EMPLOYMENT TRIBUNALS

Claimant: Mrs A E Nicholls

Respondent: Mandy Tidy

Heard at: Manchester **On:** 3 September 2020
4 September 2020
(in Chambers)

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: Mr Johnston, Counsel
Respondent: Mr Taylor, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claims of unfair dismissal and wrongful dismissal are successful and remedy will be decided at a further hearing.

2. The claim for unlawful deduction from wages is successful and the claimant is awarded £99.60.

3. The claimant is also entitled to an award for the respondent's failure to provide her with written particulars of employment. Remedy will be decided at a further hearing.

REASONS

Introduction

1. The claimant was dismissed from her role as a Bakery Assistant with the respondent, a Bakery, on 27 September 2019. The claimant commenced early conciliation on 10 October 2019 and received an ACAS early conciliation certificate

on 6 November 2019. The claimant presented her claims of unfair dismissal, redundancy payment, wrongful dismissal, unauthorised deduction from wages and holiday pay, failure to provide written reasons for dismissal and failure to provide written particulars of employment to the Employment Tribunal on 9 November 2019. On 5 February 2020, the respondent submitted a response denying all claims and specifically denying that the claimant was dismissed.

2. The claimant submitted further particulars of claim on 14 January 2020 which were treated as an amendment to the original claim, and following a preliminary hearing on 19 March 2020, the respondent submitted an amended response on 31 March 2020.

Issues

3. At the preliminary hearing on 19 March 2020, Employment Judge Batten set out the issues to be determined as follows:

Dismissal Issue

(1) What was said by the parties to each other during the altercation just after 1.00pm on 27 September 2019?

(2) Was the claimant expressly dismissed by the respondent?

(3) Did the claimant resign?

(4) If the claimant resigned, had the respondent acted in fundamental breach of the claimant's contract of employment thereby entitling her to resign and treat herself as constructively dismissed?

Unfair Dismissal

(5) Can the respondent show that its reason or principal reason for dismissing the claimant was a potentially fair reason?

(6) If so, was the dismissal of the claimant fair or unfair under section 98(4) Employment Rights Act 1996?

Redundancy Payment

(7) Was the claimant entitled to a redundancy payment in the circumstances of her case?

Notice Pay

(8) If the claimant was dismissed, was the claimant entitled to notice of dismissal and/or notice pay in lieu?

Unauthorised deduction from wages

(9) Has the respondent failed to pay any wages which are due to the claimant?

(10) If so, what amount of wages is outstanding and owing to the claimant?

Holiday Pay

(11) What is the respondent's annual leave year?

(12) To what amount of annual leave was the claimant entitled in each leave year?

(13) How much annual leave entitlement had the claimant accrued during her final leave year?

(14) How much annual leave entitlement had the claimant taken during her final leave year?

(15) How much annual leave entitlement was untaken, outstanding and owing to the claimant at the termination of her employment?

Written reasons for dismissal

(16) Did the claimant request written reasons for her dismissal?

(17) If so, did the respondent provide a written statement of reasons for dismissal within 14 days pursuant to section 92(2) Employment Rights Act 1996?

Remedy

(18) If any of the above complaints succeed, what is the appropriate remedy?

4. At the outset of the hearing the claimant's representative withdrew the claim for a failure to provide written reasons for dismissal after conceding that the claimant had not requested such reasons.

5. Similarly, in closing submissions, the claimant's representative conceded that the claimant did not pursue her case on the basis that she had been made redundant and was not pursuing a redundancy payment.

6. Also in closing submissions, the respondent's representative conceded that the claimant did not have a written contract of employment and therefore any deduction from wages was not in accordance with a contract or with the claimant's consent, and any such claim would be conceded.

Evidence

7. The parties agreed a joint bundle of written evidence running to 37 pages. On consideration of that bundle, I noted that the further particulars of claim and the amended response were not included and inserted those so that the Tribunal had the relevant pleadings. I also took note of the Case Management Order prepared by Employment Judge Batten on 19 March 2020.

8. The claimant gave evidence and called her husband, Mr Paul Nicholls, as a witness to the latter part of the conversation on 27 September 2019. The respondent gave evidence and called her husband, Mr Paul Tidy, as a witness to the conversation that took place between the claimant and the respondent on 27 September 2019.

Relevant Legal Principles

Unfair Dismissal

9. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

10. In order to bring a claim the claimant must have been subject to a dismissal. Section 95 provides that a claimant is dismissed if:

> **"(a) the contract under which he is employed is terminated by the employer (whether with or without notice)**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

11. The burden of proof is on the employer to show that there was a dismissal.

12. In the case **of Martin v Glynwed Distribution Ltd *[1983] IRLR 198, [1983] ICR 511*, at 519** the Court of Appeal said*:*

> *"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who* really *ended the contract of employment?"*

13. Case law has established that it is important to firstly establish what exactly was said between the parties. This is a question of whether the language used was ambiguous or unambiguous. Once established, it is necessary to establish the listener's understanding of the words used. Only if the listener's understanding is deemed reasonable can the Tribunal accept that understanding.

14. Once a dismissal has been established it is necessary to consider the reason for the dismissal and whether any such dismissal was fair or unfair.

15. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

16. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), the dismissal is unfair. The case of **Hertz (UK) Ltd v Ferrao EAT 0570/05** established that it is not necessary for the Tribunal to establish the reason for the dismissal if there is insufficient evidence to do so – the EAT said:

> *'It cannot be a necessary prerequisite to the rejection of an employer's case as to the reason for dismissal that it should be possible for the tribunal to ascertain the true reason; there may be cases in which the tribunal simply does not believe the employer's assertion as to his reason for dismissal and in which the true reason does not emerge from the evidence. In some cases the evidence may be such as to enable the tribunal to ascertain and make a finding as to the true reason. In other cases there may be no or no sufficient such evidence; and in such cases, as the tribunal in the present case rightly reminded themselves, the tribunal should not enter into speculation.'*

In both circumstances it will not be necessary to consider any further the concept of fairness.

17. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

18. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal.

19. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable

responses, or whether that band falls short of encompassing termination of employment.

20. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

21. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

22. The principles behind a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

23. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

24. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

25. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

26. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

27. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously

damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

Unlawful deduction from wages

28. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions 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."**

Breach of Contract

29. Section 3 of the Employment Tribunals Act 1996 provides that a "claim for damages for breach of a contract of employment or other contract connected with employment" can be brought before the Employment Tribunal.

30. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that any such claim is one that "arises or is outstanding on the termination of the employee's employment".

Holiday Pay

31. Regulation 14 of the Working Time Regulations 1998 provides:

> **(1) [Paragraphs (1) to (4) of this regulation apply where—]**
>
> **(a) a worker's employment is terminated during the course of his leave year, and**
>
> **(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.**
>
> **(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).**
>
> **(3) The payment due under paragraph (2) shall be —**
>
> **(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or**
>
> **(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula —**
>
> **(A x B) – C**
>
> **where—**
>
> **A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];**
>
> **B is the proportion of the worker's leave year which expired before the termination date, and**
>
> **C is the period of leave taken by the worker between the start of the leave year and the termination date.**

32. Regulation 30 provides that a worker can make a complaint to an Employment Tribunal when the employer has failed to make a payment owed under regulation 14.

Relevant Findings of Fact

33. The claimant was employed at the respondent's bakery from 19 October 1987 until her dismissal on 27 September 2019. The claimant worked as a shop assistant in the shop of the bakery.

34. The claimant was employed by the respondent, Amanda Tidy, who owns the business and runs the business with her husband Mr Paul Tidy, and his brother Mr Darren Tidy. The respondent also owns a second shop which is staffed by other employees.

35. When the claimant first started her employment, the shop was staffed by four assistants, but soon after the claimant started work the other members of staff left and it was just the claimant who ran the shop.

36. The shop and the bakery are on the same premises and if stood in the bakery you can see straight through into the shop and vice versa. There is a corridor that runs between the serving area and bakery which contains a cupboard where vegetables and employees' personal belongings are stored.

37. The respondent operated a policy that allowed employees to make a sandwich on site for their lunch. If the sandwich was to be consumed on site, the employee did not have to seek the permission of the respondent. If the sandwich was to be consumed off site, the employee had to seek permission of the respondent to take the sandwich off site.

38. The claimant's role was to serve customers and handle money. The claimant worked 20 hours per week, Monday to Friday from 9.00am to 1.00pm. The claimant received £166 per week in wages.

39. The claimant did not have a contract of employment and the policy about the consumption of lunch was verbally agreed with the respondent.

40. In September 2019 Mr Tidy discussed the possibility of cutbacks in the presence of the claimant as a result of falling trade following the closure of the road outside the shop due to roadworks.

41. On Friday 27 September 2019 the claimant worked her shift from 9.00am to 1.00pm. At 12.10pm the claimant made herself a sandwich and put it with her handbag in the cupboard in the corridor of the shop.

42. The respondent, who was working in the bakery, saw the claimant make the sandwich and take the sandwich to the cupboard in the corridor. The respondent proceeded to look in the cupboard and found the sandwich with the claimant's belongings. Shortly afterwards the respondent's husband, Mr Tidy, returned to the premises and the respondent informed him of what she had found.

43. The claimant finished her shift at 1.00pm and the respondent asked the claimant if she was going to pay for what she had put in her bag. The claimant informed the respondent that it was a sandwich that she had taken for her lunch, as per the respondent's policy.

44. The respondent informed the claimant that in order to take product away from site she needed to seek permission. The respondent informed the claimant that she was being watched as a result of her suspicious behaviour.

45. The claimant asked the respondent to apologise but the respondent refused to do so. The claimant was then made to leave the premises and was told by the respondent that the respondent would arrange for her accountant to make a final payment to the claimant.

46. The claimant was then approached by Mr Tidy who said that he "did not want it to end like this" to which the claimant responded that the respondent had told her she was sorting her money out and that was it.

47. The claimant's husband then entered the premises after he had arrived at the shop to collect the claimant at the end of her shift. When the claimant had not materialised by 1.15pm, her husband came inside the shop to look for her. When the claimant's husband was informed of what had occurred, he suggested that the respondent had looked through the claimant's bag and that this was unlawful.

48. The claimant informed the respondent that she was going home, and the respondent informed the claimant that she would be getting in touch with her accountant to sort out the claimant's final pay.

49. Neither the claimant nor the respondent made contact with each other over the weekend. The claimant did not attend at work on Monday 30 September 2019. The respondent contacted her accountant on the evening of 30 September 2019 to explain what had happened on Friday 27 September 2019.

50. On 1 October 2019, the claimant sent a letter to the respondent setting out her version of events and informing the respondent that she was extremely distressed and felt that she could not return to work on Monday given that the respondent had said she was contacting the accountant. The claimant asked the respondent to apologise and to pay notice pay and holiday pay and any other wages owed to the claimant.

51. The respondent received this letter on 2 October 2019. On receipt of this letter, the respondent made contact with her accountant and sought legal advice.

52. In response to contact from the respondent, on 4 October 2019 the accountant sent confirmation of the claimant's final holiday calculation based on the claimant's leaving date of 27 September 2019.

53. Also on 4 October 2019 the respondent drafted a response to the claimant confirming she had received legal advice from a solicitor, and that as a result of this advice she was advising the claimant that she had not been dismissed and the position was still open for the claimant. The respondent asserted that the claimant had said that Friday would be her last day and she would not be coming in on Monday. The respondent informed the claimant that she was in breach of her contract because she had not worked her notice. Enclosed with that letter was confirmation of the holiday pay entitlement from the accountant dated 4 October and the claimant's P45 also dated 4 October, which detailed the claimant's last day of employment as 27 September 2019. That letter was sent to the claimant on 8 October 2019 and was received by the claimant on 9 October 2019.

54. On receipt of her final pay, the claimant noted that she had been deducted £99.60 in respect of excess annual leave.

Submissions

Respondent's Submissions

55. It is submitted on behalf of the respondent that the claimant resigned from her employment. The respondent was a good employer and there was a good relationship between the two parties as admitted by the claimant in evidence.

56. It is contended that the respondent had a policy of kindness that employees could have a lunch without charge. The only stipulation was that if they were to remove that lunch from site they should seek permission of the respondent as a reasonable and courteous employer.

57. It is submitted that the respondent is truthful and was not unreasonable to challenge the claimant over the policy. The respondent relies upon the document dated 4 October 2019. It is submitted that the respondent had left the claimant's job open but it was the claimant who decided not to return.

58. The respondent contends that if it is found that the claimant resigned, she has not overcome the burden of proof to establish a fundamental breach of contract. It is the respondent's case that there was no overt accusation of the claimant's guilt and the respondent was merely querying what had happened.

59. It is the respondent's case that there was no intention to sever the employment relationship and the P45 was only sent in response to the claimant's request for her documents.

60. It was conceded by the respondent's representative that the deduction from the claimant's last wage of excess holiday was unlawful and the claimant should be reimbursed.

Claimant's Submissions

61. It is submitted by the claimant that it is common ground between the parties that there was a policy that those employed by the respondent were allowed to make and consume a sandwich. The issue between the parties is whether or not there had been a change in that policy to allow the claimant to take that sandwich off site without permission. The claimant contends that the policy had changed and she was allowed to take the sandwich off site without permission because, as she worked alone in the shop, she did not have time to consume it on site.

62. It is contended on behalf of the claimant that this evidence has not been seriously challenged and that the respondent's evidence, that she had never noticed the claimant do this before, is not believable.

63. The claimant submits that she is struggling to understand that the respondent has confirmed that there was no problem with the claimant consuming the sandwich on site or any problem with taking the sandwich home with consent, but there was a

problem with her taking it home without explicit consent. The claimant submits that she can only hypothesise why she was treated in this way. The claimant was aware that the respondent was struggling financially and that the claimant had accrued substantial service in employment rights. The respondent accepted that there had been a discussion about cutbacks.

64. It is submitted that the respondent and her witness had difficulty explaining why the claimant was challenged in this way. To accuse a longstanding employee in this way strikes at the heart of trust and confidence, and if the claimant was not dismissed she was entitled to resign.

65. It was submitted that dismissal occurred because it is difficult to see why the claimant would resign in the twilight of her career. It is also submitted that the evidence given by Mr Tidy confirms that he made an effort to resolve the situation, but it was not possible after the respondent had said she would be contacting her accountant and making up the claimant's final pay. It is submitted on behalf of the claimant that what happened after 27 September 2019 is consistent with the claimant's account that she was dismissed and not consistent with the view that she resigned in the heat of the moment.

66. The claimant contends that the respondent only sought to offer the claimant employment after the respondent had taken advice. The enclosure of the claimant's P45 was contrary to the position taken by the respondent in the letter dated 4 October 2019.

67. It was conceded by the claimant's representative that her case is one of unfair dismissal and she is not seeking a redundancy payment.

Discussion and Conclusions

Dismissal Issue

68. The respondent challenged the claimant over the sandwich found with the claimant's belongings just prior to the claimant leaving the premises at the end of her shift. The claimant was upset by this challenge and sought to defend herself. The claimant denies swearing at the respondent and that she said it would be her last day. The respondent asserts that the claimant said both things and this prompted the respondent to say she would be contacting her accountant to sort out the claimant's final pay.

69. However, Mr Tidy gives evidence that when he approached the claimant to ask why it had to end in this way, the claimant responded that it was ending in that way because the respondent had told the claimant that the respondent was sorting her money out and "that's it". Had the claimant asserted that it was her last day and she would not be in on Monday, she would not have made this statement. I accept the claimant's evidence that she had been dismissed and therefore reject the respondent's argument that the claimant resigned.

Unfair Dismissal

70. The respondent denies that it dismissed the claimant. The respondent has not asserted that if the claimant was dismissed, that it was for a fair reason. Therefore, the respondent has not proven the reason for dismissal required by section 98(1) of the Employment Rights Act 1996. In such circumstances any dismissal will be deemed unfair.

71. The case of **Hertz (UK) Ltd v Ferrao EAT 0570/05** confirms that the Tribunal is under no obligation to ascertain the real reason for dismissal if there is insufficient evidence to do so.

72. The evidence I have heard is that whilst the respondent had a policy that consent should be obtained before food was taken off site, the respondent told the claimant that this policy did not apply to her when she became the only shop assistant and did not have time to consume products on site.

73. The respondent gave evidence that she had never seen the claimant make a sandwich and take it home prior to 27 September 2019. I do not accept this evidence but accept the evidence of the claimant that she had done this on numerous occasions and never been challenged. The change from four to one assistants in the shop happened many years ago, and this policy of taking a sandwich home without consent has remained unchallenged for a similar length of time.

74. Therefore, on the respondent seeing the claimant making a sandwich and putting it with her bag, this could not have raised a genuine belief in the respondent's mind that the claimant was guilty of misconduct.

75. I have heard evidence that this particular shop was in some financial difficulty because of a prolonged road closure that stopped the footfall which generated the business for the premises. Mr Tidy admitted to a discussion with the respondent, in front of the claimant, about cutbacks.

76. The claimant had worked for the respondent for 32 years without difficulty and accrued substantial employment rights. The events on 27 September 2019 could be explained by the respondent's desire to save money. However, the claimant did not pursue her case on the grounds that she was made redundant and I have not seen sufficient evidence to conclude that the real reason for the claimant's dismissal was redundancy. I make no finding as to the real reason for dismissal and the respondent has not shown any dismissal was potentially fair.

Notice Pay

77. Having found that the claimant was dismissed, and that the dismissal was unfair, it is my view that the claimant was wrongfully dismissed and should have been paid her notice. Given the claimant's length of service, in accordance with section 86 of the Employment Rights Act 1996, she is entitled to 12 weeks' notice pay.

Unauthorised deduction from wages

78. Section 13 of the Employment Rights Act 1996 provides that:

> *"An employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by the contract of employment or consent has been given by the worker prior to the deduction."*

79. The claimant did not have a written contract of employment and did not consent to any deduction being made from her final pay. Therefore, while an employer has a right under regulation 14 of the Working Time Regulations 1998 to seek reimbursement for any excess holiday taken by an employee, it cannot deduct that amount from the employee's pay without consent. The claimant did not consent to this deduction and therefore is entitled to the reimbursement of £99.60.

Holiday Pay

80. In the absence of a contract of employment I am reliant upon the evidence given by the respondent's accountant's letter of 4 October 2019 as to the claimant's entitlement to holiday pay.

81. In that letter at page 29 of the bundle the accountant confirms that the holiday year runs from 1 April to 31 March. The claimant had her statutory entitlement of 28 days including Bank Holidays in accordance with regulation 13 and 13A of the Working Time Regulations 1998.

82. The claimant's date of termination was 27 September 2019. By that date, the claimant had accrued an entitlement to 14 days' holiday.

83. The claimant has asserted in her further particulars of claim that she had three days of accrued but untaken annual leave. I have not seen or heard any evidence from the claimant on this point.

84. Conversely, in the email from the accountant, evidence is produced to show that the claimant had in fact taken 17 days of annual leave including Bank Holidays and therefore was not entitled to any payment on termination of employment.

85. Therefore, in the absence of any evidence from the claimant, it is my finding that the claimant had taken all of her entitlement up to the date of termination of employment.

Employment Judge Ainscough
Date: 9 October 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 October 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2414428/2019**

Name of case: **Mrs AE Nicholls** v **Mandy Tidy**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 20 October 2021

"the calculation day" is: 21 October 2021

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.