



# EMPLOYMENT TRIBUNALS

**Heard at:** Watford (by video) **On:** 9 and 10 August 2021

**Claimant:** Mr Nigellus Vaz

**Respondent:** Mr Darshan Singh Grewal

**Before:** Employment Judge Fowell

**Representation:**

**Claimant:** In person

**Respondent:** In person

## JUDGMENT ON LIABILITY

1. The claimant was unfairly dismissed.
2. The dismissal was not automatically unfair under section 104A Employment Rights Act (National Minimum Wage).
3. The complaint of unlawful deduction from wages in respect of the national minimum wage is upheld.
4. The complaint of breach of regulation 10 of the Working Time Regulations 1998 (WTR) in relation to daily rest is upheld.
5. The complaint of breach of regulation 11 of the Working Time Regulations 1998 (WTR) in relation to weekly rest is upheld.
6. The complaint of breach of regulation 13 and 13A of the Working Time Regulations 1998 (WTR) in relation to annual leave is upheld.
7. The respondent was in breach of its duty to give the claimant a written statement of employment particulars, for which a further award of four week's net pay is made.

8. The remedy hearing will go ahead on 17 September 2020 at 10.00 by video link (CVP). A link to join the hearing will be sent separately.
9. The claimant is prepare a file of all the documents in his possession or control, relevant to compensation, including evidence of attempts to find alternative employment and benefits received since dismissal, and send that file, either on paper or electronically to the respondent and the Tribunal on or before **27 August 2021**.

# REASONS

## Introduction

1. These written reasons are provided at the request of Mr Grewal, who owns a number of public houses. Mr Vaz worked for him as the manager of one in Stanwell, the Swan, before moving to the Old Oak Tree in Southall in February 2020. Beyond that, there is very little agreement about what took place.
2. Mr Grewal says that Mr Vaz resigned on 16 September 2020, or at least that he simply left that day, taking with him the takings in the till and a £500 float. Further, he did so because he had been caught acting dishonestly. Mr Vaz denies any dishonesty and says that this was not the reason for his departure. He says that Mr Grewal and a new manager simply turned up one day and threw him out, in front of the customers, taking the keys from his hand. They did so, he says, because he had refused the day before to reduce his pay to £200 a week.
3. In most employment tribunal cases the circumstances of dismissal are well documented and the task of the tribunal is to assess whether the decision was fair in the circumstances. This case belongs to the small group where almost nothing is documented, where there is little or no agreement about the facts, and where a stark choice has to be made between the two accounts.
4. Both parties also allege serious dishonesty against the other. Apart from the disputed dismissal, Mr Grewal says that Mr Vaz was regularly drunk, abusive, and that through his negligence money was stolen through break-ins. Mr Vaz says on the other hand that he was exploited and underpaid, that Mr Grewal arranged one of break-ins to make off with stock, refused to furlough him and routinely employed staff working illegally, particularly those from India with no right to live and work in the UK.
5. At the outset of the hearing the state of preparation was also poor. Directions were issued on 14 March 2021 providing for a schedule of loss, disclosure of documents, for the respondent to prepare a file of papers for the hearing and for the parties to exchange witness statements after 12 weeks (i.e. by 7 June 2021) none of which was done. In the last few days both men have emailed the tribunal with a statement

and some accompanying documents. Mr Grewal's was written after receiving the one from Mr Vaz, and was not copied to him. However, time was taken to ensure that each side had a copy and the chance to consider it.

