Case Number: 140 6075 /2019[A]

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Miss P Powell **Tedroo Limited**

Heard at: **Southampton** **On:** **6 July 2020**

Before: **Employment Judge Rayner**

Appearances
For the Claimant: Miss P Powell in person
For the Respondent: Mr R Prais

This has been a remote which has been consented to by the parties. The form of remote hearing was [A audio]. A face to face hearing was not held because it was not practicable and the parties agreed that the matter could be dealt with in a telephone hearing.

Judgment

1. It is declared that the claimant was entitled to, but was not provided with any itemised pay statement in respect of any period of her work during the course of her employment with the respondent.

2. The claimant was not provided with a statement of the main terms and conditions of her employment in the course of her employment with the respondents.

3. For the purposes of the determination of this matter the relevant terms of the claimants contract are:

    a. the claimant was entitled to be paid £10 per hour;

    b. the claimant was entitled to the statutory minimum holiday entitlement in accordance with the working time regulations;

    c. the claimant was entitled to one weeks' notice of termination of employment.

4. The claimant's average working week was 27 hours.

5. The claimant suffered an unlawful deduction from her wages in respect of hours of work that were claimed but not paid. In total the claimant was not paid for and is entitled to be paid for 214.25 hours. The total sum due is therefore £2142.50. The claimant accepts that the sum of £315.00 in total should be deducted from this in respect of advances paid to the claimant during the course of the employment. The total sum owing for the unlawful deductions from wages in respect of non-payment of hours worked is therefore **£1827.50**.

6. The claimant is entitled to be paid for holidays not taken and outstanding at the point of termination of her contract of 67.3 hours.

7. The claimant is entitled to compensation of 2 weeks' pay in respect of the respondent's failure to provide her with a written statement of the main terms and conditions of her employment.

8. The claimant is entitled to compensation of 13 weeks' worth of the deductions made but not notified to her in the 13 final weeks of her employment. From the 13 final non-itemised pay slips, the amount owing is **£126.86**.

9. The claimant was summarily dismissed by the employer in breach of contract, and is entitled to one weeks' notice pay in lieu.

10. The amounts now payable to the claimant are therefore as follows:

2 weeks' pay as compensation for non-provision of statement of terms and conditions of employment (section 38 Employment Act 2002)	27 hours x £10.00 per hour x 2 weeks	£540.00
Holiday pay for 67.3 hours	67.3 x £10.00	£673.00
Unlawful deduction from wages in respect of Unpaid wages	214.25 hours x £10.00 – (£295.00 +£20.00)	£1827.50
Compensation for failure to provide itemised pay slips	Sum of deductions made but not notified as set out in the final 13 payslips	£126.86
Notice pay	1 week @ 27 hours x £10	£270
Total amount now payable to the Claimant		**£3437.36**

1. The claimant was employed as a bar manager by the respondents at the Acapulco Bar and Eatery, 56, Albert Road, Southsea, Hampshire.

2. She worked for the respondent from 1 January 2019 until 8 November 2019.

3. By a claim to the Employment Tribunal dated 4 December 2019 the claimant claimed

    a. that she was owed holiday pay and other arrears of pay;
    b. that she had not received any itemised payslips;
    c. that she had not received a statement of the main terms and conditions of employment within a two-month period and
    d. that she had not received money owing or holiday pay or any other payment following termination of employment without notice.

4. The respondents Grounds of Resistance, which is very brief, states that an employment contract was issued in January 2019, along with training documents. It says Tedroo Ltd never issued a P45 and that Miss Powell was not sacked. The ET3 states that the respondent defends the claim but no further details are provided.

5. A case management hearing took place before me on the 21 April 2020. The claimant represented herself and the respondent was represented by Mr Prais, a solicitor with Peninsular Ltd, as they have been throughout.

6. The case was listed for a 3-hour hearing by telephone, because an in-person hearing was not possible because of the Covid 19 pandemic. At that point in-person hearings were not being listed. The parties agreed that the matter would be dealt with by a telephone hearing and case management orders were given in respect of it.

7. The respondent was permitted to serve an amended response, so as to arrive with the tribunal on or before 5 May 2020 to deal with any factual assertions arising from that case management hearing. No amended response has been received.

