EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Zhang

Respondents: (1) EcoCell Store Ltd
(2) Charge Point EV Limited

Heard at: **Nottingham (via CVP)** **On:** **16 & 17 November 2022**

Before: **Employment Judge Varnam**

Representation
Claimant: Mrs C Anthoney, friend of the Claimant
Respondents: Mr I Willis, director of the Second Respondent

RESERVED JUDGMENT

1. The Respondents made unlawful deductions from the Claimant's wages in respect of the period from 22 November 2021 to 26 January 2022, in the gross sum of £1,440, and are ordered to pay £1,440 gross to the Claimant in respect of this.

2. The Respondents made unlawful deductions from the Claimant's wages, in respect of the payroll period from 6 to 19 February 2022, in the gross sum of £288, and are ordered to pay £288 gross to the Claimant in respect of this.

3. The Respondents breached the Claimant's contract of employment in respect of notice pay, and are ordered to pay the gross sum of £576 to the Claimant in respect of this.

4. The Respondents failed to pay the full sum due to the Claimant in lieu of accrued but untaken annual leave, and are ordered to pay the gross sum of £306 to the Claimant in respect of this.

5. The Respondents made unlawful deductions from the Claimant's wages in respect of the 'PAYE refund', and are ordered to pay the net sum of £84 to the Claimant in respect of this.

6. The total sum due to the Claimant from the Respondents is £2,694.

7. The Respondents are jointly and severally liable for the said sum.

8. The Claimant's claim for damages in respect of the Respondent's failure to enrol her in an occupational pension scheme is dismissed because it is outside the jurisdiction of the Tribunal.

9. The claims in respect of seventy hours' overtime pay (totalling £1,260) in respect of PAYE/NI deductions said to have been deducted from the Claimant's pay but not passed on to Her Majesty's Revenue and Customs, and in respect of the sum of £1,152 which the Second Respondent declared that it had paid to the Claimant are not properly before the Tribunal, because they were not raised in the Claimant's ET1, but they would in any event have failed on their merits.

REASONS

Introduction

1. By an ET1 presented on 2 April 2022, the Claimant brought claims of unlawful deductions from wages, breach of contract, and a failure to pay a sum due upon the termination of employment in lieu of accrued but untaken annual leave. The Claimant also sought to bring a claim that she was entitled to receive a PAYE refund shown on one of her payslips, and that she was entitled to damages for the Respondents' alleged failure to enrol her in a pension scheme.

2. The parties had previously engaged in ACAS early conciliation between 11 March 2022 and 30 March 2022.

3. The claims were brought against both Respondents. It is an oddity of this case that all parties agreed that the Claimant was jointly employed by the First and Second Respondents, and, indeed, this is expressly set out in the Claimant's contract of employment. I address the possible significance of this at the conclusion of this judgment.

4. The Respondents submitted a joint ET3, in which they trenchantly denied the Claimants' claims.

5. The matter was initially listed for a two-hour final hearing on 12 August 2022. On that day it came before Employment Judge Wilson, who determined that the time estimate was insufficient, and relisted the matter with a two-day time estimate.

6. Employment Judge Wilson also made case management directions. These included a direction for the provision of a schedule of loss by the Claimant. When the schedule of loss was provided on 8 September 2022, it included a number of heads of claim which had not appeared in the ET1. I detail these below, when I set out the issues to be resolved.

7. The matter came before me on 16 and 17 November 2022. The Claimant attended, and was represented by a friend, Mrs Catherine Anthoney, who also gave evidence on the Claimant's behalf. The

Respondents were both represented by Mr Ian Willis, who is a director of the Second Respondent.

8. At the outset of the hearing, I dealt with an application for specific disclosure from the Claimant. The application, which was made in writing and was dated 8 October 2022, had been adjourned for consideration at the hearing. The Claimant sought disclosure of her complete work records on the QuickBooks accounting system. As will appear further below, the Respondents rely, in support of their contention that the Claimant worked far fewer hours than she contended, on records apparently showing that the Claimant was only logged onto QuickBooks for a limited period of time for each working day. The Claimant contended that full QuickBooks records, including non-working days, should be disclosed as they would show that she had regularly worked outside her working hours. I refused the application, primarily because (i) the key question raised by the Respondents' evidence was whether the Claimant had worked the days and hours which she was contracted to work, and if she had not it would not necessarily be an answer to that for the Claimant to show that she had worked at times when she was not contracted to work; (ii) if the requested documents were relevant, then it would be open to the Claimant to make a submission that the Respondents had failed to disclose them because they did not support the Respondents' case, and/or to argue that her evidence that she worked on QuickBooks outside her working hours should be accepted because the Respondents had not disclosed documents in their control which should be capable of proving or disproving the Claimant's assertions; and (iii) obtaining disclosure of what would be likely to be extensive records would in all probability require the hearing to be adjourned, and I did not consider that it would be proportionate or in accordance with the overriding objective to have a further adjournment of this hearing.