6. Having done so, despite my misgivings about the state of the evidence, Mr Vaz wanted to proceed with the hearing and Mr Grewal was content to do so. I did not therefore adjourn the hearing and give further directions. Each party had had a full opportunity to submit evidence, both had ultimately set out their accounts in writing and both had provided some documentation. Neither suggested that they would need more time to locate further material or witnesses.
7. As both were unrepresented, I took the lead in asking questions of each side in turn, of Mr Vaz in the morning and of Mr Grewal in the afternoon. I then gave each the chance to put any further questions to the other, so far as they related to the issues in the case and were not simply general disparagement.
8. Mr Grewal has been represented by his daughter, who is a barrister, during this process. She made a request late last week for an adjournment as she was not available for this hearing. No further details were given and the application was refused. In the event she joined the video hearing at 1130 am from Portsmouth Crown Court, where she was waiting for a criminal trial to start, and observed some of the first morning's evidence in intervals. Given that she told me that she had to leave imminently I carried on hearing evidence from Mr Vaz.
9. The documentary evidence comprised a small handful of papers which had been photographed and emailed to the tribunal, usually one at a time. I took stock of them at the outset and few though they were, several seemed to have no obvious relevance at all. I will refer to them as necessary in setting out my findings.
10. The complaints presented have never been clearly identified during this process. Those matters which appear to me to be raised by the claim form are as follows:
  - a. unfair dismissal under section 98 Employment Rights Act 1996 (ERA);
  - b. automatically unfair dismissal under section 104A ERA (national minimum wage cases);
  - c. unlawful deduction from wages under section 13 ERA in that his wages were less than the national minimum wage;
  - d. breach of regulation 10 of the Working Time Regulations 1998 (WTR) in relation to daily rest.
  - e. breach of regulation 11 WTR in relation to weekly rest periods.
  - f. breach of regulation 13 WTR / unlawful deduction from wages in relation to outstanding holiday pay.

11. There is also provision under section 38 Employment Act 2002 to award an extra two to four week's pay where there has been a failure to provide a written statement of employment particulars. In the absence of exceptional circumstances, the Tribunal must award two weeks' pay and may award four weeks' pay.
12. The first two complaints (of dismissal) require Mr Vaz to have been an employee, and for the rest he has to be a worker. I will return to these points later.

### **Findings of Fact**

13. As already noted there were two sharply contrasting accounts to consider and I will need to set them out in a little more detail.

#### *The claimant's case*

14. The paragraphs below are a summary of the account of Mr Vaz, not my findings.
15. He told me that he has been running hotels and pubs for over 20 years. In about 2006 or 2007 he ran the Old Oak Tree in Southall for Mr Grewal. He worked on a percentage basis. Initially he took 15% of the weekly takings and then it increased to 20%, so he was doing well, earning about £1000 a week. After about six years he left to run his own establishment. For reasons we did not explore he had a criminal conviction, for which he received a community order. He says that he then had to go back to India to look after his mother and when he came back he was taken into custody and sentenced to 6 weeks in prison for breach of the community order. On his release, after a few weeks, Mr Grewal offered him a job at the Swan in Stanwell. They spent two or three hours in Mr Grewal's car negotiating over the terms. Mr Grewal said that things were different now and he would not be on a percentage. Mr Vaz was not keen on this but asked for £700 a week. They compromised on £550 a week.
16. There was nothing in writing to confirm this arrangement and all of the payments were in cash throughout. Almost from the beginning the payments dropped to £400 a week, on the basis that that was all Mr Grewal could afford. He took the view that Mr Vaz was getting payments from the government and had his accommodation provided so he could manage, but Mr Vaz said he had two small boys to look after - they are now aged six and three, and at that time they stayed with him at weekends - and all of the tax credits went to their mother. They had a social worker appointed and each of them was on a child protection plan because of concerns about the mother's care. Money was therefore a bone of contention but Mr Vaz stuck at it. He had nowhere else to go and needed the accommodation for the children.
17. Mr Grewal came into the pub every 2 or 3 days with a man called Max who seems to have been his right hand man and helped with his business dealings. They went through the books and checked that Mr Vaz received the right amount, or at least did not receive too much.

18. In April 2019 the payments dropped again to £300 per week, and in November 2019 the arrangement changed again. Mr Grewal said he could not afford the £300 anymore and put him back on commission. This time it was Mr Vaz who objected, because this in practice a further cut. He also had to pay the wages for six or seven bar staff out of the takings. However, he felt he had no choice.
19. He was also working very hard. The pub was open for seven days a week. The opening hours were from 11 am to midnight and he had to be up at six each day to make breakfast at seven for those staying in the guest rooms. Then, during the morning, he had to attend to laundry, cleaning, ordering stock and general management tasks. He worked behind the bar each evening. At the weekends, when he had the children, he would put them to bed at 7.30 and leave them on a monitor.
20. While he was there, there was a major renovation exercise in which Heineken spent nearly £30,000 doing the place up. In return, the pub was expected to order a certain quantity of beer but after a couple of months Mr Grewal held up the payments and they stopped the deliveries. Mr Grewal then took all of the bottles of beer which they had ordered for the Swan to the Old Oak Tree to sell them there and then claimed that there had been a break-in and that all of the bottles had been stolen. He even accused Mr Vaz of being the thief. Mr Vaz in turn reported Mr Grewal to the Surrey police for harassment and for making false accusations.
21. On about February 15, 2020 there was a break-in at the pub. The window was broken and the till was missing. Again, Mr Vaz called the police and reported the matter. The CCTV did not show who took it. It had recently been upgraded and was controlled by Mr Grewal who, he said, had it on his phone and looked at it constantly. Again, Mr Grewal blamed the theft on him and this time he was sacked. Mr Grewal also threatened to have been beaten up. But as Mr Vaz was packing his things, Max asked him not to leave and offered to patch things up.
22. The next day Max came round with a contract for him to sign. (I was in fact provided with a photograph of this contract, which is one of employment). Max said that he should sign it to cover his back, because "he knew what Mr Grewal was like." Mr Vaz was suspicious of it by this stage. He did not sign it. A little later he told Max (untruthfully) that he had discussed it with his solicitor and Max said to forget it then, he just been trying to help out. (I note too that the draft contract contained no provision for pay.)
23. Shortly afterwards Mr Vaz was asked to move to the Old Oak Tree in Southall. This was the pub which Mr Vaz had run successfully some years earlier. The pub have been closed for a couple of months but there was a two-birth caravan on site, which in fact belonged to Mr Vaz or at least had been bought by him in the past. Mr Vaz described the pub as filthy, with maggots and dead rats in the accommodation rooms and said that it had been used for drugs and prostitution. Up to that point it

had been under the management of another member of staff known as Kinga, a Polish woman. He had to tell her that he was taking over from her and from then on he was to pay her £350 a week. (There is in fact a short signed statement from Kinga, prepared on behalf of Mr Grewal, to the effect that Mr Vaz was her manager, so he was responsible for paying her tax and national insurance.) Mr Vaz spent a couple of weeks cleaning the place up, and then to improve the takings he started selling food in the pub as he is a good chef.

24. Unfortunately, that coincided with the first lockdown period. As Mr Vaz was regarded as self-employed he was not furloughed. The only income was from key workers staying over in the accommodation at the pub. He had to rely on universal credit. When lockdown ended, the regular weekly payments resumed.
25. In about August 2020, after the first lockdown period, Mr Grewal was on holiday and Mr Vaz was approached by a salesman for a company called InPost about installing some lockers. These were for people to collect and return online deliveries. They proposed to install a series of lockers and pay a rent of up to £1800 a year. Mr Vaz explained to him that he was not the owner, just a manager and called Mr Grewal to explain. Mr Grewal told him to deal with it himself, and put his bank account number on the form and they would sort it out later.
26. Around the same time Mr Grewal was concerned about the level of takings. One day when he came to see him, in company with an Indian man, identified as Suresh, and told him he would need to cut his pay down to £200 a week. Mr Vaz refused, as he was working long days, seven days a week. The next day Mr Grewal came back with Suresh and Suresh told him that he was taking over. He took the keys off him in the bar, in front of customers, and told him he was given two weeks' notice so that he could find alternative accommodation. Mr Vaz protested, but it was out of his hands. He stayed in the caravan for about four more weeks until the social worker was able to get him rehoused, for the sake of the children. The police turned up to question him at one point and he was able to satisfy them and they took no further action. During that time, he says, InPost returned and installed the lockers.