8. At the case management hearing it was confirmed that the claimant was claiming in respect of a failure to provide a statement of terms and conditions of her employment; a failure to provide her with itemised payslips; unlawful deductions from her wages in respect of tax; a claim for 2 hours pay ;a claim for notice pay of one week and outstanding holiday pay which was to be determined.

9. That hearing did not take place, and a further hearing was listed for today.

10. The hearing today was conducted by telephone. I heard evidence from Miss Powell, the claimant, on her own behalf, and also from her mother, Ms Susan Hotchkies. I also received a statement on behalf of the claimant from Mr J Foster, who did not attend.

11. For the respondent I heard evidence from Miss Hunter.

12. I was provided with an electronic copy of a bundle of 170 pages.

Findings of fact

The Contract of Employment

13. The claimant started work for the respondent on 7 January 2019. Stephanie Hunter was a director of the respondent company and stated in her evidence before me that an employment contract, including the main terms of employment was given to Miss Powell in January 2019 by Marcus Pingriff. Miss Hunter stated that she was present at the time it was given to the claimant.

14. The claimant asserted that she had never been given a contract of employment, although she accepted that she had been given some other documents when she first started.

15. Miss Hunter stated that the claimant had been given two copies of the contract and that she has signed one copy, which Miss Hunter alleges the claimant retained, and returned an unsigned copy to the respondent. Ms Hunter stated that the copy contract in the bundle at page 115 to 119 was the unsigned copy that the claimant had returned to the company. The claimant stated in her evidence that she had not been given a copy of this contract and she had not seen it before.

16. The copy contract in the bundle is a photograph of 5 pages, headed *statement of employment particulars*. It has the claimant's name written in under the name of employee and it sets out the date that the claimant's work started. It states the claimant will be paid £10 per hour.

17. At paragraph 7.5 it states *you must complete a holiday request for and obtain authorisation from your manager, then forward the form to Steph immediately.*

18. Paragraph 11 of the contract states that the claimant is required to give one month's written notice to terminate the contract, whilst the company may give the claimant one weeks' notice during the first 2 years of employment and then an additional weeks' notice for each complete years' service up to a maximum of 12 weeks' notice.

19. The contract document states at paragraph 15, *the company is authorised without further agreement to deduct from your salary any sums due to the company, including by way of example any overpayment or any outstanding loans or advances*.

20. Paragraph 17 is headed *key holders*. It states that the company reserves the right to request the key back at any time (17.5) and also that on termination of employment the keys must be returned straight away, if not, the company reserves the right to change the locks and have the costs taken out of any remuneration owned in the employee. (17.6).

21. The document is signed on behalf of the company and dated 1 January 2019. It is not signed by the claimant.

22. There is a conflict between the evidence of the claimant and that of the Respondent. They cannot both be right. I prefer the evidence of the claimant and I set out my reasons and conclusions on this below.

Findings of fact on Pay slips

23. The claimant states that she was not provided with payslips which itemised her earnings at all during the course of her employment.

24. Miss Hunter for the respondent states in her witness statement and asserted under cross-examination that she believed payslips had been sent to the claimant during the course of her employment. She stated that an accountant had prepared payslips for Tedroo Ltd and referred to a number of documents which were contained within the bundle at pages 139 -161.

25. The documents set out in these pages are indeed itemised payslips of exactly the type of the claimant wanted. The documents set out the claimant's gross payment in respect of the relevant week and showed deductions or tax and National Insurance. I note that none of the payslips indicate the hours worked, or indeed the rate of pay.

26. The claimant maintains that she never received any of these payslips. She stated in her evidence that she had never received them, and that she did not see them until they were put into the bundle of documents.

27. In her Witness statement Miss Hunter makes no reference whatsoever to the frequent requests for payslips, or a p60, or the queries about the claimants pay, contained in the text messages which the claimant sent to her.

28. She does refer to a text message from the claimant dated 14 May 2019, in which the claimant had asked for an advance so that she could pay her electricity.
29. Miss Hunter accepted when questioned that she had received the various texts that the claimant has produced which show that she asked for her payslips and which are set out below.

