EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109840/2021 (V)

Held on 6 September 2021 (By Cloud Video Platform)

Employment Judge: P Smith

Miss M Misiak	**Claimant** **In Person**
La Vita North Side Limited	**Respondent** **Represented by:** **Mr A Khan – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. By agreement, the name of the Respondent is amended to "La Vita North Side Limited".

2. The Claimant's claim of unauthorised deductions from wages succeeds. Applying a 25% uplift for its unreasonable failure to comply with an applicable statutory Code of Practice, the Respondent is ordered to pay compensation to the Claimant in the gross sum of **£2,266.14**.

3. The Claimant's claim for compensation in respect of accrued but untaken annual leave succeeds. Applying a 25% uplift for its unreasonable failure to comply with an applicable statutory Code of Practice, the Respondent is ordered to pay compensation to the Claimant in the gross sum of **£66.93**.

REASONS

Introduction

1. The Claimant submitted an ET1 claim form to the Employment Tribunal office on 1 June 2021. Within that form she presented complaints relating to arrears of pay and other payments, as well as for holiday pay. She had notified Acas for Early Conciliation on 24 March 2021 and a certificate was issued on 5 May 2021. The Respondent defended all the claims in an ET3 response form submitted to the Tribunal on 6 July 2021.

Issues

2. At the start of the hearing I took some time to discuss the claims with the parties, clarify the claims that had been presented, and identify exactly where the points of dispute were. The parties agreed that I should amend the name of the Respondent to its proper legal title, "La Vita North Side Limited". In relation to the case itself it transpired that on several issues the parties were in fact in agreement but on some key issues they remained in dispute. During our discussion the Claimant helpfully clarified that her "other payments" claim was not a standalone claim in itself but another way of describing her unpaid wages complaint. That left me with two claims to determine, and a list of issues was agreed.

3. In summary, the Claimant's wages claim concerned the period from 4 December 2020 until the termination of her employment (by her resignation) on 10 April 2021. The Claimant's case was that on 11 occasions during that period she was entitled to be paid what she described as "Furlough pay" but was in fact paid nothing on those occasions. As such, she contended, the Respondent had made unauthorised deductions of wages. Again in summary, the Claimant's holiday pay claim was based upon the contention that she had accrued an entitlement to annual leave during the course of the applicable leave year but that she had not been paid compensation for untaken leave once her employment ended.

4. The agreed list of issues is reproduced as follows:

Unauthorised deduction from wages claim: s.13 Employment Rights Act 1996

(1) *Has the Claimant proven a legal entitlement to a "properly payable" sum by the Respondent on each of the 11 occasions cited in her claim form?*

This point was in dispute. The Claimant contends that she had a legal entitlement to be paid £164.81 on each occasion; the Respondent disagreed that there was any such legal entitlement.

(2) *Did the sums in question amount to "wages" for the purposes of* **s.27 Employment Rights Act 1996***?*

This point was not in dispute. The Respondent agreed that if the Claimant proved a legal entitlement, the 11 instalments of £164.81 did come within the **s.27** definition.

(3) *What were the "occasions" on which the sums properly payable ought to have been paid?*

Having taken instructions, Mr Khan accepted that the 11 dates identified by the Claimant as being the occasions for payment were agreed.

(4) *What sums were paid to the Claimant by the Respondent on each of the 11 occasions?*

This point was also not in dispute: the Respondent accepted that on each such occasion the Claimant had not been paid anything at all. It therefore followed that if the Claimant proved a legal entitlement to the payments of £164.81, there had been a deduction of that amount on each of the 11 occasions. Sensibly, Mr Khan agreed that in principle these 11 occasions would amount to a "series of deductions" for the purposes of **s.23(3)** and that no jurisdictional point arose as a result.

(5) *If there has been a deduction, was it "required or authorised to be made by virtue of a statutory provision or a relevant provision of the* [Claimant]*'s contract" (***s.13(1)(a)***) or had the Claimant "previously*

signified in writing [her] *agreement or consent to the making of the deduction" (***s.13(1)(b)***)?*

This point was in dispute. The Respondent contended that even if there had been deductions it was authorised to make them because the Claimant had failed to telephone the Respondent at the appointed time in order to make herself theoretically available for work.

(6) *If the deduction was unauthorised, what sum should the Tribunal order the Respondent to pay to the Claimant?*

This point was not in dispute. If the Claimant succeeded on all the preceding issues the Respondent conceded that she would be entitled to an order compelling the Respondent to pay her the sum of £1,812.91 as compensation for unauthorised deductions from wages (11 multiplied by £164.81).

Holiday pay claim: reg.30 Working Time Regulations 1998

(1) What was the Claimant's leave year (**reg.13(3)**)?

The Claimant originally contended that her leave year followed the calendar year. That was not agreed. However, the Claimant conceded in cross-examination that there was no provision in any relevant agreement to which she was subject that stated that was the leave year. She also conceded that her leave year began on the date of the commencement of her employment (5 October 2020).

(2) How much of the leave year had elapsed at the effective date of termination (EDT)?

Given the concession made in relation to issue (1), above, it followed that the proportion of the leave year that had elapsed by the time of the EDT – 10 April 2021 – was a known figure. It was 187 days, or 51.23% of the leave year.