9. I then proceeded to hear the parties' evidence. On the Claimant's behalf I heard evidence from the Claimant and Mrs Anthoney. On behalf of the Respondents, I heard live evidence from:

(1) Mrs Janet Johnston, who was engaged by the Respondents as a self-employed bookkeeper between March and June 2022.
(2) Miss Isabel Nesbit, an installation manager employed by the Respondents.
(3) Mr Kody Hudson, an apprentice accounts assistant/credit controller employed by the Respondents since September 2021.
(4) Mr Willis.

The Respondent also presented a witness statement from Ms Chetna Brandwood FCCA, but Ms Brandwood did not attend to give evidence, and her statement was not signed other than with a typed signature, so, as I explained to Mr Willis, the weight that I have been able to give it is very limited.

10. Although Employment Judge Wilson had directed the preparation of a paginated joint bundle, there were separate bundles from the Claimant and from the Respondents. These were unpaginated, although the individual documents were identified by number. They both came in

electronic form, in Zip folders – the Respondents' documents were in one Zip folder, and the Claimant's documents were spread across a total of seven Zip folders. The spreading of the documents across multiple Zip files has made navigating the documents far more difficult and time-consuming than was necessary. I have nonetheless considered these bundles, save that, as I explained to the parties at the outset of the hearing, I have not read the Claimant's document 13D. When I began looking at it, I saw that it appeared to contain a settlement offer, and was as such subject to without prejudice privilege. Neither party sought to persuade me to consider this document.

11. At the conclusion of the hearing, I reserved my decision, which is hereby provided to the parties. I apologise to the parties for the delay in promulgating this judgment.

The Issues

12. I now turn to identify more fully the claims that I had to consider. As set out in the ET1, the Claimant's claims were as follows:[1]

(1) Unlawful deductions from wages (1): It was alleged that over the period between 22 November 2021 and 26 January 2022 the Respondent failed to pay the Claimant for ten days that she worked. The total deductions alleged to have been made came to £1,440.

The specifics of this claim are that the Claimant contends that she worked for three days on each of the ten weeks in question, but that the Respondents only paid her for two days for each week. The Respondents contended in response that (i) the Claimant had no contractual right to be paid for more than two days per week, and (ii) in any event, the Claimant worked far fewer hours on the ten unpaid days than she claimed to have worked.

(2) Unlawful deductions from wages (2): unlawful deductions from wages said to have been made in the two weeks covered by the payroll period 6 to 19 February 2022. The Claimant contended that in respect of each of these weeks she worked and was entitled to be paid for three days, but was only paid two days' pay. The total deductions alleged came to £288. The Respondents again defended the claim on the basis that the Claimant had no contractual entitlement to be paid for more than two days per week.

(3) Notice Pay: A breach of contract claim in respect of unpaid notice pay. The Claimant was given notice of the termination of her employment on 16 February 2022. She says that she should have been given two weeks' notice, and that she should have received three days' pay for each week. The Respondents gave her one week's notice, but, according to the ET1, only paid for two days. The Respondents say, in response, that the Claimant was only entitled to one week's notice, that she received this, and that she was paid for it. The sum said by the Claimant to be due was initially £576, but in the schedule of loss (see below) was increased to £864.

[1] The headings that I give to each group of claims are my own wording.

(4) Accrued Annual Leave: A sum in lieu of accrued but untaken annual leave entitlement, pursuant to regulation 14 of the **Working Time Regulations 1998**. As I understand it, the essence of the dispute here concerns whether the Claimant's annual leave entitlement should have been calculated on the basis that her working week was three days or on the basis that it was two days. There is also a disagreement in respect of the period for which leave accrued, with the Claimant contending that she accrued leave until 5 March 2022 (the date on which she says that her notice should have expired), while the Respondents apparently calculated it until either 16 or 23 February 2022.

The Respondent paid the Claimant £558 in respect of annual leave, representing 3.9 days' accrued annual leave. The Claimant contends in her ET1 that she should have been paid an additional £392.40, representing (on my calculation) a further 2.725 days' accrued annual leave.

(5) PAYE Refund: A claim for £84 PAYE refund. This is shown on the Claimant's final payslip, dated 11 March 2022, but was not passed onto her.

(6) Pension Contributions: A claim for loss of employer's pension contributions. It is said by the Claimant that she was not enrolled in a workplace pension for the first three months of her employment, that this was a breach of the Respondent's obligations under the **Pensions Act 2008**, and that she is entitled to damages for this. The loss claimed totals £194.51.

13. As I have observed above, the schedule of loss produced on 8 September 2022 sought to claim various additional sums that had not been claimed in the ET1. These were as follows:

(1) Overtime: Seventy hours' unpaid overtime pay, totalling £1,260. The Respondent denies that any overtime pay was due, or that the Claimant had done the overtime claimed.