30. The claimant did make numerous requests, by text message, to her employer, and that her employer, and I find that Miss Hunter did receive these text messages. I find that the claimant also raised queries about her pay, and her P 60. The messages were as follows, all being 2019 dates:

31. The claimant sent a text to her employer on Friday, 7 June with a reminder on 12 June 2019.

32. On 13 June the claimant texted her employer stating that she thought her wages were wrong because she had only been paid £204 when she worked 30 hours. (Her pay at £10 per hour should have been £300.) She also asked on the 14 June if Miss Hunter could check about a new starter form and her P60. On 10

July she asked Miss Hunter to remind Laura (the accountant who did the payroll) that she, the claimant, had not yet received her P60.

33. On 17 July the claimant texted Miss Hunter again, querying her wages for the week of 1 July and stating that she had been underpaid for the hours worked. She reminded her employer again in the text on 31 July about her pay and about P60.

34. On Wednesday, 7 August 2019 the claimant again raised an issue with her employer stating *did you have our hours okay from the timesheet could Laura please pay today as got a lot of bills going out and could she please do my P60 as I really need it*.

35. On 28 August, the claimant again sent a text to Miss Hunter asking her to check the wages.

36. On 4 September, the claimant again texted Miss Hunter stating *contacting step change this week. I really need my P60 and payslips so they can check to see if I am entitled to any benefits could Laura sought that today, please*. Step Change is a charity that ws assisting the claimant.

37. On 16 September, the claimant wrote *do you know if Laura has done my P60/payslips please*.

38. The response she had from Miss Hunter was *I have a meeting with her Wednesday morning. It's my day off to day*.

39. On 1 October 2019 the claimant wrote to Miss Hunter, *I had my mortgage provider phone me today and they would like to contact step change which I need payslips for has Laura sorted out now. Do you know?*

40. On 2 October the claimant wrote *any news from Laura in payslips yet. I really do need them this week*. Miss Hunter responded she *wasn't in yesterday chase again today*

41. On Wednesday 16 October, the claimant wrote, *Hi did Laura sought the portal/payslips?*

42. On Saturday 19 October. The claimant wrote, *Hi my mortgage people really need me to phone Step Change as I'm 6 months arrears and could be entitled to benefits as well. I haven't received Laura's email yet with payslips could she prioritise first thing Monday as it's really stressing me now*.

43. On Wednesday 23 October the claimant wrote *Hi, can Laura send over today. My payslips as I really do have to contact step change as soon as possible.*

44. Ms Hunter stated that she did contact the accountant to check that payslips were being sent out and to ask for them to be sent to the claimant. She states that she then told the claimant that they would be sent and assumed that they were. She stated that she herself received payslips and did not understand why the claimant would not be receiving them as well.

45. Whilst Miss Hunter is not able to give me any particular dates, she did say that she had left a message for the accountant asking if there was a hold-up and if there was, if they could contact her. They did not do so and Miss Hunter assumed therefore that the payslips had been sent. This was despite the fact that her employee texted her on several occasions stating clearly that she had not received them.

46. As well as concerns about payslips the claimant had asked the respondent on a number of occasions to sort out her P 60. Her evidence is that she was not provided with her P60, or her payslips despite making numerous requests for them.

The Warning Letter

47. Miss Hunter refers to a warning letter, which she says she sent to the claimant on 17 October 2019, which says that the claimant had closed the bar early without telling Miss Hunter, and that her time sheets don't reflect actual times worked by the claimant.

48. The claimant states that she had never received this letter. The claimant had sent a text to Miss Hunter on both the 16 October 2019 and on the 19 October 2019 chasing her payslips. Neither the letter, or the matters referred to in it, are not referred to in any of the texts sent at the time, by the claimant. Miss Hunter did not suggest that there had been any meeting with the claimant about the alleged warning, and in the absence of any contemporary comment from the claimant, I find that neither the letter, nor the matters in it were it sent to the claimant at all at the time, or shown to her, or raised with her whilst she was employed.

Termination of Employment

49. On Friday 8 November, Miss Hunter says that she was contacted by Connor Smith who worked for them, who said that the claimant had told him that the shift she was working would be her last shift. The claimant denies that she said this to him, and he has not been called to give evidence.

50. What the claimant had done, was to make some enquiries about her pay as recorded by the HMRC. The claimant was very unhappy with her employer for not having given her payslips, and on making enquiries, information she had been given by HMRC seemed to show that reports from her employer to them about her employment were incorrect. She agrees that she did speak to Mr Connor, but she is clear that she did not tell him that it was her last shift. I accept that claimants evidence.

51. Miss Hunter says that as a result of the telephone call from Mr Connor, she looked at CCTV, which seemed to show the claimant stating it was her last shift. She then rang the claimant.

52. On Friday 8 November the claimant had been asked to carry out some tasks, including sweeping the hallway to the toilets, which the claimant believed should have been done on the previous shift. She did not refuse to carry out the tasks but was unhappy about it, and did raise it with her employer.

53. When she spoke to Miss Hunter she told Miss Hunter that she had spoken to HMRC and that there were discrepancies over the information that had been given to them by the respondent about the claimants pay, her tax and her employment. Miss Hunter said she knew nothing about this.

54. I find that during that telephone call the claimant did raise concerns about her work, and about the reporting of pay to the HMRC, but that she did not resign and that nothing that she said could have reasonably led the respondent to conclude that the claimant had resigned.

55. The claimant ended the call, saying that she would need to consult with ACAS. She did not as, Miss Hunter suggests, scream at Miss Hunter.

56. Following that phone call the claimant and Miss Hunter exchanged text messages.

57. The first one was from Miss Hunter at 19.29 in the evening and it stated " *I guess after our conversation you want to cease working for us. Please can you return your polo shirt and my bar key ASAP preferably tonight. I will forward on to you any outstanding monies and paperwork. We wish you good luck for the future.*

58. The claimant replied on Saturday morning stating, *I am in receipt of your last text , I will be consulting directly with ACAS on Monday and will be in contact thereafter.*

59. Miss Hunter then responded , *You are in receipt of my property which is my bar key and polo shirt. This really needs to be returned ASAP. Can you please put it through the letterbox as soon as otherwise I'm afraid this is theft and will be dealt with accordingly*.

60. The claimant immediately went and posted the shirt and key through the door of the bar. She was very upset by the text message.

61. She received a further text message from Miss Hunter stating, *when an employee displays extreme dissatisfied behaviour and a reluctance to perform basic tasks and then tells collegeus that this shift is their last one and when the owner of the business calls them by telephone to discuss the matter as outlined by other employees and had the telephone conversation ended abruptly and the above reiterated to them and when a text message is then sent aby the owner at 19.29 and read by you at 19.30 and there is no response in any form of communication until the following morning at 11.00 still not stating that the assumption was incorrect that you were going to arrive on tie for your shift the owners have every right to ask for items owned by the company to be returned irrelevant of any employment status*.

62. The claimants text to Miss Hunter categorically denied that the claimant had told a colleague that it was her last shift.

63. Miss Hunter states in her witness statement that the claimant had told a mutual friend that night that she had left. Miss Hunter does not name the friend, or say

when he spoke to her. She says, *she decided to leave without notice, that's why we did not pay her notice*.

64. I find that nothing said by the claimant to Miss Hunter amounted to a resignation. Even if Miss Powell had made a comment to a colleague, she did not ever tell Miss Hunter that she was resigning, or leaving or that it was her last shift. She did not resign from her employment.

65. The claimant states in her evidence that she felt she had been dismissed by them (her employer) by the texts she received from Miss Hunter.

66. The next email referring to a theft made her think that she was no longer employed.

67. She says that once she got that text, she did not think she was employed.

68. I find that the words set out in the text message from Miss Hunter were slightly ambiguous in themselves, but in the context of the previous telephone call, the text from Miss Hunter stating that she guessed that the claimant wanted to stop working for them, were capable of being understood by an employee as a termination of employment.

69. I find that Miss Hunter decided to treat the claimant's employment as being at an end. It was her actions, and not those of the claimant that terminated the employment.

70. I find that Mrs Hunter in her text message which she has shown to the tribunal made the assumption that the claimant will not be returning to work. Whether Miss Hunter believed that the claimant wanted to leave or whether she didn't, her email is very clear that she is treating the claimant's employment as being at an end. she asked the return of keys and for the work uniform to be given back and she also told the claimant that paperwork will be sent through following on from that conversation.