*The respondent's case*

27. Mr Grewal agreed on a few points. The first was that Mr Vaz had worked for him before on a self-employed basis, though only on a 15% basis. He says that Mr Vaz became bankrupt and moved to Goa. His wife in Goa accused him of assault and of taking drugs, and when he returned to the UK he was arrested. Mr Vaz contacted him and after he left prison Mr Grewal allowed him to stay at the Swan for a few weeks to recuperate, with a view to taking over one of the pubs.
28. Mr Vaz was keen to return on a commission basis and this was agreed, at 15% as before. During that time Mr Vaz wanted the children to live with him and was successful in obtaining a live-with order. From then on, he did not have the time to devote to the pub and business suffered. Mr Grewal had to employ more staff. Mr

Vaz was intoxicated on a daily basis and abusive to the staff and customers.

29. On 15 February 2020 there was, he agreed, a break-in at the bar. Mr Vaz reported it to the police. (There is a letter from them confirming this.) Mr Grewal felt that this break-in was Mr Vaz's fault; he had been intoxicated and had not locked up properly. It was not recorded on CCTV and Mr Vaz had a key. Mr Vaz apologised and so he gave him a final written warning rather than dismiss him. (Mr Vaz agreed that he had received such a letter although I did not see it.)
30. In a further incident he kept the bar open after 11pm and then pushed a female licencing officer when she came to the premises to check.
31. He denied the allegation about taking the bottles of beer to the Old Oak Tree, on the basis that this could have been checked on CCTV and that if the stock had been checked in there it would have been apparent to the brewery; this was a tied public house and they check on the takings.
32. The reason for moving him to the Old Oak Tree was, he said, because of the complaints made about the accommodation at the Swan. There was "suitable, larger accommodation" there, i.e. the caravan.
33. He agreed that Mr Vaz was not furloughed but had some key workers staying in the accommodation. As already described, he felt that Mr Vaz was getting money from the government and was happy about that. Mr Grewal also agreed that before lockdown he had been paying Mr Vaz £300 per week.
34. As to the hours worked, he said that opening hours were from 11 to 11, not midnight, and disputed that Mr Vaz got up early to prepare breakfast as no breakfast was provided, just tea and coffee in the rooms.
35. When the pub reopened he heard from Max about the InPost rental money. He then contacted the sales manager concerned to get the details. He then went to see Mr Vaz to ask him about it. He does not describe what Mr Vaz had to say on the matter, but afterwards he reported the matter to the police. And the next day, Mr Vaz left the premises, taking with him the weekly takings and the £500 float. Mr Grewal reported it to the police but did not know if they had done anything. He thought that they did not have his address. Asked whether he was still in the caravan at this point he said he did not know. With Mr Vaz leaving so suddenly he was left short-handed. His wife, who is a licensee came over to help, as did Max. Suresh took over as manager, and Kinga is still working there.
36. Comparing these two accounts it seems to me that there are some serious weaknesses with that presented by Mr Grewal. Firstly, there is so little documentary evidence. Not a single piece of paper has been presented to show that at any point in time Mr Vaz was working for him in any capacity. A written contract is not essential for a self-employed relationship, but there is no reason why the terms

should not have been recorded in writing. There should then be invoices from Mr Vaz (or perhaps generated by Mr Grewal to evidence the arrangement) together with records of the payments made, so that they could be accounted for. All of the payments are entirely undocumented, and in cash, even though this arrangement continued for over two years.

