EMPLOYMENT TRIBUNALS

Claimant: Mr L Frost

Respondents: Archer & Stone Ltd

Heard: Remotely (by video link) **On:** 13 and 14 April 2021

Before: Employment Judge S Shore

Appearances

For the claimant: In person
For the respondent: Miss K Zakrzewska, Litigation Consultant

JUDGMENT ON LIABILITY

The decision of the Tribunal is that:

1. The claimant's claim of automatic unfair dismissal contrary to section 100(1)(c) of the Employment Rights Act 1996 ("ERA") is not well-founded and fails.
2. The claimant's claim of breach of contract (failure to pay notice pay) fails.
3. The claimant's claim of unauthorised deduction of wages contrary to section 13 Employment Rights Act 1996 was partly well-founded and succeeds in part. The respondent shall pay the claimant the sum of **£118.98** (subject to deduction of income tax and National Insurance).
4. The claimant's claim of failure to pay holiday pay accrued but not taken contrary to the Working Time Regulations 1998 was not well-founded and fails.
5. The respondent failed to provide the claimant with a statement of terms and conditions of employment as required by sections 1(1) and 4(1) of the Employment Rights Act 1996. The respondent shall pay the claimant the sum of 2 weeks' pay, capped at the statutory maximum week's pay at the time: £525.00 = **£1,050.00**.
6. The total payable by the respondent to the claimant is **£1,168.98** (subject to the deduction of tax and National Insurance on £118.98 unauthorised deductions).

REASONS

Introduction

1. The claimant was employed by the respondent, a company that are health and safety consultants, as a plumber, from 16 September 2019 until 2 February 2020. Early conciliation started on 18 February 2020 and ended on 1 April 2020. The claim form was presented on 25 April 2020.

2. The claim is about the lead up to and the reasons for the claimant's resignation. He says he had issues about the health and safety practices of the respondent before it deducted a substantial amount from his salary at the end of January 2020. He says he had raised issues about health and safety with the respondent and that he was constructively dismissed because of this. On his dismissal, he says he was not paid his full accrued holiday entitlement, full pay or notice pay. He says he was not provided with a statement of terms and conditions of employment as required by sections 1(1) and 4(1) of the Employment Rights Act 1996.

3. The claimant presented a number of claims, some of which fell by the wayside. At this hearing, he presented the remaining claims of:

    2.1. 'Automatic' unfair dismissal contrary to section 100(1)(c) of the Employment Rights Act 1996;

    2.2. Breach of contract (failure to pay notice pay);

    2.3. Unauthorised deduction of wages contrary to section 13 Employment Rights Act 1996 (set out in 11 numbered paragraphs in his ET1);

    2.4. Failure to pay holiday pay accrued but not taken contrary to the Working Time Regulations 1998, and;

    2.5. Failure to provide him with a statement of terms and conditions of employment as required by sections 1(1) and 4(1) of the Employment Rights Act 1996.

2. This case has been case managed on a number of occasions by the Tribunal. On 8 July 2020, Employment Judge ("EJ") Shepherd held a preliminary hearing which the respondent did not attend: it had not filed a response. EJ Shepherd listed the case for a hearing on 12 August 2020. The respondent then presented an application that its ET3 be accepted out of time.

3. On 12 August 2020, a preliminary hearing was held before EJ Brain, who granted an extension of time for the respondent to file its ET3 and the final hearing was fixed for 23 and 24 November 2020.

4. I was appointed to judge the final hearing on 23 November 2020, but found that the case was not ready for a final hearing. I adjourned the case to today and reserved it to myself.

Issues

5. My case management order dated 23 November 2020 set out the issues (questions I have to find the answers to) as follows:

1. ***Unfair dismissal***

1.1 Was the claimant dismissed?

1.2 Did the respondent breach the implied term of trust and confidence? The Tribunal will need to decide:

1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent, and;

1.2.2 whether it had reasonable and proper cause for doing so.

1.3. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.5 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.6 If the claimant was dismissed, was the reason or principal reason for dismissal he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

If so, the claimant will be regarded as unfairly dismissed.

1.7 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

1.8 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2 Remedy for unfair dismissal

2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.1.1 What financial losses has the dismissal caused the claimant?

2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.1.3 If not, for what period of loss should the claimant be compensated?

2.1.4 Does the statutory cap of fifty-two weeks' pay?

2.1.5 What basic award is payable to the claimant, if any?

3 Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

3.3. Did the respondent fundamentally breach the claimant's contract of employment?

3.4. How much should the claimant be awarded as damages?

4 Holiday Pay (Working Time Regulations 1998)

4.1 What was the claimant's leave year?

4.2 How much of the leave year had passed when the claimant's employment ended?

4.3 How much leave had accrued for the year by that date?

4.4 How much paid leave had the claimant taken in the year?

4.5 Were any days carried over from previous holiday years?

4.6 How many days remain unpaid?

4.7 What is the relevant daily rate of pay?

5 Unauthorised deductions

5.1 Were the wages paid to the claimant on w/c 23 September 2019, w/c 7 October 2019, and w/c 9 December 2019 less than the wages he should have been paid?

5.2 Should the claimant have been paid £181.71 for work at Crystal Peaks on 19 October 2019?

5.3 Should the claimant have been paid £403.80 travel time to Stanbridge Community Centre?

5.4 Was the claimant entitled to overtime for hours worked over his basic 40 hours per week?

5.5 Was any deduction required or authorised by statute?

5.6 Was any deduction required or authorised by a written term of the contract?

5.7 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

5.8 Did the claimant agree in writing to the deduction before it was made?

5.9 How much is the claimant owed?

6 Failure to provide a statement of terms and conditions of employment

6.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

6.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

6.3 Would it be just and equitable to award four weeks' pay?

Law

6. The statutory law relating to the claimant's claim of automatic unfair dismissal is as follows:

Section 100(1)(c) ERA

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that -

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee -

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where –
(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them".

Section 95 ERA

7. For the purposes of the constructive dismissal claim, the relevant section of the Employment Rights Act 1996 is s.95(1).

"Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

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

8. The House of Lords established that there is an implied term of trust and confidence between employer and employee in ***Malik v Bank of Credit and Commerce International SA*** [1997] ICR 606.The term (often referred to as 'the T & C term') was held to be as follows:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

9. The test was refined by the EAT in ***Leeds Dental Team Ltd v Rose*** *[2014] IRLR 8*. As Judge Burke put it:

> *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"*

10. A deduction from a worker's wages is unlawful unless one of the limited exceptions set out in section 13(1) of the Employment Rights Act 1996 is satisfied. Section 13(1)(b) provides for one such exception where the worker has previously signified in writing his consent to the making of the deduction. The Coronavirus Job Retention Scheme legislation and Treasury Directions do not of themselves impose contractual changes upon employers and employees (albeit that agreement to certain contractual changes is a prerequisite for eligibility for the grant monies).

11. Under Regulation 14 of the Working Time Regulations 1998, employees are entitled to accrued untaken holiday outstanding at the date of termination. This can be enforced by way of a claim for an unauthorised deductions from wages under section 13 of the Employment Rights Act 1996.

12. Breach of contract claims (also known as 'wrongful dismissal') are based on the common law (a set of rules built up over a very long period time by decisions of the Courts.

<u>Housekeeping</u>

13. At all times, I was mindful of the fact that the claimant was a litigant in person and I explained to him that the overriding objective of the Tribunal, to conduct cases justly and fairly, applies at all times. I tried to explain all the matters of law and procedure that came up in the hearing and give him the opportunity to ask questions.

14. The parties produced a joint bundle of 319 pages, which was a little haphazard due to the ad hoc circumstances of its preparation. If I refer to pages in the bundle, the page number(s) will be in square brackets.

15. I had not finished reading the bundle when the hearing started at 10:00am on the first morning, so I adjourned the hearing until 10:45am to complete my reading.

16. The claimant gave evidence in person and produced a witness statement dated 17 January 2021 that ran to 17 paragraphs.

17. Evidence was given in person on behalf of the respondent by:

    17.1. Mr Karl Collingwood, who is the sole Director of the respondent. His witness statement dated 6 August 2020, which was updated on 17 November 2020 consisted of 9 pages.

17.2. Miss Teresa Bowe, who is Managing Director of CCF Accountancy Limited, which looks after the accounts, taxes, VAT and payroll on behalf of the respondent. Her witness statement dated 3 August 2020 was just over a page long.

17.3. Mr Lukasz Woszczyk, who was the Engineering Projects Manager for the respondent until he left the organisation in June 2020. His witness statement dated 1 August 2020 consisted of just over two pages, which were presented as if they were two statements.

17.4. Mr David Hayes, who was engaged by the respondent in sales and marketing in an external capacity between January 2019 and February 2020. His witness statement dated 27 July 2020 was just over a page long.

18. The respondent also filed a witness statement dated 28 July 2020 from Kenneth Millea, who has been employed by the respondent as a Legionella Risk Assessor since September 2019. I advised the parties that I could give little weight to the statement, as the witness had not been produced to give evidence in person and his evidence could not be tested by cross-examination.

19. At the end of the evidence, I heard closing submissions from Miss Zakrzewska and Mr Frost. I considered my decision and gave an oral judgment and reasons. I did not have the facility to record the oral judgment, so this written judgment and reasons is made from my notes and may differ in some respects to the oral reasons given on the day.

20. The hearing was conducted by video on the CVP application and ran intermittently, with some IT issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

21. All findings of fact are made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the documents produced to the Tribunal.

22. I should also make a general comment about the evidence and the approach of the parties to it. I spent some time at the preliminary hearing on 23 November 2020 explaining what a list of issues is and why it is important. Much of the witness evidence filed by both parties was irrelevant to the issues I had to find the answers to. I understand that it is not easy to work out what evidence is relevant, especially when recollections were as divergent as those of the parties in this case were. Both sides were clearly upset by some of the events that took place during the claimant's employment and afterwards, but I am not going to go into matters that do not assist me to determine the issues in the case because it would be disproportionate and a waste of time and costs for me to do so.

23. I make the following findings.

Background

24. A number of facts were not disputed:

    24.1. The claimant is an experienced plumber, with more than 18 years' experience at the time he began work with the respondent [55-57].

    24.2. The claimant began work for the respondent on 16 September 2019 and his effective date of termination was 2 February 2020, when the claimant sent a text to Mr Collingwood that said he would not be returning [to work].

    24.3. The claimant was not provided with a written statement of terms and conditions of employment that complied with sections 1(1) and 4(1) of the ERA at any time during his employment with the respondent. The closest that he came to being given a statement of terms was an exchange of emails between the claimant and Stuart Levin of the respondent on 13 September 2019 [67] in which some very basic terms were proposed and agreed. I will return to the significance of this document later.

    24.4. The claimant was not immediately enrolled into the respondent's NEST pension scheme, but received a refund of all his contributions (eventually). That matter is not part of this case.

    24.5. The claimant's original payslip for January 2020 [145] showed total gross pay of £2,369.20 and a NEST repayment of £77.53 with deductions of £35.20 Tax and £188.72 NI. The net due to the claimant £2,145.28. It was accepted by Mr Collingwood that on 31 January 2020, the respondent paid the claimant the net sum of £1,800.00 in respect of his January 2020 pay.

    24.6. The claimant and Mr Collingwood engaged in a text conversation that began at 18:09pm on 31 January 2020 when the claimant asked Mr Collingwood to confirm what he had been paid [114].

    24.7. Mr Collingwood's response was that he had spotted an error on the claimant's payslip when he had stopped at a service station to pay the salaries of the respondent's staff. He said that the respondent's accountants were now closed and it would have to wait until Monday. He had paid the claimant "most of it" and "will pay the rest asap when [he] got correct information" [115].

    24.8. The claimant replied that he was disappointed as all his bills came out at the end of the month [115]. Mr Collingwood replied "Hi Lee how much do you need?" [115]. The claimant did not reply.

Wrongful and unfair dismissal

25. I find that the claimant was not dismissed and that the respondent did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. I make this finding for the following reasons:

    25.1. I find that the failure by the respondent to pay the claimant his full salary for January 2020 and instead to underpay him by approximately £345 was not calculated to destroy the implied term of trust and confidence. If it had been, I would not have expected Mr Collingwood to make an immediate offer to make

an additional payment to the claimant or to offer to sort things out on the following Monday. Whilst Mr Collingwood's actions were unwise, they were not calculated to destroy the trust and confidence between the parties;

25.2. I find that the single instance of underpayment was not likely to destroy or seriously damage the trust and confidence between the claimant and the respondent because it was an error on the part of Mr Collingwood which he indicated he would rectify on the following Monday and that he offered to advance the claimant money in the interim to meet bills. If every error on payment of salary was a fundamental breach of contract giving an employee the right to resign and claim constructive unfair dismissal, the labour market would be in chaos;

25.3. I find that on the balance of probabilities, the evidence demonstrates that the major act or omission by the respondent that had any significant motivating effect on the claimant's decision to resign was the failure to pay him his full wage on January 2020. I make that finding because of the claimant's text exchange with Mr Collingwood.

25.4. The claimant said "The most important thing is to make sure that your employees are paid correctly number one and to be honest after the conversation regarding travelling 45 mins in a morning…"

25.5. He went on to say that his heart was not in the work and that his health and his family were too important to him. The clamant said that the reference to his health was a complaint about the respondent's health and safety practices. I find that his submission does not meet the standard of proof required.

25.6. I find that a subsidiary reason was the claimant's unhappiness that he was not paid travelling time to work every day because the text exchange says as much, as I have set out above.

25.7. However, the claimant said that the non-payment of his full January 2020 salary was "the final nail in the coffin", but he could only point me to one email he had sent to Helen in the respondent's office about an alleged underpayment in October. The documentary evidence does not fit with a series of breaches of contract ending with a final straw.

25.8. The lack of evidence about the claimant doing anything about his alleged underpayments also suggests that he had waived any breaches.

25.9. I find that the documents and evidence show that it is more likely that the claimant has retrospectively engineered a claim for unfair dismissal than it is that the events he alleged happened as he described them. I make this finding for a number of reasons, but the main ones are:

25.9.1. The letter of resignation dated 3 February 2020 [268] is entirely inconsistent with the claimant's text exchange with Mr Collingwood. In it he makes a passing reference to the pay issue, but then makes a series of allegations about health and safety issues;

25.9.2. There was no mention of the resignation letter in his witness statement and Mr Collingwood's unchallenged evidence was that he had never received the letter. I therefore find that the claimant has not shown on the balance of probabilities that the letter was ever delivered. I find that it was created to bolster this claim; and

25.9.3. The health and safety issues he alleged that he raised during his employment were not evidenced by the documents

produced. For example, his complaints about his work for LYHA were principally that the premises he was required to work in were dirty. I do not find that to be a genuine complaint about circumstances connected with his work that he genuinely believed were harmful or potentially harmful to health and safety.

26. If there was no constructive dismissal, then there can have been no wrongful dismissal and notice pay is therefore not payable.

27. If there was no constructive dismissal, then there can have been no unfair dismissal, so that claim fails. I would say, however, that had I found that the claimant had been constructively dismissed, I would not have found that the claimant drew to the respondent's attention circumstances which he reasonably believed were harmful or potentially harmful to health or safety and that in response the respondent constructively dismissed him.

28. The claimant did not show that in response to his health and safety disclosures the respondent acted in fundamental breach of contract and constructively dismissed him.

Unauthorised deduction of wages and holiday pay

29. The respondent is the principal author of its own misfortune in respect of the claimant's claims for unauthorised deduction of wages, holiday pay and failure to provide a written statement of terms and conditions of employment. It failed to provide the claimant with a written statement, as is required by law and Mr Collingwood, who said that no one made any decisions in the organisation except him, was therefore responsible for the failure and his attempts to blame a former business advisor merely attempted to mask his own failure.

30. In any claim for unauthorised deductions, one should start with the contractual position between the parties. A contract of employment can be entirely expressed in a document or a series of documents. It can be entirely oral. It can be a mixture of both. Custom and practice can also be a factor.

31. In this case, we have a brief exchange of emails dated 13 September 2019 between the parties [67] in which the claimant agreed to the following terms:

> *"For the first month's trial period the salary will equate to £26,000 pa.*
>
> *This will then ,if successful increase to £27,500 pa.*
> *After 6 months this will (under review) increase to £ 30,000 pa.*
>
> *We will provide a company van for your working use. Please confirm acceptance of the above by e mail."*

Those are terms of a contract between the parties. The rest of the terms of the contract have to be worked out from the documents and evidence that were presented at this hearing.

32. It is the claimant's case that the email does not set out the terms agreed at the interview. If that is the case, he should have pointed this out to the respondent. He had 18 years' experience of work as a plumber at this point and showed in this hearing that he is not a man who is shy about offering his opinion. Blame equally lies with the respondent for failing to clarify matters.

33. The Working Time Regulations 1998 ("WTR") make provision for holiday pay and how it should be calculated. Regulation 13(2)(a) states that where there is no 'relevant document' (i.e. a contract), the employee's holiday year begins on the date that the employment begins. It was agreed that the claimant's employment began on 16 September 2019. I find that the claimant's employment ended on 2 February 2020, when he sent a text to Mr Collingwood [116]. Using the gov.uk website, I have calculated that the claimant's accrued entitlement to holiday was 10.8 days. That should be rounded up to 11 days.

34. I found the claimant's evidence on his holiday pay to be entirely silent on the issue of holiday pay. I asked him some questions about it and referred him to his Schedule of Loss [174-177], which stated that he had accrued 15 days' holiday between the start and end of his employment and had been paid for none of them. I had seen in the papers that I read before the hearing that the respondent was alleging that the claimant had two weeks' (10 days) holiday between 20 and 24 January and 27 and 31 January 2020. The claimant said that he had taken nine days.

35. In answer to my questions, the claimant also said that he had not worked on 25 or 26 December 2019 or 1 January 2020. He accepted that all these dates were weekdays on which he usually worked and that he had been paid for them. I therefore found the claimant's evidence about his holiday entitlement to be disingenuous at best. It adversely affected my assessment of his general credibility.

36. In her closing submissions, Miss Zakrzewska stated that the claimant had also taken, and been paid for, 2 days' holiday on 28 and 29 October 2019. She agreed that no evidence had been produced about this in any witness statement, but I recalled that I had seen a document referring to holidays taken in October 2019.

37. The respondent's accountant, Miss Bowe confirmed that the respondent did not show holiday pay as a separate line on payslips. Her evidence was not challenged.

38. In preparing this judgment and reasons, I looked through the documents again and found an entry that shows the claimant's request for 10 days' holiday from 20 January 2020 to 31 January 2020 had been signed off by Mr Collingwood on 7 January 2020 [98].

39. I therefore find that the claimant took, and was paid for, holidays taken on 25 and 26 December and 1, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31 January 2020. That is a total of 13 days, which is two days more than the claimant's actual entitlement. I did not consider that it was proportionate or necessary to search for documents about the October holiday. The claimant's claim for holiday pay fails.

40. I found that the way that both parties set out their evidence relating to unauthorised deductions from wages to be confusing and not at all helpful. My starting point is to determine the claims that were being made. These were discussed at the preliminary

hearing before me on 23 November 2020 and were summarised at paragraphs 5.1 to 5.4 of the list of issues in the case management order:

40.1. Were the wages paid to the claimant on w/c 23 September 2019, w/c 7 October 2019, and w/c 9 December 2019 less than the wages he should have been paid?

40.2. Should the claimant have been paid £181.71 for work at Crystal Peaks on 19 October 2019?

40.3. Should the claimant have been paid £403.80 travel time to Stanbridge Community Centre?

40.4. Was the claimant entitled to overtime for hours worked over his basic 40 hours per week?

41. I then considered the contractual position and what the claimant was entitled to. The email of 13 September 2019 was of some help. It did not say that the claimant was entitled to overtime for any of his work. Neither did it say that the claimant was entitled to 1.5x his usual hourly rate for night or weekend working. However, an absence of such terms in an email that really only set out rates of pay is not determinative of the issue.

Overtime/night work

42. The claimant's evidence is that it had been agreed at interview that he would get overtime at 1.5x his usual rate. Mr Collingwood's evidence is that this had not been agreed, but that he had met the claimant on site in September when the claimant had complained that he had been paid overtime at the 1.5x rate in his previous job. Mr Collingwood said he agreed to start overtime payments from work done in October. I find Mr Collingwood's evidence to be more credible than the claimant's on this point for the following reasons:

42.1. The claimant did not challenge the email that was silent as to overtime/night working;
42.2. The claimant's general credibility as highlighted above;
42.3. The fact that the respondent (eventually) accepted the claimant's claims for overtime/nights in November and December 2019 and paid these sums on 12 May 2020 as evidenced by Miss Bowe, who was not challenged, and in the payslip produced by her in April 2020 [135] and the respondent's bank statement showing a payment of £968.04 to the claimant on 12 May 2020 [136].

43. I therefore make the following findings on wages:

43.1. The claimant was not contractually entitled to either £269.20 (in his ET1) or £264.40 (in his Schedule of Loss) for being paid at his standard rate, not 1.5x standard for work done in the week commencing 23 September 2019;
43.2. The claimant was paid for overtime at Coventry HTC done in the week commencing 30 September 2019 on 12 May 2020;
43.3. The claimant was paid for night work in the week commencing 7 October 2019 in his November 2019 payslip [142];

43.4. The claimant was underpaid by £118.98 for his work at Crystal Peaks on 19 October 2019. Mr Woszczyk had no reason to doubt the claimant. Mr Collingwood's reason for not paying more than 3.5 hours was that the claimant had not proved he had done the 9 hours. He had no evidence that the claimant had not done the work claimed and the claimant had sent messages about the job at the time. The claimant's evidence on the point was more credible than Mr Collingwood's in this instance.

43.5. The claimant was paid the balance owed for night working on week commencing 4 November 2019 at 1.5x standard on 12 May 2020;

43.6. The claimant was paid the balance owed for weekend working on 16 November 2019 at 1.5x standard on 12 May 2020;

43.7. The claimant was paid the balance owed for weekend working on 17 November 2019 at 1.5x standard on 12 May 2020;

43.8. The claimant was paid the balance owed for weekend working on 7 December 2019 at 1.5x standard on 12 May 2020;

43.9. The claimant was not underpaid by 8 hours at 1.5x standard in respect of his work at Leeds on week commencing 9 December 2020. It was agreed that the claimant worked nights at that site in that week. It was therefore implied that he was entitled to 1.5x standard rate for that work. The claimant said that he worked 40 hours. Mr Woszczyk's evidence was that he worked 32 hours. I prefer Mr Woszczyk's evidence as he has no axe to grind in this matter. The claimant was originally paid at his standard rate for the work, but a supplemental payment to top up to 32 hours at 1.5x standard was made on 12 May 2020;

43.10. There was no agreement in place between the claimant and the respondent that he would be paid as working time for all his travel to the first job and from the last job of the day. I heard Mr Woszczyk's evidence that he received such payments, but that is not determinative of the claimant's position. The claimant did not raise travel except in relation to his work at Stanbridge for LYHA. That was only a 40-minute journey, which is much less than many people travel to and from work on a daily basis.

43.11. The claimant did not set out his claim for time off in lieu at 1.5x standard rate with sufficient clarity to meet the standard of proof required.

I have set out the claims listed above in the order they appear in the claimant's ET1 that were numbered 1-12. Claim 12 related to holiday pay, which I have already dealt with. I did not find the claimant's position on these matters to have been helpful, because it was obvious that some of his claims had been paid.

Failure to provide written statement of terms and conditions

44. This part of the claimant's case was not denied by the respondent. The requirements of section 38 of the Employment Act 2002 are that if I make an award on any of the main claims, I should award compensation for the failure to provide written terms of two weeks' or four weeks' pay. In exceptional circumstances, I can make no award. There was no suggestion from the respondent that there were exceptional circumstances justifying the making of no award here.

45. I award the claimant two weeks' gross pay; the sum of £1,050.00, which was the capped maximum as at 2 February 2020 (£525.00 per week).

Applying the Findings of Fact to the Law and Issues

46. I have only made determinations of the issues where I have had to. If a claim fails at an early hurdle, I have not gone on to make findings about matters that were no longer in play.

Unfair dismissal

46.1. The claimant was not dismissed because the respondent did not breach the implied term of trust and confidence. No other issues have to be determined.

Wrongful dismissal / Notice pay

46.2. The claimant's notice was one week.

46.3. He was not paid for his notice period.

46.4. The respondent did not fundamentally breach the claimant's contract of employment.

Holiday Pay (Working Time Regulations 1998)

46.5. The claimant's leave year began on 16 September 2019 and ended on his resignation on 2 February 2020.

46.6. 20 weeks of the leave year had passed when the claimant's employment ended.

46.7. He had accrued 10.8 days' leave (rounded up to 11 days).

46.8. The claimant had taken 13 days' paid leave in the year.

46.9. No days were carried over from previous holiday years.

46.10. No days remain unpaid.

Unauthorised deductions

46.11. The wages paid to the claimant on w/c 23 September 2019, w/c 7 October 2019, and w/c 9 December 2019 were not less than the wages he should have been paid after taking into account the balancing payment made on 12 May 2020.

46.12. The claimant should have been paid £118.98 (gross) for work at Crystal Peaks on 19 October 2019.

46.13. The claimant should not have been paid £403.80 travel time to Stanbridge Community Centre.

46.14. The claimant was entitled to overtime for hours worked over his basic 40 hours per week.

46.15. No deduction was required or authorised by statute.

46.16. No deduction was required or authorised by a written term of the contract.

46.17. The claimant did not have a copy of the contract or written notice of the contract term before the deduction was made.

46.18. The claimant did not agree in writing to any deduction before it was made.

46.19. The claimant is owed £118.98 (gross before deduction of income tax and NI).

Failure to provide a statement of terms and conditions of Employment

46.20. When these proceedings were begun, the respondent was in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars.

46.21. Part of the claimant's claim of unauthorised deduction of wages has succeeded and there are no exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002. I award two weeks' pay (£1,050.00).

46.22. It would not be just and equitable to award four weeks' pay.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
Date: 14 April 2021

Sent to the parties on:
Date: 16 April 2021