(2) PAYE/NI deductions: Sums totalling £484.27, said by the Claimant to have been deducted from the Claimant's pay in respect of income tax or national insurance, but not accounted for to HMRC.

(3) The £1,152: It is suggested that because an HMRC record showed that the Second Respondent had informed HMRC that on 28 January 2022 it had paid the Claimant £1,152, and this sum had not in fact been paid, the Claimant was now entitled to receive this sum.

(4) Increases to existing claims: The sums claimed in respect of pension contributions had increased from £194.51 in the ET1 to £644.83 in the schedule of loss. As noted above, the claim in respect of notice pay also increased from £576 in the ET1 to £864 in the schedule of loss.

14. In respect of the additional items in the schedule of loss, I will need to consider whether these are properly before the Tribunal, given that they were not included in the ET1.

15. Employment Judge Wilson prepared a list of issues which is at paragraph 14 of her order. This has been of assistance in considering the issues, but having considered all the evidence in this case it is in my view helpful to reframe the issues somewhat, to more specifically address the disputes between these two parties. I propose in due course to consider the following issues:

Unlawful deductions from wages (1)[2]

(1) Were the sums claimed by the Claimant in respect of the ten days allegedly worked but unpaid by the Claimant between 22 November 2021 and 26 January 2022 wages that were properly payable to the Claimant, having regard to sections 13 and 27 of the **Employment Rights Act 1996**?

In practice, this issue will turn on whether the Claimant was entitled to be paid for three days per week, or only for two days.

(2) If the sums claimed for these ten days were wages that were properly payable, were deductions made from those wages?

If I conclude that these sums were properly payable wages, then there is no dispute that they were not paid, and no argument has been advanced by the Respondents to the effect that any deduction made was permissible by reason of a provision of the Claimant's contract, under an enactment, or otherwise as permitted by sections 13 and 14 of the **Employment Rights Act**. If, therefore, the Claimant proves that these sums were properly payable, then her claim in respect of the ten days will succeed, subject to point (7) below).

(3) If deductions were made, what sum was deducted?

Unlawful deductions from wages (2)

(4) For the two weeks covered by the payroll period 6 to 19 February 2022, was the Claimant entitled to be paid for three days or two days?

(5) In light of issue (4), were unlawful deductions made from the Claimant's wages?

If the Claimant was entitled to be paid for three days, then as there is no dispute that she was only paid for two days, and no contention advanced by the Respondents that any deductions were permissible under one or other of the grounds set out in sections 13 and 14 of the **Employment Rights Act**, the claim will succeed.

(6) If deductions were made, what sum was deducted?

[2] In summarising the issues, I have adopted the headings used at paragraphs 12 and 13 above.

Unlawful deductions from wages: time limits

(7) Were any of the Claimant's claims in respect of unlawful deductions from wages brought outside the time limit for bringing a claim to the Tribunal?

Notice Pay

(8) To what notice period was the Claimant entitled?

(9) What notice did the Claimant receive?

(10) What was the Claimant paid for the notice period that she served?

(11) What was the Claimant entitled to be paid during her notice period?

(12) Having regard to the issues (8) to (11), is the Claimant owed any outstanding notice pay? If money is owed, how much?

Accrued but untaken annual leave

(13) How much annual leave entitlement had the Claimant accrued but not taken at the point that she was dismissed?

(14) How much annual leave had the Claimant taken, and what, therefore, was her outstanding annual leave entitlement at dismissal?

(15) What sum should the Claimant have been paid in respect of this accrued but untaken annual leave?

(16) What sum was the Claimant in fact paid in respect of accrued but untaken annual leave?

(17) Having regard to issues (13) to (16) are any further payments due to the Claimant?

Overtime

(18) Should I consider the claim to overtime payments, given that it was not raised in the ET1?

(19) If the answer to issue (18) is 'yes', was there an agreement that the Claimant would work and be paid for overtime, in addition to the alleged agreement that she would work for three days per week?

(20) If so, did the Claimant work seventy hours' overtime as she claims?

(21) Having regard to issues (18) to (20), what sum (if any) is due to the Claimant in respect of overtime?

PAYE Refund

(22) Does the Tribunal have jurisdiction to consider this claim?

(23) If so, was the Claimant entitled to receive the PAYE refund?

PAYE/NI Deductions

(24) Should I consider the claim in respect of PAYE/NI deductions, given that it was not raised in the ET1?

(25) Does the Tribunal have jurisdiction to consider this claim?

(26) Did the Respondents fail to account to Her Majesty's Revenue and Customs (as it then was) for tax deducted from the Claimant?

(27) If the Respondents did fail to account to HMRC for sums deducted, is the Claimant entitled to an order for payment of the deducted sums?

The £1,152

(28) Should I consider this claim, given that it was not raised in the ET1?

(29) If so, is this a sum which the Claimant is entitled to be paid?

Pension Contributions

(30) Does the Tribunal have jurisdiction to consider this claim?

(31) If the Tribunal does have jurisdiction, were the Respondents required to enrol the Claimant in a pension scheme?

