



THE EMPLOYMENT TRIBUNALS

Claimants: Mr PB Freer (1)
Miss M Lofts (2)
Respondent: Mr N Hadlett

Heard at: Teesside Justice Hearing Centre **On:** 11 November 2021

Before: Employment Judge Morris (sitting alone)

Representation:

Claimants: In person
Respondent: In person

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The respondent, Mr Hadlett, was the employer of both claimants at the time material to these proceedings and it is he who is properly the respondent to these proceedings.
2. The complaint of the first claimant under section 23 of the Employment Rights Act 1996 that, contrary to section 13 of that Act, the respondent made unauthorised deductions from his wages as detailed in the Reasons below is well-founded.
3. In accordance with section 24(1)(a) of that Act the respondent is ordered to pay the first claimant the total amount of those deductions, being £907.21.
4. In accordance with section 38 of the Employment Act 2002 the above award is increased by £907.20
5. Thus, the total amount that the respondent is ordered to pay to the first claimant is £1,814.41.
6. The complaint of the second claimant under section 23 of the above Act that, contrary to section 13 of that Act, the respondent made unauthorised deductions from her wages as detailed in the Reasons below is well-founded.

7. In accordance with section 24(1)(a) of that Act the respondent is ordered to pay the second claimant the total amount of those deductions, being £623.96.
8. The complaint of the second claimant that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent did not pay her compensation in respect of her entitlement to paid holiday that had accrued but not been taken by her at the termination of her employment is well-founded.
9. In that respect, further to Regulation 30(4) of those Regulations, the respondent is ordered to pay to the claimant compensation of £677.16.
10. In accordance with section 38 of the Employment Act 2002 the above award to the second claimant is increased by £546.00.
11. Thus, the total amount that the respondent is ordered to pay to the second claimant is £1,847.12.
12. The awards referred to above have been calculated by reference to the respective claimants' gross pay and should there be any liability to income tax or employee's national insurance contributions in respect of any of those awards, that shall be the liability of the respective claimant alone.

REASONS

Representations and evidence

1. The claimants and the respondent, Mr Hadlett, all appeared in person and gave evidence themselves. The second claimant, also called Mr A Berisford to give evidence on her behalf. The parties and Mr Berisford relied upon witness statements and various documents, such as copies of written statements of particulars of employment, payslips and text messages, some of which were relevant to the issues in these claims. Mr Hadlett and Miss Lofts also submitted statements from certain individuals. They did not attend the hearing to give evidence and although I read those statements their content is not relevant to the issues in these claims.

The claimants' complaints

2. The complaint of the first claimant, Mr Freer, is as follows:
 - 2.1 The respondent had made an unauthorised deduction from his wages contrary to Section 13 of the Employment Rights Act 1996 ("the Act") in that he had not been paid in respect of the final period of his employment.
3. The complaints of the second claimant, Miss Lofts, are as follows:
 - 3.1 The respondent had made an unauthorised deduction from her wages contrary to Section 13 of the Act in that she had not been paid in respect of the final period of her employment.

- 3.2 Contrary to Regulation 14 of the Working Time Regulations 1998 (“the WTR”), the respondent had not compensated her in respect of her entitlement to paid holiday that had accrued but not been taken at the termination of her employment.

The issues

- 4 The issues in this case are as follows:

Both claimants

Unauthorised deduction from wages

- 4.1 Did the respondent pay the claimants the full amount that was due to each of them?
- 4.2 In particular:
- 4.2.1 Were the wages paid to either of the claimants less than the wages they should have been paid?
- 4.2.2 Was any deduction required or authorised by statute?
- 4.2.3 Was any deduction required or authorised by a written term of the contract?
- 4.2.4 Did either of the claimants agree in writing to the deduction before they were made?
- 4.2.5 How much is either of the claimants owed?

Miss Lofts

Holiday Pay

- 4.3 Did the respondent fail to pay Miss Lofts for the annual leave she had accrued but not taken when her employment ended?
- 4.4 In particular:
- 4.4.1 What was Miss Lofts’ leave year?
- 4.4.2 How much of the leave year had passed when Miss Lofts’ employment ended?
- 4.4.3 How much leave had accrued for the year by that date?
- 4.4.4 How much paid leave had Miss Lofts taken in the year?
- 4.4.5 How many days remain unpaid?
- 4.4.6 What is the relevant rate of pay?

Consideration and findings of fact

- 5 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.
- 5.1 Mr Hadlett operates The Bottled Note public house in Middlesbrough.
- 5.2 A search undertaken by the Employment Tribunal at Companies House revealed that a company named as The Bottled Note Limited (company registration number 10860708, registered office 55-57 Borough Road, Middlesbrough) was incorporated on 11 July 2017, and Mr N Haddlet is named as the sole director.
- 5.3 A further search revealed that a company named as The Boro Bottle Limited (company registration number 09928065) was incorporated on 23 December 2015 and was dissolved on 12 November 2019, and following the resignation of another director, Mr N Haddlet is named as the sole director.
- 5.4 The claimants were both employed as members of the bar staff at The Bottled Note. Mr Freer has had two periods of employment there, the first of which commenced in 2017. In August 2020 Mr Hadlett asked Mr Freer to return to work for him, which he did. His first shift was on 30 August 2020. Mr Freer's employment ended with his resignation on 8 May 2021.
- 5.5 Mr Freer's evidence is that he did not receive a contract of employment (or any written statement of particulars of employment) despite having asked Mr Hadlett for a contract; "multiple times we asked for contracts". In contrast, Mr Hadlett submitted to the Tribunal a copy of a document printed on notepaper of The Bottled Note, which is headed "Written Particulars of Employment"; the date of issue is said to be 7 November 2020. It states that the written particulars it contains "form your contract of employment, as required under the Employment Protection (Consolidation) Act 1978 (as amended)". In the place for "Employers Signature" is hand-written, N. Hadlett, and, in print, "on behalf of The Bottled Note Ltd". Alongside the place for "Employees Signature" is hand-written, B. Freer. It is provided that the employment commenced on "16/10/2020".
- 5.6 Mr Freer denies having received a contract of employment or a written statement of particulars. His evidence is that this Written Particulars document has been fraudulently created for the purpose of these proceedings; Mr Hadlett states that it is genuine. In oral evidence, however, Mr Hadlett did accept that Mr Freer had no current contract in relation to his most recent employment, which is the employment in issue

in these proceedings, as he had “not got round to it” because Mr Freer had just come back but, Mr Hadlett said, he did have had a contract “from his previous time”, which Mr Hadlett suggested was 16 October to 4 November 2020. That is consistent with 16 October 2020 being shown as the commencement date shown on the Written Particulars.

- 5.7 In support of his contention that his signature had been forged, Mr Freer drew my attention to the fact that in what is supposed to be his signature on the Written Particulars document provided by Mr Hadlett there is a full stop after the initial “B”, which he says he does not use in his signature as is shown in what Mr Freer accepts is his signature on two other documents that Mr Hadlett submitted to the Tribunal, which are respectively dated 10 December 2019 and 7 November 2020. Mr Freer further suggests that Mr Hadlett has dated the copy of the Written Particulars document 7 November 2020 to reflect the date of one of those letters, which Mr Freer accepts that he did sign on that date.
- 5.8 Each of the above two documents is in the form of a letter from Mr Freer, “To whom it may concern”. The address given at the top of each of the letters is that of “The Bottled Note” and the latter letter is printed on the letterhead of “The Bottled Note”. In neither case is there reference to The Bottled Note Ltd.
- 5.9 A copy of a payslip presented to the Tribunal by Mr Freer, which is dated 20 December 2020, appears to have been prepared by or on behalf of “The Bottled Note Ltd”; it shows neither any payments nor any deductions in that month.
- 5.10 When Mr Freer resigned from his employment, he took a photograph of his time sheet, a copy of which he presented to the Tribunal. That time sheet is headed “The Bottled Note” not The Bottled Note Ltd. Neither in documents submitted by Mr Hadlett before the hearing nor in oral evidence at the hearing did he dispute the accuracy of that time sheet or the photograph of it that Mr Freer had taken. As Mr Freer explained in evidence, that time sheet shows that in the last period of his employment from 12 April until 8 May 2021, he worked for a total of 110.5 hours. Neither is there any dispute between the parties that Mr Freer was paid a wage of £8.21 per hour.
- 5.11 Although Mr Hadlett did not dispute the accuracy of the above, in his written evidence (that applied also to the claim by Miss Lofts) he stated that “each employee was entitled to paid his or her full wage for the **work they had performed**” and that there was “no evidence of any work being unpaid”. This was echoed in his oral evidence when he said, “all work was paid for and holiday entitlement was paid up”. Although that was Mr Hadlett’s evidence, he did not produce any corroborative evidence to that effect. It is reasonable to assume that he would have documentary evidence to corroborate his evidence; for example, in the form of payslips or bank statements showing the money (which he does not dispute Mr Freer had earned and was therefore due to him) leaving his bank account

for transmission to the account of Mr Freer. As recorded above, Mr Hadlett did have other payslips with him at the hearing and, when I asked if there were payslips covering the hours in respect of which the claimants had presented their respective claims he was only able to answer, "There will be".

- 5.12 In the record of a previous preliminary hearing in respect of these claims, which was held on 10 August 2021, it is recorded that Mr Hadlett stated as follows

"Mr Hadlett made it clear during this morning's hearing that wages had not been paid to either claimant because, as Mr Hadlett put it, "They are liars and thieves". Mr Hadlett accused both claimants of stealing from him and consuming drinks which had not been paid for."

At that hearing, the Employment Judge explained that of the claimants was entitled to be paid his or her full wages for the work they had performed unless there was an agreement that such deductions could be made. He required Mr Hadlett to produce such signed, written confirmation of consent to deductions being made commenting, "If that cannot be done, then the claims for unpaid wages will inevitably succeed." Mr Hadlett did not produce any such written confirmation for the hearing today but nevertheless included within the papers for my consideration a document headed, "Breakdown of Outstanding Loans and Drinks Tabs for Brendon Freer as at 31/05/21, which showed a grand total of £1,107.00+.

