EMPLOYMENT TRIBUNALS

Claimant: Miss S Davidson

Respondent: Everyman Motor Racing Activities Ltd

Heard at: **Leicester** **On:** **29 April 2022**

Before: **Employment Judge Varnam**

Representation
Claimant: In person
Respondent: Mrs K Sanderson, Head of Operations

JUDGMENT having been sent to the parties on ***10 May 2022*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By an ET1 issued on 29 December 2021, the Claimant brought claims alleging that the Respondent had made unlawful deductions from her wages, contrary to section 13 of the **Employment Rights Act 1996**, and that upon the termination of her employment the Respondent had failed to make a payment in lieu of accrued but untaken holiday pay, contrary to regulation 14 of the **Working Time Regulations 1998**.

2. The Claimant's ET1 also sought to raise a number of other complaints, but, as I explained to the Claimant and Mrs Sanderson at the start of the hearing, these were not matters in respect of which the employment tribunal has jurisdiction.

3. The Claimant had previously commenced ACAS early conciliation. This began in late October 2021, and ended in early December 2021.

4. As clarified by the Claimant in a document which was received by the Tribunal office on 1 February 2022, and to which I shall hereinafter refer as 'the Claimant's statement', and in a schedule of loss which the

Claimant provided, her claim was that on various occasions between April and October 2021, the Respondent deducted money from the Claimant's wages. These deductions were said to total £911.09.

5. The specific deductions made were as follows:

   (1) On 30 April 2021, a deduction of £10.26, described in the Claimant's April 2021 payslip as a 'time deduction', and a deduction of £70, simply described in the payslip as 'deductions'.

   (2) On 31 May 2021, a deduction of £5, described in the Claimant's May 2021 payslip as 'deductions'.

   (3) On 30 June 2021, a deduction of £61.56, described in the Claimant's June 2021 payslip as a 'time deduction', and further 'deductions' (otherwise unparticularised in the payslip) of £236.54.

   (4) On 31 August 2021, a deduction of £26.19, described in the Claimant's August 2021 payslip as a 'time deduction'.

   (5) On 30 September 2021, unparticularised 'deductions' of £15.

   (6) On 31 October 2021, 'deductions' (unparticularised in the October 2021 payslip) of £486.54.

6. In its ET3, received by the Tribunal on 3 February 2022, the Respondent did not deny that some deductions had been made. But it asserted that it was entitled to make these deductions by reason of an agreement signed by the Claimant. At the outset of the hearing, Mrs Sanderson confirmed on behalf of the Respondent that the deductions particularised in the preceding paragraph had indeed been made, but that the Respondent contended that they were each authorised by the Claimant's contract of employment or by some other written agreement signed by the Claimant.

7. While the ET1 raised a holiday pay claim, it was not initially clear how this claim was framed by the Claimant. However, upon exploration of this point it became apparent that what was alleged was a failure to make a sufficient payment in lieu of accrued but untaken annual leave, upon the termination of the Claimant's employment.

8. The Claimant's schedule of loss sought sums totalling £2,608.97 (plus a 25% uplift) in respect of loss of earnings arising from the termination of the Claimant's employment with the Respondent. However, as I explained to the Claimant at the outset of the hearing, such losses could only be recovered in an unfair dismissal claim (or, for example, a claim alleging that the termination of the Claimant's employment was an act of unlawful discrimination). Leaving aside the fact that, on the face of it, the Claimant resigned from her employment, there was no unfair dismissal claim raised in the ET1, and, moreover, as the Claimant had been employed for less than two years when her employment came to an end, the Tribunal would have been unlikely to have jurisdiction to consider an unfair dismissal claim, even had one been raised. I accordingly indicated that in my view

the claims in respect of loss of earnings arising from termination of employment were not before the Tribunal, and this was accepted by the Claimant.

9. As I have described, I spent some time at the outset of the hearing clarifying the issues with the parties. I then heard evidence from the Claimant, and from Mrs Sanderson on behalf of the Respondent. While neither party had filed a witness statement of the kind that a lawyer might have produced, I treated the Claimant's statement as her witness statement. The Respondent had, on 25 April 2022, filed a bundle, at the front of which was a document headed 'Particulars of Response', and I treated the Particulars of Response as a witness statement from the Respondent, to which Mrs Sanderson spoke. I asked questions of both witnesses, and each had the opportunity to question the other, an opportunity of which Mrs Sanderson in particular availed herself. I also took into account the documents contained in the Respondent's bundle, the documents attached to the Claimant's statement, the documents attached to the Respondent's ET3, and a copy of an e-mail that the Claimant handed up on the day of the hearing. When the evidence had concluded, both the Claimant and Mrs Sanderson addressed me briefly before I adjourned to consider my decision.

10. Before turning to set out my findings of fact and the reasons for my decision, I wish to record my gratitude to both the Claimant and Mrs Sanderson for the courteous and helpful way in which they both conducted the hearing, whether acting as advocates or as witnesses. I add that, having heard both give evidence, I am satisfied that both were honest and truthful witnesses, who did their best to assist me in the task of resolving their dispute.

Findings of Fact

11. The Respondent operates a business providing corporate hospitality, centred around track days. The Claimant commenced employment with the Respondent on 5 October 2020. Her contract of employment describes her as 'Events Staffing & Support', but in her evidence she described herself as a 'hospitality booker'. This in essence means that her job involved making bookings on the hospitality side of the Respondent's business. She also undertook some work as an 'instructor booker', which involved booking driving instructors for the track days hosted by the Respondent. During the hearing, there was some disagreement as to whether the 'instructor booker' role was at some point removed from the Claimant, but this issue was not relevant to the claims before me.

12. The Claimant's gross annual salary was £22,000 per annum, which equates to £423.08 gross per week.

13. From January 2021, the Claimant was frequently on 'flexible furlough'.

<u>The October 2020 documents</u>

14. In its resistance to the Claimant's unlawful deduction from wages claim, the Respondent relied on various documents signed by the

Claimant, which were said to authorise the deductions made. I now turn to consider those documents signed by the Claimant in October 2020, which seem to me to be relevant to the Respondent's arguments. Each document was signed by the Claimant, and the Claimant agreed that copies of each document were provided to her.

15. First, there is a document headed 'Clocking in System'. This was signed by the Claimant on 5 October 2020. As relevant, it provides:

Every new starter is given a clocking in fob which you must use every time you are in the office.

The clocking in system is used for payroll so make sure you clock in and out during the day.

The following rules apply

- *1 hour deduction for up to 15 minutes late.*
- *Additional £10 fine for any later than this and for each additional hour.*

[…]

- *If you do not clock back in after lunch or clock out at the end of the day, you will only receive half a day's pay for that day.*
- *If you do not clock in at all and have not informed Robert or myself then you will not receive pay for that day.*

If you have any problems with the system speak to the Office Manager immediately so these can be noted.

If you lose your fob then a replacement will cost £5.

16. As regards this document, I observe that it is made clear that deductions from pay will result from lateness, or from failures to clock in or clock out as required. However, the provision relating to the loss of a fob is in my view less clear. While it says that a replacement fob will cost £5, it does not in terms say that the cost of a replacement will be charged to the employee.

17. The second relevant document from October 2020 is headed 'Induction to Everyman Racing'. It was signed by the Claimant on 5 October 2020, and reads as follows:

In consideration of the induction which I will be receiving from Everyman Racing Limited, I agree to remain employed by Everyman Racing Limited for a minimum period of one year after completion of my start date.

The values applied are to cover the costs to the company that are incurred during your integration to the company and the expenditure of staff time away for standard daily working practices.

This induction will end on 04.11.20 and if I leave my employment at any time, for any reason, including dismissal, before the end of 04.10.21 I undertake to refund my employer £ [and here a manuscript 'X' has been inserted] *or a proportion based* [and I observe that a manuscript line has been inserted below the word 'based', and below the latter part of the word 'proportion'] *on the following scale:* -

Less than 3 months after start date	*100%*
3 months but less than 6 months after start date	*75%*
6 months but less than 9 months after start date	*50%*
9 months but less than 12 months after start date	*25%*

In the event of my failure to pay I agree that my employer has the right as an express term of my Contract of Employment to deduct any outstanding amount due under this agreement from my salary or any other payments due to me on the termination of my employment in accordance with the legislation currently in force.

18. In her evidence, Mrs Sanderson told me, and I accept, that the reason for asking employees to sign an agreement that potentially required them to refund sums to the Respondent in the event of early termination of their employment was the need to incentivise employee retention. The Respondent's business is not centrally located, and it often has difficulty recruiting new staff. Moreover, owing to the relatively specialised nature of the services that it provides, the Respondent needs to invest resources in training new employees. It therefore has a business interest in seeking to ensure that staff turnover is minimised.

19. I am bound to observe, however, that in my view there are considerable ambiguities in the Induction to Everyman Racing document. As my parenthetic comments when quoting the document show, there is a cross following the words '*I undertake to refund my employer £*'. There is then a partial underlining of the words '*proportion based*', but it may be dangerous to speculate upon what was intended by that. This is particularly so, because the Claimant told me (and I accept) that when she signed this document, her then-manager, Billy Smart, told her not to worry about it, that it was an old document, and she just needed to sign it to get set up on payroll.

20. More significantly, while the Induction to Everyman Racing document refers to the Respondent being refunded '*a proportion based on the following scale*', it contains no information with which to answer the question 'a proportion of what?'.

21. I will consider the significance of these ambiguities in due course.

The Respondent's clocking-in system

22. The Claimant was contracted to work from 8am to 5pm. The Respondent operates a fob-based clocking in system. Neither witness was able to provide me with significant details as to how the technology underlying the clocking-in system works. The Claimant told me that she had been informed that it was supported by a free piece of software.

23. The Respondent had produced extensive clocking-in records relating to the Claimant. The Claimant disputed the accuracy of these. In particular, she pointed out to me that many of the records showed her arriving at very early hours of the morning – often before 7am. She told me that she had never started that early, and it would indeed be surprising if she had regularly done so, given that she was not contracted to start until 8am. Other clocking-in records showed the Claimant leaving earlier than her contracted finishing time of 5pm – many of the records show her leaving at around 4pm, for example.

24. It seems to me that if an employee was routinely (as the records seem to suggest) turning up early for work by an hour or more, then that would be remarked upon by an employer. Still more so would an employer be likely to remark upon an employee who regularly left work around an hour early – I would frankly expect to see disciplinary action being taken in such circumstances. However, the erratic working hours ostensibly shown by the clocking-in records do not appear to have raised any eyebrows during the Claimant's employment. In my view, this suggests that the records may not be accurate.

25. Mrs Sanderson is not, as I understand it, well-versed in the minutiae of how the clocking-in system works (for example, how the software supporting it and producing the records operates). She was not, therefore, able to provide a rebuttal to the points raised by the Claimant, other than by reliance on the clocking-in records themselves. In my view, where the Claimant was raising apparently credible challenges to the reliability of the clocking-in records produced and relied upon by the Respondent, the Respondent needed to be in a position to explain why its records were reliable. In the absence of such an explanation, I approach the clocking-in records with caution.

Payslips

26. At paragraph 5 above I have detailed the deductions which it is agreed were made from the Claimant's wages. These are all shown on the Claimant's payslips. Each payslip covers the period from the twenty-first day of one month to the twentieth day of the next. So, for example, the April 2021 payslip shows payments (and deductions) made during the period commencing on 21 March 2021 and ending on 20 April 2021. Salary was ordinarily paid on the last day of each month, so that pay recorded in the April payslip should have been paid on around 30 April 2021.

27. I now turn to comment on the deductions made prior to the Claimant's first resignation on 14 June 2021. These are set out at subparagraphs 5(1) and 5(2) above.

<u>April 2021 deductions</u>

28. The Claimant's April 2021 payslip shows two deductions, described at subparagraph 5(1) above. The total amount deducted was £80.26.

29. It was not clear to me why £10.26 was shown as having been made in respect of 'time deductions', while a further £70 was marked simply as 'deductions'. But as I understood the Respondent's case, it was said that, notwithstanding the different descriptions used, all deductions from the Claimant's April pay were made because the Claimant had been late. The Respondent relied upon the provisions of the Clocking in System document quoted at paragraph 15 above.