37. Secondly, Mr Grewal has been inconsistent about the terms of their arrangement. On his account, Mr Vaz worked on a 15% arrangement from the outset and so, he argues, was self-employed. But he also accepted that at the time of his departure he was receiving £300 per week.
38. I take it from this, and find, that the business was unable to support £300 per week out of 15% of the takings, and so this was a minimum figure which Mr Grewal committed to pay. That is very close to Mr Vaz's account.
39. That in turn makes it more plausible that in the difficult period when the pub was slowly reopening, and observing social distancing, Mr Grewal might have proposed a further reduction to £200 per week. Again, his view was that Mr Vaz was getting money in benefits and so did not need any more.
40. A further inconsistency relates to the brief letter or statement from Kinga. She says there that she worked for Mr Vaz, so that she also lost her job when he left, and that this was on 21 September. That is five days after the agreed date on which Mr Vaz left, but more significantly, on Mr Grewal's account, she is still working there. That indicates that this statement was written at the behest of Mr Grewal, to bolster his claim that Mr Vaz was self-employed. At the same time, given she is still working there, it must be (a) untrue that she lost her job and (b) shows that Mr Grewal was in fact in charge of hiring and firing staff. That is supported by his comment in evidence that once Mr Vaz had the children to live with him he had less hours for the pub and he (Mr Grewal) had to employ other staff.
41. There is also a general lack of plausibility to Mr Grewal's account. Mr Vaz had worked for him in the past but was not a family member. On his account, he kept him on as manager of the pub although he was regularly under the influence and abusive to staff and customers. He even pushed the licencing inspector. The pub was broken into twice, either through his negligence or worse, and he was not dismissed, just given a final written warning. Even when the alleged fraud over the InPost lockers came to light, he was not dismissed. Given what seems to have been a fairly brisk approach to such matters, as shown by the displacement of Kinga at the Old Oak Tree, he showed an altogether implausible degree of loyalty to Mr Vaz.
42. Then there are the circumstances of Mr Vaz's departure. Given his precarious income and the fact that he was living in a caravan, it seems most unlikely that he had any other accommodation that he could use. That in turn makes it most unlikely that he would simply leave in the way described, making him and his children homeless. But it would be even more extraordinary to steal from his place of work



and then remain on site in the caravan for a period of weeks.

43. I note that there is documentary evidence from InPost to the effect that Mr Vaz gave them his personal bank details, but that does not invalidate his explanation. With Mr Grewal away for a few days it does not seem improbable, or obviously wrong, for Mr Vaz to give his own details, particularly if he is running the business and responsible for paying the staff. The email only states that

“He agree to an InPost licence, which we have since found out to be false, the trading name was incorrect. He gave his personal HSBC bank acc ... in his own name. This could have cost InPost a lot of money, fortunately the work was not complete so no payment was made to Mr Vaz.”

44. This was also presumably written at the behest of Mr Grewal. The information about the trading name must have come from him, though its relevance is unclear. It merely shows that before the lockers were installed they were told not to make the payments to Mr Vaz. But they were later installed, and I conclude that the information about the payments must have come to Mr Grewal from Max, who must have had it in turn from Mr Vaz, indicating that he was quite open about the arrangement. I prefer Mr Vaz’s account of this incident.

45. It is not necessary to make findings about all of the allegations made, particularly those of dishonesty and in connection with the break-ins. However, I do find that in general Mr Vaz’s account is the more reliable, particularly his account of his dismissal, his description of the working arrangements and the pay arrangements.

46. In particular I find as follows:

- a. Mr Vaz started work on 12 April 18 and agreed to work for £550 per week.
- b. Shortly afterwards this reduced to £400 per week.
- c. From April 2019 to November 2019 this rate reduced further to £300 per week.
- d. In November 2019 the arrangement changed to one of receiving 20% commission, on the basis that this was no more on average than £300 per week, otherwise the change would not have been imposed.
- e. During the first lockdown period, when Mr Vaz was at the Old Oak Tree, he was not paid at all.
- f. When the pub re-opened, he went back to a flat rate of £400 per week, the sum claimed in the claim form.
- g. Mr Vaz’s hours of work when the pub was open began at 6.30 am each day, to prepare breakfast for 7.00 am, and ended at 11.30 pm, half an hour after

the pub closed. These timings are necessarily somewhat approximate.