- 5.13 Copies of text message exchanges between Mr Freer and Mr Hadlett on 20 May 2021 include the following:

Mr Freer	Will My wages be paid at all today?
Mr Hadlett	No
Mr Freer	Am I getting paid what I'm owed?
Mr Hadlett	In due course you will get what you are owed, provided that all company property has been returned by then.
Mr Freer	... why are you withholding my wages.
Mr Freer	None of us have seen/signed a contract if I'm not paid today I will be going to acas
Mr Freer	Are you paying me it's totally uncalled for?
Mr Hadlett	As I said I'm waiting on [V] coming back with the information. Your abrupt departure has made the process take longer ... I will chase her up, but can't do anything until I get the info.
Mr Freer	There is no info because we haven't signed a contract to say there was a notice period. Holding my wages is illegal those wages should be paid. Failure to do so I will be contacting acas first thing in the morning.

Mr Hadlett	Brendon you have to pay national insurance and income tax, a P45 needs to be prepared. These have changed because of your leaving. If you haven't got a contract where does it say that today is payday?
Mr Freer	I should have a contract I'm on the books
Mr Freer	If I don't that your fault and these should have been don't last week on cut-off date payments should have already been sorted
Mr Freer	But I'll leave it with you if it's not payed today I'll be contacting them first thing in the moring
Mr Hadlett	I do the payment once I got the information. [V] doesn't pay you I do.

- 5.14 In December 2016 Mr Hadlett asked Miss Lofts to work for him as he knew that she had worked in the hospitality industry for most of her adult life. Her employment commenced on 20 December 2016. She worked her last shift on 16 May 2021. On 18 May 2021 she sent a message to Mr Hadlett via their work 'group chat' stating, "I'll be handing my keys in tomorrow or at my earliest convenience". She intended that as her resignation and although Mr Hadlett has stated in the course of these proceedings that "she still hasn't informed us that she is leaving", it appears that at the time he did accept her message as being her resignation as he replied in the early hours of the following morning, 19 May, "Mel I'll call by your house for the keys. You appear to have quit based on other people's ideas"; in that same message he makes two other references to Miss Lofts having "quit" or "quitting".
- 5.15 On 26 May 2021 Miss Lofts sent an email to "thepayrollprovider" in which she explained, "Myself and another ex-employee [*whom I take to be Mr Freer*] were due our wages on Friday 20th of May 2021, outstanding holiday pay included and our P45's. Unfortunately we weren't paid and when we approached Nick to why he ultimately laid the blame with you ...". The claimant duly received a response from VL, "thepayrollprovider". She explained that she had spoken to Mr Hadlett that morning but that he wanted to speak to Miss Lofts and, "Unfortunately I cannot process any further payslips until I have received instructions from Nick directly. Your P45 and final payslip is with Nick". Miss Lofts then sent a message to Mr Hadlett, "Nick, [V] has confirmed that you have my final payslip and P45. If my [*pay*] isn't in my bank account in the next half hour then I'm afraid you've [*left*] me no other option than to go through Acas". On a Thursday (which I take to be 27 May) Mr Hadlett sent a message to Miss Lofts stating, "Hi, your wages are not ready yet. With your recent departure it has created more work for [V] and she hasn't made the adjustments yet".
- 5.16 In this exchange Mr Hadlett did not deny that Miss Lofts was due the wages that she was seeking to paid; neither did Mr Hadlett present to the Tribunal any evidence that such wages had been paid although, as recorded above, he did have other payslips with him at the hearing and, when I asked if there were payslips covering the hours in respect of which

the claimants had presented their respective claims he was only able to answer, "There will be".

- 5.17 I need not repeat what I have recorded above in relation to Mr Hadlett explaining at the previous preliminary that wages had not been paid to either claimant because they had been stealing from him and consuming drinks, and the observations of the Employment Judge in that connection. Suffice it that at the hearing today Mr Hadlett did not produce any written confirmation that Miss Lofts had agreed to any deduction being made from her wage but nevertheless, as he had done in the case of Mr Freer, included within the papers for my consideration a document headed, "Breakdown of Drinks Tabs for Melissa Lofts as at 31/05/21, which showed a grand total of £1,486.30.
- 5.18 As he did in relation to the claim of Mr Freer, Mr Hadlett submitted to the Tribunal a copy of a document printed on notepaper of The Bottled Note, which is headed "Written Particulars of Employment"; the date of issue is said to be 5 December 2018. It is in the same form as that of Mr Freer and states that the written particulars "form your contract of employment, as required under the Employment Protection (Consolidation) Act 1978 (as amended)". In the place for "Employers Signature" is hand-written, N. Hadlett, and, in print, "on behalf of The Bottled Note Ltd". Alongside the place for "Employees Signature" is hand-written what appears to be a signature, which I find illegible apart from the initial "M". It is provided that the employment commenced on "5/12/2018".
- 5.19 Miss Lofts denies having received a contract of employment or a written statement of particulars and refers in her witness statement to the document produced by Mr Hadlett as "a forged contract".
- 5.20 Mr Hadlett submitted another document to the Tribunal, which is dated 23 June 2019. It is in the form of a letter from Miss Lofts, "To whom it may concern". The address in the letterhead is that of "The Bottled Note". It bears a signature but, again, I can only read the initial "M".
- 5.21 Miss Lofts presented copies of a number of payslips to the Tribunal. Three appear to be from "The Boro Bottle Limited" and three from "The Bottled Note". No payslips for Miss Lofts have been presented to the Tribunal from "The Bottled Note Ltd".
- 5.22 During the last month of her employment, 15 April to 16 May 2021, according to her time sheet Miss Lofts worked 76 hours. Her rate of pay was £8.21 per hour.
- 5.23 Mr Hadlett did not dispute the above evidence as to those hours having been worked by Miss Lofts or her rate of pay but, instead, stated in his written evidence (that applied also to the claim by Mr Freer) "each employee was entitled to paid his or her full wage for the **work they had performed**" and that there was "no evidence of any work being unpaid".