30. In response to the Respondent's reliance on the Clocking in System document, the Claimant denied that she had been late during April. I have already set out her criticism of the clocking-in records, and my views on the reliability of those records. But in any event, the Claimant said that even looking at the records, she could not see where, in April, she was said to have been late.

31. Mrs Sanderson was not one of the managers who decided that deductions should be made from the Claimant's April 2021 wages. She has understandably accepted what those managers did as being correct. However, when I asked her, she was not able to explain to me precisely why the deductions came to be made. She was not able to take me (or the Claimant in cross-examination) to any specific entries in the April 2021 records which showed lateness which might give rise to a deduction. Before the Claimant's evidence was concluded, I gave Mrs Sanderson a short break to examine the records, and see whether there were any particular incidents of apparent lateness which she wished to put to the Claimant, but there were none.

<u>May 2021 deduction</u>

32. The May 2021 payslip records a deduction of £5. It was agreed that this was made in respect of a clocking-in fob that the Claimant had lost. The Respondent relies on the last sentence of the Clocking in System document, quoted at paragraph 15 above.

33. The Claimant said that she subsequently found and returned the fob. I accept this account, notwithstanding the fact that it was raised for the first time today. But it may well be that by the time that the fob was returned, the Respondent had already incurred the cost of replacing it.

<u>The Claimant's first resignation</u>

34. Before I continue going through the deductions, it is important to explain that the Claimant resigned from her employment on 13 June 2021, apparently giving one week's notice. The Respondent's case is that the

Claimant did not attend work on 14 June 2021. Certainly, it does not appear that the Claimant worked after 14 June until her re-employment (detailed below), and she was processed as a leaver.

June 2021 deductions

35. The Claimant's June 2021 payslip records a 'time deduction' of £61.56. The Respondent's position is that this deduction was authorised by the terms of the Clocking in System document. As with the April 2021 deductions, the Claimant disputed the accuracy of the clocking-in records, and in any event said that she could not see where the June 2021 clocking-in records showed that she had attended work late. Mrs Sanderson was not able to point to any specific entries in the records showing the Claimant attending late.

36. There is a much larger deduction of £236.54 shown on the June payslip. It was clear that this deduction was made because the Claimant's employment had ended within a year of her start date, and that the Respondent was relying on the Induction to Everyman Racing document quoted at paragraph 17 above. That document, according to the Respondent, means that if the Claimant left six months but less than nine months after her start date, she was liable to refund 50% of her weekly salary. Quite how a 50% refund would result in a figure of £236.54 was not clear to me, given that the Claimant's weekly pay was £423.08 (so 50% would be £211.54).

Re-employment of the Claimant

37. On 30 June 2021, less than three weeks after she had left the Respondent's employment, the Claimant was re-employed by the Respondent. On 9 July 2021 the Claimant signed a new contract of employment. Her role was again described as 'Events Staffing & Support', but she was now paid £24,000 per annum (£461.54 per week).

38. On 9 July 2021, the Claimant also signed a document headed 'Deductions from Pay Agreement'. This was somewhat different in form and content from the documents which the Claimant had signed in October 2020, at the start of her first period of employment. It contains a number of relevant provisions.

39. First, at section 2, is a section headed 'Clocking in System', which appears to be an amended and expanded version of the document of the same name which I described at paragraph 15 above. As relevant, this section provides:

We operate a clock in/clock out policy. Upon arrival to work you must immediately clock in the time you entered the premises. Upon leaving the premises you must ensure that you clock out using the same system.

[…]

The following rules apply:

1. *You are permitted one late under 15mins per quarter, on a rolling basis.*
2. *If you are late by under 15 minutes on more than one occasion within the rolling quarter, a one-hour deduction to your salary will be applied for each occasion including the first.*
3. *Additional £10 fine for any later than this and for each additional hour.*
4. *Over 1 hour late without notification may result in disciplinary action being taken.*

[…]

8. *Failure to clock back in after lunch or clock out at the end of the day, may result in only receiving half a day's pay for that day.*
9. *Failure to clock in at all without informing your Line Manager, may result in not receiving pay for that day at all.*
10. *Punch clock errors are also counted on a rolling quarter basis.*
11. *Punch clock errors include: forgetting fob, not clocking in or clocking out correctly for your start/end of working day, or your lunch, or your break, or not leaving a note on the punch clock when required, or selecting the incorrect status, or over running your minutes.*
12. *Each punch clock error incurred within the payroll period, carry* [sic] *a penalty & those penalties are cumulative, £5 for first, £10 for second, £15 for 3rd, so if 3 in a month then the total deducted would be £30.*

40. This part of the Deductions from Pay Agreement thus makes clear that deductions may be made from the Claimant's salary in the event of lateness, or in the event of punch clock errors.

41. At paragraph 14 of the document is a heading 'Induction to Everyman Racing', which substantially, but not completely, duplicates the document of the same name described at paragraph 17 above. This section reads as follows:

> *In consideration of the induction which I will be receiving from Everyman Racing Ltd I agree to remain employed by Everyman Racing for a minimum period of one year after completion of my start date.*
>
> *The values applied are to cover the costs to the company that are incurred during your integration to the company and the expenditure of staff time away from their daily working practices.*
>
> *The induction will end on this Friday* [which, I interpose, presumably means 9 July 2021]. *And if I leave my employment at any time before the end of 29.06.2022 I undertake to refund my employer £* [and here a manuscript 'X' has been inserted] *or a proportion of a working week based on the following scales:* [and I observe that an arrow is then drawn, pointing to the scales]
>
> *Less than 3 months after start date* *100%*

> *3 months but less than 6 months after start date 75%*
> *6 months but less than 9 months after start date 50%*
> *9 months but less than 12 months after start date 25%*
>
> *In the event of my failure to pay I agree that my employer has the right as an express term of my Contract of Employment to deduct any outstanding amount due under this agreement from my salary or any other payments due to me on the termination of my employment in accordance with the legislation currently in force.*

42. It will be seen that some of the ambiguities that applied to the Induction to Everyman Racing document signed by the Claimant in October 2020 did not apply to the section of the Deductions from Pay Agreement which I have just quoted. In particular, the question, 'a proportion of what', which I posed at paragraph 20 above, is apparently answered by the words 'a proportion of the working week' (I will address whether this is a sufficiently clear answer below). The arrow pointing to the scale of percentages also seems to me to be a clearer indication of what deductions might be made than the possible underlining in the earlier document. I add that the Claimant did not suggest that her then-line manager, named Rachel, said (as Billy Smart had done in respect of the earlier document) that it was not something that she needed to worry about.