71. Miss Hunter said in evidence that she considered that the text message sent to her had stated that the claimant was not going to return property, and that was why she sent her message saying she would treat the non return of property as theft.

72. As a matter of fact, the text message sent by the claimant does not say that property will not be returned and it is not possible to read such a meaning into it. Miss Hunter revised her evidence when I asked her about this, to say that she believed that that was the meaning behind it.

73. I find that there was no basis for such belief and I put this down to an exaggeration by Miss Hunter of what was said to her. I find that Miss Hunter is untruthful in this respect, and that she knew that the text message did not say that the property would not be returned, and is simply looking for an excuse for having written a threatening and unpleasant email to the claimant. The follow up text message asking for property back, confirmed that she Miss Hunter was

treating the employment as being at an end, and the claimant was reasonable to take this as the natural meaning of the text exchange.

74. The subsequent text messages from Miss Hunter, threatening the claimant that she would treat a failure to immediately return the items as theft, was a further confirmation that the respondent considered the claimant was no longer working for them.

75. I find that the claimant was dismissed on 8 November 2019 and that this was confirmed on the 9 November 2019.

Post Termination letter

76. As part of the bundle for this case, the respondent has produced a letter, handwritten and dated 11 November 2019 to Miss Powell which thanks the claimant for returning the property and asks her to confirm by that evening if she is returning to work that week.

77. The claimant states that she did not receive this letter. Miss Hunter states that it was put through her door.

78. Again, there is a conflict on the evidence between the claimant and the respondent.

79. I prefer the evidence of the claimant. The parties had been corresponding by text message and no reference is made to this letter or the request contained in it at all in any of the text messages. Had the claimant received this text message, it is more than likely, on the basis of the evidence I have seen, that she would have responded to it.

The Pay discrepancies.

80. The claimant has alleged that she was not paid for all the hours she worked, and that various deductions were made from her pay, which were not accounted for.

81. For this hearing, both the claimant and the respondent have produced some analysis of the payment made to the claimant. They are not the same. I have therefore considered the process in place for claiming pay, and the respondents record keeping in respect of the claimant's hours of work.

82. I accept the claimant's evidence that she kept a record of her own hours worked on a daily basis, writing the hours she worked in her diary and that when she first started working, she then sent a text message to her employer, with a statement of the hours she had worked. I find that the claimant was honest about the hours she recorded, and I accept her evidence that the respondent did not raise with her on any specific occasions that she had claimed for hours which she had not worked.

83. I make this finding in part because the claimant had raised her concerns about short pay on several occasions with Miss Hunter in her text messages, as set out above, and no response was ever received that I have seen.

84. After a while in her employment, the claimant was provided with a standardised form to fill in, and this she did. She continued to keep a record of the hours she worked, and to fill in and submit a form claiming pay for those hours. She excepted to be paid for the hours that she claimed for. The claimant states that she was not paid for all the hours she worked.

85. Miss Hunter told me in evidence that she did not always pay the claimant what she had claimed, because she, Miss Hunter, calculated the hours to be paid in a different manner. She told me that she took into account her own observations of the claimants working hours in addition to what she looked at on CCTV. She paid the claimant less than she claimed, because she considered that the claimant has worked fewer hours.

86. In respect of the differences in pay between the respondent also suggests that deductions have been made because the claimant received frequent advances or subs to her wages, either by making a request for them or by taking money directly from till and leaving a chit for an amount in the till.

87. The respondent states that they have many such chits available, but none have been produced in evidence. This is also not referred to at all in the ET3.

88. The claimant denies that she had frequent advances or that she regularly took money from the till.
89. The discrepancies the claimant relies on are in the region of £300. The only direct evidence that I have of any shortfall due to the claimant being loaned money, or borrowing money from the till is as follows.

90. First, in respect of one item of about £20, which the claimant accepted in cross examination.

91. Second, the claimant fairly accepted in cross examination that there were some occasions, as referred to in evidence where she accepted that there had been a loan, or an advance, However, the claimants evidence which I accept, was that she had accounted for these various figures in her calculations of the amounts due to her.

