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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100575/2016

Claimant: Mr L Fuyal

Respondent: Mr Rahul Randev & Mr Pravesh Randev t/a The Eagle Lodge

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

In accordance with the power set out in Rule 69 of the Employment Tribunal Rules of Procedure 2013, 1hereby correct the clerical error in the Judgment sent to the parties on 13 December 2017:

Judgment

Page 2 Line 2 Delete: "(One Thousand, Two Hundred and Twenty Nine Pounds)"

Insert: "(One Thousand, Nine Hundred and Twenty Nine Pounds)"

An amended version of the Judgment is attached.

Important note to parties:

Any dates for the filing of appeals or reconsideration are not changed by this certificate of correction or the amended Judgment or Case Management Order. These time limits still run from the date of the original Judgment or Case Management Order, or if reasons were provided later, from the date that those were sent to you.

Employment Judge: Mary Kearns

Date: 16 February 2018

Sent to parties: 21 February 2018

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/41 00575/201 6

Held in Glasgow on 8, 9, 10 and 11 May and 30 and 31 October 2017

Employment Judge: Mrs M Kearns (sitting alone)

Mr L Fuyal	**Claimant** **Represented by:** **Mr M Allison** **Solicitor**
Mr Rahul Randev and Mr Pravesh Randev t/a The Eagle Lodge	**Respondents** **Represented by:** **Ms J Barnett** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was that:-

(1) The claimant was unfairly dismissed by the respondents and the respondents are ordered to pay to the claimant the sum of **£5,258 (Five Thousand, Two Hundred and Fifty Eight Pounds)** in compensation for unfair dismissal.

The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 do not apply to this award.

(2) The respondents are ordered to pay to the claimant the sum **of £1,471 (One Thousand, Four Hundred and Seventy One Pounds)** in payment for annual leave accrued but untaken on termination of employment.

(3) The respondents unlawfully deducted sums from the claimant's wages and are ordered to pay to him the sum of **£1,929 (One Thousand, Nine Hundred and Twenty Nine Pounds).**

REASONS

1. The respondents are a partnership engaged in the operation of The Eagle Lodge and a number of other restaurants in and around Glasgow. The claimant, who is now 34 years of age, worked for the respondents as a chef. On 29 January 2016 the claimant presented an application to the Employment Tribunal in which he claimed unfair dismissal; holiday pay; arrears of pay and other payments. The respondents resisted all claims.

Issues

2. The Tribunal identified the following issues:-

(i) Whether the contract of employment was tainted by illegality in performance and consequently unenforceable;

(ii) Whether the claimant was dismissed;

(iii) If so, whether that dismissal was unfair;

(iv) If so, the remedy to which he is entitled;

(v) Whether the claimant is owed holiday pay;

(vi) Whether the claimant is owed arrears of pay;

(vii) Whether other payments are due to him.

Evidence

3. The parties lodged a Joint Bundle of Documents ("J"). The Tribunal heard evidence from the claimant and Mr Gokrana Raj Panthi, a former colleague at the Eagle Lodge. The respondent called the following witnesses: Mr Rahul Randev, Mr Pravesh Randev, Mrs Marion Rumsby, Mr Graeme Brown and Ms Pauline Monaghan.

Findings in Fact

4. The following facts were admitted or found to be proved:-

5. The respondents are brothers who work in partnership running a number of restaurants in and around Glasgow. One of their restaurants is The Eagle Lodge, 2 Hilton Road, Bishopbriggs, G64 2PN. In total the partnership employs around 100 staff, 40 of whom work at the Eagle Lodge. The partnership employs a number of workers from abroad. Since 8 July 2009 Mr Rahul Randev has held an A rated Sponsor Licence from UK Visas and Immigration which permits the firm to employ migrant workers. Many of the chefs and kitchen staff at the restaurant come from abroad, often from the Indian sub-continent.

6. The claimant was born in Nepal on 21 August 1 983. At the time of termination of his employment with the respondents he was 32 years of age and had completed three years' service. He came to the UK in or around September 2010 on a sponsorship visa. He initially worked for another employer, but he moved to the respondents' employment as a chef on 6 February 2012. The move took place through a recruitment agency called Five Star International, which specializes in placing migrant workers with employers. Mr Rahul

Randev uses the agency to engage all the firm's migrant employees. In addition to finding and recruiting the employees the agency has a legal department which assists them with visa applications and other immigration issues.

7. Initially the claimant was not clear how his pay was being calculated and for the first six or seven months he received his weekly wages in cash (J77 & 78). He was receiving around £270 per week at this time. However, his pay fluctuated and when he queried this he was told that adjustments had been made for accommodation or travel. Between 2 February and 22 April 2012, although the claimant was paid in cash net, Mrs Rumsby, the firm's accountant who handled payroll had not been notified and tax and National Insurance were not remitted to HMRC for this period. The claimant assumed tax and National Insurance had been deducted and remitted to HMRC as his gross salary would have been £346.15 and he was only receiving around £270. With effect from 23 April 2012 the claimant's salary was put through the books and tax and National Insurance were paid on it by the firm's accountant Mrs Rumsby when she received notification from his manager. The sums paid to the claimant fluctuated due to adjustments for accommodation and travel. He believed he was being paid lawfully. After around six months, Five Star International advised that he should be paid a simple gross figure without adjustments by BACS into his bank account and this was done. The claimant was not, at any stage paid for any overtime worked by him, nor were other migrant employees.

8. The claimant has recently established from HMRC (J84) that their records show he received the following sums: **'2012 - 13** from P&R Randev t/a The Eagle Lodge from 23 April 2012 to 21 October 2012 Pay £8,089.90 Tax £806.00; from Mr Rahul Randev, Mr Pravesh Randev from 22 October 2012 to 05 April 2013 Pay £6,820 Tax £645.80; **2013 - 4** from Mr Rahul Randev, Mr Pravesh Randev from 6 April 2013 to 5 April 2014 Pay £17,584.80 Tax £1,627; **2014 - 15** from Mr Rahul Randev, Mr Pravesh Randev from 6 April

2014 to 5 April 2015 Pay £17,999.80 Tax £1,598; **2015-16** Mr Rahul Randev, Mr Pravesh Randev from 6 April 2015 to 8 November 2015 Pay £9,346.05 Tax £767.20'.

9. Some months after the claimant started work he was issued with a "*statement of terms and particulars of employment"* (J96 to 101) which he signed. His signature was witnessed by Dan Doherty of Five Star International. The statement was dated 6 February 2012. In relation to pay, the statement stated at paragraph 2 under the heading *[14]Remuneration", "Your total Remuneration shall be £18,000.00"* The paragraph went on: *"Your wage shall be paid monthly calculated at the gross yearly rate of £18,000. 00. Your salary shall be reviewed annually* "The claimant was in fact paid weekly, not monthly. The clause also stated: *"The Employer reserves the right in its absolute discretion to deduct from your pay any sums which may be due by you to the Employer including without limitation any overpayments or loans made to you by the Employer or losses suffered by it as a result of your negligence or breach of the Employer's rules and regulations. Any such deductions will be notified to you beforehand and itemised on your payslip. "*

10. Under the heading *"Hours of Work"* the statement provided at paragraph 5: *"Your working week comprises 40 hours. You are required to work such hours as are necessary for the discharge of your duties. The licensed trade industry is a seven-day week operation. Hours of working in restaurants vary from week to week and overtime working is frequently required. You must be prepared to work such hours as may be necessary and the management will give as much notice as possible of such requirement. Any errors in payment must be taken up with your manager immediately. Any errors will be rectified as soon as possible."* The contract also provided that the holiday year ran from January to December. Notice on both sides was one week for each year of service.

11. Paragraph 14 of the contract is headed *'Working Time Regulations'.* It states: *"You agree that the limit of an average working time of 48 hours, including overtime, for each 7 day period as set out in Regulation 4 of the Working Time Regulations (as amended) shall not apply to your employment.* "The claimant normally worked 55 hours per week (J103). However, he was not, at any point paid for overtime worked over 40 hours per week.

12. The claimant repeatedly raised with Mr Rahul Randev an issue with his wages. Although Mrs Rumsby printed payslips every week, these were handed out by others and not always received by the claimant unless he made a specific request. Under his contract the claimant was earning £18,000 per annum for a 40 hour week but in reality he was working 55 hours per week. Because he and the other migrant employees were salaried and were not paid for overtime the claimant considered that they were not being paid property for the number of hours they were working. In or about 2014 the claimant and some of the other kitchen staff raised this with Mr Rahul Randev. Mr Randev's proposed solution was that he would change the arrangements for tips so that the kitchen staff participated as well. The effect was that from around the end of 2014 the claimant received around £40 per week in tips. The procedure brought in by Mr Randev at that time was that each week, normally on a Saturday, he would make up envelopes for staff and put into them the tips he was allocating in cash. He normally allocated the claimant around £40. He would do the same for the other staff. Pauline Monaghan or Graeme Brown would then come through, pick up the envelopes and distribute them to the staff. It was Mr R Randev who decided how much the staff were given in tips and how the tips were divided. The claimant did not have any say in how much he was given. The claimant did not know that tax and National Insurance were not being paid on these tips and did not acquiesce in any such arrangement. He assumed that he was being paid in a lawful way and that the respondents were dealing with PAYE in the usual way. He now understands that where an employer dictates the amount an

employee receives he (the employer) is responsible for ensuring that the relevant PAYE payments are made. (J56 para 2).

13. In or about late September 2015 the claimant mentioned to Mr Rahul Randev that he was making an application for indefinite leave to remain in the UK C'ILR") and would require a letter from him confirming the details of his ongoing employment. Mr Randev indicated that the claimant would have to *"sign a form"* before he would give him the letter. Mr Randev then presented the claimant with a document (J45) entitled *"The Eagle Lodge Indefinite Leave to Remain (ILR) Undertaking"* and told him to sign it. He made it clear to the claimant that he would only get his letter for the ILR if he signed the undertaking and if he did not sign it his employment may not continue. The document was in the following terms:-

> *"Upon being granted Indefinite Leave to Remain in the United Kingdom, you acknowledge that the Company will have made a significant financial investment in obtaining your immigration status. In consideration of this, you agree that if your employment terminates after the Company has incurred liability for the cost of your ILR status(and all other previous costs associated with your immigration including your visa/work permit/sponsorship) you will be liable to repay some or all of the fees, expenses and other costs (the Costs) associated with your immigration status up to and including the attainment of your ILR.*
>
> *You shall repay the company as follows:-*
>
> *(a) If you resign from your position with the Company, or if your (employment is terminated on the grounds of gross misconduct, within one month of you being granted ILR status you will be required to pay 100% of the Costs WHICH AT PRESENT STAND AT £4,200. The amount that you will be required to*

repay the Company will be reduced by 1/18th for each complete month you have worked since you obtained your ILR status.

You shall not be required to repay any of the costs if:~

(a) You left the Company more than 18 months after being granted ILR status;

(b) The Company terminates your employment, except where it was entitled to and did terminate your employment summarily; or

(c) You terminate your employment in response to a fundamental breach by the Company.

You agree to the Company deducting the sums under this clause from your final salary or any outstanding payments due to you. "

14. The claimant was told to sign the document to say that he had read, understood and agreed to its terms. Initially, he refused to sign it. He was very unhappy about it because he had paid his own initial visa fee and the fee for his ILR application. He had also paid UK Visas and Immigration for his visa extension himself. He therefore did not understand how the £4,200 referred to in the undertaking had been calculated and he was given no supporting evidence. However, Mr Rahul Randev told him that if he did not sign it then the respondents would not complete the letter he needed to secure his ILR. He implied that the claimant's employment may not continue if he refused to sign. The claimant accordingly signed the document on 29 September 2015. He felt coerced into doing so and did not consent to it voluntarily. Although the document asserts that the respondents had paid costs 'at present standing at' £4,200 toward the claimant's visa/work permit/ sponsorship, this was not correct. The claimant had paid his own UK Visas and Immigration

fees. Mr Randev had paid an invoice to Five Star International dated 26 January 2015 (J121) for 7?e: *Lekha Nath Fuyal: Work in connection with extension of Tier 2 (General) Visa, including preparation and submission of application."* The invoice was for £1,000 plus VAT. However, there were no other costs paid by the respondents which were specific to the claimant. Once the claimant had signed the document on 29 September 2015 Mr Rahul Randev provided the letter he needed (J48) on 5 October 2015. He stated therein that the claimant had been employed by the respondents from 6/2/2012.

15. On or about 11 October 201 5 the claimant requested two days' annual leave from the Head Chef, Mr Graeme Brown. He told him he really needed the two days for his family. The claimant was entitled to 5.6 weeks' annual leave per year. So far, in the year to October 2015, the claimant had taken one week of his annual leave entitlement. The claimant understood from the other staff that it would not carry forward to the next year. Staff are not permitted to take holidays in December because it is too busy. November was also looking busy, so the claimant was concerned that he might lose his remaining leave. The Head Chef refused the claimant's leave request saying that he had staff shortages. The claimant made clear that he was unhappy and the Head Chef called Mr Rahul Randev who said he would come and speak to the claimant. The claimant carried on with his work.

16. When Mr Randev arrived, he and the claimant went to the banquet hall for a discussion, which took place in Hindi. The claimant told him he was upset about being refused two days' leave. He also asked Mr Randev for a salary review. He said that he was working long hours and this was difficult for him but if he had to do the long hours he wanted to request that payment for them be included in his wages. He asked for an increment to cover his additional hours. The claimant was in fact normally working 55 hours per week but only being paid for 40 hours. He said he should be getting at least £400 per week after tax. The claimant said that if he was not paid for his additional hours and

not allowed to take his holidays he would consider leaving. Mr Randev said to him: *"How can you leave?"* He reminded him that he had signed a contract before finalising his ILR application undertaking to stay and he could not just leave. The claimant felt trapped. Mr Randev then asked the claimant what would make him happy so he would want to stay. The claimant said the increment to cover his additional hours plus two days' leave. Mr Randev said he could not give this to him, but that what he could do, and had done for others was to put 16 hours on his payslip and pay the remainder cash in hand. The claimant did not agree to this suggestion from Mr Randev. He told Mr Randev that his payment must all be done properly through the bank. (The claimant was planning to purchase a property and needed evidence of his salary on his payslips). Mr Randev's suggestion was not adopted. After that, the claimant calmed himself down, went downstairs and started working. He was worried that Mr Randev might jeopardise his ILR (which had not yet been granted) by contacting Immigration and withdrawing his support for the application. The claimant continued to work for the respondents for a further two weeks.

17. The claimant was paid the sum of £294.81 by the respondents in net salary by BACS on 12 October 2015. This was £346.15 gross being payment for 40 hours. His salary was always paid a week in arrears. This was the last payment he received from the respondents.

18. The claimant's ILR was granted on 13 October 2015. He paid £400 to Five Star on 15 October 2015 for this. He received his ILR documents on 16 October 2015. The claimant was not paid his weekly wages by the respondents on 19 October 201 5. He raised this non-payment repeatedly with the Head Chef Graeme Brown, who said he would contact Mr Randev and sort it out. Each time the claimant chased this with the Head Chef he was told Mr Randev had not replied. Eventually the Head Chef said that Mr Randev was not contactable and that the claimant could not meet him. The claimant then tried to contact Mr Randev himself to request payment of his wages but

he could not get any reply and did not receive payment. The claimant was also not paid his wages on 25 October. He attempted to telephone Mr Randev on that date to find out why he had now not been paid for two weeks with no explanation and Mr Randev was not returning his calls. Finally, late on or about 25 October 2015 Mr Rahul Randev came into the restaurant and the claimant said to him and to the Head Chef that he could not return. His last working day was 25 October 2015. He had not been paid for two weeks with no explanation and was running out of money. He had realised after the first week his wages were not paid that he would probably have to look for another job and he had begun looking for alternative work. Mr Randev asked him to put his resignation in writing. The claimant did so hoping he would then receive his salary. The reasons for his resignation were the continual requirement that he work additional hours for the same low pay and Mr Randev's refusal to properly address this on 11 October 2015; the perceived likelihood that he would be unable to take his remaining annual leave and would lose it; the fact that he had been coerced into signing the 'Indefinite Leave to Remain Undertaking' on 29 September 2015. The fact that this undertaking required him to 'repay* unspecified "costs" of £4,200 to the respondents if he left, most of which had not been genuinely incurred for the purposes stated therein. Finally, the last straw was the non-payment of his wages for two weeks with no explanation in circumstances where Mr Randev did not take or return his calls and did not instruct the Head Chef to tell him what was going on. At the point his employment terminated, the claimant was owed two weeks' wages plus his lie week, making a gross total of £1 ,226. He was also owed 3.6 weeks' holiday pay amounting to £1,471 . The claimant did not work his notice.

19. The claimant emailed Mr Rahul Randev later on 27 October 2015 with the subject heading *"Resignation"* (J 38) in the following terms:-

> *"Dear sir..., I would like to mention a few experiences of working with yours management. I left job because you make fake contract before*

My ILR (which I still can explain on right place upon request) I was expecting to payed my wedges on time. You still have to payed my 4 week wedges & 3 week holiday. Head chef say that we was trying to call you & text you many time. I try call you Sunday on 25/10/15 but you never take proper response. How ever.

To Rahul Randev
Management of oregano

Dear sir I would like to tender my resignation upon yours ask. Of the last week conversation with you on 18/9/15 till 2 week notice. However I wold like to thanks management of oregano that provide me with to working operchuneat. I wold like to thanks all the team members for all the help saport cooperation that they have given to me during my service. I wold like to mansion my 4 week weages and 3 week pending holidays to be payed on my account....Any thing you want added reply me. If no then I have to get help from legal remedy.

Yours sincerely
Lekanath Fuyal"

20. On the same date the claimant emailed Teresa Doherty of Five Star International. In his email he stated: *7 left job because he make fake contract which wasn't fear. I request him to pay my panding wedges after my ILR & I was expecting to have days off. ..He wasn 't positive to do that. ..when he stop pay me then I left job.,.how ever he still need to pay my 4 week weages and 3 week holiday..."*

21. Mr Rahul Randev wrote an undated response to the claimant's email in the following terms:-

"Dear Lekhanath

RESIGNATION FROM EMPLOYMENT

I write further to your recent communications and confirm that the Company accepts your resignation. I do not however accept your position that you signed a fake contract prior to receiving notification of your ILR.

For the avoidance of doubt, all sponsored workers reaching their ILR status within the company are required to sign the undertaking to which you refer. Our legal advisers drafted this document as the Company experiences a high level of attrition with sponsored workers following attainment on their ILR status.

As you have acknowledged within your communications, the Company, through your sponsorship has provided you with the opportunity to work within the UK. To do so, requires a significant amount of investment on our part, costs attributed to your employment alone exceed £4,000. [amended in hand-writing to £4,200.]

It is correct we have withheld wages due to you. This is on accordance with your contract of employment and your signed undertaking. As there remains an outstanding balance of £2,555. We have passed the matter to a debt collecting company who will recover these costs on our behalf. Action taken by the debt company will include legal action through the small claims court,

In addition, we will write to UK Immigration to inform them that you resigned from our employment within four days of receiving your ILR status.

22. The figure of £2,555 was calculated by Mr R Randev on the basis that he was withholding three weeks' wages and three weeks' holiday pay net at £294 per week. At the time of his resignation the claimant was earning £18,000 per annum with the respondent plus a share of tips amounting to around £40 per week. He was working an average of 55 hours per week. (J103). His gross weekly pay was £346.15 plus £40. His net weekly pay was £294.81 . Within a few days of the termination of his employment with the respondents the claimant had secured employment at the Devoncote Hotel on Sauchiehall Street, working 30 hours per week at £10 per hour. His gross pay was £300. His net weekly pay was £265. On 27 October 2016 the claimant began working 45 hours per week for the Village Hotel and Spa at Atlantic Quay. His salary is £22,000 per annum.

Observations on the evidence

23. Where the claimant's evidence conflicted with that of the respondents' witnesses, particularly Mr Rahul Randev I preferred the claimant's account. The claimant made appropriate concessions. His evidence about what happened with tips and migrant workers being made to work far in excess of their contracted hours and receiving less favourable treatment was corroborated by Mr Panthi, whose evidence I also accepted. By contrast, Mr Rahul Randev's evidence was unsatisfactory and inconsistent. He contradicted himself in relation to whether staff were required to work hours unpaid in excess of their contractual hours. In cross examination he stated all of the following: that there was no requirement for his business to have staff working more than 40 hours; that the general practice was that people were put on the rota for 40 to 50 hours by the Head Chef; that they worked an average of 45 hours; and then again that he did not need staff to work more than 40 hours. He also contradicted himself regarding the claimant's employment start date. Having stated in a formal letter for UK Visas and Immigration on 5 October 2015 and in his ET3 that the claimant's employment had begun on 2 February 201 2, he then changed this in evidence to 23 April

2012. Mr Allison suggested that the change was occasioned by Mr Randev' s sight in the bundle of the claimant's letter of 2 February 2017 from HMRC. The 23 April 2012 date coincides with the date from which tax and National Insurance were paid on the claimant's salary per that letter. I concluded from the numerous contradictions in his evidence that he was not a frank and truthful witness.

24. The most important conflict between the claimant's evidence and that of Mr R Randev concerned the content of the conversation of 11 October 2015. The claimant accepted that he had asked that his salary be raised to £400 per week after tax. Ms Barnett put to the claimant in cross examination that Mr Randev would say that the claimant did ask for £400 after tax but that he asked Mr Randev to put through only 16 hours per week and wanted the remainder of his working hours paid cash in hand. The claimant vehemently denied this. He said that he had told Mr Randev that his payment must be done through the bank but that Mr Randev had said he would be paying it cash in hand and putting through 16 hours the same way he had done for others. He was clear that this suggestion had come from Mr Randev, that he had not agreed to it and that it was not adopted. Indeed, it was accepted by the respondents that from that point Mr Randev did not pay the claimant at all. Ms Barnett put to the claimant that the suggestion had come from him (the claimant) that only 16 hours went through the books and the remainder was paid cash in hand but that Mr Randev had refused to do it because it was "too *much in terms of defrauding the Revenue".* In his witness statement Mr Randev said *"The £50 cash was the most I could put through for him cash in hand. Anything more than that was too much a risk and not a jeopardy I was prepared to* make". This statement ppeared to suggest llidl Mr Randev was not averse to defrauding the Revenue but did not want to risk getting caught, which did not reflect well on his credibility. Indeed, he elaborated on this in cross examination and volunteered (in answer to a question about when he had introduced the ILR undertaking) that when migrant workers requested him to put through fewer hours and pay them the balance in cash he was

sometimes able to help and put it through for them, but it depended on the level. This reflected poorly on Mr Randev's credibility. The date of conversation was agreed by both parties to be 11 October 2015. I did not conclude that the claimant had resigned verbally at that meeting, for all the reasons set out below and not least because at that date his ILR had not yet been granted and received by him.

25. There was confusion on the part of all the witnesses about the date of the claimant's resignation and I have done my best on the evidence available, concluding that the claimant resigned late on 25 October 2015. The respondents' position was that the claimant had verbally resigned on 11 October 2015, but they accepted that he had worked in the premises after that date. It was clear from a text the claimant had sent the Head Chef on Monday 12 October that he was still employed on that date as his message said that he would be 20 minutes late. On 13 October the Head Chef texted him to ask if he had lost his bus pass. A third text from the claimant to the Head Chef dated only *"Yesterday 22:04"* stated: *"Thanks you so much for all the good time chef. Had really wander full good experience with you. I have been explane everything with you before I left that job about my payment. I was happy to work with you if he payed 4 week wedges and 3 week holiday I have email to Rahul but he never reply me. Anyway you will be proper wetness for I'm going to cases him shortly.* " Although this text was clearly sent after the claimant's resignation, nothing on the copy lodged assisted with the date. Doing my best to try and piece the evidence together I concluded that it was sent at 22:04 on the claimant's last working day of 25 October 2015. The claimant's email of 27 October 2015 refers to four weeks' unpaid wages being part of the reason for his resignation. It also refers to an attempted call on 25 October to Mr Randev. Mr R Randev's undated letter at J40 states that wages had been withheld from the claimant. Thus, he must have worked for at least one week and on his own evidence probably two before he resigned. I did not accept that he resigned verbally on 11 October and then worked on as that made no sense in the circumstances. I also

thought it unlikely he would have resigned before he received his ILR on 16 October because his resignation might have put the ILR in jeopardy.

26. With regard to the other witnesses, Mr Pravesh Randev's evidence was so evasive as to be of little assistance to the Tribunal. Mrs Marion Rumsby, the respondents' accountant was a professional and honest witness who did her best to give frank evidence. She was clearly unaware of some of the respondents' business practices. She was responsible for reporting to HMRC but did not deal with tips. Generally, Mrs Rumsby would take the information she was given from Mr R Randev and the managers at face value and simply process it accordingly. I did not find Mr Brown to be a satisfactory witness. His evidence appeared tailored to support Mr Rahul Randev's claim that he was paying the claimant an additional cash in hand payment. He was unable to explain how he could possibly have known what was in an envelope given to the claimant (and, in particular, how he knew it was cash, but not the claimant's tips) when he said he had no involvement in the alleged process, did not claim to have seen him open it and admitted never having discussed it with him. I did not find his evidence credible. I was similarly unimpressed with the evidence of Ms Monaghan. She admitted being motivated to get involved in the case and give evidence primarily by anger on hearing that the claimant had an interpreter. Having read the claimant's written English in his texts and emails in the bundle, it is abundantly clear why he requires an interpreter for formal court proceedings. Ms Monaghan did not give her evidence in a careful and measured way and I found her claim that she could corroborate Mr R Randev's account of his conversation with the claimant on 11 October 2015 because she had overheard the exact terms of it in mixed Hindi and English upstairs in the function suite through an open door while she was washing dishes to be frankly incredible. With regard to seeing the claimant open an envelope and take out cash, Ms Monaghan admitted that it could have been his tips and she did not really know what the claimant was getting. She also admitted that she could not say that the claimant had been

told that tax and National Insurance had not been paid on his tips and he had to account for these himself.

Applicable Law

Constructive Unfair Dismissal

27. In a claim for constructive dismissal the onus rests on the claimant to establish that he has been dismissed. Section 95(1)(c) of ERA provides that an employee is dismissed if

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

28. The circumstances in which an employee is entitled to terminate a contract without notice by reason of the employer's conduct are judged according to the common law. The claimant must establish a repudiatory breach of contract by the respondent. In essence, the claimant requires to prove:

(i) that there was a breach of a contractual term by the respondent;

(ii) that the breach was sufficiently serious to justify his resignation;

(iii) that he resigned in response to the breach and not for any other reason; and

(iv) that he did not delay too long in resigning.

29. In these proceedings the claimant's case was that the respondent was in breach of the implied term of mutual trust and confidence. That term was

described by the House of Lords in Malik v BCCI [1 9971 IRLR 462 HL as a term that:-

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

30. In order to establish a breach of the implied term the claimant requires to prove that the respondent was guilty of conduct that was so serious as to go to the root of the trust and confidence between employer and employee and destroy it or be calculated or likely to destroy it. Furthermore, there must be no reasonable and proper cause for the conduct. In the words of Brown Wilkinson J (as he then was) in Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666 EAT:-

> *"The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it"*

31. If the Tribunal is satisfied that there has been a dismissal in this case, Section 98 of ERA sets out how it should approach the question of whether the dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason (Section 98(1)).

32. If the employer is successful in establishing the reason, the Tribunal must then move on to the second stage and apply Section 98(4) which provides:-

"... Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) -

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) Shall be determined in accordance with equity and the substantial merits of the case."

Discussion and Decision

Illegality

33. The respondents' first submission in this case was that the contract of employment between the claimant and the respondents was tainted by illegality in performance and consequently unenforceable. Illegality in performance occurs where a lawfully made contract is performed in an illegal way, for example through some tax evasion in the way the employee is paid. As Mr Allison submitted, the Court of Appeal made clear in Colen and another v Cebrian (UK) Ltd 2004 ICR 568 CA that the burden of proof is on the employer to show that it had either contracted with the employee with the object of defrauding HMRC, or had performed the contract in a way that had this result. As Ms Barnett submitted, in order to establish illegality in performance, such as to prevent enforcement of the contract, two basic conditions must be met: Firstly, the employee must know of the illegality, and secondly there must be participation. With regard to knowledge, it must be shown that the employee knew about the facts that made the performance illegal. With regard to participation, Mr Allison and Ms Barnett both referred me to Hall v Woolston Hall Leisure Ltd 2000 IRLR 578 CA in which the Court

of Appeal held that an employee will only be prevented from enforcing a contract that has been performed illegally if, in addition to knowing about the facts that make the performance illegal he actively participated in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee. Ms Barnett drew attention to the case of Newland v Simons and Wilier (Hairdressers) Ltd 1981 IRLR 359 in which the EAT held that where both the employer and employee knowingly commit a fraud on the Inland Revenue in the payment and receipt of the employee's remuneration, the contract becomes one prohibited by statute or common law, precluding the enforcement of employment rights. The essential question was said to be 'Has the employee knowingly been a party to a deception on the Revenue?'

34. In the present case the respondent relies upon:-

(a) The failure to pay tax and National Insurance on tips; and/or

(b) The allegation that the claimant was paid a cash in hand supplement to his wages; and/or

(c) Other allegations of possible illegality.

35. I have considered (a) the failure to pay tax and National Insurance on tips; and (b) the allegation that the claimant was paid a cash in hand supplement of £40 (ET3) or £50 (R Randev witness statement) per week on top of his tips together because I concluded that Mr Rahul Randev's description of how he would put £40 each into an envelope each week for the claimant and others was, in fact a reference to his allocation of the tips and that there was no additional cash in hand supplement as he alleged.

36. Mr R Randev claimed that the business had a 'troncmaster' in relation to tips and that this was the "General Manager". Conveniently, this was said to be a

Kevin Holmes, who, Mr R Randev claimed, had now left and would not be a witness, or possibly, Mark Taylor who would not be a witness either. (Significantly, Mr Brown stated that both Kevin Holmes and Mark Taylor still worked at the Eagle Lodge. Neither was called to give evidence.) Mr Randev claimed he (Mr Rahul Randev) had nothing to do with the tips. I felt he 'protested too much' about this and I preferred the claimant's evidence that Mr R Randev himself decided how much staff would get in tips and was effectively the troncmaster. The claimant's evidence, which I accepted was that the only cash he received weekly from the respondents was payment of his share of the tips and that it was generally between £35 and £40. As mentioned above, Mr R Randev testified in some detail about how he personally used to put cash in an envelope for the claimant every week along with his pay slip. (The amount per the ET3 was claimed to be £40, the same amount the claimant accepted receiving in tips. Mr Randev's evidence in his witness statement, maintained in cross examination was that it was £50. However, it was then put to him in a leading question in re-examination that it was £40, not £50 and he agreed!) Significantly the firm's accountant, Mrs Rumsby, (who is responsible for the firm's payroll, its declarations to HMRC and its end of year accounts) said she had no awareness of some staff receiving cash supplements over and above their wages paid by BACS and that as far as she knew, tips aside, this did not happen. I accepted Mrs Rumsby's testimony on this point and did not believe Mr Randev's evidence that he had given the claimant a cash in hand payment on top of his tips, nor did I believe his evidence about having nothing to do with tips. His testimony was that on the one hand he was so scrupulous about remaining completely ignorant of the division of tips that he would leave the room if they were discussed at a staff meeting so that if the taxman were to ask him, he could say *"its not my responsibility [1];* but on the other hand, that he knew for certain that all staff including the claimant had been told that they had to account to HMRC themselves for tips and also that he knew how much the claimant was getting in tips. His evidence on this issue was contradictory and simply not credible. At the end of it he stated that it was the duty of his four managers at

The Eagle Lodge to make sure the tips were put on employees' payslips, but that he had said to them *'Whatever way you do it is down to you".* He summed up his position as *"All I know is, if a troncmaster is in place and HMRC come knocking, it's their responsibility, not mine. "*

37. It was claimed in evidence by Mr Brown and Ms Monaghan that when the kitchen staff started receiving tips they were told they were tax deductible. Mr Panthi's response when it was put to him in cross examination that they would say this was that they were *"completely lying". "Nobody ever told me that. "* The claimant also denied this. I preferred the evidence of the claimant and Mr Panthi for all the reasons set out in the observations on the evidence above. Put shortly, on the facts of this case, it was Mr R Randev who decided how much the staff were given in tips and how they were divided. The claimant did not have any say in how much he was given. The claimant did not know that tax and National Insurance were not being paid on these tips and did not acquiesce in any such arrangement. He assumed that he was being paid in a lawful way and that the respondents were dealing with PAYE normally. The claimant may have relied on assumptions and may not have asked questions. However, I am satisfied that he did not knowingly participate in this deception of HMRC. Mr Randev testified there was a tronc and that seems to have been correct. It was the responsibility of the troncmaster to make sure the tax was paid on the tips and the claimant was entitled to assume this had been done. That seems to be the effect of the Government Guidance at (J56). The guidance would appear, in the absence of anything put before me to the contrary, to negate Ms Barnett's submission that the claimant should somehow have known from his payslips that tax had not been paid on his tips. I do not find that the contract was unenforceable in these circumstances as I am not satisfied that the claimant had the necessary knowledge of the fact that the troncmaster was not meeting his responsibility to pay tax. I am also not satisfied that the claimant knowingly participated in the deception of HMRC.

38. Looking at (c) other areas of possible illegality:

39. Between 2 February and 22 April 2012, the claimant was paid his net pay in cash. Mrs Rumsby was not notified and tax and National Insurance were not remitted to HMRC for this period. However, the claimant assumed tax and National Insurance had been deducted and remitted to HMRC as his gross salary would have been £346.15 and he was only receiving around £270. He therefore believed he was being paid lawfully. I have concluded from these facts that although tax and National Insurance were not paid by the respondents between 6 February and 22 April 2012, the claimant did not know of or participate in the illegal performance.

40. A further ground of possible illegality put forward by Ms Barnett was an alienation that the claimant made a request to Mr R Randev on 16 October 2015 for a wage rise as a cash in hand payment, along with a request that Mr Randev should falsify his hours to reflect a 16 hour week. The claimant accepted that a discussion took place with Mr Randev but stated that the suggestion of the falsification of hours came from Mr Randev and was refused by him. Given the unsatisfactory nature of the respondents' evidence and Mr R R idev's admitted willingness to remunerate staff in ways that may defraud HMRC, I preferred the claimant's account of this discussion. It was, in any event accepted that the last payment made by the respondents to the claimant was on 12 October 2015, so even on the respondents' case there is no suggestion that the contract was actually performed in this way.

41. In summary the respondents' argument that the contract of employment was tainted by illegality in performance and is consequently unenforceable is rejected.

Unfair Dismissal claim

Was *the claimant dismissed?*

42. Section 95(1)(c) ERA provides that an employee is dismissed if *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"* The burden of proof is on the employee to show that he has been dismissed. The standard of proof is the 'balance of probabilities'. The claimant requires to establish:

(i) that there was a breach of a contractual term by the respondent;

(ii) that the breach was sufficiently serious to justify his resignation;

(iii) that he resigned in response to the breach and not for any other reason; and

(iv) that he did not delay too long in resigning.

43. Mr Allison submitted that this claim is a 'last straw' case. He referred to a number of what he described as 'egregious breaches' by the respondents as set out at paragraph 11 of the ET1. These are:-

(i) The respondent failed to pay the claimant the minimum wage;

(ii) he preparation of a contract based upon 'false claims';

(iii) the respondents extorting the claimant's signature and continued employment in exchange for cooperating with his ILR;

(iv) the refusal to allow the claimant to take leave;

(v) the respondents' failure to pay the claimant's wages when they fell due, and to pay them thereafter.

44. I accepted the claimant's evidence that the reasons for his resignation were as follows: the continual requirement that he work additional hours for the same low pay and Mr Randev's refusal to properly address this on 11 October 2015; the perceived likelihood that he would be unable to take his remaining annual leave and would lose it; the fact that he had been coerced into signing the 'Indefinite Leave to Remain Undertaking' on 29 September 2015; and that this undertaking required him to repay unspecified "costs" of £4,200 to the respondents, most of which had not been genuinely incurred for the purposes stated therein; and the last straw non-payment of his wages for two weeks with no explanation in circumstances where Mr Randev did not take or return his calls and did not instruct the Head Chef to tell him what was going on.

45. I have considered each of Mr Allison's arguments in turn, and then addressed their cumulative effect. With regard to (i) the minimum wage during the claimant's period of employment went up each October and was as follows:-

From October 201 1:	£6.08 per hour;
From October 201 2:	£6.1 9
From October 201 3:	£6.31
From October 2014:	£6.50
From October 2015:	£6.70

46. From 2009 employers have not been permitted to count tips toward the national minimum wage. In the absence of any contrary documentary evidence lodged by the respondent, and in view of the unsatisfactory nature of their evidence, I have concluded on the basis of the claimant's oral evidence, that of Mr Panthi and the copy rota lodged by the claimant at J103 that the claimant worked 55 hours per week. His gross weekly pay was £346.1 5. His pay was accordingly £6.29 per hour for the whole period of his employment. Thus, from October 2013, the claimant was paid less than the minimum wage prescribed by law. This was a breach of his contract. The claimant and the other migrant employees employed by the respondents

were not as free to change employment as other staff because of their requirement for immigration sponsorship. They were engaged for 40 hours per week but required to work hours far in excess of their contractual hours for no additional pay. It is difficult to escape the conclusion that they were thereby exploited. It is fair to say that although the claimant was paid less than the NMW from October 2013, he did not express the issue in this way in the evidence he gave of the reasons for his resignation. However, it was clear that he was taking issue with the continual requirement that he work additional hours for the same low pay applicable to his basic hours and Mr Randev's refusal to properly address this on 11 October 2015. Thus, although he may not have realised that he was being paid less than the minimum wage, it was clear from all the evidence, including that of Mr R Randev that one of his reasons for leaving was that he was being exploited and underpaid.

47. Taking (ii) and (iii) together, Mr Allison referred to differential treatment of migrant employees, and in particular Mr R Randev forcing them to sign an undertaking before agreeing to sign a letter confirming factual information about their employment. Mr Allison submitted that in effect, Mr R Randev was seeking to extort from the claimant and other migrant employees either a guaranteed period of employment or a sum of money and that this raised public policy considerations. He expressed his concern about the £4,200 referred to in the ILR undertaking the claimant had been made to sign in September 2015. Mr Randev's evidence was that the claimant had spoken to him in November 2014 and asked if he could contribute to the cost of his visa extension because it was very expensive. Mr Randev testified that he had agreed and had said that he would contribute £1,000 *"and the only thing would be that if he was ever left working for me I would expect him to reimburse that £1,000".* This alleged conversation was not in Mr Randev's witness statement, which contains no specification at all in relation to the "costs" said to have been "invested in the claimant's sponsorship". It was put to the claimant in cross examination that Mr Randev had paid £1,000 toward his visa extension. His answer (contrary to Ms Barnett's submission) was that he

was not told anything and did not know whether anything was paid. It was also put to him that that he had asked Mr Randev for financial help and a payment had been made to Five Star International. The claimant denied having asked for help. However, the alleged details of the conversation and in particular, that if he ever left he would have to reimburse the money were not put to him and I did not conclude that this conversation had happened. An invoice was produced from Five Star to Mr Randev dated 26 January 2015 (J121) for: *"Re: Lekha Nath Fuyal: Work in connection with extension of Tier 2 (General) Visa, including preparation and submission of application".* The claimant's position, which I accepted was that he had paid the fee to the Home Office for this extension himself. The fee payment to UK Visas and Immigration does not appear as an outlay on the Five Star invoice and VAT is charged by them on the whole sum so the claimant's evidence was not inconsistent with the documentary evidence produced. Furthermore, it was agreed between Ms Barnett and Mr Allison that the claimant's bank account showed that he had made a payment of £400 to Five Star on 15 October 2015 towards his ILR. Thus, in the absence of any evidence that the respondents had paid fees to the Home Office for either the Tier 2 Visa extension or the ILR, I accepted the claimant's oral evidence that he had paid these outlays himself. The only vouched expense incurred by the respondents on the evidence placed before me was a fee to Five Star for work done by them.

48. Apart from this single fee note from Five Star, no other vouching was produced by the respondents for the remainder of the £4,200 alleged to have been incurred by them. Mr Randev stated in cross examination that he had paid a further £1,200 to the agency (Five Star) when recruiting the claimant. If this were true then vouching ought to have been available from their records or those of Five Star, failing which, an explanation of why not. I concluded from the lack of vouching that no other costs were incurred specifically in relation to the claimant. Asked to explain how the balance of the £4,200 was made up, Mr Randev went on to say that his firm were paying Five Star a monthly retainer to engage migrant staff and that about £1,000 of the £4,200

represented the amount of time his book keeping staff would have to spend on payslips because 'they' (presumably, from the context migrant staff) kept losing them. Finally, he said he had included an element for the amount of time he personally spent going to see 'them'. The claimant's evidence was that he had paid his own fees and had paid for his own application for ILR. Nothing produced by the respondents contradicted that In his witness statement the claimant testified: 7 *am entirely unclear about what it is the respondents are saying they paid, or how they arrived at the figure of £4,200. I think this is a figure which has simply been manufactured to scare people into staying in the employment of the respondents for a period of 18 months. "* He explained that he felt coerced into signing the undertaking. In all the circumstances, I have concluded (a) that the facts support (ii) and (iii) above; (b) that cumulatively with the other points above they represented a breach of the implied term of trust and confidence; and (c) That the fact that the claimant had been coerced into signing the 'Indefinite Leave to Remain Undertaking' on 29 September 2015; and that this undertaking required him to repay unspecified "costs" of £4,200 to the respondents, most of which had not been genuinely incurred for the purposes stated therein were part of the reason for resignation.

49. With regard to paragraph 43(iv) on the facts found I did not consider that the refusal to allow the claimant to take the two days' leave he requested in October 201 5 amounted or contributed to a breach of the implied term of trust and confidence in itself. However, the claimant's concern that he would be unable to take his remaining annual leave and would lose it was symptomatic of the extent to which the respondents' treatment of him had led to a loss of trust and confidence on his part.

50. Finally, the non-payment of the claimant's wages for two weeks with no explanation in circumstances where Mr Randev did not take or return his calls and did not instruct the Head Chef to tell him what was going on was a clear breach of contract. It was a matter of agreement that the claimant was paid

on or about 12 October 2015 and that that was the last week he was paid. I have found on the facts before me that the claimant worked for a further two weeks for which he was not paid. It was not in dispute that the respondent had failed to pay the claimant wages due to him. In addition, the undated letter from Mr Randev to the claimant at J40 supports the claimant's evidence that he was not paid for weeks when he worked. In that letter, Mr Randev states: *"It is correct that we have withheld wages due to you.* "The letter goes on to refer to an outstanding balance of £2,555. Clearly, in order to withhold the claimant's wages, a deliberate decision must have been taken by Mr Randev and an instruction given by him to payroll. On the balance of probabilities, this action appeared to me likely to have been triggered by his conversation with the claimant on 11 October. Clearly, Mr Randev did not understand from the conversation itself that the claimant had gone as far as to resign but he thought that he might do so after getting his ILR. His decision to withhold his wages was in clear breach of his contract.

51. The statement of employment particulars contained a provision that: *"The Employer reserves the right in its absolute discretion to deduct from your pay any sums which may be due by you to the Employer including without limitation any overpayments or loans made to you by the Employer or losses suffered by it as a result of your negligence or breach of the Employer's rules and regulations. Any such deductions will be notified to you beforehand and itemised on your payslip."* However, there was no proper basis for the deductions made. The undertaking was not, in my view enforceable. Mr Allison submitted that it had been procured by extortion. It is clear from the claimant's evidence and the facts found that he did not sign it voluntarily or give his consent. He was pressured into signing it by Mr Randev on the basis that unless he signed it Mr Randev would not give him the purely factual letter he required for his ILR. Furthermore, the "costs" contained in the 'undertaking' were not a legitimate statement of sums incurred. In any event, the manner in which the claimant's wages were withheld was clearly in breach of the implied term, and indeed the above quoted paragraph of the statement of

employment particulars which provides that deductions will be notified beforehand and itemised on the payslip. The act done in this case was done in a manner clearly likely to destroy or seriously damage the relationship of trust and confidence and there was no reasonable and proper cause for acting in this way.

52. Considering the acts complained of taken as a whole, the claimant's case was that the respondent was in breach of the implied term of mutual trust and confidence. That term was described by the House of Lords in Malik v BCCI [1997] IRLR 462 HL as a term that:-

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

53. In order to establish a breach of the implied term the claimant requires to prove that the respondent was guilty of conduct that was so serious as to go to the root of the trust and confidence between employer and employee and destroy it or be calculated or likely to destroy it. Furthermore, there must be no reasonable and proper cause for the conduct. In the words of Brown Wilkinson J (as he then was) in Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666 EAT:-

> *"The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot expected to put up with it"*

54. I considered whether the claimant had established that the respondents had breached the implied term of trust and confidence. The claimant requires to prove that the respondent was guilty of conduct that was so serious as to go

to the root of the trust and confidence between employer and employee and destroy it or be calculated or likely to destroy it. It appeared to me that the course of conduct in this case clearly amounted to a breach of the implied term. The non-payment of the claimant's wages was not only an actual breach of the respondent's obligations under the contract to make timeous payment of his wages, but it was also a breach of the implied term. Mr Randev's conduct in deliberately withholding the claimant's pay and at the same time, not taking his calls and failing to explain was so serious that it went to the root of the trust and confidence between them and destroyed it or was likely to do so. I have no doubt that the claimant has shown a breach of the implied term in this case. I did not consider that Mr Randev's wish to reclaim his unspecified expenses amounted to reasonable and proper cause for the conduct. Any breach of the implied term is repudiatory and sufficiently serious to justify resignation.

55. With regard to whether the claimant resigned in response to the breach, Ms Barnett submitted that the claimant's resignation was due to the respondents* refusal to agree a pay rise. Given that he was paid less than the minimum wage, that is something he is entitled to complain about, but there is more to it than that as set out above. Ultimately, it is a question of fact. On the facts as found, the claimant resigned following a number of matters which taken cumulatively amounted to a breach of the implied term. The last straw was the failure to pay his wages as set out above. I concluded that the claimant had resigned on or about 25 October 2015 in response to the breach and not for any other reason; and that he had done so without unreasonable delay.

What was the reason for dismissal?

56. As is not unusual in a constructive dismissal case, I did not find that the respondent had satisfied the onus upon it to show a potentially fair reason for the claimant's dismissal in terms of section 98(1) ERA. Indeed, no reason was put forward, nor was reasonableness addressed under section 98(4).

Remedy for Unfair Dismissal

Basic Award

57. The claimant is entitled to a basic award. At the time of dismissal he was aged 32 years. His gross weekly salary was £346.15. He had 3 completed years' service. The basic award was agreed between the parties at £1,038.00. However, it requires to be corrected for the minimum wage. The corrected sum is £1,106.

Compensatory Award

58. Under s.123(1) ERA 1996, the amount of any compensatory award

"shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. n

Past loss to date of hearing

59. At the time of his dismissal the claimant was earning £346. 15 gross per week. Corrected for payment of the minimum wage this would be 55 x £6.70 = £368.50. Tips are not included in calculation of pay for NMW purposes. He was dismissed on 25 October 2015. His loss to the date of the Tribunal Hearing is calculated as follows:-

Corrected gross weekly pay £368.50 plus £40 tips = £408.50
Corrected net pay including tips: £337.15 per week.

60. Loss from 25 October 201 5 to 27 October 2016 = 52 weeks. 52 x £337.15 = £17,532. Deduct net earnings from Devoncote Hotel 52 x £265 = (£13,780). £17,532 -£13,780 = £3,752.

Future loss

61. The claimant secured employment on 27 October 2016 at a higher salary than he earned with the respondents so there is no ongoing loss from that date.

Basic Award:		**£1,106.00**
Compensatory Award:	*Past net loss:* Add: loss of statutory rights Total Compensatory award	£3,752.00 £400.00 **£4,152.00**

Claim for holiday pay

62. With regard to holiday pay, the respondents' holiday year ran from January to December. The claimant's employment terminated on 25 October 2015. This was 43 weeks into the holiday year. His annual entitlement was 5.6 weeks. 43/52 x 5.6 = 4.6. The claimant had taken one week's leave and he therefore had 3.6 weeks remaining. £408.50 x 3.6 = £1,471 rounded to the nearest whole pound. The payment is gross. The claimant is therefore

required to account to HMRC for any tax and National Insurance payable on it

Claim for arrears of pay

63. Mr R Randev conceded in cross examination that he had withheld three weeks' pay from the claimant. The first question is whether he was entitled to do so. He founds upon the undertaking he made the claimant sign on 29 September 2015. For the reasons set out above I have concluded that he was not entitled to withhold the claimant's pay. In any event, even if the undertaking had been valid, it provides that the claimant is not required to pay the "costs" if he terminates his employment in response to a fundamental breach by the "Company". There is accordingly no right to withhold payment in this case. The claimant is accordingly owed three weeks' arrears of pay: £408.50 x 3 - £1,226 rounded to the nearest whole pound.

Claim for overtime pay

64. The claimant claims overtime payments and there is an issue about whether he was entitled to paid overtime under his contract. Mrs Rumsby testified that the claimant was salaried and not entitled to overtime pay. Mr Allison submitted that that would have to be expressly set out in the contract and it is not.

65. Clearly, it is necessary to examine statement of employment particulars to see whether there is an express term regarding payment for overtime. In relation to pay. paragraph 2 states under the heading *"Renumeration",* *"Your total Remuneration shall be £18,000.00"* The paragraph goes on: *"Your wage shall be paid monthly calculated at the gross yearly rate of £18,000.00. Your salary shall be reviewed annually .....* " Under the heading *"Hours of Work" (he* statement provides at paragraph 5: *"Your working week comprises 40 hours. You are required to work such hours as are necessary*

for the discharge of your duties. The licensed trade industry is a seven-day week operation. Hours of working in restaurants vary from week to week and overtime working is frequently required. You must be prepared to work such hours as may be necessary and the management will give as much notice as possible of such requirement. Any errors in payment must be taken up with your manager immediately. Any errors will be rectified as soon as possible. "
I have looked very carefully at the statement but I can find no mention payment for overtime.

66. Mrs Rumsby gave evidence about how the contract was performed in practice. Her testimony was that the hours of hourly paid staff were provided to her by their managers for payroll purposes. However, for salaried staff the rotas were irrelevant. She said that the claimant was a member of salaried staff per the respondents' system. He was not, therefore eligible for overtime pay. She went on that however many hours a member of salaried staff worked, this would not affect her calculation of their pay unless she was notified otherwise by Mr Rahul Randev. I have a great deal of sympathy for the claimant's position here and am concerned that he has been exploited. I accept his evidence that he normally worked 55 hours per week. It is clear that he was not paid in respect of overtime at any time and that this also applied to other 'salaried' staff. I considered whether, in the absence of an express term entitling him to payment *for* overtime a term could be implied but there did not appear to be a basis for this on the facts. The performance of the contract for its entire duration was that overtime was not paid for additional hours worked. If I am wrong about this Mr Allison will doubtless ask for a reconsideration but at present I can see no contractual basis on the evidence before me for the overtime payments set out in the claimant's schedule of loss.

67. I am, however required to award the difference between the sums paid to the claimant and the National Minimum Wage from 1 October 2013 when the NMW exceeded his salary and 12 October 201 5 when he was last underpaid

by the respondent. From 1 October 2013 the NMW was £6.31 per hour and the claimant was paid £6.29. The underpayment is £0.02 per hour. £0.02 x 55 x 52 = £57.20. From 1 October 2014 the NMW was £6.50 per hour. The difference is £0.21. £0.21 x 55 x 52 = £600.60. From 1 October 2015 the NMW was £6.70. The difference was £0.41. £0.41 x 55 x 2 weeks (to 12 October 2015) = £45.10. £57.20 + £600.60 + £45.10 - £702.90. Added to the other unlawful deductions referred to above the total sum I can award for arrears of pay is £702.90 + £1,226 = £1,929, rounded to the nearest whole pound.

68. The claimant found alternative employment immediately and did not make any claim for Jobseekers Allowance or other benefits. The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 accordingly do not apply to this award.

Employment Judge: **Mary Kearns**

Date of Judgment: **4 December 2017**

Entered in Register and Copied to Parties: **13 December 2017**