



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms I B Salsam

Jonaid Hassan Shahid

Heard at: London Central

On: 9 August 2022

In chambers: 10 August 2022

Before: Employment Judge Lewis

Representation

For the Claimant: Mr H Martin, Free Representation Unit

For the Respondent: In person

Interpreter: Ms S. Soimah

CORRECTED RESERVED JUDGMENT

1. The claimant (Ms Salsam) was unfairly dismissed. For this, she is awarded a basic award of **£1632** plus a compensatory award (after grossing up) of **£16,409.28**. The recoupment provisions do not apply.
2. The respondent failed to pay the claimant any wages from 1 June 2021 until she resigned on 25 October 2021. This constituted a series of unauthorised deductions from her wages. She is awarded the sum of **£12,885.60** gross.
3. The claimant was paid below the national minimum wage throughout her employment. This constituted a series of unauthorised deductions from her wages. She is awarded **£41,374.17** gross in compensation.
4. The claimant did not take any holiday throughout her employment and was not paid in lieu. This was an unauthorised deduction from her pay. She is awarded **£508.81** gross for holiday pay accrued in the year of

termination plus **£4592.72** gross for holiday accrued in previous years which crystallised on termination.

5. The claimant was not provided with a written statement of her particulars of employment. For this, she is awarded two weeks' gross pay, ie **£1088**.

CORRECTED REASONS

Claims

1. Ms Salsam (the claimant) brings claims for unfair constructive dismissal and unauthorised deductions from her wages comprising (i) pay below the national minimum wage throughout her employment (ii) failure to pay her any wages from 1 June 2021 until she resigned (iii) accrued holiday pay for her entire employment.

Procedure

2. The respondent has at no stage presented a Response to the claim. On 4 April 2022, the tribunal wrote to him asking whether he had submitted an ET3 Response form, as none had been received, or if he wanted to apply to submit a late form. The letter told The respondent that if he did not reply, the tribunal was likely to enter judgment without further notice.
3. The respondent did not reply. (The tribunal had wondered whether he received the original ET1, because there was a small error in the postcode, but the tribunal's 4 April 2022 letter was sent to the correct postcode. Also, Kalyaan (Ms Salsam's representatives) had resent all the documents to the correct postcode by recorded delivery on 21 March 2022.)
4. On 3 May 2022, the tribunal wrote to Kalyaan, with a copy to the respondent, stating that the respondent had not replied and it was considering whether to enter judgment without a hearing. It asked for a schedule of loss within 21 days.
5. Kalyaan sent an updated schedule of loss to the tribunal and to The respondent by recorded delivery (proof of delivery on 24 May 2022). Again the respondent did not respond.
6. At 8.34 pm, the evening before this hearing, The respondent (the respondent) emailed the tribunal and Ms Salsam's representatives to ask 'for this matter to be relisted for a later date so that the claimant's legal representative and my legal representative may be able to resolve this matter by way of a settlement'. The respondent apologised for the delay in engaging with the proceedings, which he said was due to an extremely emotionally and physically stressful two years. The respondent explained that his father is suffering from a neurodegenerative condition, and he is his primary carer. He also has to give emotional support to his mother. In

March 2021, The respondent had to travel out of the country to deal with matters when his father-in-law suddenly passed away. In July 2021, one of his 18 month twins was critically ill and hospitalised for 15 days.

