Case Number: 2302466/2021

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr H Brkic		**Lazerbeam Fire and Security Limited**

Held at Croydon (By video) **On 8 August and 10 October 2022**

BEFORE: Employment Judge Siddall, Ms S Khawaja, Ms S Goldthorpe

Representation

For the Claimant: **In person**

For the Respondent: **Mr P Strelitz, Counsel**

RESERVED JUDGMENT

The decision of the tribunal is that:

1. The Claimant was an employee of the Respondent.
2. The Claimant was constructively dismissed.
3. The claim for unfair dismissal under section 100 of the Employment Rights Act 1996 is not well founded and it does not succeed.
4. The claim for unfair dismissal under section 104 of the Employment Rights Act 1996 is not well founded and it does not succeed.
5. The claim for breach of contract succeeds and the Claimant is awarded damages of:
    a. £454.34 in relation to lost pension contributions
    b. £267.55 in relation to the cost of private medical insurance.

6. It is declared that the Respondent made unlawful deductions from the wages of the Claimant and he is awarded a gross sum of £100.92 in respect of overtime worked on 7 February 2021.
7. The claim for a payment in lieu of annual leave accrued as at the date of termination of the Claimant's employment brought under regulation 14 of the Working Time Regulations 1998 succeeds and the Claimant is awarded the sum of £1696.21 gross.
8. The total sum awarded to the Claimant is £2519.02

RESERVED REASONS

1. The Claimant claims that he was constructively dismissed. He alleges that he was automatically unfairly dismissed either for asserting a statutory right or for raising health and safety concerns about his workplace. He also claims that the Respondent failed to allow him any paid holiday, has not paid his correct wages and has broken his contract in relation to the provision of pension and private medical insurance benefits.
2. We heard evidence from the Claimant and from Mr Hamid Nejad and Mr Howard Bailey of the Respondent.
3. The facts we have found and the conclusions we have drawn from them are as follows.
4. Prior to working for the Respondent, the Claimant had worked as a self-employed contractor. During this period he was paid by invoice. He was not paid through the Construction Industry Scheme (CIS). The Claimant decided that he would like to seek an employed position which offered more security.
5. The Respondent provides fire and security services at a number of sites.
6. Around October 2020 the Claimant applied for the position of Fire and Security Engineer with the Respondent. He attended an interview on 22 October 2020.
7. On 23 October 2020 the Respondent emailed the Claimant 'an offer of employment' stating a salary of £35,000 (page 75). Working hours would be 08.00-17.00 Monday to Friday, plus overtime and some Saturdays. The Claimant would be required to participate in an on-call rota after a three month probation period. The Claimant would be based at Guys and St Thomas' Hospital in London. A start date of 2 November 2020 was proposed.
8. The Claimant responded by raising some queries about any benefits which went with the position (76). In an email dated 26

October 2020 the Respondent confirmed that there was a private health insurance scheme available with Aviva and a pension scheme which the employer would make contributions to (77). There was no mention of any qualifying period for these benefits. The Claimant would be entitled to 28 days holiday including bank holidays. The Respondent would pay for business fuel and parking. The Claimant wrote back querying whether the 28 days included bank holidays and the Respondent confirmed this and also said that the claimant got an extra day's leave for his birthday. We find that these queries clearly demonstrate that the Claimant was determined to find a new role on an employed rather than a self-employed basis.

9. On 27 October 2020 the Claimant accepted the offer and he started work on 2 November 2020. He completed an induction on his first day.
10. Mr Nejad said that he had understood that the Claimant wished to be engaged as a contractor and made this clear on a personal information record form he completed prior to starting work on 30 October 2020 (paragraph 13 of his witness statement). The Claimant's evidence on this is that he completed his personal details on the form, but that the information about the method of payment was added by someone else at a later time.
11. In the alternative Mr Nejad says that very soon after he started work the Claimant asked him if there was any way he could earn more money. Mr Nejad said that he could not increase the salary but he suggested that if the Claimant was to be paid through the CIS scheme he would take home more money which would result in fewer deductions. Mr Nejad does not assert that he explained to the Claimant that this would involve him becoming self-employed once more. Mr Nejad said that the Claimant agreed to this and as a result Mr Nejad instructed the person who dealt with payroll to pay him through the CIS scheme, deducting 20% tax only each month. The Claimant says that this conversation did not take place, but that in any event he had no intention of becoming self-employed once more.
12. There is no documentation confirming any change of employment status from the Respondent to the Claimant. The Respondent did not issue either a contract of employment or a contractor agreement to the Claimant. There is a personal information record which the Claimant agrees he completed providing his address and bank details. This states that he was to be paid by CIS rather than PAYE but the Claimant states that this information was added

by someone else after he had returned the form on 30 October 2020. We accept his evidence on that.

13. We find that it is more likely than not that no such discussion between Mr Nejad and the Claimant took place. We find Mr Nejad's evidence on this to be contradictory. Paragraph 13 of his witness statement is in confict with paragraph 18. Mr Nejad also agrees that he saw the offer of employment that was sent to the Claimant but he did not query this at the time. In the light of this conflict we prefer the evidence of the Claimant that no such discussion took place. We accept that the Claimant was seeking an employed position and did not want to continue working on a self-employed basis. Even if there was a discussion about going onto the CIS scheme, it was not explained to the Claimant that going onto the CIS scheme would involve a change of status, and a loss of benefits and holiday entitlement for the Claimant. We find that if this had been explained, he would not have agreed to be paid through CIS.
14. The Claimant was asked to sign that he had received the Employee Handbook and a copy of the contract with GSTT.
15. There is an exchange of messages in which the Claimant was chased for his Unique Tax Reference and advised to register for CIS, which he did.
16. We accept on the balance of probabilities that it was the Claimant's understanding that he had to register for CIS in order to be paid, at least in the short term. In the Whatsapp messages it is suggested to him that if he does not do this he will have to be paid on an invoice (which would be consistent with self-employment, which the Claimant did not want) and that it was suggested to him there was a degree of urgency to the registration. We find that the Claimant had no understanding that this meant he was to be treated as self-employed.
17. The Claimant received his first pay in December 2020 and was issued with a CIS statement rather than an itemised payslip.
18. The Respondent has provided policies dealing with Covid in the bundle but the Claimant says he never saw these and nor did he see any posters on the wall about handwashing or mask-wearing. On balance we prefer the evidence of the Respondent on this matter. They were operating in a hospital environment and it seems inconceivable that they would have created guidance and failed to communicate this to their staff. We have also noted that there are Whatsapp messages in the bundle telling engineers to wear masks when on site.

19. The Claimant completed a timesheet each week. These timesheets referred to 'Employee' name and number.
20. Over the Christmas period the Claimant filled in a time-sheet as normal. On the bank holidays, he recorded that his normal hours were 8 hours but he did not claim for the public holidays in his total hours. He says that he made a mistake – he was not sure how to claim his holiday pay. It seems he was not paid for public holidays over the Christmas break in 2020.
21. The Claimant says and we accept that on 4 January 2021 he chased Mr Nejad for his employment contract.
22. The Claimant says that the team met daily and that there was no social isolation within the workplace. On 11 January 2021 two members of staff had a dry cough and looked exhausted.
23. The Claimant became unwell on 13 January 2021. He alleged that on the 14 and 15 January he suggested to his line manager Mr Bailey that he should get tested for Covid, but that Mr Bailey advised him not to do that as it would mean the whole team having to isolate. Mr Bailey denies that. On balance we prefer the evidence of Mr Bailey on this point. There were a number of messages between the Claimant and Mr Bailey around this time and there is no mention in any of them that the Claimant was feeling unwell.
24. The Claimant was on call from Friday 15 January to Monday 18 January. He said that he was feverish and in bed. Around 2am on Saturday 16 January he received a call to go to the Evalina Children's hospital for a job. Although he had a fever and was coughing, he went to the hospital, ensuring that he was masked and taking all possible precautions. He says that he was worried about the consequences for his job if he did not go.
25. Whatsapp messages record the request for the Claimant to attend the job. He agrees that he also had a call with Mr Bailey either before or after the message was sent. It is not in dispute that the Claimant made no objection to being called out and nor did he query with Mr Bailey whether he should go if he had symptoms of Covid.
26. After returning from the call, the Claimant advised Mr Bailey on the afternoon of 17 January that he would be off work the next day and would take a test. Mr Bailey wished him well. On Monday 18 January 2021 the Claimant tested positive for Covid. He returned to work on 25 January 2021.

27. On 5 February 2021 the Claimant messaged Lenka saying 'can you give me a call when you are free? It looks there is some miscalculation on my last month salary payment'.
28. On 7 February the Claimant sent an email querying his payslip and stating that he should have been paid SSP. He asked Lenka to confirm. She replied that because he was on CIS he was not entitled to SSP. The Claimant replied 'I shouldn't be on CIS scheme that wasn't mentioned on my interview. I should be on a full employment please can you check this with Tracey and let me know'. No response to this query has been included in the bundle.
29. The Claimant agrees that after this he received full payment for his period of sickness absence. Mr Nejad confirmed that he authorised the payment to avoid the Claimant suffering financial hardship.
30. It is Mr Nejad's evidence that in the early part of 2021 he made a cash gift of £500 to engineers working for the Respondent including the Claimant. The Claimant denies receiving such a sum. Mr Nejad says that he made the gifts from his own money. There are no records of the payment and it was not put through the payroll or CIS scheme. In the absence of any records of the payment we prefer the Claimant's evidence that he did not receive a cash payment of £500. We accept however on balance that Mr Nejad could have made such payments to other engineers.
31. On 17 February 2021 Mr Bailey remonstrated with the Claimant when he found him and a colleague eating donuts in a bin area. The Covid policy said that meals should only be eaten in the hospital canteen.
32. The Claimant's case is that on numerous occasions he raised health and safety concerns with the Respondent and especially Mr Bailey. He says that there was a lack of Covid measures in operation, and that health and safety in other areas was also very lax.
33. The Claimant asserts that he was obliged to work in ceiling voids that contained asbestos on several occasions when he had not had his mask fitted. The Respondent agrees that the Claimant did not have a mask for three months. On the first day he came for a fitting, the Claimant was not clean shaven so the test could not go ahead. At the second test the mask did not fit. A larger mask had to be ordered and this did not arrive for three months. On 27 January 2021 he attended a further fitting and was signed off to work in ceiling voids. The Claimant asserts that he was required to work in ceiling spaces even before he had a correctly fitting mask.

The Respondent argues that the Claimant should have been well aware that without a mask he should not be working in asbestos areas, that this was a breach of health and safety rules and should have been left to other members of the team.

34. We note that the ceiling permit contained in the bundle records that the Claimant was carrying out this work alongside a supervisor, who was not called to give evidence. The Respondent has not provided evidence therefore to show that the Claimant was instructed or prevented from working in ceiling voids without a mask. We accept that it is possible that this happened on occasion. The tribunal felt however that the Claimant had a responsibility to look after his own health and safety. He had attended Asbestos Awareness Certificate training on 1 November 2020 before starting his employment. He was clearly aware of the risks and it would have been foolhardy for him to put his head into a ceiling space without wearing a mask.
35. In any event, whatever happened in relation to this work, the key point is not whether the Claimant was forced to work in ceiling spaces but whether he complained to Mr Bailey that he was. The Claimant says that he raised these and other health and safety concerns, but that when he did so he was told that he had chosen the wrong company to make complaints to or asked 'do you want to sell the big issue?'
36. We heard evidence that managers at St Thomas's hospital had previously sent engineers home for health and safety breaches.
37. In addition we note that the Claimant did not record any of his health and safety concerns in Whatsapp messages or emails, although he did use both of these methods to query his pay when necessary.
38. The Respondent has produced a large number of risk assessments and policies, and examples of where health and safety instructions were issued via Whatsapp.
39. Having considered all the evidence we find it more likely than not that the Claimant did not raise significant concerns about health and safety with the Respondent. If he had done so we would have expected to see these documented in the same way that he raised his concerns about his pay. He may have had concerns about aspects of the Respondent's working practices but there is no evidence that he brought these to Mr Bailey's attention. As to the Claimant's assertion about the comments made to him, whilst we accept that they may have been made, we are not able to find that

such remarks amounted to threats against the Claimant for raising health and safety issues.