43. The Deductions from Pay Agreement is signed by the Claimant, and I accept that she was provided with a copy of it. Immediately above the Claimant's signature are these words:

> *I have read and understand the above terms. I agree that they form part of my Contract of Employment.*

<u>August 2021 deduction</u>

44. The Claimant's August 2021 payslip records a deduction of £26.21, described as a 'time deduction'. As with the comparable deductions made in April and June 2021, I was not told precisely what this related to. My attention was not drawn to any entry in the Respondent's clocking-in records which might have justified this deduction.

<u>September 2021 deduction</u>

45. The Claimant's September 2021 payslip records unparticularised 'deductions' of £15. The Respondent put no evidence before me to explain what this related to, and did not draw my attention to any entry in the clocking-in records.

46. I do note that this is the amount payable in respect of a third punch clock error, under paragraph 12 of the Clocking in System section of the Deductions from Pay Agreement. However, there was no evidence of any deductions having been made in respect of previous punch clock errors. It might be that the deduction is in fact intended to be a cumulative deduction reflecting a first and second punch clock error (the cumulative penalty for which would be £15). But I was given no evidence to

substantiate this, and it is pure speculation on my part. I cannot make findings on the basis of pure speculation.

<u>October 2021 deduction</u>

47. With effect from 30 September 2021, the Claimant, for a second time, resigned from the Respondent's employment. Her last wages, covering the period from 21 September to 30 September, were due to be paid in her October payslip.

48. The Claimant's October payslip shows that the Respondent has made a deduction of £486.54 from the Claimant's pay. This was clearly, in reliance on the Induction to Everyman Racing section of the Deductions from Pay Agreement, because the Claimant had left her employment prior to 29 June 2022. I have some difficulty in working out precisely why £486.54 has been deducted, because the largest deduction ostensibly permitted by the Deductions from Pay Agreement is one week's pay, and the Claimant's weekly salary was £461.54. During the course of the evidence, I was not taken to anything which explained this discrepancy.

49. The Claimant told me that her pay for October was received by her three days late, on 3 November 2021 rather than 31 October 2021. She told me that this had caused her loss, in the form of charges that she had incurred when direct debit payments, which would have gone through had her salary been received on time, were returned unpaid. But there was no evidence to show me what precise charges, if any, had been incurred. In the circumstances, I can say at this stage that I do not consider that, even if the payment was received late, the Claimant has proved that any recoverable loss has been caused to her.

<u>Holiday Pay</u>

50. I now turn to consider the facts relevant to the holiday pay claim.

51. The Respondent's leave year runs from 1 January to 31 December each year. The Claimant was, during both periods of her employment, entitled to the statutory minimum of 5.6 weeks' leave per year (28 days, for a full-time employee such as the Claimant).

52. The Claimant told me that she had only ever taken a small number of days' holiday – she suggested around four, during the entire period from October 2020 to September 2021, and that she had nonetheless received no payment in lieu of accrued but untaken annual leave when her employment ended. She referred to a specific occasion on 28 September 2021 when she had been told to cancel a booked holiday.

53. In response to this, Mrs Sanderson explained that, as part of the flexible furlough arrangements under which the Claimant worked for much of her employment, she had been required on some occasions to take her holiday entitlement. When this happened, the Respondent topped up the furlough payment with an additional 20%, so that the Claimant received her full salary for the days when she was on holiday, rather than merely

80% of salary under the furlough scheme. These holiday payments can be seen in the payslips, described as 'annual leave top'.

54. Mrs Sanderson told me that another entry frequently seen in the payslips – 'top up' – was unconnected to annual leave.

55. On my count, during the period between 1 January 2021 and 14 June 2021 (i.e. the final leave year during her first period of employment), the Claimant received 'annual leave top ups' totalling 15.82 days. This is somewhat more than the annual leave entitlement that she would have accrued during that time.

56. In the period from 30 June 2021 to 30 September 2021 (i.e. the Claimant's second period of employment), I can only see two 'annual leave top ups'. The September 2021 payslip records two days paid as 'holiday'. While it would on the face of it seem obvious that this records payment for holiday taken, neither the Claimant nor Mrs Sanderson seemed particularly sure as to what, precisely, this showed.

Deductions from Wages

57. There is no dispute that deductions from wages were made, as I have described. The issue is whether the deductions were made lawfully.

<u>Deductions from Wages: Relevant Law</u>

58. The particularly relevant law is found in subsection 13(1) of the **Employment Rights Act 1996**. This provides as follows:

> *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.*

59. A deduction will thus be unlawful unless the Respondent can show that it was authorised under one or other of subsections (a) or (b). Here, the Respondent invokes both, arguing that the various agreements that I have described amount either to relevant provisions of the Claimant's contract, or to the Claimant signifying in writing her agreement or consent to the making of the deductions.

60. In my view, the particular issues that I must consider in respect of each deduction are as follows:

    (1) Whether the agreement upon which the Respondent seeks to rely was incorporated into the Claimant's contract of employment, and amounts to a 'relevant provision' under section 13(1)(a).

(2) Alternatively, whether the agreement relied upon amounts to a previous written signifier of the Claimant's agreement or consent to the making of the deduction, under section 13(1)(b).

(3) If the agreement relied upon falls within one of the subsections, whether it was sufficiently clear to authorise the deduction made.

Here, I observe that it is a fundamental principle of contractual interpretation, that where a term of a contract is ambiguous it is construed *contra proferentem* – i.e. against the party who produced the agreement. Here, the Respondent produced the various agreements, so any ambiguity in those agreements must be interpreted against the Respondent.