7. I appreciate that the respondent has had an extremely stressful time regarding his family's health over the past few years and I am sorry to hear about what has happened. Nevertheless, Ms Salsam has lost pay and she has a case which needs dealing with, not perpetual delays. She submitted her claim on 15 February 2022, which was long after the crisis with Mr Hussain's daughter and his trip abroad following his father-in-law's death, although I recognise that The respondent has continued to be a carer for his disabled father.
8. The respondent left it right to the last moment to email the tribunal requesting a postponement. He has not submitted any draft Response or application for an extension of time. He told me he wants to instruct a legal representative, which should only entail a short postponement. If he is prepared to instruct a legal representative, he could have done this some time ago. As Mr Martin says, this would also have reduced the amount of time the respondent needed personally to engage with the case if he was finding that a burden.
9. I asked the respondent why he had left it until last night to contact the tribunal and request a postponement. He said he had not been aware that the hearing started on the 9 August 2022 until he had contacted Mr Martin, coincidentally, on 8 August 2022 to discuss possible settlement and Mr Martin had mentioned the hearing. I find that a surprising coincidence, given the lack of communication for extended periods. In any event, Mr Martin said that the respondent was aware of the hearing since 13 July 2022, because Mr Martin had sent him an email referring to the hearing date. The respondent said he did not read his emails. Mr Martin then showed me an email from the respondent dated 14 July 2022 in which he replied to the email of 13 July 2022. The respondent told me he had replied to Mr Martin's email without reading it. I do not find that credible. Moreover, Mr Martin mentions the hearing date in the 2nd line of his email.
10. Mr Martin's email of 13 July 2022 stated:

'Dear Mr Junaid Hassan

I work for the Free Representation Unit and I will be representing your previous employee Ms Indasah Binti Salam when she brings her claim against you at the Employment Tribunal on 09 August – 10 August.

She is seeking two years' increased pay for being paid less than the minimum wage, 21 weeks' arrears of pay and a compensatory award for unfair dismissal. The total value of her claim is, by our reckoning, well over £30,000.

To my knowledge you have not submitted a defence or made a settlement offer. If you continue to refuse to engage with Ms Salsam's claim, then the Employment

Tribunal is likely to find against you. In other words, they are likely to award her the full amount.

Should you wish to discuss the claim or make an appropriate settlement offer, please contact me on this email address ...

Kind regards,
Harry'

11. The respondent replied on 14 July 2022:

'Hi, I've been busy with a lot of other stuff. Please send me the right documentation for I need to counter Mrs Salsam accusations and no I refuse to believe that she needs to be paid £30,000. Please let me know when it's convenient for me to talk to you.

Sincerely, JH Shahid'

12. Mr Martin replied the next day:

'Dear JH Shahid,

Please see the attached letter from the Employment Tribunal setting out the steps that you need to take.

I am happy to speak at any point next week'

Kind regards
Harry'

13. Weighing matters up, I do not consider it in the interests of justice that there should be any further delay in hearing this case. The respondent knew of the hearing date by 14 July 2022 and probably before that date. He had plenty of time to find a lawyer if he wanted to. While appreciating his personal circumstances and stresses, he cannot just ignore a tribunal claim and then ask for a postponement when the reality of it arrives. This is reason enough to proceed today.

14. I also did not think it appropriate that the respondent be allowed to make comments during the hearing, although he was entitled to watch, and I would consider the content of his letter and the documents. The respondent had made no attempt to provide a draft Response form or witness statement, and I did not think it fair in the circumstances that he should be allowed to bypass the correct procedures and make his comments anyway, for which Ms Salsam and her representative would be unprepared.

15. I would add that potentially there would be difficulty in finding an interpreter if the date was postponed. The agency used by the tribunal for interpreters was unable to find a Javanese interpreter for the hearing and suggested we might need to go off contract. Ms Salsam's representatives had had similar difficulties in the past in finding an interpreter who spoke the

relevant language. We were only able to proceed with the hearing on 9 and 10 August 2022 because the claimant was able to bring someone with her who could translate (Ms Soimah). This was done on a voluntary basis and the individual had to miss work and find childcare. She might not be available on another occasion.

16. The difficulty with finding a Javanese interpreter had also arisen at the case preparation stage when Kalayaan, the organisation representing Ms Salsam, had asked for an extension of time to find an interpreter. It said there were very few professional Java interpreters available in the UK.
17. I was satisfied that Ms Soimah acted appropriately as interpreter. She took the interpreter's oath and I ensured she understood that she must simply translate what was said and not add any comments or advice. She adhered to this advice. At no stage was there any further discussion between what was said and her translation.
18. Ms Salsam gave evidence through the interpreter. She also had a witness statement. There was a revised bundle of documents of 197 pages and revised schedule of loss. I also took into account The respondent's email of 8 August 2022 requesting a postponement and its general comments about the case, which I questioned Ms Salsam about.