40. Further it is not the Claimant's case that at any point he refused to work in ceiling voids or in other dangerous situations, or insisted on taking other steps to protect his health and safety.
41. We turn to the events leading up to the termination of the Claimant's employment. We have seen an offer of employment to the Claimant from a different employer dated 31 March 2021. It appears therefore that he started looking for other work in the early part of the year.
42. On 1 April 2021 the Claimant wrote to Mr Nejad stating that he wished to resign. He asked for clarification of how much notice he had to give, as he understood that he was being treated as self-employed. He asked what holiday entitlement he had and said that he would like to take his annual leave during his notice period. The General Manager responded accepting his resignation. She thanked the Claimant for his work which she praised him for but did not answer his questions. The Claimant raised his queries a second time. He was advised that his concerns would be covered in an information email that would be sent out.
43. On 7 April the Claimant wrote to the General Manager again. It seems that his queries had not been answered. He said that he was unsure as to what terms applied to him. He said that the 'final straw and shock' was when he realised that the Respondent had not been paying any national insurance contributions for him. He referred to the benefits he had been promised when he was offered employment and added 'it hit me as a shock when I realised that none of that was intended to be documented in a contract and that I am missing out on those deliverables leaving me no choice but to leave as I am concerned about my future'. It does not appear that he received a reply to the matters raised in this email.
44. The Claimant left and started his new job very soon afterwards. He was offered a higher salary, and accepts that he suffered no loss of earnings.

Decision

45. To claim unfair dismissal and breach of contract, the Claimant must demonstrate that he was an employee of the Respondent. For his other claims he must show that he was at the very least a 'worker' under the relevant legislation. We therefore turn first to the question of the Claimant's status

46. We start with the written terms setting out the offer made to him. This is clearly described as an offer of employment and refers to annual leave and other benefits. We note also that an Employee Handbook was issued to him and that he is described as an employee on his timesheets. We find that as at the commencement of his employment he was an employee.
47. We find that there is no evidence that any change of status was every agreed with the Claimant. We take into account the following matters:
    a. We accept that the Claimant had previously been self-employed and that he understood what this entailed. We accept that in seeking work with the Respondent he was looking for the security of an employment contract.
    b. As the Claimant took some care to negotiate the terms of the employment offer and the benefits that came with it, we consider that it would have been very unlikely that he would have changed his mind a couple of days later.
    c. No written document was issued to confirm any change of status.
    d. We don't accept the Respondent's submission that in registering for the CIS scheme, the Claimant clearly understood that this would mean that he would be treated as self-employed going forward. The Claimant had not worked under the CIS scheme previously. We find that it was the Claimant's understanding that he had to register for CIS in order to make sure that he would be paid in December and for no other reason.
    e. The emails that the Claimant wrote in January and February, querying the lack of an employment contract and the failure to pay sick pay demonstrate that his understanding that he was (or should have been) an employee.
    f. We note also that on 7 February the Claimant asserted that he should not be on the CIS scheme.
48. In any event the reality of the situation is that the Claimant was an employee. It was Mr Nejad's evidence that PAYE employees and contractors were rostered to work in exactly the same way. We note that all engineers attended each morning to have work allocated to them, and we find that there were strict controls as to how they were to carry out the work (as demonstrated by the health and safety policies, the GSTT handbook and instructions given by Whatsapp). Mr Nejad argued that contractors had 'a little more' flexibility in when they could take time off, and that some of

them chose to take extended breaks if they were going overseas. There is however no evidence in the bundle of contractors taking time off in this way, and no evidence that the Claimant took any time off at all save for public holidays. Mr Bailey confirmed that he treated those paid as contractors and those paid as employees in exactly the same way.

49. The evidence demonstrates that the Respondent exercised a very high degree of control over what tasks the Claimant carried out each day and how he did it. He was required to work to a roster and had fixed hours, plus an obligation to work 'on call'. We find that there was no right for him to send a substitute to do the work for him. The Respondent's evidence was that the Claimant could find a colleague to swap with during 'on call' periods but that is not the same as an unfettered right of substitution.
50. Our starting point is the offer of employment which clearly indicates that the Claimant was being offered a role with the status of employee. The evidence of the working arrangements is consistent with the documentary evidence. The Respondent's evidence that a change of status was agreed within days of the commencement date is wholly unconvincing. The Claimant was therefore entitled to employment rights such as paid annual leave, the right not have deductions made from his salary and the right to claim unfair dismissal.
51. The Claimant had less than two years' service and therefore cannot bring a claim for ordinary unfair dismissal. He brings claims under section 100 and 104 of the Employment Right Act for which the two year's qualification period is not required. We therefore consider next whether he was dismissed.

Was the Claimant dismissed?

52. The Respondent did not expressly dismiss the Claimant. He submitted his resignation. He must demonstrate that he resigned in circumstances where he was entitled to terminate his employment without notice by reason of his employer's conduct (section 95(1)(c) of the Employment Rights Act 1996.
53. The Claimant must therefore show that the Respondent committed a fundamental breach or breaches of his contract of employment. This may be a breach of an express term or an implied term such as the duty of trust and confidence. To establish a repudiatory breach of this implied term the Claimant must demonstrate that the Respondent's actions were calculated or likely to destroy the working relationship.

54. We find that the Respondent breached the Claimant's contract of employment as follows:
    a. There was a wholesale failure by the Respondent to adhere to the terms set out in the offer of employment, such as: the promise to provide membership of a pension scheme, private healthcare insurance and paid annual leave. These each amounted to individual breaches of his contract of employment.
    b. Their denial that he was entitled to sick pay (even though this was eventually paid)
    c. Their failure to issue him with a contract of employment
    d. The unilateral decision to treat the Claimant as a contractor and their failure to respond to his questions about his employment status.
55. We find that the last three items amounted to a breach of the implied term of trust and confidence. We therefore find that the Respondent breached his contract of employment in several respects and further that their conduct was calculated or likely to destroy the working relationship. These amounted cumulatively to a repudiatory breach of his contract.
56. It is true that the Claimant waited until he had found new employment before resigning. We cannot criticise him for this as restrictions relating to the Covid pandemic were still in place and we accept that he needed to ensure that he had a job. However we do not accept that the Claimant simply left to take a higher paid job. The Claimant made his reasons for leaving very plain in his email of 7 April 2021. We accept that he decided to resign when he realised that the Respondent was not treating him as an employee, which was his goal when he accepted the job, and was not going to pay him the benefits he had been promised. We do not find that he waited too long before resigning and accepted the Respondent's breach. Waiting to get a new job before resigning is not fatal to a constructive dismissal claim.

What was the reason for dismissal?

57. Was the Claimant unfairly dismissed for a health and safety reason under section 100 of the Employment Rights Act 1996?
58. The Claimant was not an appointed health and safety representative. We have found that the Claimant did not raise health and safety concerns, nor did he either leave his workplace, refuse to carry out any task or take steps to protect himself within the categories set out in section 100. In fact, the opposite

occurred: we refer for example to the occasion when the Claimant was called out to attend the hospital on 16 January 2021 and went to work despite fearing that he had Covid and without making any objections. We have also noted the Claimant's evidence that he worked in ceiling voids without a mask, and at no point refused to do so.

59. We find that the Claimant cannot bring himself within any of the subsections of s 100.

60. Even if we are wrong on that, it is not the Claimant's case that he was subjected to any detriment for raising health and safety concerns. He refers to a couple of comments made in the workplace which may have been said, but we find that none of these comments were made in response to him raising health and safety concerns or taking steps to protect his health and safety. He has not established any conduct in this regard which amounted to a repudiatory breach of his contract.

Was the Claimant unfairly dismissed for asserting a statutory right?

61. We have considered the correspondence between the Claimant and HR from 5-7 February 2021 but we are not satisfied that in these exchanges the Claimant asserts a statutory right. He relies upon the fact that he asserted his right to SSP. It appears that this is not a 'relevant statutory right' within section 104(4).

62. We accept that in this exchange the Claimant asserts that he should not be on the CIS scheme and should be treated as an employee.