(4) In respect of each deduction, I must consider whether it has been shown that the deduction was made by reason of one or other of the agreements relied upon by the Respondent. I must also consider whether the Respondent has satisfied me that the conditions set out in the documents for the making of a deduction have in fact been met.

61. If the Respondent gets over these hurdles, then a deduction will, on the face of it, be lawful. However, there are two further matters that I may need to consider:

(1) Whether the agreement authorising the deduction was an unlawful penalty clause.

A provision of an agreement is an unlawful penalty clause if, by way of a sanction for a breach of contract, it imposes a detriment on the contract-breaker which is out of all proportion to the innocent party's legitimate interest in the contract being enforced: see the judgment of the Supreme Court in ***Cavendish Square Holding BV v Makdessi*** **[2016] AC 1172**.

(2) Whether the deduction has the effect of reducing the Claimant's pay below the National Minimum Wage ('NMW').

This is particularly so in respect of the final, October 2021, deduction, since that deduction meant that the pay actually received by the Claimant fell below the NMW. Had the deduction of £486.54 not been made, then the Claimant would have received pay above the NMW.

I will therefore need to consider, in respect of this deduction, whether the deduction made was one which is to be taken into account when assessing whether the Claimant has been paid less than the NMW. If it is to be taken into account, then NMW issues are likely to be relevant. If it is to be disregarded, then in assessing whether the Claimant has been paid NMW I look at the figure prior to the deduction, and if I do that then the Claimant was paid above NMW.

In deciding whether to take the October deduction into account, I will have particular regard to regulation 12(2) of the **National Minimum Wage Regulations 2015**, which, as relevant, provides that:

The following deductions and payments are not treated as reductions—

(a) *deductions, or payments, in respect of the worker's conduct, or any other event, where the worker (whether together with another worker or not) is contractually liable…*

So if I find that the deduction made in October falls within this provision, then it is to be disregarded for NMW purposes, such that the Claimant was not paid below NMW.

62. I also need to consider time limits in respect of some of the deductions. Section 23 of the **Employment Rights Act 1996** provides that a claim of unlawful deductions from wages must be brought within three months beginning with the date of the payment of wages from which a deduction was made. However, where there has been a series of deductions, the claim must be brought within a period of three months beginning with the date of the payment of wages from which the last deduction in the series of deductions was made.

63. Here, the last deduction was made from wages received on either 31 October 2021 or 3 November 2021, and the Claimant issued her claim on 29 December 2021. So the claims in respect of the October (and, indeed, September) deductions were clearly brought in time. The question is whether the earlier deductions form part of a series of deductions. The particular point that led me to raise this issue with the parties of my own motion was that the deductions made in April, May, and June 2021 were made in respect of a different period and contract of employment from the deductions made in August, September, and October 2021. It seemed to me that this might be relevant to whether all the deductions formed part of a single series.

<u>Deductions from Wages: Analysis and Conclusions</u>

64. I will consider each of the months in which deductions were made in turn.

April 2021

65. Two deductions were made in this month. One of £10.26, described as a 'time deduction' in the payslip, and one of £70, described simply as 'deductions'.

66. Dealing first with the £10.26, I have concluded that, subject to the time limit point that I consider below, this was unlawfully deducted. I form that view for the following reasons:

(1) I begin by considering the Clocking in System document quoted at paragraph 15 above. I do not consider that this document was incorporated into the Claimant's contract of employment. Most significantly, I have seen nothing to suggest it was so incorporated. As such, the Respondent cannot rely on section 13(1)(a) of the **Employment Rights Act 1996** in respect of this document. But in my

view the Clocking in System document is a document in which the Claimant signified, in writing, her agreement to the making of a deduction. As such, in principle this document can be relied upon by the Respondent to authorise deductions, pursuant to section 13(1)(b) of the **Employment Rights Act**.

(2) I also consider that the wording of the document is sufficient to authorise the making of deductions for lateness. The words used, and quoted above, are clear in what they say, namely that there will be a deduction of one hour (which in context can only mean one hour's pay) for up to one hour's lateness, and a further £10 for each subsequent hour.

(3) I also do not consider that such a provision amounts to a penalty clause. An employer plainly has a legitimate interest in requiring its employees to attend work on time, and the relatively small deductions provided for in the Clocking in System document are not out of all proportion to that legitimate interest.

(4) However, the Respondent has, on the facts of this case, a fundamental and insurmountable problem. This is that the Respondent did not satisfy me that the Claimant had been late in April 2021 so as to justify the Respondent in invoking the right to make deductions for lateness. As I have observed above, the Claimant was emphatic in her evidence that she had not been late. Against this, Mrs Sanderson was not able to give direct evidence, from her own knowledge, of occasions when the Claimant was late. She was reliant upon the fact that this was apparently the belief of other managers, who did not themselves attend to give evidence, and upon the clocking-in records, the accuracy of which appears very much open to doubt. In any event, Mrs Sanderson was not able to point to anything in the clocking-in records which even apparently showed the Claimant being late in April 2021.

(5) In the circumstances, while I am satisfied that, had the Claimant been late, the Respondent would have been entitled to make deductions, I am not satisfied that the Claimant was in fact late during April 2021. As such, the precondition for the Respondent making such a deduction has not, on my findings, been met.

67. I then turn to consider the further deduction of £70. I have little hesitation in concluding that this deduction was unlawful, subject to the time limit point. It was not actually clear to me, on the evidence, on what basis the Respondent sought to justify this deduction. As I have observed, it was described in the payslip merely as 'deductions', suggesting that it might not have been a 'time deduction' like the £10.26. Since the Respondent put no evidence before me to show why the £70 was deducted, I take the view that it gets nowhere close to establishing that the reason was a permissible one. But even if the deduction was purportedly made on the grounds of lateness, the Respondent would have the same issue that it had in respect of the £10.26 (see paragraph 66(4) above).

68. I accordingly conclude, subject to consideration of time limits, that the Respondent made gross unlawful deductions of £80.26 from the Claimant's April 2021 pay.

May 2021

69. A £5 deduction was made from the Claimant's May 2021 pay. I accept that this deduction was made because the Claimant had lost a key fob.

70. The purported justification for this deduction is again found in the Clocking in System document, which, as relevant, provides:

    If you lose your fob then a replacement will cost £5.