(32) Did the Respondent fail to enrol the Claimant in a pension scheme?

(33) If so, is the Claimant entitled to damages for this failure?

Consideration of the evidence

16. I now turn to set out my factual findings, which will inform my consideration of the issues that I have identified. Some of the facts that I set out below were not disputed between the parties. Others were disputed, and when I deal with those issues I make my findings on the balance of probabilities, deciding which version of events is more likely than not to have occurred. During the course of the hearing I heard disputes about a number of matters. In my findings of fact, I have limited

myself to dealing with those matters which I consider to be necessary in order to decide the issues in this case.

17. In making findings of fact, I have had to resolve a number of factual disputes between the Claimant and Mr Willis, who were the principal witnesses on each side. I did not find either the Claimant or Mr Willis to be a wholly satisfactory witness. When cross-examined, both frequently avoided answering questions that they were asked, preferring to either dispute the relevance of the question, or to seek to advance aspects of their own case which were ungermane to the question that they had been asked. I found the Claimant's evidence to be particularly of this tendency, and I repeatedly had to remind her to stick to answering the question asked. On other occasions, I was concerned that she was obtaining assistance in her answers from others who were with her as she gave her evidence (the case being heard remotely). On at least one occasion, the Claimant's husband attempted to answer a question on her behalf, and I had to stop him from doing this.

18. As is set out below, I have rejected aspects of the evidence of both the Claimant and Mr Willis, while accepting other aspects of their evidence. I do not consider that either witness set out to tell deliberate lies, but I do think that they have both convinced themselves of the moral rightness of their respective cases, to the extent that they have in some respects lost objectivity in their recollection of events.

19. In fairness to Mr Willis, he did show some capacity for objectivity, by, for example, conceding that it was likely that some money was due to the Claimant in respect of the claim that I have defined as 'unlawful deductions from wages (1)'. On the other hand, however, Mr Willis is, in my view, the principal author of the unusual degree of ill-feeling that has arisen between the parties in this case prior to the hearing, since he has repeatedly and (as I find) wrongly, unreasonably, and without any sufficient evidential basis accused the Claimant of serious criminal misconduct, namely fraud. Serious and unnecessary allegations of impropriety were characteristic of this case, and they were not solely directed against the Claimant. To give an example of such an inappropriate question going the other way, Mrs Anthoney at one point put to Mr Willis that he had mistreated the Claimant because she is of Chinese ethnic origin. I told Mr Willis not to answer this question, because no allegation of race discrimination had hitherto been raised, and I was not prepared to allow such a serious allegation to be put forward, unheralded, in cross-examination.

20. Ultimately, in reaching my findings, I have not placed unalloyed reliance on what I was told by either the Claimant or Mr Willis, but have, in respect of each dispute of fact, assessed their respective accounts against what I consider to be the inherent probabilities and, where available, the contemporaneous documentary evidence (which is often more reliable than the recollections of witnesses: see the observations of Mr Justice Leggatt (now Lord Leggatt, a Justice of the Supreme Court) in ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 (Comm), at paragraphs 15-22). I have also had regard to the evidence of other

witnesses. This approach has led me to prefer the Claimant's evidence in some respects, and Mr Willis's in others.

Findings of Fact

21. The Respondents are companies which are owned and controlled by Mr Willis and his wife, Ms Victoria Brown. It appears that the business of the two companies is very closely entwined, and in evidence neither party drew any distinction between the day-to-day operations of the two companies, although Mrs Anthoney on behalf of the Claimant was at pains to emphasise that the First Respondent was not registered as a payroll provider at the time of the Claimant's employment.

22. The Claimant's employment by the Respondents began on 15 October 2021. There was some suggestion in some of the documents produced by the Respondents that the Claimant's employment began on 20 October 2021, but both the Claimant in her ET1 and the Respondents in their ET3 stated that the Claimant's start date was 15 October 2021, and so I accept that date.

23. The Claimant was employed as a bookkeeper. She is an experienced bookkeeper, and holds qualifications from the Association of Accounting Technicians. Her work consisted, in particular, of attempting to reconcile the Respondents' payroll and tax records, which, it is common ground, were in a considerable state of disarray. It appears from the Heads of Terms document to which I refer below that she had more general responsibility for financial record-keeping and accounting. The Claimant was assisted in this work by Mr Hudson, although he was an apprentice with little or no previous experience of accounting or bookkeeping.

24. Among the software that the Claimant had to use in performing her duties was QuickBooks. The precise operation of QuickBooks was not explained to me by either party during the course of the hearing, and I have refrained from the temptation to conduct my own research into it.

<u>Terms of employment at the commencement of employment</u>

25. On 15 October 2021 the Claimant was provided with a Heads of Terms document. This was not a statement of terms and conditions which complies with the requirements of section 1 of the **Employment Rights Act 1996**, and in her oral evidence the Claimant was at pains to deny that the document was a contract. I agree with the Claimant that the Heads of Terms document was clearly not itself intended to be an exhaustive statement of the Claimant's terms of employment, and I note that when he e-mailed it to the Claimant at 12:03 on 15 October 2021 Mr Willis referred to drawing up 'a more permanent contract of employment' once the Claimant had agreed to the Heads of Terms. As such, I conclude that the Claimant was right to say that the Heads of Terms was not, in itself, a contract. However, I find that, where matters are set out in the Heads of Terms, that does reflect the agreement that the parties had come to as at 15 October 2021. As such, my conclusion is that at the commencement of her employment the Claimant worked under an oral contract of

employment, the terms of which are partially evidenced by the Heads of Terms.

26. The Heads of Terms contain the following provisions which are relevant to the matters that I have to decide:

(1) They provide that the position was a part-time position, and that the Claimant should expect to work a minimum of eight hours per day, two days a week.

(2) It is said that the 'Holiday period is 5 weeks per year paid pro rata based upon days worked'. This appears to provide for less holiday than the statutory minimum of 5.6 weeks per year, and as such the Claimant's entitlement would have been to 5.6 weeks' holiday per year.

(3) The Claimant's basic wage was £18 per hour, to be paid weekly unless the parties agreed otherwise, and 'Tax and NI will be deducted as appropriate'. The combination of this provision with the provision that the Claimant would work an eight-hour day was that her gross daily rate of pay was £144.

(4) The Claimant was subject to a three-month probation period.

I find that the above were all terms of the Claimant's contract as of 15 October 2021.

27. The Heads of Terms contain nothing dealing with the notice period to which the Claimant was entitled. As such, I find that, as at the commencement of her employment, the Claimant was entitled only to statutory notice, as set out in section 86 of the **Employment Rights Act**. This would be one week, once the Claimant had reached one month's service.

28. The Heads of Terms are headed 'EcoCell Electrical' and 'Chargepoint EV'. Neither of the Respondents' full company names is set out. The 15 October 2021 e-mail to which the Heads of Terms were attached has the subject line 'Head of Terms – EcoCell Store/Chargepoint EV'. This tends to suggest that it was envisaged that both Respondents would jointly employ the Claimant.

29. At the time that the Claimant commenced her employment, she worked in the Respondents' office for both of the two days per week that she was employed to work.

Pension Contributions

30. When she began her employment, the Respondents did not have an occupational pension scheme in place. No such scheme was set up until around 28 January 2022, when the Claimant had been employed for somewhat over three months.

31. Based on this, the Claimant complained that she had suffered the loss of pension contributions. Her initial claim was for £194.51, which I

understand to represent the alleged loss of employer's pension contributions. In her schedule of loss and witness statement, this sum had grown to £644.83, and appeared to include a claim for loss of employee's contributions.

32. Mr Willis's evidence was that setting up a pension scheme for the Respondents was a responsibility of the Claimant in her role as bookkeeper. I accept that this may have formed part of the Claimant's duties, but ultimately it was the Respondents' responsibility to set up an occupational pension scheme and enrol their employees in it.

Increase in the Claimant's hours, and change in place of work

33. At 12:17 on 24 November 2021, the Claimant e-mailed Mr Willis, with the subject line 'An extra day a week from Friday 26/11/21'. The gist of the Claimant's e-mail was that, owing to the volume of work that she had to do, it was necessary for her to work three days per week rather than two.

34. In her e-mail, the Claimant referred to having discussed this matter with Mr Willis previously, and I accept that she had done so.

35. The Claimant's e-mail proposed that from 26 November 2021 she would work each Monday and Wednesday in the Respondents' office, and each Friday from home.

36. It is clear that the Claimant expected to be paid for the extra day per week, and, indeed, it would be surprising if she had not had this expectation. However, the Respondents were at that time experiencing cash flow issues, and as such the Claimant appears to have been prepared to accept a deferment of the payment for the extra day. In her e-mail of 24 November 2021, she wrote that:

> *You can pay me two days a week as normal, the extra day a week can be paid whenever you can.*

37. In his evidence, Mr Willis told me, and I accept, that it was at that time envisaged that the Respondents' financial position would improve from around April 2022, as a result of an anticipated tax refund.

38. I have not seen any response from Mr Willis to the 24 November e-mail, either approving or refusing the request for an extra day per week. However, thereafter both parties proceeded on the basis that the Claimant would be working twenty-four hours (i.e. three days) per week – for example, this is implicit in the Claimant's e-mail to Mr Willis on 13 December 2021 (see below), in which she refers to working twenty-four hours per week. Similarly, on 9 February 2022, Mr Willis sent a text message to the Claimant in which he wrote that '*the job you applied for was 16hrs per week that has already increased to 24hrs'*. I understood from Mr Willis's evidence and his cross-examination of the Claimant that the Respondent accepted that there had been an agreement that the Claimant would work twenty-four hours/three days per week from 26 November 2021. As such, having regard to the fact that the Claimant and

Mr Willis had previously discussed an increase in the Claimant's working hours, I conclude that during an oral conversation in late November 2021 the Claimant and Mr Willis agreed that the Claimant would work three days/twenty-four hours per week, with the first 'extra' day being 26 November 2021. I find that this varied the Claimant's contract of employment, so as to increase her days and hours of work (and her pay).