- h. There would be time in the morning for a rest break of an hour, and Mr Vaz, as manager, could take time away from the bar for short periods each evening, to look after his children, cook for them and put them to bed, but would generally then be working till closing time.
- i. Out of that total period of 17 hours each day, from 6.30 am to 11.30 pm, Mr Vaz would be working for approximately 12 hours each day, allowing for these breaks.
- j. During lockdown the only work would involve catering for those key workers staying in the pub and that would only involve perhaps 3 hours of work a day.
- k. Much of the management of the pub, including monitoring takings and staff wages was in fact done by Max / Mr Grewal, who came every couple of days to oversee these matters.
- l. Mr Vaz did not in fact account for tax and national insurance payments for the bar staff and others who worked there from time to time. The claimed arrangement that Mr Vaz was a self-employed manager who had control of the takings and was responsible for paying the staff from them, accounting for their tax and NI, was a fiction. The takings were controlled by Mr Grewal, who apportioned the money to Mr Vaz first. All of the wages were paid in cash from the takings at the bar with no payment records being kept. (That is confirmed in the statement from Kinga).

## Conclusions

- 47. In those circumstances, was Mr Vaz in fact an employee? Section 230(1) ERA defines an employee in a rather circular fashion i.e. as:

“an individual who has entered into works under (or, where the employment has ceased, worked under) a contract of employment”.
- 48. Section 230(2) defines a contract of employment as:

“a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing”.
- 49. The purpose of this definition is to distinguish between individuals dependent upon an employer for their livelihood on the one hand, and self-employed individuals or independent contractors on the other.
- 50. The starting point is deciding between these alternatives is usually the decision of the Court of Appeal in *Ready Mixed Concrete (South East) Ltd v Minister of*

*Pensions and National Insurance 1968 1 All ER 433 QBD.* The court set out the following three questions:

- a. Did the worker agreed to provide his or her own work and skill in return for remuneration?
- b. Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of [using the language of the day] master and servant?
- c. Were the other provisions of the contract consistent with its being a contract of service?

51. Taking these in turn, clearly Mr Vaz did provide his own work and skill in return for remuneration, so the first point is satisfied. The last point about provisions of the contract does not apply, since there was no written contract.
52. The main point relied perhaps is that Mr Vaz was for a time working on a commission basis, but as I have found, for most of the time it was a flat rate, and the short time on commission was to reduce it still further. There is no particular magic about being paid commission that prevents a person being an employee. It is simply the means of calculating pay. It is more consistent with a self-employed arrangement in general, but equally Mr Grewal decided not to use that model when re-hiring Mr Vaz.
53. The final aspect is about the degree of control, and on examination Mr Vaz appears to have been in very much a powerless and subordinate position. He was moved summarily from the Swan to the Old Oak Tree as Mr Grewal directed. That is difficult to reconcile with him being in business on his own account. The lack of a written contract or any terms about notice, or invoices or insurance, deprive the arrangement of many of the usual trappings of a self-employed arrangement. The pay arrangements for himself and other staff was, as already held, largely out of his hands. He had some control over how many bar staff to employ; over whether, for example, to employ a chef or do the cooking himself, but in practice I conclude that Mr Grewal could have vetoed this. It is hard to see how, if he had been issued with a contract of employment, his position would have been any different.
54. There is also some significance in the fact that he was offered a contract of employment. Although it was not signed, it was intended to protect his position, and would not have been offered if it did not conform to Mr Grewal's understanding of the role. (Max appears to have been acting on his behalf throughout.) The pages I have been provided with do not appear complete, and are mainly concerned with non-competition clauses, so that may also have been behind the proposal.
55. The House of Lords, in *Carmichael v National Power plc 1999 ICR 1226*, endorsed the view that certain elements formed part of an irreducible minimum of a contract of employment – control, mutuality of obligation and personal performance.

Mutuality of obligation is simply the obligation on the part of the employee to do work and on the part of the employer to provide pay. That certainly seems to be satisfied here. In practice Mr Vaz could not provide a substitute to carry out his duties. The person had to be on site, managing the premises. It is a live-in role. The incident with InPost shows that any claim to be the actual manager of the business operation was treated as misconduct. Mr Vaz did not even have the relevant bank account details for Mr Grewal, i.e. "the business". Mr Vaz said that he did but when I asked how he said he would have found it through opening the post.