As recorded above, in his oral evidence Mr Hadlett said, “all work was paid for and holiday entitlement was paid up”.

- 5.24 Miss Lofts’ evidence was that in the final holiday year of her employment she did not take any paid holiday. Mr Hadlett did not dispute that in his witness statement although in oral evidence he did say that both claimants had been paid everything that they were owed and specifically in relation to this claim, I repeat, “holiday entitlement was paid up”. He did not, however, produce any documentary evidence to corroborate that statement in relation to Miss Lofts’ claim for holiday pay and it is reasonable to assume that he would have some documentary evidence such as holiday requests, holiday records kept either by him or his payroll provider or payslips recording the payment of holiday pay. Furthermore, in oral evidence Mr Hadlett suggested that Miss Lofts had used up her holiday because she was on Furlough especially when (he said) she had refused to come into work, “she took holiday because she was not at work”; alternatively, he maintained that any holiday pay had been “covered by extra pay above Furlough pay”. None of these explanations is a sufficient answer to the statutory entitlement under Regulation 14 of the WTR that where the proportion of leave taken by a worker is less than the proportion of the year which has expired, the worker is entitled to a payment in lieu of untaken entitlement to leave.
- 5.25 On the evidence available to me I find, first, that in the final holiday year of Miss Lofts’ employment she did not take any paid holiday and, secondly, not having done so she did not receive any compensatory payment from Mr Hadlett in that respect.
- 5.26 Finally, there are points to be drawn from the evidence of Mr Berisford, whose evidence I found to be balanced and credible. He is also a publican in Middlesbrough.
- 5.26.1 First, his evidence was that the copy contracts that Mr Hadlett had produced for these proceedings looked like a contract template he had given him when they had been discussing contracts, “probably at the start of 2020”. At that time, he said, Mr Hadlett had not given contracts to his staff and, as a publican, he had suggested that Mr Hadlett might use his template. He reiterated that at that time Miss Lofts had not received a contract. In cross examination, Mr Hadlett put it to Mr Berisford that he had obtained the contract he had used from a company providing employment advice and resources and, “I didn’t use yours”. Mr Hadlett did not challenge Mr Berisford on the remainder of his evidence.
- 5.26.2 Secondly, Mr Berisford explained that his understanding was that Mr Hadlett was the claimants’ employer “as CEO of a company”, which was quite possibly the employer.

The law

- 6 So far as is relevant to the issues in these cases, the principal statutory provisions are as follows:

Deduction from wages – the Employment Rights Act 1996

“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.

Holiday pay – the Working Time Regulations 1998

“14 Compensation related to entitlement to leave

(1) This regulation applies 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(1) 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 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 —

$$(A \times B) - C$$

Where —

A is the period of leave to which the worker is entitled under regulation 13(1);

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.”

Employment particulars – Employment Act 2002

“38 Failure to give statement of employment particulars etc

(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2)

(3) If in the case of proceedings to which this section applies —

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and
(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by an worker) under section 41B or 41C of that Act,
the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.
(4) In subsections (2) and (3) —
(a) references to the minimum amount are to an amount equal to two weeks' pay, and
(b) references to the higher amount are to an amount equal to four weeks' pay.
(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.”

Application of the facts and the law to determine the issues

- 7 The above are the salient facts relevant to and upon which I based my judgment having considered those facts in the light of the relevant statutory law and the case precedents in this area of law.
- 8 In one respect, the principal question in these cases is the identity of the claimants' employer. It is appropriate, however, that I should consider, first, the monetary claim brought by the respective claimants.

Wages – Mr Freer

- 9 As recorded above, Mr Hadlett did not dispute the accuracy of the corroborative evidence submitted by Mr Freer in the shape of the photograph of his time sheet that he had taken, which shows that from 12 April until 8 May 2021, he worked for a total of 110.5 hours.
- 10 In similar vein, in the exchange of text messages between Mr Freer and Mr Hadlett, excerpts from which are set out above, Mr Hadlett does not deny that Mr Freer is owed wages. To the contrary, his responses include that Mr Freer would get what he was owed, the delay was caused by Mr Freer's abrupt departure but he would chase up his payroll provider and that he would do the payment once he got the information.
- 11 Similarly, at the previous preliminary hearing, Mr Hadlett did not suggest that Mr Freer (and Miss Lofts) were not owed wages but only that they had not been paid those wages because they had been stealing from him and consuming drinks for which they had not been paid. Despite the Employment Judge explaining that a written agreement to the making of such deductions would be necessary and requiring Mr Hadlett to produce such an agreement, he did not do so but from the document he has produced relating to "Breakdown of Outstanding Loans and

Drinks Tabs” it appears that he continues to be of the opinion that he is entitled to make such deductions, which he is not.