71. What the quoted text does not say is that that cost will be charged to the Claimant, or that, if it is charged to the Claimant, that charge will be imposed by way of a deduction from wages. The sentence could simply be read as notice to the Claimant of the cost that the Respondent will incur in replacing a lost fob.

72. It may be that the Respondent feels that my comments above are overly pedantic. However, as I have observed, clauses that are invoked in an attempt to legitimise a deduction from wages will be construed strictly, and they will be construed against the party who produced the agreement (i.e. the Respondent). Adopting this approach, I do not consider that a mere statement that a replacement fob will cost £5 provides any authority for the deduction of £5 from the Claimant's wages.

73. It follows that I find that the Respondent unlawfully deducted £5 from the Claimant's May 2021 wages, subject to time limits.

74. I add that if I had come to a different conclusion about the effect of the words quoted at paragraph 70 above, then I would not have found that the deduction was unlawful merely because, after losing the key fob, the Claimant subsequently found it and returned it to the Respondent. In my view, if the Respondent had a right to make a deduction because of the loss of the key fob, then that right arose upon the loss of the key fob, and it was not undone by the subsequent return of the key fob (which might have occurred after the key fob was replaced). I also would not have found that any deduction to reflect the loss of a key fob was a penalty clause – the Respondent has a legitimate interest in ensuring that its key fobs are kept safe, and charging the Claimant a modest sum for the replacement of a lost key fob would not be disproportionate to the Respondent's legitimate interest. But I do not get to the stage of considering these matters, because I do not conclude that the Respondent's Clocking in System document in fact authorises the deduction.

June 2021

75. Two deductions were made from the Claimant's June 2021 pay. First, there was £61.56, said to be a time deduction. I have little hesitation in concluding that this sum was, again subject to time limits, unlawfully deducted. While the Respondent was entitled to make deductions if the

Claimant was late, it has not satisfied me that she was in fact late in June 2021, for the same reasons that it failed to satisfy me that she was late in April 2021.

76. The second June 2021 deduction was of £236.54. This deduction was made in reliance on the Induction to Everyman Racing document quoted at paragraph 17 above. In essence, the Respondent contends that the Claimant left within a year of commencing her employment, and that as such the Respondent was entitled, pursuant to the Induction to Everyman Racing document, to deduct 50% of her gross weekly salary (although I am, as observed above, unable to understand why that deduction was £236.54 and not £211.54).

77. Leaving aside issues about the precise calculation, the key question is whether the Induction to Everyman Racing document authorised the deduction of 50% of a week's pay. This is a difficult question, but I have come to the view that the answer is that the document does not authorise the deduction made, or any deduction. I take this view for the following reasons:

    (1) I accept that the Induction to Everyman Racing document was incorporated into the Claimant's contract of employment. The document itself provides that any right to make deductions granted by the document took effect as a contractual term. As such, if the document did permit deductions, then those deductions would be permissible by reason of section 13(1)(a) of the **Employment Rights Act**. In any event, even if the document was not incorporated into the contract, it was signed by the Claimant, and I consider that it would fall within section 13(1)(b) of the **Employment Rights Act**, as being a document in which the Claimant had previously signified in writing her agreement to the deduction.

    (2) The question is therefore one of construction of the meaning of the document. It is in this regard that I find that the Respondent's argument fails. In my view, it is not possible to construe the document as authorising a deduction of half a week's pay, for the following reasons:

        (i) The cross, described at paragraph 17 above tends to suggest that no deduction would be made. It may be that the underlining below the words 'proportion based' might indicate that a deduction would be made, but there is at least ambiguity (which, as I have observed, must be construed against the Respondent). The ambiguity is particularly apparent in light of Billy Smart's comments that the Claimant did not need to worry about what the Induction to Everyman Racing document said.

        (ii) More importantly, however, there is the fact that, even if the underlining is sufficient to allow the Respondent to invoke the provisions embodied in the words '*a proportion based on the following scale*', the question 'a proportion of what' remains unanswered. There is nothing in the Induction to Everyman Racing document which says that the proportion is of a week's pay. It could equally be an hour's pay, a day's pay, a month's

pay, or a year's pay. It could, on the wording of the document, be a proportion of something wholly unconnected to pay.

(iii) There was no evidence before me from which I could conclude, applying the standard contractual test of the reasonably objective observer, that the proportion should be of a week's pay rather than anything else.

(iv) This failure to specify the sum of which a proportion may be deducted is fatal to the Respondent's case on this point. In order to make a deduction, the Respondent must be able to show me a document that clearly authorises, not merely *a* deduction, but *the* deduction that was made. There is nothing in the document which permits a deduction of 50% of a week's pay. At most, the document authorises the deduction of 50% of an unspecified sum.

(v) I draw some limited support for my analysis from a first-instance judgment cited in the *IDS Employment Law Handbooks*, Volume 13, paragraph 2.93, from which I quote directly:

> ***Pearce v Stone Foundries*** *ET Case No.34531/92: a persistently unpunctual employee had 15 minutes' pay deducted each time he was late. A clause in the employee handbook provided that if lateness continued following a caution, payment 'for the same' would be deducted. An employment tribunal held that this was too vague since it did not give the employee any method of calculating what deductions could be made.*

The selfsame criticism may be made here: the Induction to Everyman Racing document purports to authorise a deduction, but does not enable the Claimant to calculate that deduction.

78. For these reasons, I have concluded that the deduction of £236.54 was also unlawful. It follows that the Respondent has, once again subject to time limits, made unlawful deductions totalling £298.10 from the Claimant's June 2021 pay.

August 2021

79. £26.19 was deducted from the Claimant's August 2021 pay. This was described as a 'time deduction'. However, as with the April and June deductions, the Respondent failed to draw my attention to any evidence showing that the Claimant was, notwithstanding her denials, late for work at any point during August 2021. In the circumstances, I conclude that the deduction of £26.19 was unlawful.