Fact findings

19. Ms Salsam is an Indonesian national. She has Indefinite Leave to Remain status. Her first language is Java Indonesian. She speaks very little English.
20. Ms Salsam is currently aged 68. Had she not left the respondent's employment because she was not being paid, she intended to continue to work until Haj in June 2022.
21. Prior to working for The respondent, Ms Salsam had worked for ten years for a Mr Naqvi. Unknown to Ms Salsam, he had only paid tax and national insurance for her for one year of the ten.
22. Ms Salsam heard through a friend that the respondent was looking for a live-in nanny and carer. The respondent's wife had just given birth to twins. At her job interview, they discussed the job in basic English. The respondent said Ms Salsam would be paid £300/week. She was not given a written contract of employment. Ms Salsam's pay increased to £350/week from 1 January 2021.
23. Ms Salsam took over the duties of caring for the respondent's disabled father from another carer, who left soon after she started. The respondent's father was unable to move or feed himself.

24. Ms Salsam had her own room with a single bed. Her room was smaller than that of the family members. She bought her own soap and shampoo.
25. Her duties involved being a nanny to the twins and looking after The respondent's father. A typical day involved getting the children up, changing their nappies, getting them dressed, making and feeding them breakfast, tidying up afterwards, feeding the respondent's father and giving him his medication, playing with the children, washing their bottles, washing clothes, preparing and feeding lunch and dinner for the children, helping the respondent's father eat dinner, playing with the children in the afternoon, sometimes watching children's programmes with them on TV, getting them ready for bed and putting them to bed.
26. The respondent's family employed another person to be a cleaner. They did not do those tasks themselves.
27. Ms Salsam's hours were 8 am – 10 pm Monday to Friday. Occasionally, if the children did not go to bed, this might extend to 11 pm, but she does not claim for that extra hour as she cannot be precise about it. On Saturdays, she worked 8 am – 2 pm. She would then leave the respondent's house to spend the week-end with a particular friend (Duri), and return at 8 pm on Sundays. Occasionally she would help with the children for 2 hours on Sunday evening, but this was not usual and she does not claim for those hours. On the rare occasions she was asked to work on a Sunday, she would be given Monday off instead.
28. Ms Salsam had a one hour break during the week for lunch and to pray. She had no break on Saturdays.
29. Ms Salsam cooked her own lunch. At first, she would use food provided by the family, but at some stage between 2020 and 2021, she started buying her own food and cooking it herself. That was because there was not always enough food for her – or because she did not like the food that was available. The position was the same with the evening meal. The only exception was occasionally if there happened to be food left over from a party, she would be allowed to eat it alone in the kitchen. She did not join in the party as such or join in the conversation. This happened roughly 5 or 6 times altogether. Ms Salsam did not eat any meals together with the family. She ate in a separate room.
30. Ms Salsam never went to the cinema, theatre or to a restaurant with the family. She never went on holiday with the family. In December 2020, the respondent went on holiday to Pakistan with his wife and children. Ms Salsam remained in London looking after The respondent's father, washing and cleaning.
31. Ms Salsam did not accompany The respondent and his wife when they went out together shopping or to dinner. She would stay at home and look after the children. If they took the twins with them, she would stay at home and look after The respondent's father. Occasionally if the family went to

the park, she would come with, but more often than not, she would stay at home and continue working.

Holiday

32. There was never any discussion about Ms Salsam's holiday entitlement, apart from a conversation in 2020 or 2021 when she said she would want 6 weeks in 2022 to return home to Indonesia for a visit. The respondent agreed, although in the event, this trip did not happen while she was still employed. There was no discussion about whether she would be paid her wages while she was away. The respondent simply said he would not pay for her ticket.
33. Ms Salsam knew that under UK law she was entitled to paid holiday, but she was afraid to ask The respondent.