(3) How much leave had the Claimant accrued for the year under **regs.13** and **13A**?

This point was in dispute. It was agreed that the Claimant was employed on a genuine zero-hours contract. That status could have an impact on my determination of how much leave she had accrued during the leave year. In its Paper Apart the Respondent contended that the Claimant had accrued 27.88 hours' leave without specifying how this figure had been arrived at, but the Claimant did not specify how much leave she had accrued within the year. It was therefore necessary for me to decide that issue.

(4) How much leave had the Claimant taken in the year?

The Claimant's case is that she took no leave at all in the leave year. In its Paper Apart the Respondent stated that the Claimant had in fact taken 48 hours, meaning that there was no shortfall.

(5) How many hours remain unpaid?

The parties agreed that the Claimant accrued annual leave in terms of hours rather than days. They also agreed that the answer to this question was to be found in the difference between the amount of leave the Claimant had taken and what she had accrued.

(6) What amount should the Respondent be ordered to pay to the Claimant in compensation for accrued but untaken annual leave under **reg.30**?

The Claimant claimed that she ought to have been paid the sum of £1,821.91 as compensation under **reg.30**. This figure was revised during her evidence, to £1,812.91. It was unclear to me how the Claimant had calculated that figure.

5. During the course of the hearing it emerged that the Claimant wished to pursue an argument that the Respondent had unreasonably failed to comply with an applicable statutory Code of Practice, namely the **Acas Code of Practice on Disciplinary and Grievance Procedures**, in order to claim an

uplift of up to 25% on any award of compensation I may order in relation to her two claims. Whilst the term "uplift", the **Code of Practice** or the applicable legislation (**s.207A Trade Union and Labour Relations (Consolidation) Act 1992** and **sch.A2**) were not mentioned by name, it was clear from box 15 of the ET1 that a complaint of this nature was pled by the Claimant. The Respondent did not object to me determining this point as part of the hearing, and Mr Khan was given the opportunity both to lead evidence on it and to cross-examine the Claimant on it.

The evidence

6. I was provided with a productions file amounting to 103 pages and was shown some of the documents within it during the course of the hearing. Included within that file was a narrative document prepared by the Claimant (pages 26 to 33, plus the appendices that followed). This document set out her version of the facts underpinning both claims. Although there had been no order for witness statements I suggested to the parties that, in a departure from standard practice, that document might be taken as the Claimant's evidence in chief. This was suggested because the Claimant was representing herself, there would be no prejudice to the Respondent (as the Claimant had helpfully provided a copy to the Respondent well in advance of the hearing) and it might assist the more expeditious disposal of the proceedings. The Claimant and Mr Khan agreed with this course of action. I therefore also heard oral evidence from the Claimant on her own behalf and, on behalf of the Respondent, from one of its directors, Mr Marco Arcari.

Findings of fact

7. The Claimant commenced employment with the Respondent on 5 October 2020 as a member of the Front of House staff at the Respondent's restaurant in Bishopbriggs. In advance of the commencement of her employment the Claimant was provided with a statement of employment particulars which set out some terms of her contract of employment with the Respondent. Amongst those terms were the following material stipulations:

REMUNERATION

Your hourly rate is £ N.M.W. per hour. Your pay may vary each week depending on the number of hours you work. You will be paid weekly in arrears by bacs on the Friday of each week.

HOURS OF WORK

You are normally required to work full time / part time hours per week, however your working hours may vary each week according to the needs of the business.

Whilst the Company will endeavour to give employees their normal hours of work, the nature of the business is seasonal and these hours are not guaranteed, and may increase or decrease in line with business requirements.

Your normal days of work are between Mondays and Sundays according to the rota. The weekly rota will be notified to you in advance by management. You must ensure that you take an accurate note of your weekly shifts.

It is the employee's responsibility to check the rota on a Saturday for the following weeks schedule, or if you are not working on a Saturday you must phone the restaurant on the Saturday (between 10pm and 11pm) to find out your weeks shifts. No Facebook messaging, texting or any other form of communication other than phonecall with the restaurant will be permitted. No photographs of the rota can be taken and put on any Facebook groups and no business information of the La Vita Restaurant Group can be put on Facebook.

ANNUAL HOLIDAYS

Employees annual holiday entitlement in any holiday year is 5.6 weeks, subject to a maximum of 28 days, inclusive of public holiday entitlement, which part-time employees will receive on a pro-rata basis.

Annual holiday entitlement accrues at the rate of 1/12th of the full annual holiday entitlement for each complete calendar month of service during each holiday year.

…

Payment for annual holiday entitlement will be made at your normal basic rate of pay. If your employment commences way through the holiday year, your holiday entitlement during your first year of employment shall be calculated on a pro rata basis.

…

DEDUCTIONS FROM WAGES

The Company reserves the right to seek reimbursement by deduction from wages, in accordance with the provisions of the Employment Rights Act 1996 in the event of any deficiencies attributable to you, or in the event of overpayment of salary, recovery of unearned holiday pay or other remunerations, or if any other sums are due by you to the Company arising from your employment.

Should your employment terminate while a part of any amounts remain outstanding, the Company reserves the right to recover the balance in full from your final pay.