- 12 In contrast with Mr Hadlett’s position at the preliminary hearing that wages had not been paid in the above circumstances, his evidence at the hearing today changed to be that Mr Freer had been paid his full wage, but he did not produce any corroborative evidence to that effect. It is reasonable to assume that Mr Hadlett would have documentary evidence to corroborate his written statement and oral evidence; for example, in the form of payslips or bank statements showing the money (which he does not dispute Mr Freer had earned and was therefore due to him) leaving his bank account for transmission to the account of Mr Freer. As recorded above, Mr Hadlett did have other payslips with him at the hearing and I did not find satisfactory his answer that, “There will be” pay statements in respect of the disputed wages of the respective claimants.
- 13 In these circumstances, I am satisfied, on balance of probabilities, that Mr Freer was not paid the wages that were due to him in respect of the 110.5 hours’ work he performed from 12 April to 8 May 2021. He therefore suffered an unauthorised deduction from his wages contrary Section 13 of the Act and, that being so, his claim is well-founded.
- 14 Mr Hadlett has not disputed that Mr Freer’s rate of pay was £8.21 per hour. As such, the amount of the unauthorised deduction comes to £907.21. In accordance with section 24 of the Act I order that Mr Freer must be paid that amount.

Wages – Miss Lofts

- 15 Once more as recorded above, and recognising the risk of some repetition, in these proceedings Mr Hadlett has not denied that during the period 15 April to 16 May 2021 Miss Lofts performed the 76 hours’ work for which she is seeking to be paid.
- 16 Similarly, in the exchange of messages between Miss Lofts and Mr Hadlett he did not deny that she was due the wages that she was seeking and instead only explained that her wages were “not ready yet” due to the fact that her recent departure had created more work for his payroll provider and “she hasn’t made the adjustments yet”.
- 17 I repeat the above point that at the previous preliminary hearing, Mr Hadlett did not suggest that Miss Lofts was not owed wages but only that she and Mr Freer had not been paid those wages because they had been stealing from him and consuming drinks for which they had not been paid. Despite the Employment Judge explaining that a written agreement to the making of such deductions would be necessary and requiring Mr Hadlett to produce such an agreement, he did not do so but from the document he has produced relating to “Breakdown of Drinks Tabs” it appears that he continues to be of the opinion that he is entitled to make such deductions. I repeat that he is not.

- 18 Once more in contrast with Mr Hadlett's position at the preliminary hearing that wages had not been paid in the above circumstances, his evidence at the hearing today changed to be that Miss Lofts has been paid the wages due to her but, in the course of these proceedings he has not presented any evidence that such wages have been paid. I repeat the point made more fully above that it is reasonable to assume he would have been able to produce appropriate documentary evidence to corroborate his oral statement (examples of which I have given above) and he did have other payslips with him at the hearing.
- 19 In these circumstances, I am satisfied, on balance of probabilities, that Miss Lofts was not paid the wages that were due to her in respect of the 76 hours' work she performed from 15 April to 16 May 2021. She therefore, suffered an unauthorised deduction from her wages contrary Section 13 of the Act and, that being so, her claim is well-founded.
- 20 Mr Hadlett has not disputed that Miss Lofts' rate of pay was £8.21 per hour. As such, the amount of the unauthorised deduction comes to £623.96. In accordance with section 24 of the Act I order that Miss Lofts must be paid that amount.

Holiday pay - Miss Lofts

- 21 As indicated above, in accordance with Regulation 13 of the WTR, the starting point in any claim for unpaid holiday is to identify a claimant's "leave year". As is provided in that Regulation that leave year will begin on either, first, such date as may be provided for in a relevant agreement (such as a contract of employment) or, secondly, if there is no provision in a relevant agreement, on the date on which the worker's employment began and each subsequent anniversary of that date.
- 22 For the reasons explained below, I have found that Miss Lofts was not issued with a contract of employment or equivalent written statement of principal terms of employment. That being so, the second alternative applies and the start of the leave year is the anniversary of the date of the commencement of her employment on 20 December 2016. In this case, therefore, her relevant leave year began on 20 December 2020.
- 23 I have accepted above that Miss Lofts did not take any paid holiday during the period from that date until her resignation on 18 May 2021 and that not having done so she did not receive any compensatory payment from Mr Hadlett in that respect. As indicated above, I reject the explanations offered by Mr Hadlett that Miss Lofts had used up her holiday because she was on Furlough especially when she had refused to come into work, "she took holiday because she was not at work"; alternatively, that any holiday pay had been "covered by extra pay above Furlough pay".
- 24 Mr Hadlett has not disputed Miss Lofts' evidence that in that proportion of her holiday year from 20 December 2020 to 18 May 2021 she accrued an entitlement to some 82.5 hours' paid holiday and, therefore, at an hourly rate of £8.21, an entitlement to be paid £677.16.

- 25 In these circumstances, on the evidence available to me, I am satisfied, on balance of probabilities, that Miss Lofts was not paid compensation in respect of her entitlement to paid holiday that had accrued but not been taken by her at the termination of her employment. She is therefore entitled to a compensatory payment under Regulation 14 of the WTR of £677.16 and her claim to that effect is well-founded.
- 26 Further to Regulation 30(4) of the WTR Mr Hadlett is ordered to pay to Miss Lofts that amount of compensation of £677.16.

The identity of the employer

- 27 I now turn to consider the important question of the identity of the claimants' employer.
- 28 In that regard, I have given careful consideration to a recent judgment of the Employment Appeal Tribunal in its decision in Clark v Harney Westwood & Riegels [2020] UKEAT 0018_20_2112 in which the President reviewed many of the leading authorities in this area of the law including the following: Clifford v Union of Democratic Mineworkers CA [1991] IRLR 518, Secretary of State for Education and Employment v Bearman EAT [1998] IRLR 431, Autoclenz Ltd v Belcher SC [2011] ICR 1157 and Dynasystems for Trade and General Consulting Ltd v Moseley EAT 0091/17. So far as is relevant to the issues before me, the principles I draw from that case law, upon which I rely in making my decision as to this question of determining the identity of the employer, include those set out below. The majority of the following quotations are taken from the judgment of the President in the decision in Clark.
- 28.1 "Where the only relevant evidence is documentary, the question as to whether a person, A, is employed by B or C is a question of law: (Clifford)".
- 28.2 "However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed one of law and fact. This will require consideration of all the relevant evidence: (Clifford)".
- 28.3 Although the starting point for ascertaining the intention of the parties is usually a written contract, where the written document does not reflect the true intentions the parties, or is a sham, it may become necessary to look beyond the written document to the course of dealings between the parties and their subjective beliefs about the contractual arrangement. The key question in every case is what was "the true agreement between the parties", which "will often have to be gleaned from all the circumstances of the case" and "may be described as a purposive approach to the problem" (Bearman and Autoclenz).
- 28.4 The express terms of any written contract might not reflect the actual agreement between the parties (Bearman and Autoclenz).
- 28.5 It "may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B

and not C, as this could amount to evidence of what was initially agreed: (Dynasystems)”.

- 28.6 Per Lord Clarke in Clark (quoting, with approval, an excerpt from a previous judgment by Aikens LJ) “ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.”
- 29 In applying the above principles I need to determine whether the contracts of employment, copies of which were provided by Mr Hadlett, are (as he maintained) copies of genuine contracts entered into between the respective parties or are (as the claimants maintained) copies of documents fraudulently created for the purpose of these proceedings; which would render them in a category similar to a “sham” agreement referred to above.
- 30 I first restate, in no particular order, certain of my findings of fact above that I consider are of significance in answering this question:
- 30.1 In answering questions in oral evidence Mr Hadlett did accept that Mr Freer had no current contract in relation to his most recent employment (i.e. the employment that is the context for Mr Freer’s complaint) as he had “not got round to it” because Mr Freer had just come back.
- 30.2 I refer to the points I have drawn from the evidence of Mr Berisford as recorded above, particularly that at the time he and Mr Hadlett had been discussing contracts of employment, “probably at the start of 2020”, Mr Hadlett had not given contracts to his staff, which Mr Hadlett did not challenge.
- 30.3 In the formal responses (ET3) to these claims submitted by Mr Hadlett, although he denies being the employer of either of the claimants he does not make any reference to that being borne out by contracts of employment that they had entered into.
- 30.4 Similarly, in the record of the previous preliminary hearing referred to above, it is recorded that Mr Hadlett stated that he was never the employer and both claimants were in fact employed by The Bottled Note Limited, and that the Employment Judge informed him as follows:

“It is therefore for Mr Hadlett to produce to the tribunal any documentary evidence to confirm that he personally is not, and was not, the employer of either claimant. He must produce evidence to show that The Bottled Note Limited was the correct employer.”

Despite the importance of evidence of the identity of the employer clearly having been discussed at that preliminary hearing, there is no reference to Mr Hadlett immediately informing the Employment Judge at that hearing

that, in fact, he had in his possession signed contracts of employment from the claimants as evidence of the correct identity of the employer.

- 30.5 As I am no graphologist I will not get drawn into making a decision as to whether the signatures on the copy contracts of employment are the signatures of the respective claimants but I do accept Mr Freer's evidence that he does not insert a full stop after having written his initial "B" and give some weight to that evidence.
- 30.6 In the exchange of text messages between Mr Freer and Mr Hadlett referred to above, Mr Freer makes a number of references to a contract ("none of us have seen/signed a contract"; "we haven't signed a contract"; "I should have a contract"), which Mr Hadlett does not seek to correct by stating that there is a signed contract but only asks, "If you haven't got a contract where does it say that today is payday?"
- 31 A second consideration in relation to determining whether the copy contracts are forgeries or are genuine is the general credibility of the witnesses, as I have found it to be. For the reasons set out above, I have found that, contrary to his assertions, Mr Hadlett did not pay either of the claimants in respect of the final periods of their respective employments and did not pay Miss Lofts the compensation due to her in respect of accrued entitlement to paid holiday. In coming to those judgements I found the evidence of the claimants to be credible, supported as it was by the corroboratory evidence referred to above and, in the case Miss Lofts, by the evidence of Mr Berisford. In contrast, I did not find the evidence of Mr Hadlett to be credible, again for the reasons set out above including his changing his stance from that at the preliminary hearing that the claimants had not been paid their wages because they had stolen from him to his evidence before me that they had been paid their wages, and his failure to adduce any corroborative evidence that I have found it was reasonable that he would have in his possession if it existed. I do not suggest that because a party or a witness has not been entirely truthful in relation to certain matters necessarily means that the evidence he or she gives in relation to other matters is also false. That said, Mr Hadlett's lack of credibility in relation to the claimant's monetary claims is a matter to which I give some weight in deciding which of the parties is credible in relation to the existence of signed written statements of particulars of employment.
- 32 As in each of the issues in dispute in respect of which I have to form a judgment in this case, I must decide this issue of whether the copy contracts before me are genuine on the balance of probabilities. In light of my general findings of fact above and, particularly, the matters set out immediately above I am satisfied on the balance of probabilities that, on the evidence available to me, the copies of the contracts of employment produced to this Tribunal are not genuine.
- 33 Even if those copy contracts were to be genuine documents, that would not be an end to the matter. Indeed, as set out in the case law that I have quoted from above, that would only provide the starting point for ascertaining the intention of the parties and might not reflect the actual agreement between them. From that starting point it would be necessary to look at the dealings between the parties

and how they had acted throughout the relationship in order to determine what was “the true agreement” between them and, therefore, what, at the time the contract was concluded, was agreed between them as to the identity of the employer.

34 The above findings as to the validity of the copy contracts also have relevance in this connection but, in addition, there are the following points:

34.1 Also in relation to this exchange of text messages between Mr Freer and Mr Hadlett is the clear statement from Mr Hadlett, “[V] doesn’t pay you I do.” He does not suggest that it is the company, The Bottled Note Ltd, that pays Mr Freer.

34.2 Although it is a neutral point there is no dispute that it was Mr Hadlett who offered the respective claimants their employment, that they accepted those offers and that thus the respective contracts were formed.

34.3 I acknowledge that one of the copy payslips before me is said to have been provided by The Bottled Note Ltd but the majority refer only to The Bottled Note. Given that inconsistency in the payslips, I do not attach weight to the one that refers to The Bottled Note Ltd.

34.4 I repeat that it is similarly only the name “The Bottled Note” that is written on the top of the time sheet submitted by Mr Freer and on the top of the letters that Mr Hadlett submitted to the Tribunal dated 10 December 2019 and 7 November 2020, there being no reference on any of those documents to The Bottled Note Ltd.

34.5 In the Case Summary of the previous preliminary hearing referred to above it is recorded as follows:

“I today confirmed to both claimants the Companies House search shows the existence of that limited company and that Mr Hadlett is a director. I invited both claimants to confirm that they agreed to the title to the proceedings being amended to show the correct respondent as The Bottled Note Limited. I explained to both claimants that their claims for unpaid wages can only be brought against whoever was their legal employer. The fact that Mr Haslett was a director of the limited company and that he gave all instructions about how to do their work, when that work had to be done. where it had to be done and what arrangements would be made for wages to be paid, does not necessarily make him their employer. Ms Lofts confirmed that her last wage slip showed that payment had been made by The Bottled Note Limited. Nevertheless, both Ms Lofts and Mr Freer stated that they did not wish to amend the title to the proceedings to show The Bottled Note Limited as their employer, but both wished to continue with proceedings against Mr Hadlett personally.”

That is a very clear indication to the claimants of the risks that they faced if they were to proceed with their claims against Mr Hadlett if, in fact, their

employer was The Bottled Note Limited and he was only a director or manager giving them instructions in relation to their employment by that limited company. Despite the invitation from the Employment Judge that they might agree to an amendment to show the company as the correct respondent they declined to do so. I am satisfied that, given that clear invitation and explanation, I should give weight to the claimants' insistence that Mr Hadlett was their employer and is properly the respondent to these proceedings. I am satisfied that (paraphrasing certain of the quotations from the case law above) this demonstrates, first, that the parties seamlessly and consistently acted throughout the relationship as if the employer was Mr Hadlett and not The Bottled Note Limited and this does amount to evidence of what was initially agreed and, secondly, that the actual agreements, at the time the respective contracts were concluded, were that the claimants' employer would be Mr Hadlett.

35 Drawing my consideration of this question of the identity of the claimants' employer to a conclusion, and accepting that there is a degree of repetition in this summary paragraph, I am satisfied, with reference to the quotations in the case law set out above, that I have before me a mixture of documents and facts to consider and, therefore, the question is a mixed one of law and fact. Although the starting point for ascertaining the intention of the parties is usually a written contract where the written document is not genuine or does not reflect the true intentions the parties or is a sham it becomes necessary to look at "the course of dealings between the parties and their subjective beliefs about the contractual arrangement" in order to answer the key question of what was "the true agreement between the parties", which will often have to be gleaned from all the circumstances of the case. I am satisfied that throughout the relationship between the parties to these proceedings they "consistently acted throughout the relationship as if the employer" was Mr Hadlett and not The Bottled Note Limited. In these circumstances it is my judgment that what was agreed between the parties at the time that the respective contracts of employment were concluded was that Mr Hadlett was to be the employer.

36 In light of the above, my answer to this important question is that Mr Hadlett was the claimants' employer and it is he who is properly the respondent to these proceedings.

Failure to give a statement of employment particulars

37 I have found above that I am satisfied that the copies of the contracts of employment presented to this Tribunal by Mr Hadlett are not genuine, and in that regard I accept the evidence of each of the claimants that they did not receive from Mr Hadlett a contract of employment or other written statement of particulars of employment as is required by section 1 of the Act.

38 As set out above, section 38 of the Employment Act 2002 provides, in essence, that if, when certain proceedings were begun, an employer was in breach of his duty under section 1 of the Act to provide a statement of employment particulars, a tribunal must (unless exceptional circumstances would make it unjust or inequitable do so) increase any award by the minimum amount equal to two

weeks' pay and it may, if it considers it just and equitable in all the circumstances, increase the award by an amount equal to four weeks' pay. The proceedings to which that section applies include the complaints that have been brought by these claimants in respect of unauthorised deductions from their wages and breach of the WTR including in respect of holiday pay.

- 39 Such an award is not dependent upon a claim having been brought by either claimant. It is sufficient that I make a finding that Mr Hadlett was in breach of section 1 of the Act at the time the proceedings were begun, which I have done.
- 40 I am satisfied that exceptional circumstances do not apply in these cases that would make an award unjust or inequitable and, therefore, I am required to make at least the minimum award and may make the higher award. In deciding which award to make, I have brought into account that Mr Hadlett is a small employer but, against that, I have accepted the evidence of Mr Freer that, "multiple times we asked for contracts". I am satisfied that Mr Hadlett not having responded to those requests, it is appropriate to make an award of the higher amount of four weeks' pay to each of the claimants.
- 41 As neither of the claimants has normal hours of work, I have had to average out their respective wages from the evidence that I have available to me in order to arrive at a sum equivalent to a week's pay.
- 42 That is relatively straightforward in the case of Mr Freer as I have found that, in the last four weeks of his employment he earned an average of some £226.80 per week and, therefore, an amount equal to four weeks' pay is £907.20. In accordance with section 38 of the Employment Act 2002, I increase the award made to Mr Freer by that amount.
- 43 In the case of Miss Lofts I have found that during the period from 15 April to 16 May 2021 she earned £623.96. That averages out to some £136.50 per week and, therefore, an amount equal to four weeks' pay is £546.00. In accordance with section 38 of the Employment Act 2002, I increase the award made to Miss Lofts by that amount.

Conclusion

- 44 In conclusion, my judgment in respect of the claimants' complaints is as follows:

The respondent

- 44.1 The respondent, Mr Hadlett, was the employer of both claimants at the time material to these proceedings and it is he who is properly the respondent to these proceedings.

Mr Freer

- 44.2 Mr Freer's complaint under section 23 of the Act that, contrary to section 13 of the Act the respondent made unauthorised deductions from his wages as detailed above is well-founded.

- 44.3 In accordance with section 24(1)(a) of the Act the respondent is ordered to pay the claimant the total amount of those deductions, being £907.21.
- 44.4 In accordance with section 38 of the Employment Act 2002 the above award is increased by £907.20.
- 44.5 Thus, the total amount that the respondent is ordered to pay to Mr Freer is £1,814.41.

Miss Lofts

- 44.6 Miss Lofts' complaint under section 23 of the Act that, contrary to section 13 of the Act the respondent made unauthorised deductions from her wages as detailed above is well-founded.
- 44.7 In accordance with section 24(1)(a) of the Act the respondent is ordered to pay Miss Lofts the total amount of those deductions, being £623.96.
- 44.8 Miss Lofts' complaint that, contrary to Regulation 14 of the WTR, the respondent did not pay her compensation in respect of her entitlement to paid holiday that had accrued but not been taken by her at the termination of her employment is well-founded.
- 44.9 In that respect, further to Regulation 30(4) of the WTR, the respondent is ordered to pay to Miss Lofts compensation of £677.16.
- 44.10 In accordance with section 38 of the Employment Act 2002 the above award to Miss Lofts is increased by £546.00.
- 44.11 Thus, the total amount that the respondent is ordered to pay to Miss Lofts is £1,847.12.
- 45 The awards referred to above have been calculated by reference to the respective claimants' gross pay and should there be any liability to income tax or employee's national insurance contributions in respect of any of those awards, that shall be the liability of the respective claimant alone.

EMPLOYMENT JUDGE MORRIS

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE
ON 26 November 2021**

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