Leaving

34. From 1 June 2021, the respondent stopped paying Ms Salsam's wages. She asked him four times to pay her. He kept saying that he did not have the money but that he would pay her once he sold his house. He did not give a date for this, but kept saying it would be 'soon'. The only payment Ms Salsam received from her employer during this period was £700 on 21 July 2021. This was to pay various accumulated arrears in the period prior to 1 June 2022. It was paid by the respondent's mother. Ms Salsam had to borrow money from friends to manage.
35. Ms Salsam resigned because she had not been paid for the period since 1 June 2021 and she did not believe that she was going to get paid. On 23 October 2021, the respondent had said the money would be available in another week. When she telephoned in on Monday 25 October 2021 and said she really needed to be paid now, he said he would pay all her wages by the next week because his house would have been sold by then. At this point, Ms Salsam no longer believed him. She had waited for nearly 5 months because she knew how hard it would be for someone of her age and with little English to get a new job and she was worried about paying her rent. On one occasion in the past, the respondent had failed to pay her for two months, but had then paid her the entire sum in one go. She had been hoping this would happen again.

After Ms Salsam left

36. Ms Salsam became homeless after leaving her job. She has now been housed by Barnet Homes in shared temporary accommodation.
37. Kalyaan helped Ms Salsam register with some employment agencies, but they have not found her any work. She had a one-week trial with two different families, each of whom paid £400 for the week, but they did not take her on. Ms Salsam found three further opportunities herself, but none of the employers wanted to hire her because of her age.

Law

The national minimum wage

38. With limited exceptions, workers are entitled to be paid the national minimum wage. The hourly rate depends on the worker's age and the year when the work was carried out. It does not apply to rest breaks. Free meals are not counted towards payment.
39. As a result of regs 9(1)(e) and 16 of the National Minimum Wage Regulations 2015, a fixed amount is allowed in respect of each day when free accommodation is provided (this is the 'accommodation offset').
40. The claimant was entitled to the national living wage throughout her employment. The hourly rate for a worker of her age was as follows:
For the year 1 April 2019 – 31 March 2020, the hourly rate was £8.21 and the accommodation offset was £7.55/day.
For the year 1 April 2020 – 31 March 2021, the hourly rate was £8.72 and the accommodation offset was £8.20/day.
For the year 1 April 2021 – 31 March 2022, the hourly rate was £8.91 and the accommodation offset was £8.36/day.
For the year starting 1 April 2022, the hourly rate is £9.50 and the accommodation offset is £8.70/day.
41. Under section 17 of the National Minimum Wage Act 1998, if the employer does not pay the national minimum wage and the worker succeeds in a tribunal claim, the tribunal awards arrears based on the level applicable at the date of the tribunal's calculation if that is higher than a calculation based on the level applicable at the time the work was done. The required calculation is essentially (1) calculate the amount of the original underpayment (2) divide by the minimum hourly rate at the date of the underpayment (3) multiply by the minimum wage rate at the date of determination.
42. Under reg 57(3) of the National Minimum Wage Regulations 2015, the minimum wage does not apply where:
- (a) The worker resides in the family home of the worker's employer, and
 - (b) The worker is not a member of that family, but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities, and
 - (c) The worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;
 - (d) If the work had been done by a member of the employer's family, it would not be treated as work or as performed under a worker's contract because the requirements in paragraph (2) would be met.

Paragraph (2) essentially refers to family members who help with the housework.

43. The government announced in March 2022 that it will remove this exclusion. However, at present it remains in force.
44. The Court of Appeal in Nambalat v Taher; Udin v Chamsi-Pasha [2012] IRLR 1004 gave guidance on the exemption:

‘There need not be a broad equivalence of the work done in the house as between the worker and family members; a person receiving free accommodation and meals may be expected to perform more household duties for the family than other family members. What matters is whether the work is done in a context in which the worker is treated as a member of the family. The way in which household tasks are shared ... is an important indicator of whether the worker is treated as a member of the family. The way in which accommodation is allocated, meals taken and leisure activities organised are other indicators. It is for the tribunal to decide whether, on the evidence, it is established that the worker is being treated as a member of the family, and not as a domestic servant.... There comes a point where the demands upon the worker are so onerous and extensive as to be inconsistent with the worker being treated as a member of the family.... Tribunals need to be astute when assessing whether an exemption designed for the mutual benefit of employer and worker is, or is not, being used as a device for obtaining cheap domestic labour.’