8. There was no dispute between the parties that the Claimant was genuinely employed on "zero hours" terms. She agreed that the arrangement was such that she was not guaranteed hours of work in any particular week and that there had been some weeks where she was not required to work at all. In weeks when she was required to work the Claimant further agreed that the amount of hours she was required to work varied, according to business need.

9. The "NMW" (National Minimum Wage, or more accurately, the National Living Wage) rate applicable to the Claimant was £8.72 upon her commencement. From 1 April 2021 that increased to £8.91.

10. In the brief period between her commencing her employment and later being furloughed the Claimant was paid gross wages in the following manner:

(1) Week ending 16 October 2020: £200.56.

(2) Week ending 23 October 2020: nil, save for a tax rebate of £101.20.

(3) Week ending 30 October 2020: nil, save for a tax rebate of £47.20.

(4) Week ending 6 November 2020: nil, save for a tax rebate of £47.

(5) Week ending 13 November 2020: £235.44.

(6) Week ending 20 November 2020: £126.44, plus a tax rebate of £21.80.

(7) Week ending 27 November 2020: £261.60.

11. Putting aside the tax rebates, the average gross weekly pay earned by the Claimant during the five weeks she actually worked was £164.81.

12. Mr Arcari contended that the requirement to telephone the restaurant between 10pm and 11pm each Saturday, under the "Hours of Work" clause, was genuinely expected of all employees in the Claimant's position. I did not accept that. The Claimant said in evidence that in general she found out about her working hours when the Bishopbriggs restaurant manager would send a photograph of the weekly rota to her via WhatsApp. I was shown a string of WhatsApp messages which showed this happening on a weekly basis until mid-November 2020 (pages 74 to 78). The practice at Bishopbriggs was as the Claimant described.

13. On 30 November 2020 an email was sent to the Claimant from the Respondent's payroll service provider stating the following:

Hello

Unlike the last time, the furlough scheme comes at a cost to the company but we will be absorbing these costs during the closure to make sure you still have an income if you are not required to work.

Some people will be placed on furlough and some not. If you are required to work during the Level 4 closures then you will not be on furlough. If we do not require you to work, then you will be placed on furlough.

You must phone every Saturday between the hours of 9pm and 10pm to find out if you are working the following week or whether you are off as you normally would in your contract.

To receive furlough we need you to opt into to this and reply to this email saying "I agree.."

We must receive your reply by Tuesday 31st November at 10am at the latest for the next payroll run.

If we do not receive a reply before the deadline we can not give you furlough.

14. The reference to "furlough" was a reference to the Government's Coronavirus Job Retention Scheme (CJRS). In summary, that scheme – introduced under **ss.71** and **76 Coronavirus Act 2020** – permitted employers adversely affected by the Covid-19 pandemic to apply for financial support in the form of grants, in order to partially meet the cost of employee wages and avoid redundancies. Such applications were to be made by employers to HM Revenue and Customs (HMRC) who had responsibility for administering the scheme. No direct relationship would be created between HMRC and individual employees as part of the scheme; the only direct relationship created was between HMRC and employers who had applied for grants under the scheme.

15. Mr Arcari accepted that whilst he had not written this email himself, he was involved in what he described as its "setup". I took this to mean that he had involvement in putting together the proposal being made to the Respondent's employees, rather than how it would ultimately be expressed to them.

Nevertheless, on the same day the Claimant replied to this email saying "I agree".

16. Mr Arcari did not get involved in making CJRS arrangements with HMRC himself; that task was left to the Respondent's payroll service provider. Unfortunately, no-one from the Respondent's payroll service provider attended the Tribunal to give evidence as to how the company went about making claims in respect of its employees, under the scheme. The Respondent offered no evidence at all as to whether an application was made to the CJRS specifically in relation to the Claimant, but on the balance of probabilities I found that it was likely the Respondent did do that. My reason for reaching that conclusion was based upon a collection of payslips produced by both the Claimant and the Respondent, from the time before closure and the time after closure (pages 54 to 73 and 98 to 100). The Respondent's payroll service provider was plainly drawing a distinction between normal remuneration and what the Claimant was being paid post-closure. The payslips described her normal remuneration as "Basic Pay" but this was changed to "Furlough Pay" from the first payslip following her agreement to be furloughed (4 December 2020; page 100).

17. After the Claimant was furloughed the first payslip containing "Furlough Pay", dated 4 December 2020, showed the gross sum of wages payable as £164.81. That was precisely the same sum as had been the average of her gross weekly pay across the weeks she had thus far worked. I considered whether this was likely to be coincidental and I concluded that it was not. The email of 30 November 2020 had been silent about what remuneration furloughed employees would receive from the Respondent if they agreed to be furloughed, but Mr Arcari volunteered in examination-in-chief that he had had a conversation with members of staff about being furloughed, in which he had informed them that *"the benefit will be that you receive 100% - 80% plus 20%, and they were all happy about that"*. The reference to 80% was, in this context, plainly to one of the maxima (80% of an employee's wages) recoverable as a grant under the CJRS.

18. For these reasons I concluded that upon the Claimant agreeing to be furloughed, either the Respondent or its payroll service provider calculated her average weekly earnings and arrived at the figure of £164.81. Whilst it was not inconceivable that there might have been an alternative explanation for why that figure came to be arrived at, on the balance of probabilities I found that the Respondent or its payroll service provider arrived at that calculation in order to make a claim to HMRC under the CJRS, specifically in relation to the Claimant as a zero-hours employee.

19. Despite not working but being paid £164.81 for the week ending 4 December 2020, the Claimant did not telephone the Bishopbriggs restaurant to check the rota situation. She was simply paid automatically. The same occurred the following week (ending 11 December 2020).

20. In the week ending 18 December 2020 the Claimant was paid nothing. From then on, payments made to her by the Respondent proved sporadic. In the weeks ending 25 December 2020 and 1 January 2021 she was paid what was described as "Basic Pay", neither instalment of which amounted to £164.81 (pages 57 and 58). It appeared that the Claimant may have actually worked during this time as she was scheduled to do so on the rotas I was shown (pages 76 and 77). Mr Khan confirmed that the Claimant was not on the discrete "flexible furlough" scheme. No explanation was provided to me as to why this had seemingly happened, but it is not necessary for me to make any finding about it to resolve these claims and I therefore make no finding in relation to it.

21. In the week ending 8 January 2021 the Claimant received "Furlough Pay" of £164.81, and the same occurred in the weeks ending 22 January, 29 January and 5 March 2021. However, in the weeks ending 15 January, 5, 12, 19 and 26 February, 12, 19 and 26 March, and 2 and 9 April 2021 she was paid nothing.

22. The explanations put forward by the Respondent for why the Claimant was not paid in the weeks she received nothing were confused and confusing. Initially the suggestion was made that the reason she was paid in some weeks

but not others was because she had made herself available by telephoning in in those weeks but not in others. However, Mr Arcari could not point to any particular occasion when the Claimant had telephoned the restaurant, but he said he did know that she had not telephoned in on *"quite a few occasions"*. I found this evidence to be vague and not reliable. The second suggestion was that the Respondent could not pay on certain occasions because it did not have the funds. Mr Arcari said, and I accepted, that cash flow was a major problem for the Respondent at this time. He went on to say that the result of these cash flow problems was that in some weeks the Respondent had to decide which employees it would pay wages to and which it would not, and that in making these decisions the Respondent had tried to be *"fair to everybody"*.

23. These two explanations were, in my judgment, unsatisfactory. The first was undermined by the actual, established practice within the Bishopbriggs restaurant, and I have made a finding in that regard already. It was also undermined by the complete lack of specificity given by Mr Arcari as to the occasions when the Respondent was contending the Claimant telephoned in and was paid, telephoned in and was not paid, did not telephone but was paid, or where she did not telephone and was not paid. Even though I accepted that the Respondent was likely suffering from cash flow problems at the material time, the second explanation was undermined by a lack of corroboration and also because, if followed to its logical conclusion, it would have likely meant that whilst the Respondent received grant monies under the CJRS on the basis of the employees it had registered, it did not in fact use all of that money to pay the employees it had made claims in respect of. That would run counter to the very purpose of the CJRS itself.

24. My finding on the balance of probabilities is that on the occasions she was paid, the Claimant had not telephoned the Bishopbriggs restaurant to find out about the rota in advance. The Claimant was adamant that she had never telephoned in, and given that that was consistent with what I have already found was the typical practice at Bishopbriggs, I preferred her evidence over

Mr Arcari's on this issue. She was simply paid automatically on the basis of her average earnings prior to 30 November 2020.

25. The Bishopbriggs restaurant temporarily closed on 31 December 2020, in line with Covid-19 restrictions. From this point, the Claimant was not sent any more rotas until the restaurant was due to reopen, which eventually occurred in the week commencing Sunday 4 April 2021. I was shown the complete WhatsApp chain and there was no message or rota sent from the manager to the Claimant between 27 December 2020 and 3 April 2021. Mr Arcari's evidence was that although the restaurant had closed, the Respondent still compiled weekly rotas despite that fact. The suggestion made by Mr Arcari that decisions were being made by the Respondent about who would be *"placed on furlough"* on a weekly basis, hence the need for the continued use of the rota.

26. Whilst in that period the restaurant did offer a takeaway/collection service, I did not accept that any rotas created during that time would have included Front of House staff such as the Claimant. Firstly, the Respondent provided no such rotas in its productions and none appeared in the Claimant's WhatsApp productions. Mr Arcari's assertion was not corroborated by evidence that could reasonably have been available to the Respondent. Secondly, it was unnecessary for the Respondent to continue to compile rotas for Front of House staff given that the restaurant was closed and that under the CJRS, grants in respect of furloughed employees with zero- or varied hours (such as the Claimant) would be applied for using an average wage calculation rather than being dependent upon actual hours. If Mr Arcari's evidence had been correct, the Respondent would have been engaging in an entirely futile bureaucratic exercise in relation to Front of House staff. Finally, I thought it highly unlikely that rotas were being produced in case the restaurant was permitted to reopen at very short notice, which Mr Arcari had suggested. Given the situation that the country found itself in from December 2020 onwards in terms of Covid-19 restrictions, the suggestion that restaurant operators would be waiting for weekly updates as to whether they would or would not be permitted to reopen imminently was in my mind fanciful. It was

clear from very early in 2021 that restrictions were not going to be lifted for quite some time, at least to the point at which restaurants could fully reopen.