September 2021

80. £15 was deducted from the Claimant's September 2021 pay. It was not clear to me why this sum was deducted. As I have noted above, it may be that it was connected to a clocking-in error (or, perhaps more likely, two

such errors). But, as I also noted, this was pure speculation on my part, and I cannot make judgments based on speculation. If the Respondent was relying on a clocking-in error, then it failed to advance any evidence to prove that such an error occurred. If it was relying on an alleged incident of lateness, then it failed to draw my attention to any particular occasion(s) on which the Claimant was late, and faces the same problems that it had in respect of April, June, and August 2021. In summary, the Respondent has not satisfied me that the deduction was permissible, and I accordingly find that it was unlawful.

October 2021

81. In October 2021, the Respondent deducted £486.54 from the Claimant's pay. This deduction was plainly intended to be a deduction of one week's pay, in reliance upon the provisions of the Deduction from Pay Agreement described at paragraph 41 above. I repeat the observation at paragraph 48 above that a week's pay would actually be £461.54.

82. I have concluded that it was permissible for the Respondent to make *a* deduction from the Claimant's October 2021 pay, but that the deduction that was in fact made was greater than that which was authorised. I have concluded that *a* deduction was authorised for the following reasons:

    (1) The provisions of the Deduction from Pay Agreement were expressly incorporated into the Claimant's contract of employment, such that, pursuant to section 13(1)(a) of the **Employment Rights Act**, the Respondent may make deductions permitted by the document. In any event, I would have found that by signing the Deduction from Pay Agreement, the Claimant signified her agreement to the making of the deductions, such that section 13(1)(b) of the **Employment Rights Act** authorised the making of deductions permitted by the document.

    (2) The Deduction from Pay Agreement makes clear that a deduction may be made from final salary if the Claimant leaves before 29 June 2022, as she did.

    (3) The same points applied to the June 2021 deduction. However, in my view the problems that bedevilled the Respondent in respect of the June 2021 deduction do not apply here. In particular:

        (i) In the Deduction from Pay Agreement, there is an arrow pointing from the words '*proportion of a working week based on the following scales*' to the scales themselves. This tends to suggest that the scales are to be applied. Certainly, the arrow is more suggestive of that result than the partial underlining in the previous agreement.

        (ii) The major problem that the Respondent faced in respect of the agreement applicable at the time of the June 2021 deduction was that it did not state that the percentage deduction was to be calculated by reference to a week's pay. By contrast, the Deduction from Pay Agreement signed in July 2021 says in terms that the deduction is to be of a '*proportion of a working*

week'. This can only sensibly be read as meaning that the deduction will be of a proportion of a week's gross pay. There is no other logical construction of the words used.

(4) I accordingly conclude that the wording of the Deduction from Pay Agreement was sufficient to make clear to the Claimant and anyone else that if she left her employment early, a deduction would be made from her final salary, and that that would be a percentage of a week's gross pay, according to the scales. Such a deduction is therefore lawful, unless rendered unlawful as a penalty clause or under the minimum wage provisions.

83. I do not consider that the Deduction from Pay Agreement is a penalty clause. For one thing, the penalty clause rules apply where a contract has been breached, and I do not consider that there has necessarily been a breach of contract simply because the Claimant has left her employment. As such, the penalty clause rules do not apply.

84. But even if the penalty clause rules did apply, I consider that the Deduction from Pay Agreement would not fall foul of them. I have heard from Mrs Sanderson that the Deduction from Pay Agreement was incorporated because of the Respondent's difficulties in recruitment, the need to train any new staff, and the consequent need to retain staff and to incentivise staff to remain employed (or to disincentivise them from leaving). These are entirely legitimate aims for an employer to pursue. I do not consider that a relatively limited deduction, which declines the longer an employee remains employed, is disproportionate to those aims.

85. During the hearing, the Claimant pointed out that the amount of money that she actually received from the Respondent for the period from 21 September to 30 September 2021 was below the NMW. She suggested that this rendered the deductions unlawful.

86. As is set out at paragraph 61(2) above, the question in considering whether the Claimant was paid NMW is whether the deduction should be factored in in ascertaining whether her pay fell below NMW. Such an assessment will turn on the words of regulation 12(2)(a) of the **National Minimum Wage Regulations 2015**, which I quoted at paragraph 61(2).

87. In my view, the deduction made in October 2021 falls within the wording of regulation 12(2)(a). It was, as I have explained, a deduction made pursuant to the Claimant's contract. The question then is whether the deduction relates '*to the [Claimant's] conduct or any other event, where the [Claimant] is contractually liable'*. In my view, it does. The '*conduct or any other event*' was the Claimant's resignation. On the terms of the Deduction from Pay Agreement (which was incorporated into the Claimant's contract of employment) the Claimant became contractually liable to undergo a deduction calculated in accordance with the scales. There seems to me to be little doubt, therefore, that the deduction is not to be factored into a calculation of whether the Claimant has received NMW. If the Claimant's pay is calculated without regard to the deduction, then she has received NMW.

88. I draw support for my conclusions on NMW from the judgment of the Employment Appeal Tribunal in ***Commissioners for Revenue and Customs v Lorne Stewart plc*** [2015] IRLR 187, in which an employee's act in resigning her employment, thereby triggering a contractual provision entitling the employer to deduct certain sums from her final salary, was held to fall within the predecessor provision to regulation 12(2)(a).

89. It follows from the foregoing paragraphs that any deductions permitted by the provisions of the Deduction from Pay Agreement will be lawful.

90. The agreement provided that a deduction might be made if the Claimant left before 29 June 2022, and she clearly did so. However, there is a question concerning the extent of the permitted deduction. The Respondent deducted one week's gross pay (or slightly more). As provided for by the scales, such a deduction could be made if the Claimant left less than three months after her start date.

91. The Claimant's start date, in respect of her second period of employment, was 30 June 2021. She left her employment on 30 September 2021. As such, she has not left less than three months after her start date. Rather, she has left exactly three months after her start date.

92. A deduction of a week's pay could only lawfully be made if the Claimant left less than three months after her start date. As she left exactly three months after her start date, the deduction that could be made was in the next band down, namely 75% of a week's pay (applicable where the Claimant left '*3 months but less than 6 months after start date*').

93. 75% of the Claimant's gross weekly pay of £461.54 is £346.16. A deduction in this sum would have been lawful. However, the Respondent deducted £486.54. This exceeded the lawful deduction by £140.38. As such, the Respondent made an unlawful deduction of £140.38 from the Claimant's October 2021 pay.