45. Mr Martin also referred me to Puthenveetil v Alexander in the ET.
46. Under section 28 of the National Minimum Wage Act 1998, the burden of proof is reversed so there is a presumption that the individual bringing proceedings qualified for the national minimum wage and was underpaid (though it would seem that the worker must still prove by how much they were underpaid).

Holiday pay

47. Under the Working Time Regulations 1998, a worker is entitled to 5.6 weeks’ annual leave (subject to a maximum of 28 days). The first four weeks’ of that leave entitlement is required by the EU Working Time Directive.
48. The holiday year starts on the date specified in the contract of employment or any collective agreement. If no date is specified there, the year will start on the anniversary of the date the worker commenced employment.
49. Leave must be taken in the leave year in which it is due and there is no entitlement under the Regulations to be paid in lieu except on termination. However, various exceptions have developed over the years in the case-law under the Working Time Directive, eg where the employer did not allow the worker to take leave or the worker was unable to take leave because

he or she was on sick leave or maternity leave, or because the employer effectively prevented the worker from taking leave by refusing to pay for it. These exceptions are relevant to the first four weeks' of annual leave, as that is the period covered by the Directive and EU law.

50. In King v Sash Window Workshop [2018] IRLR 142, the CJEU said that a worker could carry over and accumulate until termination his or her leave where the employer had not allowed the worker to take paid leave. There is no limit on how many years this can go back and the employer's obligation to pay crystallises on termination. (This also has the effect of avoiding limitation difficulties as regards back pay.)
51. Potentially, the King principle might also apply if a worker is deterred from taking leave because the employer refuses to pay holiday pay or says, for example, that the worker is self-employed and not entitled to it.
52. In Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu C-684/16 [2019] 1 CMLR 1233, and Kreuziger v Land Berlin C-619/16, the ECJ went further. It precludes national legislation, under which, in the event that the worker did not ask to exercise his or her right to paid annual leave during the reference period concerned, that worker automatically loses their right to the leave at the end of the period automatically and without prior verification of whether the employer has in fact enabled the worker to exercise that right, in particular by providing sufficient information. A national court hearing a dispute between a worker and his or her former employer who is a private individual, must disapply the legislation and ensure that, should the employer not be able to show that it had exercised all due diligence in enabling the worker actually to take the paid annual leave to which he or she is entitled under EU law, the worker cannot be deprived of his or her acquired rights to that paid annual leave. When the worker leaves, the employer must pay for the untaken leave.
53. With regard to the additional 1.6 weeks granted by the Working Time Regulations 1998 but not underpinned by EU law, leave can be carried over to the next year, but only if agreed in a 'relevant agreement', ie a collective agreement or the worker's written contract.
54. The daily rate for holiday pay is calculated by dividing the worker's annual salary by the number of working days in the year, not the number of calendar days (Leisure Leagues UK Ltd v Maconnachie [2002] IRLR 600, EAT).

Unauthorised deductions from wages: time-limits

55. The claims for unpaid wages, unpaid holiday pay and pay below the national minimum wage can be and were brought as claims for unauthorised deductions from wages under section 23 of the Employment Rights Act 1996. Such claims must be brought within 3 months of when the

deduction was made. Where there is a series of deductions, the time-limit is counted from the last deduction.

56. Under section 23(4A), a tribunal cannot consider a complaint as regards deductions made more than two years before the date the Claim was presented.
57. As regards holiday pay, if it involves a right to undertaken leave which rolls over and crystallises on termination, the two year limit on back-pay would not arise.

Unfair constructive dismissal

58. The claimant contends that she was constructively dismissed under s95(1)(c) of the Employment Rights Act 1996. Under s95(1)(c) an employee is dismissed where she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
59. An employee will be entitled to terminate her contract without notice to her employer only if the employer is in repudiatory breach of contract: see Western Excavating (ECC) v Sharp [1978] ICR 221.
60. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)
61. A claimant may resign because of a 'final straw' (see principles in London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493). An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts, even if he or she has previously affirmed, provided the final act forms part of the series (in the way explained in Omilaju). The final action does not land in an empty scale. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)
62. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. She may demonstrate by what she says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign. (Chindove v William Morrisons Supermarket PLC UKEAT/0043/14.)