27. On 15 January 2021 the Claimant and Mr Arcari had a 55-second telephone conversation. The Claimant's recollection of this conversation was that it involved Mr Arcari telling her she would not be paid as the Respondent *"couldn't afford furlough"*. Mr Arcari was asked what had been discussed in that conversation. Initially he struggled to remember but his reply was *"It might have bene regarding her furlough, and coming back to work; being available for work. Something along those lines."* He went on to say that *"I probably said I didn't know 100% when she'd be coming back but she was Front of House and we would wait to see what the Government guidelines would be."* He said that the conversation moved to a discussion about whether the Claimant could undertake a different job, such as on the delivery corner, but that the Respondent *"could not pay the wages out"*. Also, Mr Arcari offered to pay the Claimant some money by way of what he described as *"holiday pay"*, in order to *"help* [her] *out"*.

28. The Claimant challenged this evidence in cross-examination, stating that the lengthy account given by Mr Arcari of what was said in this conversation was not accurate because it would have exceeded 55 seconds. He denied that. In my judgment, Mr Arcari's version is to be preferred. Whilst his recollection was admittedly hazy and the conversation admittedly short, it seemed to me unlikely that a full 55 seconds could be taken up by Mr Arcari simply informing the Claimant that the Respondent *"couldn't afford furlough"*. It was likely that more was discussed, and the matters described by Mr Arcari were pertinent to the challenges faced by the Respondent at that time.

29. In her 22 January 2021 payslip the Claimant was paid £41.10 in what was described as "Holiday Pay". The Claimant contended that she had not in fact taken annual leave in that pay period. Mr Arcari's explanation for its appearance in the payslip was that it was made as a result of the conversation they had had had on 15 January 2021. I accepted that evidence for the

reasons explained in the previous paragraph, but I also accepted that the Claimant had not in fact taken annual leave as at the time of that conversation.

30. On 15 February 2021 the Claimant emailed Mr Arcari, stating:

> *Hope you are well. I'm Maja, waitress from La Vita Bishopbriggs. I've already contacted you regarding furlough pay. Unfortunately nothing has changed and while people who are not able to work get their weekly furlough pay this is another week when I get nothing. I'm truly confused, could you please tell me the reason why some people get the money while other people don't?*

31. That email was not replied to, but the pair had a six-minute telephone conversation the next day. The Claimant's only evidence about the subject of this discussion was that Mr Arcari *"reiterate*[d] *that they cannot afford to pay furlough."* I found that it was unlikely that that was the only thing discussed in a conversation of this length. Mr Arcari's evidence, which on this issue I again preferred, was more cogent. He said that he remembered the conversation as he was sitting in his van at the time. He said that they also discussed the Claimant coming back to work, but that she told him she could not as she was on holiday at the time. The Claimant – for the first time in these proceedings – admitted that she was in fact in Poland between 21 January and 26 February 2021. Mr Arcari reminded the Claimant of her obligation, under her contract of employment, to ask for permission from the Respondent before she could take annual leave. Mr Arcari's evidence, corroborated as it was by the admission that the Claimant was indeed abroad, was in my judgment to be preferred as to the conversation that took place on 16 February 2021.

32. In her 5 March 2021 payslip the Claimant was paid £41.20 in what was described as "Holiday Pay". Mr Arcari's explanation for how that sum came to appear in that payslip was consistent with his explanation for the appearance of the corresponding sum (less ten pence) in the Claimant's 22 January 2021 payslip. For those same reasons, I accepted it.

33. On 16 March 2021 the Claimant emailed Mr Arcari with a lengthy email headed *"Furlough Payment Grievance"* (page 44). It set out a schedule of missing payments and a narrative of events that seemed to substantially replicate the document the Claimant relied upon as her evidence-in-chief in this hearing. Mr Arcari did not acknowledge or reply to that email. He could not remember receiving it, although it was sent to his usual email address. My finding is that it was sent to him and was simply ignored.

34. On 19 March 2021 the Claimant emailed Mr Arcari again (page 46), telling him that he had not responded to her email from a few days before and that there had been another occasion on which the Respondent had failed to pay her wages. Mr Arcari remembered receiving it, but he did not acknowledge this or reply. Again, I find that it was received but ignored.

35. On 24 March 2021 the Claimant emailed Mr Arcari again (page 48), reminding him of the existence of a formal grievance and inviting him to resolve the matter. Mr Arcari remembered receiving this third email, but again it was neither acknowledged nor replied to. My finding is that this was a third occasion of the Claimant's grievance simply being ignored by Mr Arcari and, by extension, her employer the Respondent.

36. On 3 April 2021 the Claimant emailed Mr Arcari communicating her resignation, on one week's notice. Mr Arcari acknowledged the Claimant's resignation by email on 9 April 2021. He told her she was not required to work her period of notice, and the parties agree that the termination of her employment became effective on 10 April 2021.

37. As at 10 April 2021, 187 days of the Claimant's leave year had elapsed. That amounted to 51.23% of the leave year.

The applicable law

38. The key provision applicable to unauthorised deductions claims is **s.13 Employment Rights Act 1996**, which states the following:

13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

39. The Employment Tribunal has jurisdiction to determine unauthorised deductions claims by virtue of **s.23**.

40. The key provisions in relation to holiday pay claims are set out in the **Working Time Regulations 1998**, and I reproduce those which are relevant to this case as follows:

13 Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(ii) if the worker's employment begins after 1st October1998, on the date on which that employment begins and each subsequent anniversary of that date.

13A Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

14 Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A

differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(A x B) – C

where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

15A Leave during the first year of employment

(1) During the first year of his employment, the amount of leave a worker may take at any time in exercise of his entitlement under regulation 13 or regulation 13A is limited to the amount which is deemed to have accrued

in his case at that time under paragraph (2) or (2A), as modified under paragraph (3) in a case where that paragraph applies, less the amount of leave (if any) that he has already taken during that year.

…

(2A) Except where paragraph (2) applies, for the purposes of paragraph (1), leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) and regulation 13A(2), subject to the limit contained in regulation 13A(3), on the first day of each month of that year.

(3) Where the amount of leave that has accrued in a particular case includes a fraction of a day other than a half-day, the fraction shall be treated as a half-day if it is less than a half-day and as a whole day if it is more than a half-day.

41. Holiday pay claims of this nature may be presented to an Employment Tribunal by virtue of **reg.30(1)(b)**.

42. The following provisions of the **Coronavirus Act 2020** form the legal basis for the CJRS:

71 Signatures of Treasury Commissioners

(1) Section 1 of the Treasury Instruments (Signature) Act 1849 (instruments etc required to be signed by the Commissioners of the Treasury) has effect as if the reference to two or more of the Commissioners of Her Majesty's Treasury were to one or more of the Commissioners.

(2) For the purposes of that reference, a Minister of the Crown in the Treasury who is not a Commissioner of Her Majesty's Treasury is to be treated as if the Minister were a Commissioner of Her Majesty's Treasury.

76 HMRC functions

Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease.

Analysis and conclusions

43. Based upon my findings of fact as set out above, my conclusions in relation to the agreed list of issues are set out as follows. Rather than set out the parties' submissions separately I have made reference to the points they made in relation to each of the issues they agreed I had to decide.

Unauthorised deduction from wages claim: s.13 Employment Rights Act 1996

(1) Has the Claimant proven a legal entitlement to a "properly payable" sum by the Respondent on each of the 11 occasions cited in her claim form?

44. *"Properly payable"* appears in **s.13(3)** and has been determined to mean sums to which the worker has some legal – but not necessarily contractual – entitlement (**New Century Cleaning Company Ltd v Church [2000] IRLR 27**, England and Wales Court of Appeal; **Helliwell & another v Axa Services Ltd & another UKEAT/0084/11/CEA**, 25 July 2011, unreported). An Employment Tribunal is entitled to interpret the terms of the contract in order to determine what is *"properly payable"* (**Agarwal v Cardiff University [2019] IRLR 657**, Court of Appeal), and what is *"properly payable"* requires a finding of fact (**Davies v Droylsden Academy UKEAT/0044/16**, 11 October 2016, unreported).

45. **Sections 71** and **76** of the **Coronavirus Act 2020** do not of themselves create or confer rights upon employees. Equally, the **Treasury Directions** introduced under the powers conferred by **ss.71** and **76** – implementing the CJRS itself – do not create or confer any rights upon employees either. In any event, the Claimant does not contend that she had a statutory right to be paid £164.81 each week. She relies on the furlough agreement as set out in the

Respondent's email of 30 November 2020 as creating a private, contractual right.

46. The Claimant submitted that her agreeing to the Respondent's furlough proposal in the 30 November 2020 email, that created for her a legal entitlement to be paid £164.81 every week. Mr Khan submitted that there was no legal entitlement to a *"properly payable"* sum because, whilst conceding that the Claimant may have made herself available for work, the Respondent retained a discretion to make – or not make – payments to furloughed employees depending on factors such as employee availability, cash flow, business need and the need to treat all employees with fairness.

47. In order to determine whether a legal entitlement was created it is necessary to look closely at the Respondent's email of 30 November 2020. Whilst it is not expressed in legalistic language, the wording of the email is plain enough. In its first sentence the email refers to the Respondent *"absorbing the costs"* of the CJRS and of it using the scheme in order to *"make sure that you still have an income if you are not required to work"*. In the case of an employee with no guaranteed hours like the Claimant, the Respondent could simply have offered her no hours or pay at all, saving at the very least the costs it proposed to *"absorb"* through its use of the CJRS. "Making sure" such a person still had any income at all, whilst at the same time taking on costs for itself when not required to work would be a surprising position to take if the Respondent were not making an offer to the Claimant that she would receive regular remuneration whilst not being required to work.

48. The second paragraph of the 30 November 2020 email included the phrase *"If we do not require you to work, then you will be placed on furlough"*. The Claimant was not required to work on the 11 occasions in question, so she satisfied that criterion. However, in order to "place" onto the CJRS a zero-hours employee who was not employed in the corresponding period in 2019/20, and claim a grant in respect of her wages, the Respondent would have had to use an average-hours calculation. As I have already found, the Claimant's average weekly wage in the weeks she worked prior to being

furloughed was £146.81, and as I have also found, the fact that this figure was then stated in her payslips as Furlough Pay was not merely coincidental.

