Case number: 2600799/2020 (V) Reserved

EMPLOYMENT TRIBUNALS

Claimant: Miss L Minton

Respondent: Pine View Care Homes Limited T/A Groby Lodge

AT A FINAL HEARING

Heard: Remotely, via CVP **On:** 8 February 2021

Before: Employment Judge Clark (sitting alone)

Appearances

For the claimant: Mr Wilding of Counsel

For the respondent: Mr D Raja. Director (for the first 10 minutes of the hearing only)

REMEDY JUDGMENT

1. The claim of unauthorised deduction form wages **succeeds in part**. The respondent shall pay the claimant the **gross** sum of **£1,954.28**.

2. The claim of accrued but untaken holiday outstanding at the date of termination **succeeds**. The respondent shall pay the claimant the net sum of **£442.80**

3. The claim of disability discrimination **succeeds**. The respondent shall pay the claimant the net sum of **£11,049.97.**

REASONS

1. Introduction

1.1 This is a claim of disability discrimination, unauthorised deduction from wages and outstanding holiday pay. During 2020, this claim had been subject to case management orders leading towards a final hearing over three days, the first day of which was listed for today. During the course of last year, the respondent's representative had failed to attend a preliminary hearing and subsequently indicated the respondent's refusal to engage in the process at the time. He may have felt it had good grounds for doing so as it was dealing with the effect of Covid-19 on its business and the residents it provides care to. However, it did so in the face of an order refusing an application for a stay of proceedings, in the face of subsequent orders

requiring it to take certain steps and Mr Raja then expressed the respondent's position towards the claim, the tribunal and certain tribunal judges in terms which were wholly inappropriate and sufficient to amount to unreasonable conduct of proceedings. On 17 December 2020, Employment Judge Victoria Butler struck out the respondent's response for that reason and because of a failure to comply with case management orders. As far as I am aware, there has been no appeal against that decision. The final hearing was converted to today's remedy hearing. The order gave the usual form of words that the respondent would only be entitled to participate to the extent permitted by the employment judge.

1.2 In *Office Equipment Systems v Hughes [2018] EWCA Civ 1842*, the Court of Appeal confirmed that a respondent failing to present a response and being debarred from contesting liability should ordinarily, but not absolutely, be permitted to defend remedy. Although I regard that case as broadly applicable to this situation, this case has some material differences. The most significant of which is that the respondent here has not failed to present a response but has been struck out because of the manner in which they have conducted the litigation. That is material to the decision I had to make as to the extent of their participation at today's hearing.

1.3 I had decided in advance that I should inform Mr Raja of his right to apply to participate in today's remedy hearing and I invited him to do so. I indicated that my provisional view was that it would be appropriate for the respondent to raise any points relevant to remedy so as to test the evidence being put before me. Instead, Mr Raja renewed his previous applications to stay or postpone this hearing. That had been refused by EJ Ahmed last summer. Nothing of substance seems to have changed. His most recent email sought a stay of proceedings until August 2021. I was not convinced that that was an application that a debarred party is able to make but, in any event, I refused it on its merits as it was not in the interest of justice to delay in the circumstances any further. Having given my decision, Mr Raja's manner of addressing the tribunal and the issues in the case veered back towards the unreasonable. I explained that in any application to participate, I would have to take into account the extent to which such participation would further, or hinder, the overriding objective or conflict with a fair trial being possible. Mr Raja stated that he felt there was no point in participating, invited me to do what I wanted and disconnected from the remote hearing.

2. This Hearing

2.1 This is a remedy hearing although as far as I am aware a liability judgment has not been issued.

2.2 There are some issue with the way the claim has been pleaded and the evidence that has been adduced in respect of some of the claims that are before the tribunal. There were gaps that have now been filled with oral evidence and there are other aspects which do not make sense. The fact that the response has been struck out does not remove the claimant's obligation to prove her case and her loss. If nothing else, I must be satisfied of jurisdiction to determine an issue and, even where there is jurisdiction, I must be able to make sense of the claim in order to properly assess loss and damage.

2.3 I have heard from Miss Minton and her mother, Mrs Laight, who affirmed written witness statements and an impact statement and gave further evidence on the documentation in a small bundle.

2.4 In view of the surrounding issues of this case, including Mr Raja's indication of an intention to appeal, I indicated that I would hand down my decision in writing.

3. Background facts

3.1 The claimant commenced her employment on 11 March 2019 as an apprentice care worker. I have seen a written contract of employment of the same date. The relevant terms of the contract are:-

a) Job title – Apprentice

b) Rate of pay £3.90 per hour (this was known to be the applicable rate of pay from April 2019 and the claimant was started on the preceding rate of £3.70 per hour)

c) Pay was paid monthly on or around 1st of each month for the previous month. The pay period for each month was 26th to 25th of the following month.

d) The hours of work were 45 per week over a 5 day week

e) The annual leave (holiday) entitlement was 28 days including bank holidays. The leave year ran from 1 January to 31 December.

f) There is no contractual sick pay. Sickness absence was paid at SSP rates for qualifying employees.

g) Notice to be given by employer to employee was one week at the material time.

h) There is a contractual power to lay off/impose short time work without pay protection (subject only to the statutory regime)

i) The contract contains a written agreement for the repayment of training costs "except NVQ courses".

3.2 The claimant understood this employment to be an apprenticeship leading to the award of an NVQ level II in health and social care. She was told that she would be monitored and after 12 months someone would assess her progress. She was not given any information about the detail of any course and was not told what duties or functions of her role she would be assessed against nor any form of curriculum or competency framework. She was not required to compile evidence of her skills and competencies. There was no mention of time off work for training, no training arranged and no third-party agreement with a training provider or coordinator. Nothing in the information given to her in writing or orally expressed any time out of work for training, or the total period of any practical training. After her employment had ended she did become aware of an organisation called T2 and contacted them. They told her she was not known to them.

3.3 The claimant was under the impression that this employment was for a fixed period of 12 months. At the end of the apprenticeship, she might hope to obtain employment but understood she had no guarantee of that. This is a curious aspect of the case as this is not what the contract of employment states. As far as I can see, the contract is open ended but it is clear that she had formed the understanding in her own mind that it was to last for only 12 months.

3.4 The claimant has suffered with various mental impairments in recent years. These had been diagnosed variously since 2013 as anxiety, and since 2017 as depression, bipolar disorder and borderline personality disorder. She declared this on her health questionnaire when appointed to this role. However, she also ticked that she did not think this amounted to a disability.

3.5 She is prescribed medication. She takes Aripiprazole, Sertraline and Promathazine daily and describes the positive effect of these in terms that, without them, she would not be able to function. She has described a number of day to day activities that, without the medication, she would be unable to perform either at all or to any normal standard. I accept that evidence.

3.6 During her employment, the claimant worked to a standard that did not appear to be a concern to the employer. She did, however, begin to experience frank episodes of her mental impairment including panic attacks and hallucinations and on occasion was sent home. This became an acute illness in August when, outside of work, she began hallucinating believing she was being chased and ran into a road. This was a serious matter and she was detained at the Bradgate Unit in Leicester under the Mental Health Act 1983 from 31 August. This was period of assessment was immediately followed by a period of medical certification as unfit for work until 5 November 2019 when she felt she was ready to return to work.

3.7 She did not receive SSP for this period of absence. The respondent's position stated at the time was that she had not met the relevant minimum earnings level to be entitled to SSP. Whether or not the underlying substance of that decision was correct, it is at least consistent with a copy of a form I have seen prepared by the respondent explaining the reason SSP was not paid for the claimant to seek payment directly from the state.

3.8 She returned full time before there was a drop in occupancy at the home such that she was laid off. She was then asked to return to work in late November 2019. She did the odd shift and this continued through December until just before Christmas when she was told there was again no need for her.

3.9 I find that although the discussions in December were vague and surrounded by discussion of lay off, this was understood to be a dismissal by both parties. The surrounding circumstances however do not support the drop in occupancy as being the reason for her dismissal for a number of reasons. First, the claimant came to learn that a new apprentice was being taken on and that her manager told her that it was likely that her apprenticeship would finish early so the new apprentice could start. Secondly, the claimant's mental health had featured in various other discussions with her manager. Since July 2019, when her

mental health deteriorated, she said to the claimant "*if you sorted out our mental health we could take you on as an employee and not as an apprentice*". This comment clearly engaged directly with the claimant's disability and is enough to raise the material connection between her disability to the later acts of the employer. I find she also said "*you're a good girl but it's hard to factor in your hours as when you do come into work we do not know if you are going to be sent home or even come in*". This may have some indirect relationship to the claimant's disability but it is far less clear and capable of interpretation in a way that is simply a matter of fact. What it does do is give an evidential basis for the impression that the claimant's work itself was not particularly a concern of the employer. I also accept that words to similar effect were stated to the claimant's mother as an explanation for the dismissal when she visited the employer after her daughter's dismissal to collect paperwork. I also find the manager said *"if you manage to get yourself straight/stable then there will be a job for you – we will always have you back".* This is after dismissal. It is clearly a statement directly relevant to the disability and shows this is a key issue in the decision making. It also follows from the fact the claimant's mother visited in January and had these conversations that any misunderstanding about whether she had in fact been dismissed or not was not corrected and the respondent proceeded to engage with her on the basis that the employment had ended. I therefore accept that the claimant was dismissed. The actual date of dismissal is vague. On one hand, I could resort to the ET1 and ET3 both of which agree that the effective date of termination was 1 December 2019. However, I must reach an alternative finding where the facts clearly demonstrate that that agreement to be wrong. It is wrong in this case because of the hours of work paid in December which amounted to 117 hours. Even allowing for the pay roll cut off being 25 November and that some of the hours paid in December related to hours worked in late November, it is impossible to arrive at a termination date of 1 December and still reconcile the payment of 117 hours. The best the claimant can recall is that the dismissal was a little before Christmas eve. I have concluded it took effect on or around Friday 20 December 2019 as the end of the week before Christmas.

3.10 Throughout her relatively short period of employment I found the claimant worked for 117 hours in March 2019, for which she was paid at the previous apprentice rate of £3.70 per hour. In April she was paid for 198 hours also at the rate of £3.70 notwithstanding the fact that the rate of pay increased from 1 April 2019 to £3.90. In May she worked 180 hours. In June she worked 163 hours plus 27 hours (3 days) of paid annual leave. In July she worked 111 hours. In August she worked 99 hours plus 90 hours (10 days) of paid annual leave. In September she worked 45 hours. In October she was off sick for the entire month. In November she worked 36 hours. In December she worked 117 hours. To total is therefore 1066 hours for which she was paid at the rate of £3.70 or £3.90 and including 117 hours of paid holiday.

3.11 I accept that the claimant was affected by the loss of her employment and the link being made to her disability and mental health. This was a real set-back for her and has resulted in significant loss of confidence leaving her without the sense of purpose that work had given her. The fact it was supposed to provide her with a qualification aggravated this sense of loss as this was supposed to be the foundation of her future career. She began to

worry that her ill-health would mean no-one would employ her and she began to view herself not only as a failure but seriously feared that this would now be her "lot in life".

3.12 This led to an understandable and reasonable period following her dismissal when the claimant felt there was no point in trying to find new work as she would be bound to find a similar reaction. However, I find something must have changed and, in March 2020, she did apply for new work in a similar field of work at Abbey House care home. She was successful. I find this was an extremely positive boost to her and something she enjoyed. She found the new employer and colleagues supportive of her and her mental health and a welcome contrast to her experience at the respondent. I have no doubt it restored her own sense of worth and value and to some degree enabled her to overcome the injury to her feelings she had suffered from the dismissal. However, for some reason that I cannot attribute to any benevolent motives, I find Mr Raja then made contact with the new employer. He did so at a time shortly after the claim had been presented and whatever was said, this led her new manager to ask her if she was thinking of leaving. That then required her to fully explain her recent experiences in circumstances she found intimidating and distressing to the point that she was reduced to tears and questioned whether she had lost her recently recovered sense of security in the workplace. It seems to me that whilst this period of employment was a real tonic to help her overcome that injury, I must also accept that the injury to feelings remained under the surface for some time and I find she is only now overcoming the experience of what happened as a result of the conclusion of this case. Whilst that injury was healing well, it was reopened by the consequences of Mr Raja's contact and demonstrated how fragile the claimant remained at the time.

3.13 However, the effect of Covid-19 and the claimant's psychological fragility in dealing with its consequences meant she was sectioned once again during 2020. Even after substantial support from her new employer and a phased return to work, I find she felt unable to continue in this employment for a variety of unconnected personal reasons and she chose to resign to focus on her improving her own health. I have to conclude that those personal reasons were unrelated to the dismissal from the respondent's employment and that they would have arisen around that time in whatever employment the claimant was in. Equally, I cannot attribute the effect of Mr Raja contacting the new employer as being relevant to that resignation.

4. Unauthorised deduction from wages - Was the claimant an apprentice for the purpose of the national minimum wage?

4.1 This is a technically complex claim. Notwithstanding the respondent's conduct of its defence and the lack of any residual participation today, I have taken great care to analyse whether this employment relationship falls within or without the statutory regime.

4.2 In short, during the relatively short period of employment, the claimant worked for 1066 hours in total including 117 hours paid as annual leave. Throughout this period the claimant was 18, turning 19, years of age. Under the 1998 Act, the prevailing minimum rate of pay for an employee of her age meant the claimant was entitled to be paid the sum of £5.90 per hour (rising to £6.15 from 1 April 2019). It was and remains unlawful to pay any person aged 18-

20 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 not in dispute that if I conclude that the agreement between the claimant and the respondent falls within the legal definition of a qualifying apprenticeship, then in general terms (save for the issue of the rate paid in April 2019) she has otherwise been paid at a rate of pay for which the 1998 Act permits. Conversely, if I find this employment falls outside the definition of a qualifying apprenticeship, then the claimant has suffered an unlawful deduction from wages throughout the entirety of her employment relationship in a series of deductions for which the remedy is that she be compensated by the payment of the shortfall for the hours actually worked.

4.3 That is resolved by 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. I do not have to make a finding as to whether this was a benevolent employer that happened to get things wrong or one seeking to profit from the lower rates of pay. However, even in a case involving the most well intended employer, 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 that there should be minimum rates of pay based on age. The public policy pay-off for this particular arrangement with apprentices is that society gets more young people trained in the necessary skills and trades needed so they can become economically independent contributors in the future. For that reason, meeting the statutory requirements demanded by the regulations is an essential safeguard to permitting the employer to derogate from what would otherwise be the age specific minimum wage due.

4.4 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***

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

4.6 I consider each potential route in turn.

Is it a contract of apprenticeship?

4.7 This means the traditional, if now somewhat 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?

4.8 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 it related to agreements in England, in March 2015. No new apprenticeships could be created under that provision after that date.

4.9 The agreement in his case was formed on or around 18 March 2019 and cannot therefore fall within this provision.

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

4.10 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).

4.11 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.

4.12 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 take judicial notice of the industry standards in this sector that the options for the claimant in the area of occupation she was to be trained, that is health and social care includes such a standard.

4.13 The second condition is that the agreement must provide for the apprentice to receive training in order to assist them to achieve the approved standard in the work done under the agreement. The agreement in question before me is limited to the contract of employment. It says nothing about training beyond the fact that NVQ costs will not be recovered on termination after short service. I do not regard the job title of "apprentice" is enough to satisfy this in itself. Nor is there any reference in the agreement to the actual approved standard that the claimant could potentially be working to although I accept that the claimant was told that she would work towards an NVQ level II in health and social care. There is some scope for interpreting the necessary agreement as including a verbal agreement. Whether the

agreement must be evidenced in writing or can exist orally is moot and I will revisit it if the other elements of the necessary conditions are satisfied.

4.14 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.***

4.15 I cannot see that this contract 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 for there to be some collateral oral arrangement whereby the claimant would, at some unspecified future point, enrol herself on some unspecified course. 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 sufficient to satisfy this condition. 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.***

4.16 "Must specify" is a mandatory command. There are no half measures. I am similarly unable to identify anywhere in the agreement, written or oral, where the practical period has been so specified. The claimant's understanding that there would be some sort of review at around 12 months is too imprecise to satisfy this provision even it is sufficient for the agreement to be oral only. It follows that, even before concluding any doubt about the

requirement for the agreement to be in writing, 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 even if it could be found in oral agreements.

4.17 I must then go on to consider whether this employment satisfied the alternative, 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.***

4.18 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 where it was not otherwise already one.

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

4.19 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.

4.20 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 her age specific hourly rate. I have been alert to the possibility that the employer's intention may have been to provide, or facilitate, appropriate training and have interpreted these regulations as leniently as is permissible. Even then, I cannot bring the agreement within the provisions.

4.21 There is nothing before me to established that the respondent 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 her period of employment. That deduction continued as a series throughout each pay period from start to finish such that no jurisdiction issue arises in looking back across the entire period of employment. She is entitled to an order under s.24(1)(a) of the Employment Rights Act 1996 that the employer pay the amount of any unlawful deduction made. There is no claim before me in respect of s.24(2) of that act.

4.22 There are 1066 hours due to be reconciled including paid annual leave taken and paid at the apprentice rate. The effect of this decision on the notional period of notice is calculated elsewhere.

4.23 During March 2019, the claimant was paid £432.90 based on £3.70 per hour for the 117 hours worked which should have been calculated at £5.90 per hour. The gross figure due is therefore £690.30. In April, the rate should have gone up to £6.15. For some reason the employer continued to pay the previous apprentice rate. I have to acknowledge that some of the payment for April will have been in respect of the final 6 days of March when the lower rate did still apply. The claim has not set out sufficient detail to identify this accurately. I have to make some adjustment and the claimant will have to carry the risk that the broad brush approach I take favours the respondent. On the claimant confirming her hours were reasonably constant from week to week at this time, I assume 25% of the April hours to have been applied at the previous hourly rate. Consequently, of the 198 hours worked, 49.5 will be calculated at the previous age related hourly rate of £5.90 resulting in a total of £292.05. The remaining 148.5 hours attract the 2019 rate of £6.15 giving a total of £913.28. The total gross payment due for the April payment is therefore £1,205.33. For the remaining period between May and December, the rate of pay due is £6.15. The total gross due for the remaining 751 hours is therefore £4,618.65.

4.24 The gross pay that should therefore have been paid over this period totals £6,514.28. Of course, the claimant was paid during this time and received net payments of £4,549.80. In most pay dates, the claimant fell below the level for payment of national insurance contributions. I only have before me some of the pay statements and it is clear that deductions totalled no more than around £10 in the entire period of employment. I therefore make a broad-brush adjustment to arrive at her gross payments to bring them up to £4560. The shortfall between the gross payment due and the gross payment actually paid is therefore £1,954.28 which is the gross value of the unlawful deduction.

5. The Disability claims

5.1 I am satisfied that Miss Minton's condition met the definition of disability under s.6 of the Equality Act 2010. At the material time of December 2019, the substantial adverse effects I accepted had both lasted 12 months and, in any event, the evidence available shows were likely to continue for at least 12 months. The employer sought to rely on the fact the claimant ticked the box that she did not have a disability. I do not accept that is determinative. It will be seen from what follows below that I have concluded that the evidence that both was, and ought reasonably to have been, available to the employer was such that it had knowledge of her disability at the material time.

5.2 The disability claim is based on unfavourable treatment because of something arising in consequence of disability and failures to make reasonable adjustments. Some parts of the claim are not at all cealr. I do not understand why it is said that the comments of Rikki Hamil are "something arising" in consequence of her disability. However, it is clear that there are other matters said to amount to the "something arising" identified in particular time off work related to the disability and her own unpredictability which I accept arise in consequence of the disability. The evidence has satisfied me that the dismissal, as the unfavourable treatment alleged, was impermissibly influenced and therefore sufficiently caused by those facts.

5.3 I have decided that is the basis on which I have jurisdiction to assess compensation for disability discrimination. I am unable to include within that the purported claim of failure to make reasonable adjustments as I am unable to properly understand it. The PCP is said to be "*the same as in the claim for indirect discrimination*". There is no claim for indirect discrimination. This renders the construction and understanding of a reasonable adjustment claim impossible. In any event, there is limited consequence to this. Although a reasonable adjustment claim does of course stand as a claim in its own right, in this case it may exist more of a means of rebutting any attempt by the respondent to justify the unfavourable treatment under the section 15 claim. That is not a live issue and the section 15 claim has succeeded.

5.4 There are two broad heads of loss and damage claimed. The first is injury to feelings. The claimant says dismissal is a serious matter and should not be regarded as a one off bringing it within the lower bracket as determined by *Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871*. She seeks the middle bracket and values the claim "squarely" within it. In other words, attracting a value of £15,000.

5.5 In Vento, the Court of Appeal set down three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower is said to be for the less serious or one off cases. The upper is said to be for the most serious cases. The middle band for cases not falling within the upper band. There is little further guidance as to when cases fall into one or other band. There is some support for the contention that dismissal, albeit literally a one off event, may not be viewed by a tribunal as a lower band issues based on the fact it would seem wrong to categorise one of the most serious employment sanctions as "less serious" (*Voith Turbo v Stowe [2005] IRLR 228*). However, when drawing on the guidance in both Vento, the subsequent updating authorities, and cases such as Voith Turbo, it is important to keep in mind that the measure of damage is on the tortious basis. The principal is that a claimant is, as far as money ever can, put in the position they would have been in but for the tortious act. It is, therefore, based on the assessment of the individual claimant's injury, not the manner or mechanism of how that injury is caused. The description of the Vento bands do not mean that an individual who suffers a particularly harrowing campaign of discriminatory treatment but is nonetheless of such constitution that their evidence is that it caused little or no injury to feelings would still be compensated at the higher band. Conversely, an individual suffering one unintentional incident may be extremely adversely affected. The bands provide the structure in which compensation can be assessed and do so in a way that a single scheme can deal with cases consistently across the varying extremes of discrimination, from the effects of blatant and intentional harassment to accidental indirect discrimination occurring in a benevolent context. I also acknowledge that whilst compensation is not at all to be punitive on the tortfeasor, the law should not shy away from making an otherwise justifiable and appropriate award and tribunals should not undervalue the effect of discrimination and risk their judgments undermining the very serious social objectives of the Equality Act 2010.

5.6 In respect of claims presented on or after 6 April 2019, the Vento bands have been uplifted by presidential guidance so that the lower band (less serious cases) became £900 to £8,800 and the middle band (cases that do not merit an award in the upper band) became £8,800 to £26,300. It is not contended that this case falls into the category of the most serious cases to warrant the upper band.

5.7 Some help in fixing an appropriate award for injury feelings is provided by the requirement to have some cross check to the level of damages awarded for general damages in personal injury cases. The 15th edition of the Judicial College guidelines on the assessment of general damages provide similar brackets. I take a broad approach to the various brackets it contains although the most relevant brackets would appear to be those in respect of psychiatric or psychological damage. Chapter 4(A)(d) deals with less severe psychiatric damage generally and provides a bracket of £1,440 to £5,500. The next bracket up, moderate injury, provides a range of £5,500 to £17,900. Some cases may be appropriately compared to minor injuries set out in chapter 13 where recovery in a period up to 3 months commands an award of up to £2,300. These too are broad brackets within which the individual circumstances must be weighed to arrive at a just figure and I consider them not because they provide the answer to the award of injury to feelings but because they have

some broad relevance, they provide a useful benchmark against which to check any figures arrived at.

5.8 In this case there are four points that stand out as being relevant to me in the assessment of injury to feelings. The first is that the principal that a tortfeasor takes his victim as he finds him applies. The fact that the claimant's mental impairment may means she was particularly susceptible to reflecting on the effect her disability had had on her employment and the consequential injury to feelings she experienced does not diminish the injury or the award that follows. Some might even argue it should aggravate it. Secondly, I accept that the claimant's evidence of injury to feelings was real and had a tangible and distinct effect on her feelings and reflection of her own value as a disabled person for approximately a year. It also affected her ability to take steps to get back into the workplace for a number of months. Thirdly, however, she was in fact able to take steps to get back into the workplace and the very real feelings she had in December and January had dissipated enough by March for her to be successful in finding new work which, initially at least proved to restore her sense of value and self-worth. Finally, I have considered the effect of the respondent's contact with her new employer. There are no good reasons for this before me and I suspect it followed discovery that the claimant's claim had been issued. Its effect was to cause the earlier injury to feelings to resurface somewhat. I have decided this must aggravate the injury to feelings that the respondent had already caused and should be reflected in the award.

5.9 I accept that dismissal is a serious matter and should not be classified as less serious. I also find the injury has been aggravated. But the level of injury to feelings, as real as they are, would be over compensated if I awarded it at the figure of £15,000 sought by the claimant. It seems to me the acute injury to feelings dissipated relatively quickly but remained present for some months controlled by the positive effect of the new employment, only for the metaphorical wound to be reopened when the claimant began to question her sense of security in the working world once again. It would be under compensating to draw assistance from the Judicial College guide in respect of minor injuries. Although she found new employment in about 3 months, the depth and duration of the injury to feelings goes beyond this guide. The specific factors to be considered by the Judicial college in respect of psychiatric injury generally include the injured person's ability to cope with life, education or work. Whilst I remind myself that this is only a benchmark and I am not compensating for psychiatric injury, used as it is intended as a comparative measure of the appropriate award it seems to me to be of some help in arriving at what might be an appropriate figure. Similarly, I note that the "moderate" bracket is regarded as an appropriate bracket for compensating work related stress where it is not prolonged.

5.10 I have decided that the injury to feelings award is to be compensated at the cusp of the lower and middle Vento brackets. I take some comfort in that after analysing the comparative awards in personal injury cases and concluding that a broadly comparable injury might be compensated in the lower part of the moderate bracket although still in single figures. In setting the actual award I regard myself as bound to apply the middle Vento band although there may be arguments leading to fine adjustment either way, I regard the figure of £8,800 to reflect the injury without over compensating.

5.11 I then turn to financial loss. The law is set out in *Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA Civ 545,* in which the Court of Appeal gave the following guidance to tribunals having to assess future loss of earnings after a discriminatory dismissal:

> (1) where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach;
>
> (2) in the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the claimant securing an equivalent job as time went by;
>
> (3) applying a discount to reflect the date by which the claimant would have left the respondent's employment anyway in the absence of discrimination was not appropriate in any case in which the claimant would only voluntarily have left his employment for an equivalent or better job; and
>
> (4) in career-long-loss cases, some general reduction should be made, on a broad-brush basis (and not involving calculating any specific date by which the claimant would have ceased to be employed) for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons.

5.12 There are a number of factors in this case which cause me to limit the period of time that the respondent should be liable to the claimant for ongoing losses. The first relates to the strange state of affairs in this case that although the employment was contractually open ended, the claimant understood her employment to be for a 12 month fixed term contract. This is not at all a conclusive or determinative but it is a matter but a matter which I may need to factor into my assessment of what would have happened. Notwithstanding the terms of the written employment contract, it seems to me there has to be some prospect that the employment relationship could have ended in any event on the anniversary.

5.13 I then have to consider the fact that there is some evidence of reduced occupancy in respect of which the contractual power to impose lay off or short time working was likely to continue for some time. This has effect on two levels. Arithmetically, I have to assess what the actual ongoing loss would have been. More fundamentally, the fact of lay off or short time working lasting for an extended period is more likely than not to have been another factor militating towards this particular employment ending.

5.14 However, of greater significance than either of those two factors is the fact that, with effect from 18 March 2020, the claimant did in fact obtain comparable employment in circumstances which I must accept fully mitigated her loss. I have given careful consideration to whether the respondent’s involvement in that new employment could be said to have been

material to it coming to an end. I have decided that it was not. The new employment therefore provides a relatively short and certain period of time post dismissal for which the respondent is liable for ongoing financial loss.

5.15 In addition to this, the very fact that there was a deterioration in the claimant's health in or around June 2020 for reasons which appears to be unrelated to the employment with the respondent, means I would in any event have to factor in the chance that, had the employment with the respondent not ended in December 2020 as it did, there is a real prospect it would have ended fairly and in a non-discriminatory way in any event by July 2020 when the claimant decided that she needed to put her health first before continued employment.

5.16 The loss is therefore the earnings due during the period between 21 December 2020 and 18 March 2021. That is a period of 12½ weeks. At full contractual terms of 45 hours per week that equates to a gross weekly loss of £276.75 (£6.15 x 45). Of course, at that higher hourly rate of pay the claimant would be exceeding her tax free allowance and be subject to some further deductions for tac and NI. I calculate that a gross weekly pay of £276.75 in that tax year equated to a net weekly payment of £256.22. The headline net loss for the period in question therefore equates to £3,202.75 (£256.22 x 12.5). That must then be adjusted to reflect the fact that at the time of dismissal the claimant was on short time working due to the reduction in occupancy. She told me she was asked to work for only a few days a week as and when needed. Her overall pay for December supports a conclusion that her hours had been reduced to about 50-60% of normal. I am satisfied that state of affairs was likely to continue for a little while further, but improve over the 12 weeks I am considering. It therefore seems to me that I must reflect that initial state of affairs somehow together with the prospect of it improving somewhat. The approach I take is to reduce the relatively short period of time by a factor to do justice to both parties. I set that reduction at 30% which is less than she was actually suffering at the date of dismissal but which factors in the prospect that the hours were more likely to have picked up over the period. The headline gross figure of loss will therefore be reduced by 70% to reflect the fact that the contract of employment had within it a contractual term for short term working which was being invoked at the date of dismissal. There is only one further qualification to that calculation. That is that the claimant was not given or paid notice. The claimant is entitled to notice at full contractual rate under Part IX of the Employment Rights Act 1996. One of those 12 ½ weeks will therefore be calculated at full contractual rate and the remaining 11½ week's pay at 70%. The result is a net loss of £2,318.79 (£256.22 + £2062.57 (being £2946.53 /100 x 70)).

5.17 From that must be deducted any sums received or otherwise obtained in mitigation of loss.

5.18 The claimant says she did not receive notice of dismissal. The respondent did, however, make a payment to the claimant of £70.20 at the end of January 2020. The exact nature of that payment is not clear. However, the contractual terms relating to the pay month are such that it is clear the claimant did not work after 25 December 2019. Any payment reflecting the period after then must have been for some other purpose. Whatever that is, it seems to me it should go to defray the liability that I have found the respondent otherwise has

to the claimant. Secondly, the claimant received £865.95 in universal credit during the intervening period for which credit must be given. The loss for which the respondent is liable is therefore reduced by £936.15 to a net sum of £1,382.64.

5.19 The claimant had originally pleaded a claim to interest on the discrimination awards although that has not been advanced further today. Nevertheless, I see no reason not to award an appropriate sum under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

5.20 The period between the act of discrimination on 20 December 2019 and today is 417 days. The applicable rate of interest is 8% per annum calculated on the basis of simple interest. The award of injury to feelings attracts interest at the full rate for the full period. The calculation is therefore £8,800 x 8% / 365 x 417 = £804.30. The award for financial loss is calculated from the mid-point thus £1,382.64 x 8% / 365 x 208 = £63.03. Therefore, the total compensation awarded for disability discrimination amounts to £11,049.97 (£1,382.64 + £63.03 + £8,800 + £804.30)

6. Claims for unpaid holiday

6.1 The claimant 's employment started in the third month of the annual leave year as set by the relevant agreement. The contractual entitlement provided for the statutory minimum for a 5 day week worker of 28 days including bank holidays. The claimant took and was paid for 13 days holiday (The calculation of the rate of pay for that holiday has been incorporated into the unauthorised deduction claim). The claimant accrued leave at a rate of 1/12 of the entitlement on the 1st of each calendar month she was employed. In her case she was entitled to 9/12 of the leave entitlement. That amounts to 21 days. From that must be deducted the 13 days taken and paid leaving 8 days accrued but untaken as at the date of termination. At the appropriate gross day rate of £55.35 (9 hours x £6.15 p/h) that totals £442.80

7. Claim for unpaid sick pay

7.1 There is clearly an issue in this employment as to whether the claimant met the qualifying conditions to entitle her to SSP, particularly in respect of earnings. Mr Wilding submitted that the claimant did in fact meet the minimum pay threshold on her lower rate of pay applied at the time and that when the correct hourly rate of pay is applied, she most certainly did meet the threshold. It is said SSP should have been paid and she should recover the failure to pay it as an unauthorised deduction from wages.

7.2 I have decided that my initial view, expressed at the time of these submissions, has not been displaced. However tempting it may be to step in to this area of dispute, the fact is there is a dispute as to the entitlement to SSP. It is therefore not a matter that falls to be determined by the Employment Tribunal (see Taylor Gordon &Co. Ltd v Timmons [2004] IRLR 180) and the fact the respondent's response has been struck out does not alter the question of whether jurisdiction is engaged. This much of the unauthorised deduction from wages claim must therefore fail. My determination on jurisdiction, however, does not decide

the substance of that claim. If there are grounds for a successful challenge it may still be capable of being advanced before the DWP and/or first-tier tribunal as appropriate.

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Employment Judge Clark
10 February 2021

Sent to the parties on:
11 February 2021
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For the Tribunal:

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