Failure to provide section 1 statement of particulars

63. Section 38 of the Employment Act 2002 applies where the claimant has successfully brought certain claims in the employment tribunal, including claims for unfair dismissal and for pay deductions. If at the time the proceedings began, the employer was in breach of his duty under section 1 of the Employment Rights Act 1996 to provide a written statement of initial employment particulars, the tribunal must award (except in exceptional circumstances) two weeks' pay and may, if it is just and equitable in all the circumstances, award four weeks' pay.
64. This is gross pay, subject to the same cap as applied to statutory redundancy pay as at the termination date.

Tax – grossing up

65. Ms Salsam will have to pay tax on any sums awarded in connection with the termination of her employment, subject to a £30,000 allowance. This does not apply to sums for wages and accrued holiday pay during employment. If the award in respect of termination of employment is more than £30,000 and therefore taxable, the tribunal should award a grossed-up sum so that, after tax, Ms Salsam will be left with the intended amount of compensation.
66. The relevant tax year for grossing up is the year in which the award is received by Ms Salsam.
67. In this instance, it is any award Ms Salsam receives for unfair dismissal (being termination of her employment) which will be taxed in her hands and is therefore subject to grossing-up if over £30,000. This will apply to the compensatory award (which is calculated as net pay) but not to the basic award, which is calculated as a gross figure.

Conclusion

Unfair constructive dismissal

68. Ms Salsam was an employee. She was employed by The respondent. The respondent agreed to pay her £350/week from 1 January 2021. Prior to that, she was paid £300/week. Leaving aside the issue of the national minimum wage for the moment, Ms Salsam was contractually entitled to these sums under her contract.
69. I find that Ms Salsam was constructively dismissed. The repudiatory breach of contract was The respondent's failure to pay her wages each week from 1 June 2021 until she resigned on 25 October 2021.
70. Ms Salsam did not affirm the breach. She asked on four occasions to be paid. It was difficult for her to resign because she would lose her accommodation, and because she knew it would be very hard for her to

find new employment. In any event, a new breach took place each week that she was not paid.

71. Ms Salsam resigned because of the failure to pay her.
72. The constructive dismissal was unfair. No reasonable employer would have failed to pay Ms Salsam's wages for the work which she continued to carry out. If the respondent could not afford to pay Ms Salsam, he should have made her redundant. Instead, he continued to benefit from her labour, with no clear idea when he could pay for it. When speaking at the start of the hearing, the respondent seemed to think that Ms Salsam need not have resigned, and that promising to pay her was the same as actually paying her. It is not.
73. Ms Salsam was therefore unfairly dismissed.
74. For the unfair dismissal, I award a basic award of **£1632** (3 x £544). Ms Salsam worked over two whole years. Given her age, she is entitled to one and a half week's gross pay for each year. The ceiling on weekly gross pay which can be counted into a basic award as at the dismissal date was £544.
75. Ms Salsam's pay was below the minimum wage. Her gross weekly pay at the termination date (October 2021), applying the national minimum wage in force at that time, should have been £574.09, which is calculated as follows:
- Ms Salsam worked 71 hours/week (Monday – Friday = 14 hours / day less 1 hour break = 13 hours x 5 = 65 hours + 6 hours on Saturdays without a break)
- 71 hours @ £8.91 / hour (the current hourly rate) = £632.61
less £8.36/day for accommodation x 7 days = £58.52 accommodation offset
= £574.09 / week gross.
- I have counted the accommodation offset for 7 days because, although Ms Salsam went to stay with a friend on Saturday nights, I understand that she could have slept in her room at The respondent's house if she wanted to.
76. For her compensatory award, I award £400 for loss of statutory rights. I award loss of earnings from 25 October 2021 until 29 May 2022, when she would have left anyway to attend Haj. This is 31 weeks.
77. Ms Salsam tried to get new employment as set out above, but she was unable to do so. I accept this was difficult given her age and that she does not speak English.

78. Since Ms Salsam was paid below the national minimum wage, which is unlawful (see below), I award loss of earnings at the rate of the national minimum wage which would have applied in that period, ie

78.1. Loss of earnings for the unfair dismissal compensatory award are awarded on a net basis. I have calculated this by using the Money Saving Expert website. In the case of the 2022/23 tax year, I double-checked on the GOV.UK site, which came up with the same figure.