49. In my judgment, the Respondent's email of 30 November 2020 did amount to an offer to vary the Claimant's contract of employment so as to move from a zero-hours type of arrangement to a guaranteed, average-hours arrangement, albeit a temporary one during the time in which the Claimant was not required to perform work and for the purposes of the Respondent making a claim under the CJRS. As I have found, the Claimant indicated her agreement to the Respondent's offer in her reply. That agreement, and the variation to her contract that resulted, created for the Claimant a legal entitlement to a guaranteed amount of pay each week during that period, payable by the Respondent. The sum properly payable on each of the 11 occasions the Claimant has claimed was the sum of £164.81.

(2) Did the sums in question amount to "wages" for the purposes of **s.27 Employment Rights Act 1996***?*

50. There was no dispute that the 11 sums of £164.81 met the statutory definition of "wages".

(3) What were the "occasions" on which the sums properly payable ought to have been paid?

51. By agreement, and as I have found, the occasions for payment of the 11 sums of £164.81 were 15 January, 5, 12, 19 and 26 February, 12, 19 and 26 March, and 2 and 9 April 2021.

(4) What sums were paid to the Claimant by the Respondent on each of the 11 occasions?

52. By agreement, and as I have found, the Claimant was paid nothing on each of those 11 occasions. On the face of things, there have therefore been deductions from the Claimant's wages on each of those occasions. Naturally, a complete failure to pay is a deduction (**Delaney v Staples [1992] IRLR 1919**, House of Lords).

(5) If there has been a deduction, was it "required or authorised to be made by virtue of a statutory provision or a relevant provision of the [Claimant]*'s contract" (***s.13(1)(a)***) or had the Claimant "previously signified in writing* [her] *agreement or consent to the making of the deduction" (***s.13(1)(b)***)?*

53. To determine whether the 11 deductions were authorised deductions, it is necessary first to consider whether statute or the Claimant's contract *"required or authorised"* such deductions. No provision of statute was cited to me in support of the Respondent's contention that it was so authorised. Whilst Mr Khan directed me to HMRC's guidance as to the operation of the CJRS and what employers should do, he did not contend that any such guidance *"required or authorised"* a deduction from wages. If that had been the Respondent's contention, I would have rejected it because guidance, although often helpful, does not form part of the body of law and cannot trump the law itself.

54. Instead, I was directed to the Claimant's contract and the deductions clause referred to in my findings, above. Within that clause it was stipulated that the Respondent might seek *"reimbursement"* of *"any deficiencies attributable to you"*, meaning the Claimant. It was not contended that the Claimant was responsible for any deficiencies. It was also stipulated that reimbursement might be permitted in the event of an overpayment of salary, to recover unearned holiday pay, or to recover *"other remuneration"*. Again, in my judgment, none of these situations pertained to the Claimant. Finally, the clause permitted the Respondent to recover *"any sums due by you to the Company arising from your employment."* It was not contended that the Claimant owed anything to the Respondent, and for this reason this sub-clause did not apply either.

55. The Respondent submitted that the reasons it did not pay the Claimant £164.81 on any of these 11 occasions related to employee availability, cash flow, business need and the need to treat all employees with fairness. In my judgment, there was nothing in the Claimant's contract that permitted the Respondent to deduct those sums for any of these contended-for reasons.

Equally, there was nothing in the 30 November 2020 email which set out that employees (such as the Claimant) who agreed to furloughed on the Respondent's terms would not, or might not, be paid if the Respondent came to experience any of those particular difficulties. There was no evidence of the Respondent retaining a discretion to withhold pay in any of these circumstances at all. No other instance of the Claimant having indicated her consent in writing, in advance, was suggested.

56. The Respondent also submitted that it was permitted to withhold the 11 payments of £164.81 because the Claimant did not telephone the restaurant at the appointed time as set out in the email of 30 November 2020. I have accepted that this email served so as to vary the Claimant's contract of employment and it followed that I had to consider whether her indicating her consent in advance did, in principle, permit the Respondent to do this.

57. I considered whether the Respondent's contention was the proper interpretation to be placed upon that part of the email, and concluded that it was not. Within that email the Respondent had distinguished between employees who were required to work and who were not. The need to telephone the restaurant was only realistically going to apply to those who might be required to work. The Claimant was not required to work. In any event, as I have found, the practice at the Bishopbriggs restaurant was that the Respondent did not require the Claimant to telephone in on any particular occasion; its practice was to send out pictures of the rota via WhatsApp, and during the period the Claimant was on furlough that seldom happened. Finally, and as I have also found, the Claimant was paid "Furlough Pay" irrespective of whether she had telephoned the restaurant; this simply happened automatically, without her needing to do anything. In my judgment, in agreeing to the 30 November 2020 proposal the Claimant had not indicated her consent, in advance, to wages being deducted in the event that she failed to comply with the telephone requirement.

58. For these reasons, I have concluded that the 11 deductions were neither authorised under **s.13(1)(a)** nor **s.13(1)(b)**. It is therefore declared that the

Respondent has made unauthorised deductions from the Claimant's wages on each occasion.

(6) If the deduction was unauthorised, what sum should the Tribunal order the Respondent to pay to the Claimant?

59. For the reasons set out above, the Respondent would be ordered to pay to the Claimant the sum of £1,812.91, representing 11 times £164.81. However, for reasons that will follow this sum is uplifted by 25% and the sum the Respondent is ordered to pay to the Claimant is **£2,266.14**.

Holiday pay claim: reg.30 Working Time Regulations 1998

*(1) What was the Claimant's leave year (**reg.13(3)**)?*

60. The Claimant conceded that her leave year did not follow the calendar year as there was no stipulation in her contract of employment to this effect. It follows that, as an employee who commenced their employment after 1 October 1998 (**reg.13(3)(b)(i)**) her leave year started on the date of commencement. That was 5 October 2020, meaning that the leave year would have ended on 4 October 2021 had the Claimant remained in employment.

(2) How much of the leave year had elapsed at the effective date of termination (EDT)?

61. It followed that the proportion of the leave year that had elapsed by the time of the EDT – 10 April 2021 – was a known figure. It was 187 days, or 51.23% of the leave year. However, the Claimant was within her first year of employment. Her annual leave accrued on a monthly basis, pursuant to **reg.15A(2A)** and in fact the annual leave clause as contained within her contract of employment. By 10 April 2020 the Claimant had completed six twelfths of the first leave year, which was 50%.

*(3) How much leave had the Claimant accrued for the year under **regs.13** and **13A**?*

62. The Claimant did not have what are described as "normal" working hours; she was a zero-hours employee. I was provided with a table showing the hours the Claimant worked in each particular week (page 97), and these were not apparently in dispute. Excluding the weeks in which she did not work, the Claimant worked a total of 135 hours across seven working weeks. Her average weekly hours over this period were therefore 19.29. Applying the *pro rata* principle to the Claimant's statutory (and contractual) entitlement to 5.6 weeks' annual leave, the Claimant's entitlement to annual leave was 108.02 hours in the year. Taking into account the fact the Claimant's employment terminated after 50% of the leave year had expired, her entitlement as at the EDT (10 April 2021) was 54.01 hours.

(4) How much leave had the Claimant taken in the year?

63. I was provided with no evidence that suggested the Claimant had taken any annual leave during the leave year. The Respondent contended that she had because of the two payments made to her under the payslip label "Holiday Pay" (22 January and 5 March 2021, representing 48 hours) but in my judgment, and as per my finding, these payments were not made because of her having taken annual leave but as an attempt on Mr Arcari's part to *"help* [*her*] *out"*, essentially by way of an advance.

64. Mr Khan submitted that **reg.15(2)** applied in this situation and that the Respondent had in fact required the Claimant to take leave on these two occasions. I rejected that submission because it was unsupported by any evidence that the Respondent had required the Claimant to take leave or even given the requisite notice that she should do so, under **reg.15(2)**. Such a contention was also inconsistent with Mr Arcari's evidence that he was, in his words, trying to *"help* [her] *out"*.

65. It follows that the Claimant had not taken any of her entitlement to 54.01 hours' annual leave.

(5) How many hours remain unpaid?

66. Although the Claimant was not paid anything in respect of accrued but untaken annual leave following the termination of her employment, she had been paid 48 hours' pay prior to the termination of her employment, in the form of two separate advance payments. It is the difference between these figures which remains unpaid. That amount is 6.01 hours.

(6) What amount should the Respondent be ordered to pay to the Claimant in compensation for accrued but untaken annual leave under **reg.30***?*

67. The Claimant's rate of pay as at the EDT was £8.91. This amount, multiplied by the 6.01 hours the Claimant was not compensated for upon termination, would result in an award of compensation under **reg.30** in the sum of £53.55. However, for reasons that will follow this sum is uplifted by 25% and the sum the Respondent is ordered to pay to the Claimant is **£66.93**.

Acas Code of Practice: uplift

68. Finally, the Claimant argued that any awards of compensation I would make should be uplifted by the maximum factor of 25% permitted under **s.207A** and **sch.A2** of the **Trade Union and Labour Relations (Consolidation) Act 1992**. Her argument was that a statutory Code of Practice applied (the **Acas Code of Practice on Disciplinary and Grievance Procedures**) once she lodged a grievance with her employer, and because the Respondent failed to deal with – or even acknowledge – her grievance on no less than three occasions, the Respondent unreasonably failed to comply with the **Code**. Mr Khan argued against this, submitting that there was no unreasonable failure because Mr Arcari had already communicated to the Claimant why she was not being paid every week and that the submission of a grievance would not have changed matters. He contended that I had no power to order an uplift in these circumstances.

69. I agreed with the Claimant and disagreed with Mr Khan. Mr Arcari's failure to acknowledge the Claimant's grievance might not have been unreasonable if that had been the only occasion, but I have found that this was followed by a second and third failure and that the grievance was simply ignored. In my

judgment, that was unreasonable. In neither acknowledging nor progressing the grievance the Respondent failed to comply with the **Code** completely. That too was unreasonable. In the circumstances of this case I considered that a full uplift of 25% on both awards of compensation was appropriate, and as I have already indicated, the sums the Respondent has ordered to pay have been adjusted to reflect this.

Employment Judge: Paul Smith
Date of Judgment: 08 October 2021
Entered in register: 12 October 2021
and copied to parties