92. It is the employer's responsibility to keep a record of hours worked and a record of the way in which payments are made in respect of those hours. If the mechanism chosen by the employer is one of a claimant recording her own hours and then sending that to the employer so that she can be paid, I would expect the employer, Miss Hunter, to be able to show why the amount claimed was not the amount paid.

93. The respondent has produced no evidence at all of any alleged discrepancies in hours claimed and hours paid. She has not been able to tell the tribunal the dates on which she made deductions or the differences between the hours the claimant claimed and the hours she, Miss Hunter thought she had worked. This information was not put to the claimant in cross examination and it is not set out or referred to at all in the respondents ET3.

94. Despite Miss Hunter asserting that she spoke to the claimant, she has provided no supporting evidence of any discussion with the claimant at all, or of any notification to the claimant of any occasion when she has not paid for hours claimed, and why.

95. If Miss Hunter did make such deductions for such reasons, she ought to have notified the claimant at the time, so that any objection from the claimant could be discussed. She ought to have kept records of what she was paying and why, and kept records of what she was deducting and why. She has not done any of these things.

96. I find that Miss Hunter did not speak to the claimant about the deductions she was making and I reject her evidence that she did so.

97. I find that the claimant was never told by the respondents there was any issue about the hours she was claiming for, or that deductions were made because the claimant had over claimed, and it was not suggested to the claimant in cross examination that the reason for any deductions made was because she was claiming for hours not worked.

98. I find that Miss Hunters assertions that she had lots of chits in the till, which the claimant had put in as IOUs when she borrowed money, is simply untrue. The case has been listed for many months, and the respondent has had adequate time to produce all the relevant documents and a duty to do so. Not one chit or IOU has been produced.

99. Further, the claimant has accepted that there were some occasions where she may have made mistakes herself. A few instances were put to her in cross examination, and she either accepted them, or explained that she had already taken them into account. The items were in respect of hours worked, occasions when she was late, or deductions in respect of loans.

100. The claimant's acceptance of the discrepancies which were put to her, coupled with her constant request for details of pay, and the absence of contemporary discussions between the claimant and Miss Hunter, lead me to conclude that Miss Hunter does not have any basis for any other deductions other than those raised with the claimant. I have seen no evidence of any and find that Miss Hunter is being dishonest when she states that she raised matters with the claimant.

101. I remind myself that section 13 ERA provides that an employer shall not make a deduction from wages unless the deduction is authorised or required by a term of the employees contract, or, the worker has previously signified in writing her agreement to that deduction (section 13 (1) ERA) .

102. Where the amount properly payable to the worker is not paid, or the amount is less than the amount properly payable, the difference is treated as a deduction.

103. I find that the claimant made a valid claim for wages each week, and that she had not previously agreed to any deductions being made, because she had not been provided with a contract of employment at all.

104. I find that there was no relevant provision of the contract which required deductions, and I find that the amount properly payable to the claimant, on each occasion, in the absence of any discussion or agreement over differences, was the amount claimed by the claimant on her time sheets.

105. Except in those instances where there has been clear evidence before me I have therefore awarded the claimant the full amount as claimed.

Applicable Legal principles

106. Part II of the Employment Rights Act 1996 (ERA) contains the general prohibition on deductions from wages. This is set out in S.13(1) ERA, which states that: 'An employer shall not make a deduction from wages of a worker employed by him.'

107. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b).

108. A deduction is defined in the following terms: '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 … as a deduction made by the employer from the worker's wages on that occasion' — S.13(3).

109. Here the deductions refer to statutory deductions such as tax and national insurance and deductions under attachment of earnings orders for example.

110. The question of what wages are 'properly payable' to the worker lies at the heart of S.13(3). If what was paid by the employer to the worker on the relevant occasion was less than the amount properly payable (applying common law and contractual principles), then there has been a deduction for the purposes of S.13

Applicable Legal principles- Termination of Employment

111. In this case there is a question of whether the claimant was dismissed. The burden of proof falls on the employee to show a dismissal, on the 'balance of probabilities'. The employment tribunal must consider whether it was more likely than not that the contract was terminated by dismissal, rather than, for example, by resignation or by mutual agreement between employer and employee.

112. When words or actions give rise to ambiguity, either by their nature or because of the circumstances in which they took place, the test as to whether ostensibly ambiguous words amount to a dismissal or a resignation is an objective one meaning I must consider surrounding circumstances.

113. If, after such consideration, the words are still ambiguous, I should ask myself how a reasonable employer or employee would have understood them in the circumstances. Any ambiguity is likely to be construed against the person seeking to rely on it. (see for example Graham Group plc v Garratt EAT 161/97.)

114. When considering all the circumstances, I should consider events both preceding and subsequent to the incident in question and take account of the nature of the workplace in which the misunderstanding arose.

115. The same objective test applies when the ambiguity occurs in correspondence between employer and employee. Where an employee has received an ambiguous letter, the EAT has said that the interpretation 'should not be a technical one but should reflect what an ordinary, reasonable employee… would understand by the words used'. It added that 'the letter must be construed in the light of the facts known to the employee at the date he receives the letter'. (see for example Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT.)

116. If an employer subsequently seeks clarification of whether an employee's words amount to a resignation, this could indicate that the employee in question has not resigned — see, for example, Goodwill Incorporated (Glasgow) Ltd v Ferrier EAT 157/89 and Tom Cobleigh plc v Young EAT 292/97.

117. Occasionally, there are no direct words at all on either side but it is nonetheless argued that a dismissal (or resignation) can be inferred from the actions of the parties. If the employer's conduct is at issue, this will normally be a case of constructive dismissal falling within S.95(1)(c) ERA — see 'Constructive dismissal' below — but occasionally it may be an express dismissal falling within S.95(1)(a). In Kirklees Metropolitan Council v Radecki 2009 ICR 1244, CA, for example, the Court of Appeal held that removing an employee from the payroll while he was suspended and negotiating a settlement agreement was a sufficiently unequivocal statement of the employer's intention to terminate employment. And in Hogg v Dover College 1990 ICR 39, EAT, the Appeal Tribunal held that the College's letter to a teacher removing him as head of history and offering him new terms amounted to an express dismissal. The new terms were so different from the old terms that the situation could only be described as the termination of one contract and the formation of a new one.

118. I remind myself that it is only in exceptional circumstances that resignation will be the proper inference to draw from an employee's conduct.

119. In *London Transport Executive v Clarke* 1981 ICR 355, CA, Lord Justice Rimer specifically stated that 'an employer cannot unilaterally deem an employee to have resigned when he has not; and a removal of the employee from the employer's books by a process of such deeming following a notice to the employee of an intention to do so would arguably amount to a dismissal'. He went on to note that the dismissal would be prima facie unfair.

Conclusions on Disputed documents

120. Regarding the terms and conditions of employment or employment contract, no signed document has been produced. Whilst I accept that it is not

necessary for an employer have a signed contract, I do not accept that in the circumstances described by Miss Hunter she would not have made sure she had a signed contract, and I accept the evidence of the claimant, on the balance of probabilities, that the documents described by the claimant were the only ones provided to her, and that a statement of terms and conditions was not provided. that no such document was ever given to her

121. There was therefore no written agreement in respect of any deductions from her wages of the type set out in the contract relied upon by the respondent.

122. I conclude that Miss Hunter did not ensure that her accountant was doing what was required in providing payslips. I find that she changed the claimant's hours of work, and her pay without discussion, and without telling her, that she failed to provide any sort of explanation for pay shortages, and that she kept no records at all of any sort.

123. I conclude that there was no other agreement, or notification to the clamant, in respect of any deduction or adjustment to the claimants wages.

124. In this case there are several documents which the claimant has said she did not receive. These are the contract of employment, the pay slips; the letter which is purports to be a warning letter and the letter which the respondent states were sent at the end of the Claimants employment.

125. I prefer the evidence of the claimant in every instance where there is a conflict between her evidence and that of Miss Hunter.

126. I find that the claimant kept records; I find that she persistently asked Miss Hunter for payslips and a P60. I find that the claimant raised her concerns about pay discrepancies regularly. I find that the claim did ask for loans, but did so in text messages.

127. I conclude that as the parties had been communicating throughout their employment relationship by text message, that had the respondent wanted to address any of the claimants concerns, or raise any concerns of their own, they would have done so by text message, and that had they in fact written to the claimant as they suggest, the claimant would have responded, either in writing, or by text message.

128. I conclude that both letters which the respondent states were written and put through the claimant's door, were not written at the time and were not delivered to the claimant.

Conclusion on payslips

129. I conclude that the claimant did not receive any payslips at all during the course of her employment. I accept the claimant's evidence and that she was not given itemised payslips. I prefer her evidence to that of Miss Hunter

130. The reason the claimant needed the payslips was in order to apply for benefits. I have seen the documentation that she requested them on a number

of occasions throughout the course of her employment and on each occasion, she referred to not having received them at all.

131. The evidence I was given by Miss Hunter was inconsistent and she contradicted herself on a number of occasions and I conclude that any steps that she did take to approach the accountants were personal in nature and did not in fact result in her ever seeing any payslips for the claimant. She stated in evidence that she asked the accountant to provide them, and said that the accountant told her they would be provided. She says that she received payslips, so assumed that the claimant did as well. This is despite the claimant asking her for them, and stating that she did not have them on numerous occasions.

132. Further I conclude that the payslips were not provided to Mrs Powell prior to disclosure being given in this case. Whilst the respondents were well aware of the claim being made and whilst it was set out in the ET1 there is no reference to it and no denial of it within the ET3 itself.

133. A combination of failing to provide a statement of terms and conditions and failing to provide regular itemised pay slips meant that the claimant was not aware of the deductions being made from her pay and has had to trawl back through various documents that she herself kept in order to try to reconstruct what deductions have been made, from the payments that she has received and the payments that she ought to have received.

134. I accept that she has done her very best to do this in very difficult circumstances. I have also considered the mechanism by which the claimant was paid.

Holiday pay

135. I come therefore to the question of the claimant's holiday. The claimant asserted that she is owed 67.3 hours holiday. She said and I accept that there is no record of holiday on the payslips.

136. In light of my findings about the unreliability of the respondents record-keeping, albeit that I accept the claimant herself made errors, I accept the claimants evidence in this case in respect of the 67.3 hours. I conclude that that

Conclusions on termination of Employment

137. In this case the claimant had not resigned and I find that in the telephone conversation that took place the claimant did not resign from her employment when she spoke to Miss Hunter. I find that she did raise her concerns about her payslips and I find that she did say that she tended to speak to ACAS.

138. It follows that the termination by the respondent, to take effect immediately means that the claimant is entitled to one weeks notice for breach of contract. This is the statutory minimum notice period.

Disposal

139. In respect of the payslips I am therefore making a declaration that the claimant did not receive pay slips. I am also making a declaration that the claimant did not receive a statement of the main terms and conditions of employment.

140. I find that there was an unlawful deduction from wages in respect of non-payment of hours worked and claimed for and not paid and I find a non-payment unlawful deduction in respect of holiday pay.

141. I have concluded that on the evidence that I have heard and the documentation that I've been referred to that the claimant is entitled to the following payments:

142. I find that she has not been paid the correct holiday pay as it and is entitled to holiday pay of £673.

143. I find that the claimant was not provided with payslips and I make an award of 13 weeks' worth of the deductions that were made but not notified to her in accordance with section 12 of the Employment Rights Act 1996. I have calculated the amount due by looking at the payslips setting up the deductions made the last 13 weeks.

144. I find that no contract of employment or statement was provided to the claimant and I award 2 weeks' worth of pay and I have calculated pay on basis of my finding of fact of the average week and payment of £10 per hour and therefore I find in respect of the contract award 2 weeks' pay which is the sum of £540 and

145. I find that unlawful deductions are made from the claimant's wages.

146. I accept the hours owing are 219.75 hours but I have taken into account the various concessions made during the course of cross examination and I have therefore reduced that by 5.5 hours and also taken of the amount of £295 plus £20. I therefore find that the claimant suffered an unlawful deduction from wages of £1827.50.

147. I also find that the claimant's contract was terminated by the employer in circumstances where she was being dismissed and that she was therefore entitled one weeks notice which is £270 on the basis of 27 hours average, at £10 an hour.

148. I therefore calculate the total sum due to the claimant is £3437.36.

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Employment Judge Rayner
Dated: 28 August 2020
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Note: online publication of judgments and reasons

The ET is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions.

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness