EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106954/2020 (V)

Held in Aberdeen by CVP on 25 January 2021

Employment Judge Murphy (sitting alone)

Mr P Johnston	**Claimant** **In person**
Muehlhan Industrial Services Ltd	**Respondent** **Represented by** **Mr S O'Connor - Lawyer**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Respondent made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the Claimant the sum of £567.96 in respect of an underpayment of wages in the period from 27 August to 19 November 2020.

2. The Respondent made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the Claimant the sum of £912.48 (gross) in respect of 6 days' wages relating accrued untaken holiday.

3. The Respondent made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the Claimant the sum of £953.24 in respect of the deduction from the Claimant's wages on 27 November 2020.

4. The sums awarded in items 1 and 2 above are expressed gross of tax and national insurance. It is for the Respondent to make any deductions lawfully required to account

to HMRC for any tax and national insurance due on the sums, if applicable. The sum awarded in item 3 should be paid to the Claimant net of any deductions.

REASONS

Introduction

1. The Claimant brings claims (as amended by his application to amend dated 29 December 2020) for

    a. underpaid wages during the period between 27 August and 19 November 2020, during which period he was under statutory notice of the termination of his employment. In this period the Claimant claims he was underpaid by £2,226.44 (gross).

    b. underpaid accrued untaken holiday on the termination of his employment in the sum of £912.48.

    c. the sum of £953.24 which he alleges was unlawfully deducted from his final wage on 27 November 2020.

Issues to be determined

2. The issues for determination by the tribunal are as follows:-

    a. Was the Claimant's pay correctly calculated by the Respondent during his statutory notice period from 27 August to 19 November 2020, having regard to Part XIV, Chapter II of the Employment Rights Act 1996 ("ERA") and the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 ("CCWP Regs")?

        i. Did the Claimant have normal working hours under section 234 of ERA?

        ii. If so, did his remuneration vary with the amount of work done?

    b. What was the Claimant's accrued untaken holiday entitlement as at 19 November 2020?

i. Had the Claimant taken 12.5 days' annual leave in the relevant leave year as he claimed, or 18.5 days in that year as the Respondent claimed?

c. It was agreed between the parties that the Respondent deducted £953.24 from the Claimant's final wage in November 2020. Was the Respondent entitled to make that deduction to recover an overpayment of wages in the period from August 2019 to April 2020?

i. was the Claimant entitled to the basic hourly rate of pay of £16.67 he was paid (with overtime and double time based on that rate) during that period, as the Claimant claimed? or

ii. was he entitled to a lower basic hourly rate than that paid of £16.16 (with overtime and double time based on that lower rate), as the Respondent claimed?

Findings in Fact

3. The tribunal made the following findings in fact.

4. The Claimant was employed by the Respondent from 2007. At all material times, he was employed as a Scaffold Supervisor. The Claimant signed an updated contract of employment dated 26 February 2016. It included an Hours of Work clause (Clause 2.8) which stated he was contracted to work 39 hours per week with normal working hours of 8 hours per day Monday to Thursday and 7 hours on a Friday. Regarding remuneration, Clause 2.9 of his contract referred to Clause 2.4, which in turn referred to a Rate of Pay Appendix which was not produced to the tribunal. The terms of Clauses 2.9 and 2.4 are set out at paragraphs 60 and 61 below.

5. The Claimant's rate of pay was reviewed annually by the Respondent in June / July. His contract of employment specified he would be notified of any changes in writing.

6. In or about June 2019, the Claimant was sent a letter by the Respondent's then HR Manager, Gillian Williamson, notifying him that, following the review, his basic hourly rate would be paid £16.67 per hour (with overtime and double time based on that rate).

7. The Claimant did not retain a copy of Ms Williamson's letter, not appreciating the importance it would come to have.

8. From July 2019 until 24 March 2020, the Claimant, when working his contracted 39 hours, was routinely paid a basic rate of £16.67 per hour for those hours plus a bonus rate of £1.50 per hour. In addition, the Claimant was routinely paid an additional 5 hours' travel time at his basic rate for weeks when he worked at least his contracted 39 hours.

9. The Claimant regularly worked overtime for the Respondent. On Mondays to Thursdays, he often worked from 7 am to 5 pm with a thirty-minute lunch break, representing a 9.5 hour day (including 1.5 hours' overtime). He often worked 8.5 hours on a Friday (including 1.5 hours of overtime). He typically worked between 4 and 6 hours' overtime on a Saturday. Overtime was paid at the rate of 1.5 x basic rate unless it was on a Sunday or exceeded 4 hours on a Saturday, in which case, it was paid at double his basic rate. Although the Claimant routinely worked overtime, it was not compulsory, and it was open to him to refuse to work the extended hours.

10. The Claimant agreed to be furloughed with effect from 24 March 2020. He thereafter performed no work for the Respondent until his employment terminated on 19 November 2020 by reason of redundancy.

11. The Claimant had an annual leave entitlement of 30 days (including public holidays). The Respondent's holiday year runs from January to December. Although 39 hours' holiday are itemized in the Claimant's pay slip for January 2020, the parties agreed that this week of holiday came from the Claimant's 2019 holiday entitlement, not his 2020 entitlement.

12. The Claimant took 5 days' annual leave in February 2020. The Respondent wrote to the Claimant on 15 May 2020 and advised him that they required him to take 7.5 days' mandatory annual leave. The Respondent 'topped up' the Claimant's furlough pay during May 2020 in the sum of £280.65, which figure is attributed to 7.5 days' holiday on the Claimant's pay slip (i.e. a top up payment of £37.42 gross per day of annual leave).

13. The Claimant did not take a further 6 days' annual leave between 28 August and 4 September 2020or indeed any further annual leave before his employment ended. The Claimant, therefore, took a total of 12.5 days' annual leave in the relevant leave year.

14. The Claimant's pro-rated entitlement to annual leave in the year in which his employment terminated, calculated in accordance with the formula in Clause 2.12 of his employment contract, was 26.5 days. The formula is (46/52) x 30. After deduction of the 12.5 days taken, the Claimant, therefore, had 14 days' accrued untaken holiday as at 19 November 2020. He was paid in lieu of 8 days on 26 November 2020. The rate of pay for annual leave entitlement was agreed between the parties to be £152.08 per day.

15. The Respondent served notice to terminate the Claimant's employment by reason of redundancy with effect from 27 August 2020 to expire on 19 November. On 8 September, the Claimant was signed off on sick leave by his GP and remained so until his employment terminated.

16. On 19 August 2019, the Claimant attended a meeting to hear a grievance he had raised against the Respondent concerning his furlough and a redundancy process that was ongoing at the time. At this meeting, Roy Stanfield, one of the Respondent's managers, told the Claimant that he had been overpaid since 24 June 2019. He told the Claimant that the Claimant had been sent a letter stating his rate of pay was £16.16 per hour. He told the Claimant this letter was signed by Jim West (the Respondent's Managing Director). The Claimant said that he had a letter from Gillian Williamson (the Respondent's HR Manager at the material time), saying the higher rate he had been paid was his hourly rate as he had not received a pay rise the previous year. Mr Stanfield asked the Claimant to send him a copy and undertook to look into it.

17. The Claimant did not send him a copy as he had not retained one. He was not asked for it again. Nor did the Respondent provide the Claimant with a copy of the letter Mr Stanfield had mentioned, signed by Mr West.

18. The Claimant was informed at his final redundancy consultation meeting on 26 August 2020 that his wages while on notice would be paid at his average weekly pay, based

on the last 12 weeks he had worked, excluding his furlough period. This gave a figure of £894 per week.

19. In September, October and November 2020 (80 days), the Claimant was paid £8,532.53 gross including furlough pay and top ups but excluding the 8 days paid in lieu of annual leave on termination, and ignoring the deduction of £953.24 from his November pay slip. In August 2020, the Claimant was paid £2,500 gross by way of furlough pay and no salary top up. For the period of his notice in August 2020, which ran from 27 August, the Claimant was, therefore, paid £403.23 gross (that is 5/31 X £2,500). Therefore, throughout the period of his notice from 27 August to 19 November, the Claimant was paid the gross sum of £8,935.76 (ignoring the aforementioned deduction). This equates to a weekly rate of £744.65, including both furlough pay and top up.

20. From the Claimant's November pay, a deduction was made of £953.24. The Respondent explained at the time by email to the Claimant that this represented an overpayment of pay during the months from August 2019 to March 2020 inclusive because the incorrect rate of £16.67 per hour had been paid during that period.

Observations on the Evidence

Notification of Pay Rate following review in June /July 2019

21. There was a factual dispute between the parties on the question of who sent the Claimant his pay review notification in July 2019, and what rate of pay the letter confirmed had been awarded. The Claimant's evidence was that, as was standard practice for the Respondent, the letter had been issued to him by Gillian Williamson, the Respondent's then HR Manager. Ms Williamson has since left the Respondent's employment. The Claimant's evidence was that her letter confirmed his rate would increase to £16.67 with effect from 24 June 2019. The Claimant did not produce this letter to the tribunal because, he said, he had not retained it the previous summer, not appreciating the importance it would come to have.

22. It is undisputed that the Claimant was remunerated thereafter based on the £16.67 rate for over a year, and was not informed until he attended a grievance hearing on 19

August 2020 that there had been an error in his rate of pay for the period from August 2019, which ought to have been £16.16 (basic).

23. The Claimant was skeptical that this alleged error came to light in the context of a grievance against the Respondent about concerns over his treatment.

24. The Respondent disputed Ms Williamson had ever sent such a letter. Ms Williamson was no longer in the Respondent's employ when the issue was alleged to have been identified by the Respondent in August 2020. The Respondent produced to the tribunal an undated letter addressed to the Claimant, signed by its Managing Director, James West, which was headed CIJC Pay Review 2019. The letter purported to inform the Claimant that his basic hourly rate would increase to £16.16 with effect from 24 June 2019.

25. The Claimant denied having seen this letter prior to its disclosure by the Respondent in these proceedings. Mr West was not called as a witness by the Respondent to speak to the letter. The only evidence of its provenance came from Jenna Strain, the Respondent's current HR, Logistics and Training Manager, and Ms Williamson's successor. Ms Strain was not employed by the Respondent at the time she suggested the letter to have been sent by her predecessor, Ms Williamson. She gave evidence of a belief that Ms Williamson attended to the postage of the pay review letters after they had been signed off by Mr West. She accepted she had no personal involvement with the issuing of the letter.

26. It was not put to the Claimant in cross examination that he received the letter from Mr West in June / July 2019. The Claimant had given evidence in chief that he had not seen the letter until December 2019 or January 2020. Although the Claimant was taken to the letter during cross-examination, he was asked only if he had it there and if he accepted that the letter confirmed an increase to the hourly rate from June 2019 to £16.16.

27. It is for the Respondent claiming the section 14 exemption from the prohibition on deductions from wages to show it applies. The Respondent must, in the present case,

ask the tribunal to make a finding of fact that there was an overpayment. The onus lies with the Respondent to prove that fact.

28. It was difficult to weigh the evidence on this issue, which was unsatisfactory in a number of respects. However, on balance, the tribunal prefers the Claimant's account that he did not receive the letter from James West in June or July 2020 which specified an increase to £16.16 per hour. The tribunal accepts the Claimant did not receive this letter until December 2020 or January 2021. There was an absence of evidence from any witness from the Respondent in a position to speak to these matters. Ms Strain did not give an account of how she knew what had happened the previous summer, prior to her employment, or who had informed her on these matters. Mr West, the letter's apparent author, who is understood to remain in the Respondent's employment, did not appear as a witness. The tribunal finds that the Respondent has not proven on the balance of probabilities that the £16.16 letter was sent by the Respondent to the Claimant either in June 2019 or at any time before the termination of his employment.

29. In addition to the matters already mentioned, the tribunal had regard to a number of aspects of the evidence in reaching this finding. These included the failure to produce any information from the Construction Industry Joint Council which might have supported the Respondent's position that the appropriate rate for a scaffolding supervisor was £16.16; the absence of any date on the letter signed by Mr West; the undisputed evidence that the alleged overpayment was first raised in the context of a hearing to consider a grievance by the Claimant some 13 months later; and the undisputed evidence that, when it was so raised, the letter bearing Mr West's signature was not provided to the Claimant for comment.

Annual leave taken

30. A further area of factual dispute concerns the amount of annual leave taken by the Claimant in the relevant leave year prior to the termination of his employment. It was agreed between the parties that the Claimant took a total of 12.5 days' annual leave between 1 January and 31 May 2020. It was agreed that on the termination of the Claimant's employment, he was paid in lieu of 8 days' holiday. The Claimant further

agreed that the rate at which the Respondent had calculated these 8 days in lieu was the correct rate (that is £152.08 per day).

31. The Respondent's Jenna Strain gave evidence that the Claimant took 6 days' holiday during his notice period from 28 August to 4 September 2020. Ms Strain's evidence was that, although these days were not itemized on his wage slips as all other holidays had been (including the 7.5 days taken earlier in his period of furlough), these were paid by way of "top up" payments to furlough in the Claimant's September wage slip. At the material time, the Claimant was under notice of termination which affected his pay entitlement and lifted it above the usual furlough payments. There was no breakdown in the September wage slip to indicate what portion, if any, of the 'top up' payment of £998 made that month was attributable to holiday and what portion was attributable to the Claimant's notice. The Respondent's position in submissions was that different rates fell to be applied for the purposes of calculating holiday pay as compared with notice pay under the relevant rules on the computation of a week's pay in ERA.

32. Although Ms Strain's evidence was that the holiday began on 28 August 2020, there was no indication of any holiday pay 'top up' on the Claimant's reduced furlough rate during August in his August wage slip. Ms Strain led no evidence of how and when the requirement to take 6 days' annual leave from 28 August 2020 was notified to the Claimant. No documentation was produced evidencing notification in line with the requirements prescribed by the WTR or otherwise. The letter issuing notice of termination of the Claimant's employment dated 26 August 2020 made no mention of a requirement to take annual leave in his notice period. Nor did any of the other correspondence before the tribunal. This can be contrasted with the position regarding the 7.5 days' leave taken during furlough in April 2020 at the Respondent's insistence, which was notified in a letter dated 15 May 2020 to the Claimant.

33. The Claimant's evidence was that the only annual leave he took from his 2020 entitlement prior to the termination of his employment was the 12.5 days taken in the period to 31 May 2020. Consistently with this position, the Claimant queried his payment in lieu of annual leave by email dated 26 November 2020 when he received

his final pay slip including the payment in lieu of 8 days' outstanding annual leave. The Claimant was not cross-examined by the Respondent's legal representative on the Claimant's evidence that he had not taken annual leave beyond the 12.5 days indicated.

34. The tribunal prefers the evidence of the Claimant on the matter of the number of days' annual leave taken by him. As the Claimant was under statutory notice of termination during this period and was furloughed, he was already eligible for top up payments to increase his rate of pay, effectively to 100%, in accordance with section 88(1) of ERA. It was not, therefore, in his interests to request holiday in this period and there is no evidence from either party that the Claimant requested leave on these dates. It is inferred from Jenna Strain's evidence that the Respondent's position is that it was the Respondent that notified the Claimant he was to be required to take 6 days' annual leave on the dates mentioned. There was no evidence before the tribunal on which it could base a finding that it did so.

35. The rate of pay for each day's untaken annual leave was agreed between the parties to be £152.08.

Relevant Law

Pay entitlement during statutory notice (while furloughed)

36. Under section 86(4) of the Employment Rights Act 1996, a statutory minimum notice period linked to the employee's period of continuous employment is incorporated into the contract of employment.

37. Under section 88(1)(a) of ERA, if the employee has normal working hours during the period of notice and is ready and willing to work all of those normal working hours but is incapable of work because of sickness (s.88(1)(b)), the employer is liable to pay a sum not less than the amount of remuneration for all the working hours based on the calculation of a week's pay as set out in Chapter 11 of the Act (s.88(1)(b)). Section 222 and 223 apply where there are 'normal working hours.'

38. Under section 234 (1) where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week, there are for the purposes of ERA normal working hours in his case. The normal working hours are the fixed number of hours (subject to section 234(3) which is inapplicable on the present facts). Under section 221(2), if the employee's remuneration in normal working hours does not vary with the amount of work done in those hours, the amount of a week's pay is the amount which is payable under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

39. With effect from 31 July 2020, however, the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 (the CCWP Regs) came into effect, modifying how a week's pay should be calculated for the purposes of the statutory minimum notice entitlement (Reg 4). In essence, they provide that, for those with normal working hours, where the remuneration does not vary during those hours with the amount of work done or the time of work, a week's pay is the amount payable under the employee's contract if he works throughout normal working hours in a week (R4(2)). For these purposes, the amount which is payable is to be calculated disregarding any reduction in the amount payable as a result of him being furloughed ((R4(2)).

40. 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.

Annual leave

41. Under Reg 14 of the Working Time Regulations 1998 ("WTR"), employees are entitled to accrued untaken holiday outstanding at the date of termination. Likewise, they may, depending upon the terms of their contract, have a contractual right to annual leave exceeding the WTR entitlement and the contract may make provisions for the calculation of a payment in lieu of accrued untaken leave on termination of the employment, so long as the approach does not infringe the worker's statutory rights under WTR.

42. Under Regulation 15 of WTR, an employer may require the worker to take leave on particular days by giving notice, specifying the days on which it is to be taken and twice as many days in advance of the number of days' leave being notified (R15(2), (3) and (4)).

43. A failure to pay in lieu the worker's entitlement in whole or in part can be enforced by way of a claim for an unauthorised deductions from wages under section 13 of the Employment Rights Act 1996.

Deductions of overpayments of wages

44. 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 14(1) specifies that section 13 does not apply to a deduction where the purpose is the reimbursement of the employer of an overpayment of wages. It is for the party claiming the section 14 exemption to show it applies.

45. If it is established that a deduction falls within section 14(1), that is the end of the matter and the tribunal has no further jurisdiction to determine the legality of the deduction or even if the employer deducted the correct amount.

Submissions

46. The Claimant submitted that during his statutory notice period, his pay should have been based on calculating average pay over the twelve weeks preceding the commencement of his furlough. He disputed the Respondent's approach of basing the calculation on his contractual 39-hour week. This should be based on a 12-week averaging calculation in line, he submitted, with Government guidelines.

47. With respect to wages during his notice period, Mr O'Connor identified the main dispute as whether the Claimant had normal working hours for the purposes of the calculation of a week's pay under the rules prescribed by ERA. He referred to section 234(1) of ERA, and submitted that under that definition, the Claimant had normal working hours. He referred to the contract of employment, which, he said, sets out contractual working time of 39 hours per week.

48. When it came to the calculation of notice pay, said Mr O'Connor, the Claimant was only entitled to what was due under the contract, namely 39 hours per week. He submitted this was the effect of section 221(2) and 223(3) of ERA and Regulation 7(4) of the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 which, he said, mirrored section 223(3) of ERA. He submitted that overtime did not fall to be considered. Nor did the productivity bonus payment of £1.50 per hour paid to employees for attendance during their normal contractual hours fall to be factored into the computation. This bonus was only payable to those who turned up to work, he submitted, and the Claimant did not do so during the notice period.

49. As regards holiday pay, the Claimant reiterated he was paid 6 days short. Mr O'Connor conceded the Claimant had been underpaid holiday pay on termination to the tune of £252.54. He accepted that the rate of pay for holidays should be based on an averaging of pay over the 52-week reference period and the calculation would not exclude overtime and bonus payments. He submitted this was the basis on which holiday pay had been calculated by the Respondent and that the Respondent's position was that 6 days' holiday had been taken from 28 August to 4 September.

50. The Claimant disputed the deduction of £953 from his final pay and the alleged erroneous overpayment. He maintained he was correctly paid at £16.16 per hour during the material period. With respect to the deduction of £953.24, Mr O'Connor submitted that the Respondent was entitled to make the deduction under Clause 2.9 of the contract and section 14(1)(a) of ERA. He submitted there was no expectation placed on the employer under that provision to provide a reason for the overpayment. He pointed out the Claimant was informed of the error on 19 August 2020 at a grievance hearing and was sent emails on 26 November and 1 December 2020 to explain the deduction. Taking all the evidence into account, he submitted the Respondent had not made an unlawful deduction under section 14 because the deduction fell within the exception in section 14(1) of ERA.

Discussion and Decision

Pay entitlement during statutory notice (while furloughed)

51. The tribunal accepts Mr O'Connor's submission that the Claimant had normal working hours for the purposes of section 234(1) of ERA. The contract of employment is clear that he was contracted to work 39 hours per week. Although he regularly worked overtime hours, the tribunal did not find that these hours were compulsory under the written contract or as a matter of practice.

52. On the facts found, the Claimant's remuneration for his 39-hour week did not vary according to the amount of work done in those hours or the time of work of those normal working hours. The 'normal working hours' always fell under the contract on Monday to Friday at set times. It is true that the Claimant's rate of pay varied when he was working non-contractual overtime, depending upon the timing of such overtime (on a weekday, Saturday or a Sunday). That is not, however, what section 221(3) and section 222 of ERA are concerned with. These provisions concern varying remuneration during the normal working hours, based on work done or timing.

53. Likewise, Regulations 5 and 6 of the CCWP Regs are not engaged here. The calculation of a week's pay during the Claimant's notice period is governed by Regulation 4(2) of those relatively recent regulations. Mr O'Connor's submission that Regulation 7(4) is engaged is not accepted; that Regulation is concerned with situations where Regulations 5 or 6 apply.

54. Applying Regulation 4 (2), the tribunal accepts the Respondent's position that overtime worked over and above the normal working hours of 39 per week does not fall to be included in the calculation of a week's pay for statutory notice under ERA. It is not appropriate, therefore, to use the figures based on a twelve-week averaging exercise as the Claimant submits.

55. That said, in identifying the amount payable on the calculation date (here the 26 August 2020) if the Claimant works his normal working hours in a week, due regard must be given to Reg 4(2)(b). This provides that:

(b) the amount which is payable, in relation to any period during which E is furloughed, is to be calculated disregarding any reduction in the amount payable as a result of E being furloughed

56. Before being furloughed, a finding in fact has been made that, when working his contracted 39 hours, the Claimant was routinely paid a basic rate of £16.67 per hour plus a bonus rate of £1.50 per hour for those contracted hours. In addition, the Claimant was routinely paid an additional 5 hours' travel time at his basic rate for weeks when he worked his contracted 39 hours. The written contractual terms governing pay were not fully produced to the tribunal and the Appendix dealing with remuneration was missing. The tribunal inferred from the Claimant's undisputed evidence about the routine manner in which the bonus and travel hours were paid that, if these entitlements did not form part of the Claimant's express terms in the missing appendix, they had in any event become implied into his contract through the actings of the parties over time.

57. These elements of pay are bound up with the Claimant's normal working hours, or, to use the language of Regulation 4(2) of the CCWP Regs, furlough aside, they would be payable to the Claimant if working throughout his normal working hours in a week. Any reduction in these aspects of the Claimant's remuneration due to furlough must be disregarded.

58. On that basis, a week's pay for the purposes of Reg 4(2) in the Claimant's case is calculated to be 39 x (£16.67 + 1.50) = £708.63 + (5 x 16.67 = £83.35) = £791.98.

59. In fact, during his notice period he was paid at a weekly rate of £744.65 (see para 19 above). He was therefore underpaid by £47.33 per week (gross), equating to £567.96 (gross) over the 12 week notice period.

Annual leave

60. It flows from the findings in fact that the Claimant was short paid by 6 days' annual leave on the termination of his employment. The parties have agreed the relevant daily rate for calculation of holiday pay £152.08 per day. The Claimant was therefore entitled to a further £912.48 (gross) on termination in respect of accrued untaken annual leave.

Deduction of overpayments of wages

61. Clause 2.9 of the Claimant's contract of employment is in the following terms:

> *'Your basic rate of pay is detailed in section 2.4 of this contract and is paid monthly in arrears on the last Friday of each month.*
>
> *Your salary will be reviewed annually in line with any amendments to the Working Rule Agreement by the Construction Industry Joint Council. You will be notified of any changes in writing.*
>
> *The Company is entitled to deduct from your salary or other payments due to you any money which you may owe to the Company at any time.'*

62. Clause 2.4 of the contract states

> *'**Basic rate of pay** See Rate of Pay Appendix'*

63. Unfortunately, the Rate of Pay Appendix was not produced to the tribunal, nor was any evidence led by either party as to its contents.

64. Relevant findings in fact set out in paragraphs 9 and 10. The tribunal has found that the Claimant received a letter from Gillian Williamson in June 2019, notifying him of an increase to his hourly rate of pay to £16.67 with effect from 24 June 2019. It is also an undisputed fact that this is the rate he was paid in the months from August 2019 to March 2020.

65. Having been notified by Ms Williamson that he would be paid £16.67 (basic rate), the tribunal finds that the Claimant was entitled to rely on this as an express term of the contract between the parties. His contract stipulated that he would be notified of changes in writing, and he was so notified. Thereafter, the acting of the parties were consistent with and supportive of the existence of such a contractual term relating to pay. The Respondent paid the Claimant monthly in accordance with that term and the Claimant accepted payment without query. No evidence was ever produced to the Claimant or to this tribunal of amendments to the CIJC Working Rule Agreement to support the existence of an error in the pay rate notified to him.

66. The tribunal finds, therefore, that, as the Claimant was contractually entitled to the rate of pay he received between August 2019 and March 2020, there was no overpayment for the purposes of section 14(1) of ERA. In those circumstances, the deduction of £953.24 from his final wage in November 2020 was unlawful, contrary to section 13 of ERA.

Conclusion

67. Returning to the issues identified at the outset, the questions are answered as follows.

68. The Claimant had normal working hours and his remuneration did not vary with the amount of work done but his pay was not correctly calculated by the Respondent during his statutory notice period from 27 August to 19 November 2020, having regard, in particular, to Regulation 4(2)(b) of the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 ("CCWP Regs").

69. The Claimant's accrued untaken holiday entitlement as at 19 November 2020 was 14 days. He was paid in lieu of 8 days only. The Respondent therefore unlawfully deducted the sum of £912.36 from the Claimant's final pay in November 2020 in respect of 6 days' holiday.

70. In the period from August 2019 to April 2020, the Claimant was entitled to a basic hourly rate of pay of £16.67 (with overtime and double time based on that rate). The Respondent was not, therefore, entitled to deduct the sum of £953.24 from the Claimant's wages in November 2020 as a result of an overpayment, and such deduction was unlawful.

Employment Judge **Lesley Murphy**

Date of Judgment **11th of February 2021**

Date sent to parties **11th of February 2021**