39. Mr Willis contended that the agreement for increased hours was purely temporary. I accept this contention, but it is important for me to be clear what I mean when I find that the agreement was temporary. I find that the agreement between the Claimant and Mr Willis to increase the Claimant's hours was one that was intended to respond to the exigencies of the situation that prevailed in November 2021. That does not mean that the agreement was not a binding contractual variation. However, it was hoped and anticipated that the situation would improve in the future, such that the Claimant would at that future point be able to perform her bookkeeping duties within the two days/sixteen hours originally contracted for. As such, it was anticipated that the Claimant's contracted hours would in the future be varied again, so as to reduce them to what they had previously been. But this does not mean that there was not a variation of the Claimant's contract of employment in November 2021; it simply means that it was anticipated that this variation might be reversed by a further variation at some later date.

40. Presumably because of the Respondents' cash flow difficulties, the Claimant continued to be paid for sixteen hours' work per week, not twenty-four hours' work. This remained the case throughout her employment.

41. At 09:47 on 13 December 2021, the Claimant e-mailed Mr Willis as follows:

> *As per conversation today, following government Covid-19 guide, I would prefer to work from home 24 hours a week from this week 13/12/21 instead of 2 days at office and 1 day work from home since 26/11/21 until the Covid-19 restriction released.*
>
> *I understand under current company's circumstance you have a lot of work to catch up from 2019 but with lack of cash flow to pay extra work for a moment. However, I trust you will respect my hard work and willing to pay 1 extra day a week back from Week 21/11/2021 as agreed as soon as next year 2022.*

42. Again, I have not seen a response to this e-mail. But it appears to be common ground that from around mid-December 2021 until the end of her employment the Claimant worked entirely from home.

<u>The schedule of hours worked</u>

43. On 17 January 2022, the Claimant presented Mr Willis with a schedule setting out the hours/days that she had not been paid for since November 2021. This document begins with the following words:

As per email agreed working hours from W47 22/11/21 extra 8 hours per week total paid 16 hours and 8 hours will be paid after new year 2022 as soon as before Apr 2022 or leaving!

The document goes on to set out the hours worked since the agreement to increase hours. In summary, it asserts that by 26 January 2021 the Claimant would have been working three days/twenty-four hours per week for ten weeks, and that, as she had not been paid for the extra day, she would be owed ten days' pay (£1,440).

44. The schedule was signed by Mr Willis. In Mr Willis's first witness statement, which was appended to the Respondents' ET3, it was said that this schedule had been presented to Mr Willis when he was on the telephone to a client, and that he had signed it when his attention was elsewhere. However, the Respondents did not pursue this contention during the hearing, and Mr Willis elected not to put this allegation to the Claimant in cross-examination, even when I invited him to do so. In these circumstances, where the contention that the schedule was signed by Mr Willis without consideration of its contents has not been pursued, I find that Mr Willis signed the schedule knowing of its contents, and intending to indicate the Respondents' acceptance that the sum of £1,440 would (by 26 January 2022) be owed to the Claimant.

Did the Claimant work the hours set out in the schedule?

45. The Respondents relied during the hearing on a contention that, notwithstanding (i) the agreement to increase the Claimant's hours, (ii) the contents of the schedule, and (iii) Mr Willis's signature on the schedule, the Claimant was not entitled to payment of the sum of £1,440 because she had not in fact worked the hours set out in the schedule. In his closing submissions, Mr Willis accepted that the Claimant might have worked some hours in excess of the two days/sixteen hours per week for which she had originally been employed, and he accepted that these hours would be payable. However, he maintained the Respondents' denial that the Claimant had worked or should be paid for one extra day/eight extra hours per week.

46. The Respondents' contention is based on an analysis of the QuickBooks software. The Respondents had produced a log (item 16 in the Respondents' bundle). This was said to show the number of hours that the Claimant had worked each week on QuickBooks between 22 November 2021 and 26 January 2022, and to show that those hours fell vastly short of the twenty-four hours per week which the Claimant was contracted to work. On the face of it, the document shows huge discrepancies between the Claimant's contracted hours and her work on QuickBooks. In all the weeks the work that the Respondents record as done on QuickBooks falls many hours short of the contracted twenty-four hours. The most hours that are recorded in any one week is 8 hours 33 minutes in the week commencing 22 November 2021, and otherwise all weeks record fewer than five hours' work on QuickBooks. Indeed, in three weeks the Claimant is alleged to have done no work on QuickBooks, and in two more she is alleged to have done only one or two minutes' work on QuickBooks in the whole week. The total number of hours that the Claimant is said to have

worked on QuickBooks between 22 November 2021 and 26 January 2022 is 17 hours 33 minutes.

47. The Respondents' case is that the Claimant should have been doing most or all of her hours on QuickBooks, and that the large discrepancies between the number of hours that the Respondents have recorded and the Claimant's contracted hours indicates that the Claimant was working far less than her contracted hours.

48. In her witness statement, the Claimant pointed out what she said were errors in the Respondents' log. For example, she pointed out that the first weeks recorded in the log covered the period when she was working in the Respondents' office. If, the Claimant asked, the Respondents were correct in accusing her of doing very little or no work during these weeks, then it would follow that she had done this while in the Respondents' office, where her inactivity would be noticed. The Claimant contended that she had worked far more hours on QuickBooks than the Respondents' figures showed, and she also emphasised that she had undertaken work using materials other than QuickBooks.

49. The Respondents then produced a revised log (item 28 in their bundle). This purported to show that the Claimant had worked a total of 47 hours 20 minutes on QuickBooks between 22 November 2021 and 26 January 2022. This represents a substantial increase over the figure in the previous log, but is still far short of the hours that the Claimant was contracted to work.

50. The Claimant disputed the accuracy of the revised log. As I have observed, she had sought disclosure of the underlying QuickBook records, but I did not order that these be disclosed.

51. I have to consider whether the Claimant worked the twenty-four hours per week that she was contracted to work. I am satisfied that she did. I reach this conclusion for the following reasons:

    (1) I did not consider the Respondents' logs to be compelling or impressive evidence. The first log was implausible, for the reasons summarised in the Claimant's witness statement and at paragraph 48 above. The fact that a revised log was produced acknowledging an extra thirty hours' work beyond that shown in the first log illustrates the unreliability of the first log. During his evidence I asked Mr Willis about the oddities in the first log, but his response was simply to refer me to the revised log. While it was the revised log on which the Respondents ultimately chose to rely, in my view the defects in the first log are relevant. The fact that the Respondents produced a document which, even on their own case as put forward before me, was grossly inaccurate, puts doubt in my mind about the reliability of all the records produced by the Respondents. If they got the first log so badly wrong, how can I be confident as to the second log?

    (2) There was moreover a problem that the underlying records used to produce the logs were not disclosed by the Respondents, even when requested by the Claimant. In my view, the non-disclosure of the

underlying records materially lessens the weight that I can put on the logs. For the reasons set out in the previous subparagraph, I have doubts about the reliability of the logs. The non-disclosure of the underlying records means that, for whatever reason, the Respondents have chosen not to put before me evidence in their possession that would have allowed me to confirm whether their allegations about the Claimant's hours on QuickBooks had validity. In those circumstances, the Respondents have not allayed my concerns about the accuracy of their logs. While they produced an e-mail, dated 8 August 2022, from a QuickBooks Customer Success Representative, stating that a log generated from QuickBooks cannot be edited, this does not in any way address the fact that the Respondents clearly produced an inaccurate record in the form of the first log, however that was done.

(3) I accept the Claimant's evidence that, in any event, not all of the work that she performed utilised QuickBooks. So even if the QuickBooks records were reliable, I would not regard this as sufficient to establish that the Claimant had not worked her contracted hours.

(4) It also seems to me that it is implausible that the Claimant would have worked many hours less than she was contracted to do without this sparking any concern from the Respondents during the time that she was employed. But so far from expressing any such concern, Mr Willis signed the Claimant's schedule of hours worked. The allegation that the Claimant had not, in fact, worked the hours set out in the schedule was only raised after the Claimant had been dismissed.

Written contract of employment

52. On 28 January 2022, Mr Willis sent an e-mail to the Claimant. This included the following section:

> *Your employment Heads of Terms indicates a 3 month probation, our standard contract includes the option to extend that for a further month. I wish to excise* [sic] *that option and wish to continue the probation period up to the 15th of Feb, at which point a permanent contract will be offered, subject to the outcome of the next few weeks.*

53. On 31 January 2022, the Claimant signed a written contract of employment. The Claimant and Mr Willis were in disagreement as to when this was presented to the Claimant. The Claimant's case was that it was not given to her until 31 January 2022. She said that on that day she had threatened to resign if she was not give a permanent contract, and that Mr Willis then produced the document.

54. Mr Willis, by contrast, said that he had given the contract to the Claimant on 15 January 2022. As I understood his evidence, he contended that the Claimant then, on 31 January, signed the contract as part of a response to the e-mail sent on 28 January 2022, in an attempt to represent herself as having been given a permanent position with a permanent contract, notwithstanding the extension of her probation.

55. The Claimant's contention that Mr Willis gave her a contract only three days after he purported to extend her probation period and told her that she would not receive a permanent contract until 15 February 2022 seems surprising. But, on the balance of probabilities, that is what I find occurred. Surprising as the Claimant's account is, I find Mr Willis's account to be fundamentally implausible. In particular, if Mr Willis's view was that the Claimant's probation period should be extended and that a permanent contract would only be given after the extension, then I can see no logical reason why he would have given her a contract on 15 January, thirteen days before he purported to extend the probation period.