78.2. From 25 October 2021 – 31 March 2022 = 22 weeks 4 days. The hourly rate was £8.91 and the accommodation offset was £8.36/day. Ms Salsam's entitlement to national minimum wage in that period was £574.09 gross (see calculation above), which would be £508 net of tax and there would have been no NI deduction.

$22 \text{ weeks } 4 \text{ days} \times £508 = £11,466.28 (£11,176 + £290.28)$

78.3. From 1 April 2022 – 29 May 2022 = 8 weeks 3 days. The hourly rate was £9.50. $71 \times £9.50 = £674.50$
The accommodation offset was £8.70/day. $7 \times £8.70 = £60.90$
Weekly entitlement to national minimum wage = £613.60 gross

The net figure for £613.60 gross is £539.

$8 \text{ weeks } 3 \text{ days} \times £539 = £4543 (£4312 + £231)$

75.4. Sub-total = £16,009.28 (£11,466.28 + £4543)

79. I deduct £800 which Ms Salsam earned on two job trials. This leaves £15,209.28

80. Plus £400 for loss of statutory rights, the total compensatory award is **£16,409.28**.

81. Recoupment does not apply. Ms Salsam did not receive any recoupable benefits (job-seekers allowance; income-related employment support allowance; income support; universal credit).

Pay from 1 June 2021 until 24 October 2021

82. Ms Salsam was not paid at all for this period, ie 21 weeks.

83. Her contractual pay at that time was £350/week plus free accommodation. However, this was below the national minimum wage (minus the accommodation offset).

84. As Ms Salsam was not paid the national minimum wage for these 21 weeks, the award is calculated on the basis of the national minimum wage as at today's date (August 2022). The calculation is. $21 \times £613.60 \text{ gross (see above)} = \mathbf{£12,885.60}$ gross.

National minimum wage

85. I first had to decide whether Ms Salam was entitled to the minimum wage at all. She is a worker (in fact, an employee). By reason of her age, she would be entitled to the national living wage rate. The main question is whether she falls within the exception in reg 57 for certain work in relation to the employer's family household.

86. I find that the exception does not apply. Although Ms Salsam did live in the respondent's family home, she was not treated as a member of the family. I have taken into account that she was given her own bedroom, but she bought her own soap and shampoo. She did not share leisure activities. She was not for example taken out with the family to the cinema, theatre or to restaurants. She was not taken with them on holiday. She was left behind to work on all these occasions. If there was a party in the house, she was sometimes allowed to eat left-over food, but this was on her own in the kitchen. She sometimes watched television, but this was children's programmes with the children and part of her job was to keep them entertained. She cooked her own meals. She did not eat with the family. It is true that at first she was told she could help herself to food, but she then started to buy her own food because there was not adequate food left for her or she did not like what was there. There is no evidence that her tasks of getting the children up, changing their nappies and dressing them, feeding them and putting them to bed, were shared tasks. She was expected to work at least 14 hour days (with only an hour's break) during the week and 6 hours without a break on Saturday. As soon as she finished on Saturday, she left the house and stayed Saturday nights with a friend, returning Sunday evening. She worked long hours with young children, as well as being expected to help the respondent's father eat. The demands on her in terms of time were inconsistent with her being a member of the family. Ultimately she was a source of cheap domestic labour.

87. The claimant was paid below the minimum wage throughout her employment, which breaks down into these periods:

87.1. September 2019 – 31 March 2020

71 x £8.21 = £582.91 less

7 x £7.55 = £52.85

Ms Salsam should have been paid £530.06. In fact, she was paid £300/week.

87.2. 1 April 2020 – 31 March 2021.

71 x £8.72 = £619.12 less

7 x £8.20 = £57.40

Ms Salsam should have been paid £561.72. In fact, she was paid £300/week up to 31 December 2020 and then £350/week.

- 87.3. 1 April 2021 – 31 May 2021. (From 1 June 2021 to the end of Ms Salsam's employment has already been dealt with.) The weekly national minimum wage sum which Ms Salsam should have been paid was £574.09 gross (see calculation above). In fact, she was paid £350/week.
88. Ms Salsam was therefore paid below the national minimum wage for every week of her employment. This was an unauthorised deduction from her pay each week. She is entitled to compensation at the rate applicable when I make the calculation, ie £613.60 gross (see calculation above).
89. I can only award back pay for the period of two years prior to the presentation of the claim on 15 February 2022, ie from 15 February 2020 to 31 May 2021 (the remaining time covered in a separate calculation, being the period of complete non-payment). This is 67 weeks 3 days.

$67 \times £613.60 = £41,111.20$
 $£613.60 \text{ divided by } 7 \times 3 = £262.97$
total = **£41,374.17** gross.

Holiday

90. Ms Salsam did not take holidays at any stage during her employment and was not paid in lieu. There was never any verbal agreement for holidays, so her entitlement was the statutory 5.6 weeks/year, which breaks down into the 4 weeks required by EU law under the Working Time Directive and the additional 1.6 weeks granted by the Working Time Regulations. Ms Salsam's holiday year ran from 1 September (the anniversary of when she commenced her employment).
91. In the holiday year when her job ended, Ms Salsam worked from 1 September 2021 – 24 October 2021. This is 54 days or 7 weeks 5 days. She is entitled to pay in lieu of untaken holiday in the year of termination, again calculated at the rate for the national minimum wage. Her entitlement is pro rata to the proportion of the year which she worked.
92. The national minimum wage rate of pay in that holiday year was £613.60/week. The daily rate is £613.60 x 52 divided by 260 (working days in the year) = £122.72.
93. Had she worked the entire holiday year, she would have been entitled to £613.60 x 5.6 ie £3436.16. For 7 weeks 5 days, I divide by 52 and multiply by 7.7 = **£508.81**.
94. Ms Salsam also seeks pay in lieu of holiday for 1 September 2019 – 31 August 2020; 1 September 2020 – 31 August 2021. After some discussion, she accepted that she loses the additional 1.6 holiday which is not covered by the EU Working Time Directive. There was no relevant agreement

which allowed her to carry over the 1.6 untaken entitlement under the Working Time Regulations.

95. Regarding the basic entitlement which is underpinned by EU law (2 x 4 weeks), Mr Martin argues that I should apply the principle in Shimizu and Kreuziger. Ms Salsam admitted in the tribunal that she did know that she was legally entitled to paid holidays, but she was afraid to ask for the time off and she also did not feel she had the language abilities to have a proper discussion. She did manage to have a discussion in 2020 or 2021 about taking 6 weeks leave to go back to Indonesia, which was agreed. That is not the same as a discussion about her annual entitlement and that it would be lost if untaken, let alone a discussion about the entitlement to be paid. The respondent knew that Ms Salsam had limited English and he knew what long hours she was working with few breaks. He knew her pay was low. She was not given a written statement of the particulars of her employment. I find that The respondent did not provide Ms Salsam with sufficient information to enable her to take the leave. He did not tell her that she was entitled to 5.6 weeks paid holiday (or indeed to any paid holiday) each year. I therefore find that Ms Salsam accrued an extra 8 weeks' holiday as at the date she left and that she is entitled to pay for that period, again calculated at the current rate for the national minimum wage: 8 weeks @ £574.09 gross (see calculation above) = **£4592.72** gross.

Section 1 statement

96. Ms Salsam was never given a written statement of her main terms and conditions of employment under section 1 of the Employment Rights Act 1996. For this I award 2 weeks' pay. I do not award 4 weeks' pay because I bear in mind that the respondent was a small employer who may not have been aware that he had obligations to provide written particulars. Ms Salsam should have been paid £574.09 gross at that date. The statutory cap applies. 2 x £544 = **£1088**.

Grossing up

97. The only award which would require grossing up is the compensatory award for unfair dismissal, as loss of earnings was calculated on a net basis. However, the sum awarded for that is below £30,000 so grossing up is not required.

Employment Judge Lewis 15.8.22, corrected 24.11.22
Employment Judge Lewis

Judgment and Reasons sent to the parties on:

24/11/2022

For the Tribunal Office