63. That is not the assertion of a specific right under the Employment Rights Act 1996. We accept however that an assertion that a person is an employee could be seen as an assertion that he was entitled to a variety of relevant statutory rights in some situations. Even if this was the assertion of a statutory right or rights within the meaning of section 104(4) we note that the Claimant does not argue that he was subjected to any adverse treatment for raising his concerns about his pay. In response to his complaint about not being paid for his sickness absence, Mr Nejad agreed to pay him not just SSP but his full salary for the absence period. This is the very opposite of a detriment.

64. There is no evidence of any repudiatory breach of contract as a response to the Claimant asserting his rights in February 2021. Therefore we find that the Claimant cannot bring himself within section 104(4).

Conclusion in relation to claims for unfair dismissal

65. We accept that the Claimant was unhappy once he realised the implications of the CIS scheme. We accept also that he may have had some concerns about health and safety at the workplace. (We have not been in a position to reach any conclusion about the legitimacy of such safety concerns and that will be for others to decide). However to succeed with a claim under section 100 or section 104(4) the Claimant has to establish that he has been dismissed for *taking action* in relation to such concerns ie for asserting his rights or acting on the safety issues. We accept that the Claimant left his employment once he realised that contrary to his understanding he was not being treated as an employee and was not going to receive the benefits that he had been promised. This treatment amounted to a repudiatory breach of his contract. The evidence does not demonstrate that the Respondent carried out these repudiatory breaches *because* the Claimant asserted his rights (which he may have done) or because he took action on health and safety matters (for which there is in any case scant evidence). The claims for unfair dismissal therefore fail.

Holiday Pay

66. As a result of our finding that the Claimant was an employee, he was entitled to paid annual leave under the Working Time Regulations (in addition to his rights under the contract). On termination of his employment he was entitled to payment for annual leave that had accrued but had not been taken.

67. The Respondent asserts that the Claimant would have been entitled to 5 days leave including two bank holidays for the holiday year to 31 December 2020. The Respondent asserts that under the contract the Claimant could not carry over holiday to the next holiday year. However the case of **King v Sash Windows Workshop** (decision of the European Court C214/16) makes it clear that if an employee has been deterred or prevented from taking annual leave because they are treated as self-employed, they may claim annual leave going back to the start of their employment. This principle has recently been reinforced and extended by the Court of Appeal in **Smith v Pimlico Plumbers** [2022] EWCA Civ 70 which states that this principle should apply even where a worker has taken leave but has not been paid for it, and that such claims will still be in time if brought after the end of

employment. We award the Claimant 5 days pay amounting to (5 x £134.62) = £673.10

68. We also award the Claimant 7.6 days' pay including 3 bank holidays for 2021 in the sum of £1023.11 (7.6 x £134.62).
69. We award a total of £1696.21 gross in relation to holiday pay.

Breach of Contract

70. The Claimant argues that the Respondent breached his contract of employment in several ways, which we deal with here.

Pension

71. The Respondent breached the contract of employment of the Claimant by failing to permit him to join a pension scheme upon his employment commencing, contrary to his letter of offer.
72. The Respondent argues that the employee would not have been able to join the scheme until he had satisfactorily completed his three-month probationary period. The email exchanges at the start of his employment make no mention of this requirement and we have not been directed to any other document that supports that assertion.
73. The Respondent operated an auto-enrolment scheme. The contribution rate of 3% claimed by the Claimant has not been challenged. We therefore award the Claimant a figure to reflect his loss of pension contributions from the start of his employment to his resignation at a rate of 3%.
74. The Claimant was employed for 22.5 weeks and his pensionable earnings over that period would be £15,144.75 (£134.62 x 5 x22.5). We calculate 3% of that figure as £454.34.

Private Medical Insurance

75. The Respondent breached the Claimant's contract of employment by failing to provide him with membership of a private medical insurance plan during his period of employment.
76. Mr Strelitz argues that no award should be made to the Claimant as he did not incur a financial loss. He did not seek to replace the lost benefit by purchasing healthcare insurance himself. The Claimant's evidence is that he had purchased healthcare cover for his family but it was not clear when this commenced. In any event we do not accept Mr Strelitz' submission. If there has been a breach of contract, we must endeavour to put the Claimant in the position he would have been in, had the contract been performed. If the Respondent had adhered to the contractual promise made to

the Claimant, he would have enjoyed the benefit of healthcare cover throughout his employment.

77. We award the Claimant the sum he has claimed, having obtained a quote from Aviva (the company with whom the Respondent has a healthcare scheme), of £53.51 per month for five months, a total of £267.55.

Arrears of Wages

78. It is the Claimant's case that he is owed wages by the Respondent. On his ET1 form he ticked the box to indicate that he was claiming arrears of pay. At paragraph 9.2 he asserted that unlawful deductions had been made from his salary.

79. As he made clear in his email of 7 April 2021, towards the end of the Claimant's employment he realised that the Respondent was not making either employee or employer national insurance contributions on his behalf as he was being paid under the CIS scheme.

80. It is not disputed that in treating the Claimant as self-employed and paying him through the CIS scheme, the Respondent was making a saving in relation to employer's national insurance contributions. That is not relevant to this claim.

81. The Claimant alleged that in fact, although under the CIS scheme the Respondent should only have been deducting 20% from his gross earnings in respect of tax and NI liabilities, they were in fact further reducing his wages by a notional amount equivalent to the sum they would have deducted if employee national insurance contributions had been payable. He argues that this amounted to a breach of contract and/or an unlawful deduction from his wages.

82. At the end of the hearing on 10 October 2020 we requested the Respondent to produce a complete schedule of all hours worked by the Claimant over his five months of employment and the payments made to him for each hour, including overtime and on-call periods of work. This schedule was provided to the tribunal and to the Claimant on the same day. On the basis of this evidence the Respondent asserts that the Claimant was in fact overpaid for his hours by a tiny amount.

83. The Claimant was invited to comment upon the schedule produced by the Respondent. He emailed the tribunal on 14 October 2022. He made two points about the schedule.

84. First he argued that the schedule demonstrated that he had not been paid for three hours of overtime that he worked on Sunday 7 February 2021.

85. Second he argued that the hourly rate of pay used by the respondent in the schedule was not correct and that he was owed additional wages. It was not in dispute that the claimant was entitled to an annual salary of £35,000. The payment schedule indicates that the respondent had calculated this as £134.61 per day (£35,000 divided by 260 working days) or £16.82 per hour (the daily figure divided by 8 hours).
86. In relation to his first point, we have noted that there is a timesheet in the bundle at page 544 for the week ending 7 February 2021 which records that on that day the Claimant worked for three hours. He claimed for six hours pay as this work counted as overtime.
87. Turning to the payment schedule prepared by the Respondent, we note that this does not record any hours worked on 7 February 2021, nor any overtime payment for that month (although overtime was paid in other months).
88. In an email to the tribunal dated 18 October 2022 the Respondent commented on the Claimant's email of 14 October and his calculation of his hourly rate (see below). However the Respondent made no comment upon the Claimant's assertion that he was owed six hours' pay for 7 February 2021.
89. This argument differs somewhat from the Claimant's argument that the Respondent had been deducting a sum equivalent to a notional amount of employee national insurance from his salary. However we have decided that his claim for unpaid salary can be considered as one of the claims before this tribunal. The Claimant clearly indicated on his claim form that he considered that he had not been paid the correct amount of wages. He may have been under a misapprehension at to the *reason* for that or the basis of the deduction, but the claim for a deduction remains.
90. We find that there is no evidence that the Respondent was deducting an amount equivalent to employee NI contributions from the Claimant's salary. We find however on the balance of probabilities and in the absence of a denial from the Respondent that the Claimant is owed overtime for three hours worked on 7 February 2021.
91. As to the correct hourly rate, we do not accept the Claimant's assertions that the annual salary amount should be divided by 254 or 255 to get the daily rate, rather than 260. Where a person works five days a week (leaving aside the question of overtime and on-call work) it is standard practice to work on the basis that there are 260 working days in a year: 5 days x 52 weeks. The Claimant

has not put forward any good reason as to why in his case the calculation should be based on 254 or 255 days. This does not seem to equate to the number of public holidays in a year for example. We accept the Respondent's submission that the daily rate should be calculated as £134.61 and the hourly rate as £16.82.

92. We therefore award the Claimant the gross sum of £100.92 representing six hours pay (for three hours of overtime) at a rate of £16.82 per hour.

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Employment Judge Siddall
Date: 2 October 2022.