56. Accordingly, I find that Mr Vaz was an employee.
57. The definition of a worker in the Working Time Regulations is the same as in the Employment Rights Act. It is set out in Regulation 2, the interpretation section. Among the various definitions there it states:

"worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under ) –

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer or any profession or business undertaking carried on by the individual."

58. Hence, all employees are workers. On any view, Mr Vaz meets the second limb, providing work personally to Mr Vaz.

59. So, dealing with each complaint in turn:

- a. The complaint of unfair dismissal is made out. Mr Vaz was simply evicted from the bar with no process whatever, and without good reason, which was therefore an unfair dismissal.
- b. The reason or principal reason for that decision was, I find, his refusal to agree to a reduction in wages. Section 104A applies where (a) the dismissal is either because the employee has taken or proposed action to enforce his right to the national minimum wage, (b) where the employer has been prosecuted for a failure to pay, or (c) where "the employee qualifies, or will or might qualify, for the national minimum wage or for a particular rate of national minimum wage." That is not quite the same thing as refusing to accept a pay cut, even if the pay takes him below the national minimum wage. On my findings, Mr Vaz was already receiving less than that. He refused because he was already working long hours and a seven day week. It seems to me that some reference, express or implied, to the national minimum wage is required here. If, for example, Mr Grewal had made this

proposal and Mr Vaz had objected on the grounds that he would be on less than the national minimum wage, that would suffice, or even perhaps if they had discussed what hourly rate that would correspond to, but given Mr Grewal was already in breach of the national minimum wage regulations (as I find) then somewhat paradoxically this particular provision seems not to apply.

- c. The complaint of unlawful deduction from wages in respect of the national minimum wage is upheld. Mr Vaz is entitled to up to two years of the underpayment, taking into account the various rates paid during that time.
  - d. The complaint of breach of regulation 10 of the Working Time Regulations 1998 (WTR) in relation to daily rest is also upheld. He was entitled to receive a rest break of at least 11 hours between bouts of work each day, and instead he had only from 11.30 pm to 6.30 am.
  - e. The complaint of breach of regulation 11 of the Working Time Regulations 1998 (WTR) in relation to weekly rest is upheld. He was entitled to receive an uninterrupted period of 24 hours in each 7 day period. That was not provided.
  - f. The complaint of breach of regulation 13 and 13A of the Working Time Regulations 1998 (WTR) in relation to annual leave is also upheld. Mr Vaz was entitled to receive 5.6 week's annual holiday each year under these provisions. It appears that no holiday was taken at any point. In default of any contractual leave year, it runs from the date on which he began his employment. The view in the WTR is that an employee has to take their annual leave or lose it, but the European Court has now clarified in the case of **Kreuziger v Land Berlin Case C-619/16, ECJ, and Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ**, that this "use it or lose it" rule was open to national legislation, provided the worker has had the opportunity to exercise the right. That interpretation remains valid, and so annual leave has to be calculated over the period of about 2.5 years in question.
  - g. There was also a clear failure to provide a written statement of employment particulars. A contract was offered to Mr Vaz but I note that it did not cover pay, so that does not mitigate the situation and so the maximum amount of four weeks' pay is indicated.
60. For completeness, no question was raised by the respondent about the legality of the (implied) contract of employment here, given what appears to have been a wholesale failure to account for tax and national insurance. In any event, applying the guidance of the Supreme Court in **Patel v Mirza 2017 AC 467, SC**, that the key question is whether in the circumstances the relief claimed should be granted, I find that it should, given Mr Vaz's small responsibility for this state of affairs and the

imbalance of power.

61. For all of the above reasons, save for the claim of automatically unfair dismissal, the claims are upheld.

Employment Judge Fowell

Date 09 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

.3<sup>rd</sup> September 2021.....

..THY.....

FOR THE TRIBUNAL OFFICE