Total unlawful deductions made

94. I have found that the Respondent made the following unlawful deductions, subject to consideration of time limits:

    (1) April 2021: £80.26.
    (2) May 2021: £5.
    (3) June 2021: £298.10.
    (4) August 2021: £26.19.
    (5) September 2021: £15.
    (6) October 2021: £140.38.

    These deductions total £564.93.

<u>Time Limits</u>

95. I have repeatedly referred to the possible impact of time limits on the Claimant's claim. As I have noted, where a series of deductions are made,

the three-month period for bringing a claim runs from the last in the series of deductions.

96. The deductions made in August, September, and October 2021 were plainly a series of deductions. In each case, the Respondent has made deductions from the Claimant's pay, purportedly in reliance upon provisions authorising such a deduction. In any event, each of these claims was brought in time as individual claims, since the Claimant commenced early conciliation within three months beginning with the date on which each deduction was made, and once early conciliation was concluded the claim was promptly brought to the tribunal.

97. The question is whether the deductions made in April, May, and June 2021 were part of that same series. If they were not, then they will be out of time, as early conciliation was commenced more than three months after each deduction was made.

98. My initial doubt was whether the fact that the deductions made in April, May, and June were made in respect of employment under a separate contract of employment from that which applied when the deductions made in August, September, and October were made had the effect that the deductions were not part of the same series. On reflection, however, I have concluded that the deductions made in April, May, and June, and the deductions made in August, September, and October were one series of deductions, notwithstanding the Claimant's resignation and re-employment under a new contract. The break between periods of employment was minimal. All deductions were made in purported reliance on very similar contractual provisions, and give rise to the same issues. The parties were the same in each case. In my view, all deductions are to be viewed as part of one continuing series.

99. It follows that the claims were all brought in time. I will accordingly give judgment for the Claimant for £564.93 in respect of unlawful deductions from wages.

Holiday Pay Claim

Holiday Pay: Relevant Law and contractual provisions

100. The combined effect of regulations 13 and 13A of the **Working Time Regulations 1998** is that a worker, such as the Claimant, is entitled to 5.6 weeks' paid annual leave per year (that is, 28 days per year). The same right was expressly granted to the Claimant by clause 9.1 of her second contract of employment, signed in July 2021.

101. Pursuant to regulation 14 of the Working Time Regulations, a worker whose employment is terminated during their leave year is entitled to receive a payment in lieu of any paid annual leave that they have accrued, on a *pro rata* basis, during their leave year, but have not taken. Such a payment in lieu is calculated on the basis that the worker receives one day's pay for each day of accrued but untaken annual leave.

102. The same right was expressly conferred upon the Claimant by virtue of clause 9.4 of her second contract of employment.

103. The Respondent's leave year ran from 1 January to 31 December each year, as stated in clause 9.2 of the Claimant's second contract of employment.

104. Clause 9.3 of the Claimant's second contract of employment provides that:

> *For the years in which the Employment commences or terminates, your entitlement to Annual Leave shall accrue on a pro-rata basis for each complete month of service during the relevant year*.

105. The essence of the above is that, in calculating whether any holiday pay is due to the Claimant, my task is to (i) calculate how much annual leave entitlement the Claimant had accrued during her second period of employment and then (ii) calculate how much annual leave she had in fact taken. If the amount of leave taken is less than the amount of leave accrued, then the Claimant is entitled to a payment in lieu of those days' leave which have been accrued but not taken.

<u>Holiday Pay: Analysis and Conclusions</u>

106. As I have observed above, the Claimant appears to have been paid at least what she was entitled to in respect of her first period of employment. I am therefore concerned with her second period of employment, which lasted from 30 June 2021 to 30 September 2021.

107. The Claimant was employed for almost exactly three months (strictly, three months and one day). Her entitlement to annual leave over the course of a year would have been twenty-eight days. It follows that she had accrued one-quarter of this, which is seven days' annual leave entitlement.

108. How much leave did the Claimant take between 30 June 2021 and 30 September 2021? I refer to my findings at paragraph 56 above. The payslips show two days marked as 'annual leave top up' during this period. So that is two days' annual leave taken.

109. There are then two days paid as 'holiday' in the September 2021 payslip. As I have noted, neither the Claimant nor Mrs Sanderson seemed particularly clear what this related to. However, it seems to me that it is highly likely to refer to some form of annual leave taken. It is not clear to what else it could refer. Moreover, the burden of proving the extent of any accrued but untaken annual leave rests with the Claimant, and she has not satisfied me that the two days marked 'holiday' do not in fact represent two days' annual leave taken by her. On the balance of probabilities, I therefore find that the payment marked as 'holiday' in the September 2021 payslip represents a further two days' paid annual leave.

110. That means that I find that the Claimant received a total of four days' paid annual leave between 30 June 2021 and 30 September 2021.

111. However, the total amount of annual leave that the Claimant had accrued when her employment ended was seven days. She therefore had three days outstanding at the termination of her employment. She is entitled to a payment of three days' gross pay in lieu of this accrued but untaken annual leave.

112. The Claimant's annual salary of £24,000 equated to a gross daily rate of £92.30 (reached by dividing £24,000 by 260, being the number of weekdays in a year). I have found that the Claimant is entitled to a payment of three days' pay in lieu of accrued annual leave. The calculation is accordingly

3 x £92.30 = £276.90.

113. I observe in passing that clause 9.4 of the Claimant's second contract of employment permitted the Respondent to require her to take any accrued but outstanding annual leave during her notice period. However, this provision was not invoked.

114. As such, I find that the Respondent is liable to pay the Claimant the gross sum of £276.90 in lieu of accrued but untaken annual leave.

Summary

115. As set out above, I find that the Respondent owes the Claimant the following amounts:

(1) Unlawful deductions from wages: £564.93 gross.

(2) Payment in lieu of accrued but untaken annual leave: £276.90 gross.

116. These sums total £841.83 gross, and that is the sum that the Respondent must pay to the Claimant.

Employment Judge **Varnam**
16 June 2022

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE