect of that alleged overarching implied term was not notified to the claimants before the deductions. I have found they did not receive the Handbook. They did receive the amended offer but it does not include the existence and effect of an overarching or wide right to make justified deductions for negligent and careless losses in general; it deals with the two specific terms already dealt with above. To be clear, nor would I also find an implied narrower term giving the respondent the right to make deductions in the two circumstances outlined in the further offer letter, for the reasons already given.

90. It follows that the respondent had no contractual authorisation to make deductions from the wages due to the claimants.

Were deductions authorised by the claimants previously signifying in writing their agreement to the deductions?

91. A deduction can also be authorised where the worker has previously signified in writing his or her agreement to the deduction. Prior to the deductions the claimants consented to a deduction of £40 for the guinea fowl [274] and a deduction of £150 in respect of a work clothing grant each [185]. The claimants did not authorise any other deductions in writing.

Wages due to the claimants after deductions

92. Ms Sutton did receive a part payment from the respondent in the net sum of £236.49. I was not given the gross sum but looking at other monthly wages paid to the claimants they were having about 3% deducted for tax and national insurance contributions. To the best that I can calculate it this which would give a gross figure of approximately £243.80.

93. Ms Sutton was entitled to a gross wage for June 2018 of £591.50. She received gross £243.80. This leaves the sum owing of £347.70. From that deductions of £170 were authorised in writing. The gross sum owed and outstanding to Ms Sutton is therefore £177.70.

94. Mr Bartlett did not receive any final payment. He was entitled to a gross June wage of £591.50. From that deductions of £170 were authorised leaving the gross sum owed and outstanding to Mr Bartlett of £421.50

Holiday Pay

95. Employment Judge Brace identified that the claimants' claim for accrued and outstanding holiday pay on the termination of employment was being brought

under the Working Time Regulations 1998. Those regulations provide a free-standing mechanism for making a complaint to the tribunal for unpaid holiday pay outstanding on termination of employment. It is also possible to bring a claim for unpaid holiday pay as an unauthorised deduction from wages claim (and it is often done, for example, in cases where there is a claim going back several leave years) but it is not necessary to do so. There is no right for a claim brought directly under the Working Time Regulations for an employer to offset other sums it is said the employee owes them.

96. I have not accepted that there was any difference to the termination date of the employment of Ms Sutton. The claimants both started on 2 February 2018 and their employment terminated on 21 June 2018. They had worked 38% of their leave year. 38% of 28 days maximum holiday entitlement is 10.64 days holiday entitlement as at the termination of employment. Under Regulation 13(6) that is to be rounded up to 11 days. £31,440 normal joint remuneration for the year divided by 52 weeks and then 6 days gives a daily rate of normal remuneration of £100.64 a day. Multiplied by 11 days it gives the sum of £1107.04 owed jointly in gross holiday pay as at the termination of employment and £553.52 to each individual claimant.

97. I should add that even if the holiday pay claim were treated as an unauthorised deduction from wages claim, the position in relation to deductions would have reached the same outcome in any event.

Other matters

98. In their closing submissions the claimants invite me to impose a financial penalty under section 12A of the Employment Tribunals Act 1996. That section empowers a tribunal to order payment of a financial penalty to the Secretary of State:

> *"(1) Where an employment tribunal determining a claim involving an employer and a worker-*
> *(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and*
> *(b) is of the opinion that the breach has one or more aggravating features,*
> …" .

99. Section 12A was added by section 16(1) of the Enterprise and Regulatory Reform Act 2013, with effect from 6 April 2013. The explanatory notes accompanying section 16 stated that its purpose is "*to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law".*

100. I decline to impose a financial penalty. I have not found it established on the balance of probabilities that the respondent forged the email sending the handbook. The respondent therefore had an argument to be tested as to whether the handbook authorised at least some of the purported deductions. If the holiday pay claim were advanced as an unauthorised deduction from wages claim as opposed to a Working Time Regulation claim the issue of potential deductions would also have legitimately arisen for assessment. The explanatory note is just that and does not define and certainly does not limit what is an aggravating feature, but within its context I would not consider the respondent made deliberate and repeated breaches of employment law.

Summary

101. In summary:

(a) I make a declaration that the respondent made unauthorised deductions from wages in respect of the claimants' June 2018 wages and failed to pay to the claimants holiday pay due on termination of employment;

(b) Ms Sutton is awarded the gross sums of £553.52 holiday pay and £177.70 unpaid wages;

(c) Mr Bartlett is awarded the gross sums of £553.52 holiday pay and £421.50 unpaid wages;

(d) I decline to order a financial penalty under Section 12A Employment Tribunals Act 1996.

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Employment Judge Harfield
Dated: 6 July 2020

JUDGMENT SENT TO THE PARTIES ON 9 July 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS