EMPLOYMENT TRIBUNALS

Claimant: Mr B Craske

Respondent: Exact Engineers Limited

Heard at: Nottingham **On:** Thursday 22 October 2020

Before: Employment Judge Clark (sitting alone)

Representation

Claimant: In Person
Respondent: Mr D Kennington, director

JUDGMENT

1. The Claimant's claims of unlawful deduction from wages **succeed.** The respondent is ordered to pay to the claimant the **GROSS** sum of **£3,716.11** deducted in contravention of s.13 of the Employment Rights Act 1996.

2. The claimant's claim for accrued but untaken holiday pay **fails and is dismissed.**

REASONS

1. Introduction

1.1 This is the final hearing in a short track claim for deductions from wages and accrued annual leave.

1.2 There are four discrete claims, some more complicated than others engaging the complexities of the National Minimum Wage Act 1998 ("the 1998 Act") and its associated regulations. Neither party was in a position to assist me with the law. Consequently, although three of the four matters are straightforward, the value and significance to the parties of the fourth, and the complexity of the various statutory provisions involved, has required me to take time to consider the law further. As a result, I have reserved what is otherwise a straightforward matter.

2. The Issues

2.1 The issues are: -

a) Whether the claimant was employed as an apprentice for the purpose of the 1998 Act

b) Whether the claimant suffered an unlawful deduction from wages during any notice period he served (albeit absent from work due to ill health).

c) Whether the claimant was owed accrued but untaken holiday as at the date of termination.

d) Whether the claimant suffered an unlawful deduction from wages for the period 11 March to 5 April 2019.

3. Preliminary matters

3.1 As a claim progressing on the short track, the case management orders have not only been brief but, in this particular case, not entirely consistent. Initially, the only order restated at the telephone preliminary hearing on 2 April 2020 was for each of the parties to bring to the hearing all documents on which they intended to rely plus two further copies. That telephone preliminary hearing had been listed as the final hearing. It did not go ahead due to the covid restrictions at the time and was relisted for today. Notice of that was given to the parties at the time. As the restrictions are continuing, a pre-trial effectiveness review has been conducted in recent weeks. In response to the questionnaire whether orders had been complied with, the respondent said “N/A”. The claimant did not respond. EJ Broughton ordered that the case proceed as an attended case and varied the order to one requiring the respondent to send the documents to the tribunal at least 4 working days before hand. That is a standard control measure to give time for paper documents to sit in quarantine for a few days before being opened. The importance of that purpose is expressed in the warning that “if this is not complied with it is very unlikely that the hearing will be able to proceed”.

3.2 In response, the respondent wrote to the tribunal, but not the claimant, stating that it had been given only 4 days to provide a bundle and witness statement and that as the hearing was on 22 October this has not given them time to prepare. EJ Ahmed reviewed the (deemed) application on 19 October and refused any variation to EJ Broughton’s revised order stating that the parties are expected to be in a position to proceed on 22 October.

3.3 As at Wednesday 21 October, no documentation had been received by the tribunal from either side. So far as the issue in the respondent’s application was a plea that it did not have sufficient time to prepare its own documentation, it is no surprise that EJ Ahmed ordered as he did as it had known of the requirement to prepare for the hearing since April. However, there is another difficulty arising from the variation of the order. The original order was for *each* party to bring their documents. There was no order for disclosure or inspection in advance nor, explicitly, for witness statements. The varied order reads as though the

respondent now had a sole duty to provide a joint bundle and copies of all side's statements. That is something it could not reasonably be expected to comply with in the circumstances.

3.4 It is a problem for the claimant also. He was originally expecting to be able to bring his documents to the hearing. The varied order does not provide for *him* to send them in advance. Whilst he could have done that on his own initiative, or could have sent them to the respondent, as a litigant in person his is not to be criticised for not thinking round the case management problems caused by the formal orders issued by the tribunal. Equally, why should he disclose to the respondent his documents in advance of the hearing and not at the same time receive disclosure of the respondent's documents. This has led to a very unfortunate state of affairs in a case which has already been adjourned off once.

3.5 Today both parties attended, albeit Mr Kennington for the respondent attended about 25 minutes late. Mr Craske produced two copies of a small bundle in compliance with the original order. Mr Kennington did not produce any documentation, instead stating that he intended to rely on that which had already been submitted. When I enquired further, I was told it was the ET3 response. The tribunal file showed the ET3 as having a small number of attachments including a more detailed defence followed by a single payslip. Mr Kennington was insistent that there was much more submitted at the time than was on the file. I caused my clerk to check the original email sent on 29 November 2019 and the single ".pdf" file attached to it. A copy of that was provided to me and to Mr Craske and it did indeed include more documentation than what had been printed out on the file. However, that was limited to only 6 further pages made up of 4 payslips and 2 timesheets. It did not include any of the other documentation that had been ordered by EJ Butler. I do not accept those further documents were sent to the tribunal, however, in view of the informal nature of this short track listing I permitted Mr Kennington to hand up further important documentation including the emails concerning the claimant's resignation which had not been included in the claimant's bundle.

4. Evidence

4.1 I heard from both Mr Craske and Mr Kennington for the respondent and considered the documentation produced. Despite being told by the parties that the individuals accompanying each of them could not add to the evidence already adduced, Mr Kennington then sought to call Ms Towel, his accountant. Despite the fact we had all but concluded the process, I permitted her to be called to give evidence and be questioned by Mr Craske.

5. Findings Of Fact

5.1 Mr Kennington is an electrical and alarm engineer. He is the director of a limited company called Exact Engineers Ltd through which he trades. It is essentially a one-man company.

5.2 I find he has previously employed apprentices whom he has trained on the job and attended an appropriate college course.

5.3 Mr Craske was employed by the respondent in the role of an Apprentice Electrician "Electrical and Security Systems Apprentice" from 5 December 2018. Throughout his employment he was aged 21 years. His employment ended after around 4 months. The exact date of termination is something I need to reach a finding on.

5.4 Mr Kennington and Mr Craske appear to have had some acquaintance prior to the period of employment. The prospect of the two working together had clearly been discussed in late November 2018. I have seen text messages between them. Mr Kennington text the claimant asking him if he: -

"still wanted a job as an apprentice"

5.5 The claimant did. A discussion took place about a potential start date. It is clear to me that Mr Kennington wanted the claimant to start sooner rather than later. I find the reason for that urgency was because of the work he needed to get done. Mr Kennington described having a: -

"massive workload that starts on Monday"

5.6 In the course of these text messages, the claimant asked: -

"what will happen with college?"

5.7 To which Mr Kennington replied: -

"block release".

5.8 The claimant asked when it would start, intimating his own presumption that any course would have already commenced by that time in the academic year. Mr Kennington replied: -

"yes you missed one week but it's only health and safety so you can catch up"

5.9 That would tend to suggest the college course was already identified and very little more would be needed to enrol the claimant on it. In fact, whilst I find the intention to provide formal training was genuine, nothing had been done at that stage to arrange the training. I doubt Mr Kennington had any basis in fact for making the statement that the claimant had only missed one week on health and safety other than, perhaps, what he presumed was the case from his previous experience as an employer of apprentices.

5.10 The claimant resigned his then employment and commenced employment with the respondent with effect from 5 December 2018. In a letter dated 27 November 2018, Mr Kennington set out the terms of employment headed contract of employment confirming his appointment as "apprentice electrician". I find the following extracts of the salient terms were agreed:-

a) job title and description - electrical and security systems apprentice

b) hours of work – "your working hours will be 40 per week minimum including college."

c) Probationary period – “this post is subject to the completion of a six-month probationary period”…. And… “During this period, 2 weeks’ notice may be given by either party to terminate this contract”.

d) Salary – “The employer shall pay the employee and hourly wage of £3.70 per hour”… and … “You will be paid on the Friday of the following week after the week completed”.

e) Holiday – “you are entitled to 28 days including statutory/local holidays”... and … “On termination of the employment the employee will be entitled to a pro rata payment in lieu of any unused holiday entitlement. The employer reserves the right to deduct payment for holiday taken in excess of holiday entitlement from the final payment of salary made to the employee”.

f) Deductions – “the employer also reserves the right to make deductions from the employee’s salary where… 7.1 the employer suffers loss by failure of the employee to follow instructions or exercise diligence.7.2 the employee causes damage to the employer’s or client’s property the value of replacement or repair shall be deducted”.

5.11 This contract does not identify any third-party training provider, awarding body or other educational institution. It does not identify the particular course or qualification that will be undertaken. It does not identify the level of qualification that will be achieved at the end of the apprenticeship. It does not identify the amount of time in any period that will be devoted to off-site training or to when the training part of the agreement will end.

5.12 The employment systems within this employer are informal and unsophisticated. Much of the discussions about employment matters, including training, took place on the job. The company was essentially Mr Kennington. Mr Kennington relies on his accountant for payroll and other business support. In particular, he engages the services of Ms Towel of “Nottingham Accountants Ltd” who I have heard from today.

5.13 Mr Kennington and Mr Craske spent a lot of time together and I accept that during that time they discussed aspects of the role during their day-to-day activities. I accept Mr Kennington provided on-the-job training to Mr Craske. I have no detail before me as to the nature and extent of that training other than to be satisfied it was sufficient to mean that even after a few months Mr Craske could undertake work unsupervised on certain jobs and in certain aspects. Beyond those limited opportunities, his work was to work alongside Mr Kennington.

5.14 I find those discussions did also include discussion about the formal training that would be associated with the apprenticeship. When the parties were discussing the claimant becoming an employee they discussed having missed the start of the relevant course. I accept that during the first few weeks of Mr Craske’s employment Mr Kennington spoke with JTL. The reference to JTL is an important aspect of this case which gives me some confidence that Mr Kennington did intend for there to be formal off-site training. JTL is a charity which coordinates electrical apprenticeships, amongst other related trades apprenticeships. I am satisfied that the intention was that this body would coordinate the

claimant's electrical apprenticeship. I accept Mr Kennignton had discussions with his area representative for JTL who was initially unavailable at the time he called in the run up to Christmas. When he was able to get some information, it became clear the possibility of starting a course in January was out of the question as it was already full and that Mr Craske would have to wait until the following September. I am, however, still without any information as to what that course may have been.

5.15 I accept that led to what Mr Kennignton describes as alternative training options to be explored in the meantime, including a relevant course for fire alarm engineers. No actual training was provided or arranged. Whilst I have no reason to doubt Mr Kennington's account, once again I have been provided with nothing to explain even the most basic of information as to the actual course, course provider or other information that would be important to any apprentice.

5.16 This is an employment relationship of such informality, that crucially important matters such as payment of wages and pay dates were missed and payments were late. In fact, Mr Kennington did not even set up a bank transfer system for the payment of wages until some weeks into the relationship. Apart from the issues raised in this claim, I am satisfied the claimant did eventually get the wages he was, on the face of it, apparently due.

5.17 I find the claimant completed timesheets recording the hours that he worked on the days that he worked. I find that he was able to take paid holiday in accordance with the terms of his contract of employment. There is no dispute in this case that he took paid annual leave on 25 and 26 December 2018 and 1 January 2019 as well as on 27, 28 and 29 March 2019. Those 6 days are not disputed before me, despite the claimant's claim that he was not paid for any holidays at all. There is a dispute as to whether he was also paid for annual leave taken over the Christmas and New Year period. I find it significant that the evidence produced by the claimant himself on his time she sets out, in some detail, the hours worked on every day that he worked save for Monday 24, Thursday 27, Friday 28, Monday 31 December 2018 and Wednesday 2 January 2019. That is a further 5 days and coincides with the respondent's case that the employee had an additional period of paid annual leave over the Christmas period. I find he was paid his normal 40 hours wages for each week over that period. I have nothing before me to support the respondent's contention that there was also a day's paid holiday taken in February 2019 but the dates I have found that the claimant was able to take annual leave for which he was paid overall arrives at the total of 11 days paid annual leave during his employment.

5.18 As 2019 progressed, and the payment of wages continued to be sporadic, I find Mr Craske understandably withdrew somewhat. The discussions between him and Mr Kennington increasingly became one way in that Mr Craske became less engaged in discussions with Mr Kennington. It seems something was affecting Mr Craske's well-being. Whether that was to do with his work or other aspects of his life, he became unwell. Whatever concerns he had about work or otherwise, he did not engage with Mr Kennington.

5.19 In March 2019, the claimant's weekly wages became seriously overdue. By Friday, 5 April 2019 he was owed 4 week's wages. That day, the claimant was working at Ms Towel's

property. They had a lengthy discussion about his employment and whilst she appears to have been a customer at that time, I find both understood this discussion was in the context of her capacity as an agent of the employer in so far as matters of payroll and other related employment matters were concerned. Much of the discussion was focused on the fact that, by this time, he was owed 4 weeks' wages. She empathised and promised to speak with Mr Kennington.

5.20 Over the weekend the claimant decided to terminate his employment. At 8:17 on the evening of Sunday 7th of April 2019 he wrote the following in an email: -

> ***Please accept this email as notice of my formal resignation from my position at Exact Engineers. This decision has not been an easy one to make but due to stress and my own well-being, I have to put it first.***
>
> ***I would like to thank you for the opportunity which you gave me several months ago.***
>
> ***I wish you all the best to look forward to staying in touch.***

5.21 While the resignation is crystal clear in so far as expressing his intention to end his employment, it is ambiguous as to when that employment will end. Faced with that ambiguity, about an hour later Mr Kennington replied simply asking: -

> ***"can you let me know are you planning on working a notice period?***

5.22 He did not receive a reply.

5.23 First thing, the following morning, Mr Kennington wrote again asking: -

> ***"if you don't wish to discuss your notice or reasons for leaving at the moment, however as you are aware you have my laptop and some of my tools which I need back. Therefore please drop these off at my house today as my girlfriend is at mine. If you don't I will be coming by your house this evening to collect them".***

5.24 Later that afternoon, Mr Kennington emailed him again saying: -

> ***"Brandon you haven't brought back all the hand tools with bag and drill bits? I will not be transferring any further money until all my stuff is returned. If you want to keep them it can be deducted out of your wages. You told me you are off with stress you have not gone about things in a professional manner. I have a business and I need to know where I stand in regards to getting my tools back etc as I need to know whether I need to replace these tools so I can go about business as usual.***
>
> ***Please call me ASAP so we can discuss the above in a professional way"***

5.25 There was no reply to either of those emails. Instead, Mr Craske had lengthy conversations with Ms Towel on both the Monday 8 and Tuesday 9 April 2019. During those conversation, he shared his circumstances of his mental ill-health. Ms Towel understood the situation to be that the claimant's employment was at that time continuing through the remainder of his contractual notice period, albeit that he was unfit to attend work at that time. I am satisfied that Ms Towel conveyed the claimant's position to Mr Kennington. On 9 April 2019 the claimant attended his GP and obtained fit note certifying him as being unfit for work for the period 9 to 30 April 2019. The reason stated was anxiety and low mood.

5.26 I find Mr Craske did not go about things in a professional way just as Mr Kennington had asserted. On the other hand, Mr Kennington has not performed the employer's side of the employment relationship in a professional manner either. The claimant was paid at the lowest legal level as an apprentice and, even then, found that his wages could not be paid on time or correctly. I don't doubt that Mr Craske had great doubts about whether he could rely on anything Mr Kennington told him about his employment, whether that was to do with his pay or his training. This experience, and particularly going without pay, may well have contributed to his ill-health and I am sure informed his decision to resign.

5.27 However, Mr Kennington clearly needed the tools the claimant had retained at that time. I find Mr Kennington formed the opinion that the claimant had resigned summarily and that explained his firm approach to the return of the tools. Whatever the rights and wrongs of how each viewed the other, the reality was they each reached something of a stand-off. Mr Kennington refusing to pay the outstanding wages (which were already long overdue) until the tools were returned and Mr Craske refusing to return the tools until his wages were paid. I find a small payment of outstanding wages was made to Mr Craske, less a deduction for the estimated value of the tools Mr Craske had in his possession.

5.28 That state of affairs does neither party any credit. Despite arguing there was a contractual power to deduct from wages the cost of the tools, Mr Kennington ultimately then involved the police, the tools were returned on 25 July 2019 through the intervention of a constable of Nottinghamshire police. Those tools were handed back to Ms Towel whose evidence was that she could not say whether or not they were complete or whether or not they were damaged. Mr Kennington has asserted that they came back to him damaged and that he is entitled to deduct the cost of that damage. I am not prepared to accept they were either damaged or incomplete on what little the employer has put before me. Frankly, even if they were damaged in any respect there is no evidence before me from which I could find or even infer such damage was caused by Mr Craske.

6. Discussion and conclusions

6.1 This is a case in which it is convenient to take each of the 4 discrete claims in turn. I deal with any necessary elements of law together with any further findings of fact under each heading.

7. Was the claimant an apprentice for the purpose of the national minimum wage?

7.1 This is the most substantial part of this claim in terms of both its value and the legal complexity.

7.2 In short, during the short period of employment, the claimant worked 755 hours in total (plus his 2 weeks' sick leave during his notice). Throughout this period the claimant was 21 years of age. Under the 1998 Act, the prevailing minimum rate of pay for an employee of his age meant the claimant was entitled to be paid the sum of £7.38 per hour (rising to £7.70 from 1 April 2019). It was and remains unlawful to pay any person over 19 years of age at an hourly rate of pay lower than that unless they were in the first year of a qualifying apprenticeship. It is common ground that if I conclude that the agreement between the

claimant and the respondent falls within the legal definition of an apprenticeship, then in general terms (save for the issues raised in the other claims) he has otherwise been paid at a rate of pay for which the 1998 Act permits. Conversely, if I find his employment falls outside the definition of an apprenticeship, then as a matter of law the claimant has suffered an unlawful deduction from wages throughout the entirety of his employment relationship in a series of deductions for which the remedy is that he be compensated by the payment of the shortfall for the hours actually worked.

7.3 That is a matter of interpreting complex statutory law. The motives and intentions of the employer are not of any great concern and if the agreement does not comply with the law, it does not matter how benevolent the employer's intentions otherwise were. For what it is worth, I do record my conclusion that despite his ineptitude in carrying out the essential functions of an employer, Mr Kennington's intention was to organise an appropriate training course for the claimant eventually. Had things not gone wrong as they did, I have no doubt that Mr Craske would have continued at work, would now be attending his course and would soon be holding a recognised qualification. Although I found the need for the "apprentice" was driveng by demands of workload for the employer, I do not find Mr Kennington was disingenuous about the training. However, the reason this question has to be answered strictly according to the law is because this is an area of public policy which permits an employer to pay less to a worker than they would otherwise be required to pay under the 1998 Act. The contractual terms are not left to common law or contractual freedom. The state has decided there should be minimum rates. The public policy pay-off for this arrangement is that more young people get trained in skills and trades so they can become economically independent contributors to society in the future. Meeting the statutory test demanded by the regulations is an essential safeguard to permitting the employer to otherwise derogate from what would be the age specific minimum wage normally due.

7.4 The route to answering this question starts at regulation 5 of the National Minimum Wage Regulations 2015 ("the 2015 regulations"). This is headed "determining whether the apprenticeship rate applies" and it provides: -

> ***(1)the apprenticeship rate applies to a worker –***
>
> > ***(a)who is employed under a contract of apprenticeship, apprenticeship agreement (within the meaning of section 32 of the apprenticeship, skills, children and learning act 2009) or approved English apprenticeship agreement (within the meaning of section A1 (3) of the apprenticeship, skills, children and learning act 2009, or is treated as employed under a contract of apprenticeship, and***
> >
> > ***(b)who is within the 1st 12 months after the commencement of that employment or under 19 years of age.***
>
> ***(2)A worker is treated as employed under a contract of apprenticeship if the worker is engaged –***
>
> > ***in England, under government arrangements known as apprenticeships, advanced apprenticeships, intermediate level apprenticeships, advanced level apprenticeships or under a trailblazer apprenticeship***

7.5 It can be seen that there are four routes by which an employment relationship or agreement can satisfy the meaning of apprenticeship so that the employer is permitted in law to pay the apprentice rate of pay. They are where the employee is: -

a) employed under a contract of apprenticeship,

b) employed under an apprenticeship agreement (within the meaning of section 32 of the Apprenticeship, Skills, Children and Learning Act 2009), ("the 2009 Act")

c) employed under an Approved English Apprenticeship agreement (within the meaning of section A1 (3) of the Apprenticeship, Skills, Children and Learning Act 2009)

d) is treated as employed under a contract of apprenticeship within the meaning given to that expression by regulation 5(2)

7.6 I consider each in turn.

Is it a contract of apprenticeship?

7.7 This means the traditional, if not now antiquated, common law apprenticeship contract where a "master" agrees to train and an apprentice agrees to be bound for a period to achieve the qualification or standing in a particular trade. Very few apprenticeships take this form today. I have no doubt that this agreement is not a contract of apprenticeship in this common law sense. It is an open-ended agreement which describes itself as a "contract of employment". It is in every other respect an ordinary contract of employment and to fall within the provisions of the 2015 regulations, it therefore needs to fall within one of the other three definitions.

Does it fall within section 32 of the Apprenticeship, Skills, Children and Learning Act 2009?

7.8 The short answer is that is does not. I do not need to go into the detail of why it does not comply with the technical provisions of what that statutory provision required, which it does not, because those provisions were repealed so far as concerns agreements in England in March 2015. No new apprenticeships could be created under that provision after that date.

7.9 The agreement in his case was formed over the weeks leading up to 5 December 2018 and cannot therefore fall within this provision.

Does it fall within the definition of an Approved English Apprenticeship agreement?

7.10 At the same time as s.32 of the 2009 Act was repealed, a new form of statutory apprenticeship status was introduced in section A1. This provides

A1 Meaning of "approved English apprenticeship" etc

(1) This section applies for the purposes of this Chapter.

(2) An approved English apprenticeship is an arrangement which—

(a) takes place under an approved English apprenticeship agreement, or

(b) is an alternative English apprenticeship,

and, in either case, satisfies any conditions specified in regulations made by the Secretary of State.

(3) An approved English apprenticeship agreement is an agreement which—

(a) provides for a person ("the apprentice") to work for another person for reward in an occupation for which a standard has been published under section ZA11,

(b) provides for the apprentice to receive training in order to assist the apprentice to achieve the approved . . . standard in the work done under the agreement, and

(c) satisfies any other conditions specified in regulations made by the Secretary of State.

(4) An alternative English apprenticeship is an arrangement, under which a person works, which is of a kind described in regulations made by the Secretary of State.

(5) Regulations under subsection (4) may, for example, describe arrangements which relate to cases where a person—

(a) works otherwise than for another person;

(b) works otherwise than for reward.

(6) A person completes an approved English apprenticeship if the person achieves the approved . . . standard while doing an approved English apprenticeship.

(7) The "approved . . . standard", in relation to an approved English apprenticeship, means the standard which applies in relation to the work to be done under the apprenticeship (see section ZA11).

7.11 It can be seen that this definition can itself be satisfied in two ways. The first is to meet the definition of an approved English apprenticeship as defined by s.A1(3). The second is that the agreement may still be regarded as an approved English apprenticeship if it is an "Alternative English Apprenticeship". In both cases, the agreement must satisfy any conditions imposed by regulations. The regulations are the Apprenticeships (Miscellaneous Provisions) Regulations 2017 ("the 2017 regulations"). I consider each constituent element in turn.

7.12 So far as the requirements of the approved English apprenticeship is concerned, I am satisfied that section A1(3)(a) is satisfied in this case in that this is an agreement for the claimant to work for the respondent for reward in an occupation for which a standard has been published under section ZA11. That is a standard and an outcome in a particular occupation published by the Institute for Apprenticeships and Technical Education. Whilst I have not received direct evidence on this fact, I am prepared to infer that the options for the claimant in the area of occupation he was to be trained, that is electrical and security systems, through the support of the apprentice charity JTL, includes such a standard.

7.13 The second condition is that the agreement must provide for the apprentice to receive training in order to assist the apprentice to achieve the approved standard in the work done under the agreement. The agreement in question could certainly state this in clearer terms but I it seems to me arguable that this is satisfied. Whilst the job title "apprentice" would not be enough on its own, the reference to time within the normal working hours to be spent at college demonstrates that this is such an agreement. I am, however, left in some doubt that the actual approved standard has not been identified in the agreement (either the written agreement or verbally). That matter does concern me and I will revisit it if the other elements of the necessary conditions are satisfied.

7.14 The third condition is that the agreement satisfies any other conditions specified in regulations made by the Secretary of State. The 2017 regulations are specific in a number of ways. Regulation 3 states: -

3 Off-the-job training

(1) It is a condition of an approved English apprenticeship for the purposes of section A1(2) of the Act that the apprentice is to receive off-the-job training.

(2) Each approved English apprenticeship agreement must specify the amount of time the apprentice is to receive off-the-job training during the period of the agreement.

(3) For the purposes of paragraphs (1) and (2)—

"off-the-job training" means training which is not on-the-job training and is received by the apprentice, during the apprentice's normal working hours, for the purpose of achieving the approved apprenticeship standard to which the agreement or arrangement relates;

"on-the-job training" means training which is received by the apprentice during the apprentice's normal working hours for the sole purpose of enabling the apprentice to perform the work to which the agreement or arrangement relates.

(4) For the purposes of paragraph (3), "normal working hours" means the period when the apprentice is required or, as the case may be, expected, under the agreement or arrangement, to work or to receive training.

7.15 I cannot see that this agreement complies with regulation 3(2) insofar as it fails to specify the amount of time that the apprentice is to receive off the job training during the period of the agreement. I do not regard it as sufficient to say, as this contract does, that the claimant will work a minimum of 40 hours per week including college. Even if I take the view that the "agreement" referred to could be oral and left to my findings of fact, I cannot make such a finding on the exchanges that took place. The confirmation that the training would be "block release" does not satisfy this. That conclusion is enough for the agreement not to comply with section A1(3)(c). However, regulation 4 further provides: -

4 Practical period

(1) Each approved English apprenticeship agreement must specify the practical period.

(2) When agreeing the practical period, the employer must take into account—

(a) the apprentice's knowledge and skills;

(b) whether the work and training is to be undertaken by the apprentice on a full-time or part-time basis; and

(c) the approved standard to which the agreement relates.

7.16 I am similarly unable to identify anywhere in the agreement, written or oral, where the practical period has been specified. It follows that, even before concluding any doubt about the approved standard to which the claimant should have been working, I have to conclude that the agreement contained in the contract of employment does not satisfy the first definition of an approved English apprenticeship and nothing in the surrounding informal oral discussions rescues that position.

7.17 I must then consider whether it satisfies the second definition being an alternative English apprenticeship as defined by section A1(4). Essentially, that means that it satisfied the definition set out in regulations. Those regulations are, again, the 2017 regulations. Regulation 6 provides: -

6 Alternative English apprenticeships

(1) For the purposes of section A1(4) of the Act, an alternative English apprenticeship is an arrangement under which a person to whom paragraph (5) or (6) applies works in order to achieve an approved standard.

(2) Work under paragraph (1) may be—

(a) for an employer;

(b) otherwise than for an employer; or

(c) otherwise than for reward.

(3) The arrangement in paragraph (1) must specify the amount of time the person is to receive off-the-job training during the period of the arrangement.

(4) The arrangement in paragraph (1) terminates on the date specified in the arrangement.

(5) This paragraph applies to a person where—

(a) the person was working for an employer and receiving training, under an approved English apprenticeship agreement;

(b) that agreement was terminated before the final day or the revised final day because the person was dismissed by reason of redundancy; and

(c) that agreement was terminated less than six months before the final day or the revised final day.

(6) This paragraph applies to a person who is working and receiving training to achieve an approved standard under an arrangement where the person is holding office—

(a) as a minister or a trainee minister of a religious denomination; or

(b) as a constable of a police force in England.

(7) For the purposes of paragraph (1), the arrangement in paragraph (6) must specify a period of not less than 12 months during which the person is expected to work and receive training under the arrangement.

7.18 It can be seen that these further provisions do not provide any assistance to the respondent in this case. The alternative English apprenticeship deals with situations where the nature of the work undertaken by the worker is either not for an employer, or not for reward, or, under paragraph 5,where what was already an Approved English Apprenticeship agreement terminates before the final day. Nothing in this additional provision turns the agreement in this case into a qualifying apprenticeship for the purposes of regulation 5 of the 2015 regulations.

Is the agreement treated as a contract of apprenticeship within the meaning given to that expression by regulation 5(2) of the 2015 regulations?

7.19 The fourth and final route to satisfying regulation 5 of the 2015 regulations is to consider whether the worker should be treated as employed under a contract of apprenticeship in accordance with regulation 5(2)(a). That is limited to those working under government arrangements known as Apprenticeships, Advanced Apprenticeships, Intermediate Level Apprenticeships, Advanced Level Apprenticeships and Trailblazer Apprenticeships. There is nothing before me to show this agreement formed part of any of those government schemes.

7.20 It follows from all of the above that I have to reach the conclusion that the provisions of the 1998 Act meant the claimant was entitled to be remunerated at an hourly rate not less than his age specific hourly rate. I have been alert to the fact that the employer's intention

was to provide such training and have interpreted these regulations as leniently as is permissible, including what is meant by an agreement. Even then, I cannot bring the agreement within the provisions. I have not had to engage with the requirement that such an agreement must be in place at the start of the apprenticeship, thus ruling out an agreement being formed at a later date, at least insofar as it might govern the rate of pay during that earlier period.

7.21 The respondent has not established that it was entitled to pay less than the age specific rate, specifically that it was entitled to pay £3.70 and then £3.90 per hour. As a matter of law, the claimant has therefore been subject to an unlawful deduction from wages throughout his period of employment. That deduction continued as a series throughout each pay period from start to finish such that no jurisdiction issue arises. He is entitled to an order under s.24(1)(a) of the Employment Rights Act 1996 that the employer pay the amount of any deduction made. There is no claim before me in respect of s.24(2) of that act.

7.22 There are 755 hours due to be reconciled plus the period of notice. The rates paid at various times, the contractual overtime, the fact of periods of non-payment and the implications during notice mean the implications of my findings on the other claims have to be considered first.

7.23 What I can say is that those other conclusions do not affect the payment for the period up to the week ending 8 March 2019. During that period the claimant worked 579.50 hours for which he was paid £3.70 per hour gross when he was properly due 7.38 per hour. Under his contract, he was entitled to overtime at the rate of time and a half for hours in excess of 40 hours per week. I calculate there were 35.5 hours of overtime within those total hours. That effectively adds half again for those overtime hours to be paid at the appropriate flat rate, namely a further 17.75 hours. The total pay properly due in the period amounts to £4407.71 (579.50 + 17.75 x £7.38). During the same period, he was actually paid gross payments of £2,209.83 (597.25 x £3.70) for which credit must be given. The shortfall owed to the claimant in this period is therefore £2,197.88 **gross.**

8. Claim for pay during the notice period.

8.1 The first issue is to determine the date of termination. The competing contentions are whether the date of termination was, as the respondent alleges, with immediate effect on 7 April 2019 or, as the claimant contends, that his notice of resignation marked the beginning of his contractual notice period of 2 weeks such that the employment ended on Sunday 21 April 2019.

8.2 It is right that the resignation is ambiguous in that regard. The question is how is that ambiguity to be resolved? Mr Kennington did the right thing in many respects by simply asking the claimant what his intentions were and did not receive a reply. The absence of a reply, however, did not fill the gap in any ambiguity that was already present. That ambiguity simply prevailed. From Mr Craske's point of view, however, he spoke at length with the respondent's accountant dealing with payroll and, indeed, provided his employer with a doctor's fit note signing him off as unfit to attend work. I am satisfied that Ms Towel conveyed

the claimant's position to Mr Kennington. I note also Mr Kennington's second email sent on 8 April in which he uses the phrase "you have told me you are off with stress" which carries a meaning closer to an understanding that he was off work as opposed to the reason for previously resigning. Ms Towel, in her brief but frank and helpful evidence, confirmed her understanding was that Mr Craske was working his notice albeit that he was unfit to attend work during the period notice.

8.3 Whilst the resignation date is ambiguous, that state of affairs is no more indicative of a resignation with immediate effect than it is of an employee simply "giving notice". He does not use language to say "I am finishing today". There is nothing about it which entitles the employer to resolve the ambiguity of the terms of the letter itself as leading to that conclusion. If that ambiguity is to be resolved one way or the other it is by reference to the contract of employment which requires the employee to "give notice" of 2 weeks to terminate the contract. Whilst the word notice may be used in the context of an immediate termination, it is more naturally used in the context of an announcement of something to happen in the future, given at a time not less than the period in advance of the event required by the terms of any agreement. In this case, the claimant was required to give two weeks' notice of termination. Neither the ambiguity in the terms of the letter nor the absence of direct communication from the claimant entitle the employer to conclude that this was a termination with immediate effect. Claimant's employment therefore ended on 21 April 2019 in accordance with his contractual obligations.

8.4 He was not paid during that time. The question is what pay was properly due to him? The case has been argued in respect of the SSP payments he would otherwise have been entitled to during that two week period. This tribunal does not have jurisdiction to determine whether SSP is due or not where it is disputed. It does have jurisdiction in the limited circumstances where there is no dispute that SSP was otherwise due but not paid such that it becomes a question of an unauthorised deduction from wages. (see Taylor Gordon & Co Ltd v Timmons UKEAT/ 0159/03 and Hair Davison Ltd v McMillan UKEATS/0033/12). The parties are in agreement that if the employment relationship continued he would have been entitled to SSP and at the time the relevant rate of SSP was £94.25 per week. Taking out the 3 qualifying days for this period of incapacity would arrive at an entitlement for SSP of £131.95.

8.5 However, as a matter of law these payments were due to the claimant during his notice period. I have had to consider whether Part IX of the Employment Rights Act 1996 applies. The provisions it contains deal with minimum period of notice and, at section 87 onwards, sets out the rights of an employee during a period of statutory notice. In short, section 88(1) provides for normal pay during the period of notice even if during that period the employee is incapable of work because of sickness or injury. If that provision applied, it would have the effect of increasing the amount due to the claimant to his normal pay for the period of statutory notice he was obliged to give, namely 1 week. The effect of my conclusion on the first issue would have meant this increased to £308 gross for that week. However, I have decided that these provisions are disapplied on the facts in this case. Section 87(4) provides:-

This section does not apply in relation to a notice given by the employer or employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

8.6 By section 86(1), the respondent was obliged to give the claimant one week's notice. By the contract of employment, the employer was obliged to give the claimant 2 weeks' notice. Although this only applied during the initial probation period, it meant at the time of the termination the employer, if it had terminated the contract, would have had to give "at least one week more than the notice required by section 86(1)". It follows that s.87(4) engaged to disapply section 87 and the provisions of that section do not apply in this case. The claimant is therefore entitled only to the amount that the parties agree he otherwise should have received during that period, being £131.95 **gross**.

9. The Claim for Accrued but untaken holiday.

9.1 Mr Craske claim is set out as a claim for hours. He claims there are 71 additional hours to be paid as holiday pay. So far as I was able to understand that claim, it appears to derive from the misconception that as he worked additional hours in some weeks, he has accrued additional holiday. Neither his contract nor the working time regulations 1998 provide explicitly for this method of accrual. The fact he worked additional hours may, in certain employment contexts mean the calculation of what is a normal week's pay is increased when calculating the rate of pay due during any period of paid holiday. That is not a claim before me. The claim before me is based on regulation 16 of the Working Time Regulations 1998 ("The 1998 Regulations")

9.2 The approach to calculation under the 1998 regulations is as follows. The claimant was employed between 5 December 2018 and 21 April 2019. That is 138 days or, expressed as a proportion of a whole year, 0.378 of the year.

9.3 He is entitled under the 1998 Regulations and his contract employment to 28 days paid annually per annum including public holidays. For a 5 day per week worker as he was, we arrive at that figure from the original statutory entitlement of 5.6 weeks. If there is a payment due, it is important to undertake the calculation based on weeks, or proportions of weeks, outstanding because the formula for payment relies on the calculation of a week's pay. That is the case even though, in most employment contexts, holiday can be taken in single days or even fractions of days at a time.

9.4 The proportion of that annual entitlement accrued is therefore 5.6 x 0.378 which results in a proportion for the part-year of 2.12 weeks (that is, 11 days rounded up).

9.5 From that there needs to be deducted any paid annual leave actually taken during that period of employment. I have found as a fact that the claimant took 11 days paid annual leave. In my judgement, therefore, the claimant has neither overtaken his leave entitlement nor does he have an accrued but untaken outstanding entitlement to be paid in accordance with regulation 16 of the 1998 regulations. For those reasons this claim fails and is dismissed

10. Claim for unpaid wages (11 March to 5 April 2019.)

10.1 There is no dispute that the claimant is owed 4 week's pay for the period 11 March to 5 April 2019. At his contractual rate of pay of £3.70 (rising for the last 5 days to 3.90) I am told that equates to £742.48 for the hours actually worked. This was not paid on the date that it was originally due, that being each of the Friday's during the period for which the claimant was contractually entitled to receive the previous week's wages. That is a fundamental breach of the contract of employment. I am satisfied that part of the reason why the claimant resigned though not the whole reason, was the manner in which his employment rights had been infringed in particular the frequent delay in the payment of the wages due. This became profound when the wages were not only late but substantially late to the point of being four weeks' late.

10.2 There is also no dispute that this sum was then positively withheld by the employer. It has accepted it owes the claimant the wages but in the circumstances of his resignation and failing to return the tools in his possession, which I accept were rightfully owned by the respondent, it refused to pay them. In arguing the case before me the respondent seeks to rely on a right to make deductions from wages in the circumstances. I have come to the conclusion that the respondent cannot rely on those provisions for the following reasons.

10.3 Firstly, the contractual power to make deductions from wages in this case potentially engages only two of the five circumstances set out in the contract. They are found at clause 7.1 and 7.2 of the contract as set out above. The factual circumstances must fall within either of those provisions. In respect of the first, I am not satisfied that the employer suffered loss. The employer has not shown any loss derived from the steps it took to recover possession of the tools nor has it satisfied me of the fact that some of the tools remained outstanding. Clause 7.1 may have provided a basis for a deduction as an alternative to recovery of the chattels, but I am not satisfied this is made out in this case once the tools were in fact recovered. Secondly the employer cannot have both the recovery of the property and the deduction from where there is a contractual power to make a deduction from wages it must elect which course wishes to take. In this case, having sought recovery and obtained possession of the tools it cannot then seek to rely in addition on a deduction from wages for the estimated value of the tools. As an aside, I have next to nothing before me to arrive at a finding on the accuracy of that estimate should I have needed to apply it.

10.4 So far as 7.2 gives rise to an entitlement for the employer to deduct from wages the value of replacement or repair for damaged property, the employer has not established as a fact any damage. This provision simply does not arise

10.5 I am therefore not satisfied that the employer has established any basis for not paying the sum which is agreed to be owed to the claimant. For those reasons on this part of the claim I give judgement for the claimant. That would have been in the agreed sum of £742.28 gross based on the rate of pay contained in the contract of employment. However, the remedy for this infringement needs to be ordered having regard to my conclusions in respect of the first issue. In short, none of the money due for that 4 week period was paid at all. Mr Craske has included the hours worked within his total of 755 hours. In respect of these hours, however, there is no credit to be given for the payment of wages at the lower

apprentice rate of pay. It is complicated slightly by the fact that the appropriate minimum wage increased during the period. The shortfall is calculated as follows: -

a) For the period between 9 March 2019 and week ending 29 March 2019, the claimant worked 130 hours of which 15 hours were on overtime rates meaning he is entitled to be paid the appropriate rate for a further 7.5 hours, a notional total of 137.5 hours. The claimant was not paid at all. The shortfall that is properly due amounts to £1,014.75 **gross** (137.5 x £7.38)

b) For the week ending 5 April 2019, the amount properly due is arrived at on the same basis as in the previous calculation save that the appropriate hourly rates under the 1998 Act had increased. The hours worked were 45.5. 5.5 hours of overtime means the claimant is notionally entitled to pay for a further 2.75 hours making 48.25 hours in total at the new prevailing rate of £7.70 per hour. The shortfall that is properly due therefore amounts to £371.53 **gross** (48.25 x £7.70)

11. Conclusions and remedy

11.1 All claims of unauthorised deduction from wages succeed. The claim of accrued holiday pay fails.

11.2 The claimant is entitled to an order that he his employer pay a sum for the shortfall in the amounts properly due. I have set out the calculations in each case above. The total sum due is therefore £3716.11.

EMPLOYMENT JUDGE R Clark

DATE 28 October 2020

JUDGMENT SENT TO THE PARTIES ON

……...…….

.

AND ENTERED IN THE REGISTER

……...…….

.

FOR SECRETARY OF THE TRIBUNALS