56. In my view, what most probably happened is that, having decided on 28 January 2022 not to give the Claimant a permanent contract for the time being, Mr Willis changed his mind, probably under pressure from the Claimant, and presented the contract on 31 January, the day on which the Claimant signed it. Insofar as the probation period had been extended on 28 January, it was brought to an end on 31 January by the provision of a permanent contract.

57. Related to the dispute about when the contract was presented was a dispute about whether, as Mr Willis alleged, it had been orally agreed between he and the Claimant that the contract was not worth the paper it was printed on – i.e. that it was to be of no effect, and should not be regarded as recording the parties' contract. The Claimant denied that there had been any such agreement.

58. For the following reasons, I accept the Claimant's evidence on this issue:

    (1) I found Mr Willis's evidence on this point to be extremely vague. In his supplementary witness statement, signed on 5 September 2022, he wrote that the contract '*was drawn up from a template and contained a number of mistakes and references that did not apply to [the Claimant], so it was withdrawn*'. He went on to point out various respects in which the terms of the contract were not relevant to the Claimant's work, and continued by saying that '*as a result, the agreement was essentially ripped up*'. However, at no point either in this statement, or in his cross-examination of the Claimant, or in his own oral evidence, was any detail of the alleged withdrawal or ripping up of the contract provided. In particular, I have no specifics of when the alleged agreement to treat the contract as a nullity is said to have been made, or as to the circumstances in which it was made, nor do I have any detail as to what precisely Mr Willis contends that he and the Claimant said about this.

    (2) Mr Willis's accounts of this matter have been inconsistent. I have quoted above his supplementary statement, made on 5 September 2022. However, in an earlier unsigned statement, dated 14 April 2022 and appended to the Respondents' ET3, Mr Willis makes no reference to the contract not being worth the paper it was printed on. Indeed, at the very beginning of this earlier statement, he wrote that the Claimant '*was provided Heads of Terms of employment 15th October 2021, followed by her employment contract on 15th Jan 2022*'. So far from

asserting that the contract was not worth the paper it was printed on, the first statement thus relies on it as being the employment contract.

(3) Mr Willis's contemporaneous actions were inconsistent with the account that he now advances. In particular, when Mr Willis wrote to the Claimant on 16 February 2022, dismissing her, he expressly invoked clause 23 of the contract. It is improbable that he would invoke a term of the contract if it had indeed been agreed that the contract was not worth the paper it was printed on.

59. It follows that, in my view, the contract was intended by both the Claimant and the Respondents to reflect the contractual agreement between them. I do not think that it would have been presented at all if it was not intended to reflect the parties' agreement. It is true that, as Mr Willis pointed out, there are provisions in the contract which appear irrelevant to the Claimant's work, and that there are also inconsistencies between some terms. However, in my view this simply reflects the fact that it has been produced by a non-lawyer using a template.

60. The contract contains the following relevant provisions:

(1) It states that the Claimant had been appointed and her continuous employment ran from 15 January 2022. This was clearly incorrect – the Claimant had been continuously employed since 15 October 2021.

(2) In an unnumbered introductory section headed 'statutory information' it states the following in respect of the Claimant's hours of work:

> *Minimum expect to work 8hrs per day, 3 days per week. Over time eligibility over 8hrs per day.*

There is then a subsequent 'terms and conditions' section, which, at paragraph 4, provides that:

> *The Employee's normal working hours are:*
>
> *Minimum expect to work 8hrs per day, 3 days per week. Over time eligibility over 8hrs per day.*
>
> *This is a total of 24 hours per week excluding rest breaks.*

(3) In the same 'statutory information' section, it states that the Claimant's notice period is to be '*2 week (year 1)*'. However, in clause 23 of the subsequent 'terms and conditions' section, the following wording is used:

> *During the Employee's probationary period, this employment may be terminated by either party giving one weeks ' notice to the other.*
>
> *After the Employee's probationary period:*

To terminate this employment, the parties should give notice to the other in accordance with the following provisions:

i. the Employee's entitlement to notice from the Employer shall be one week for each complete year of continuous employment (subject to a maximum of twelve weeks).

As the Claimant had less that one year's complete service, this wording indicates that her notice period was to be only one week, whether or not she was within her probation period. It will be necessary for me to resolve the discrepancy between this section and the 'statutory information' section when I come to consider the Claimant's wrongful dismissal claim.

(4) As regards annual leave, the 'statutory information' section provides that the Claimant will receive '*statutory entitlement based on days worked'*. I read that as providing that the amount of annual leave that the Claimant would receive would be the same as her statutory annual leave entitlement under the **Working Time Regulations 1998**.

(5) Further provisions dealing with annual leave are found in clauses 13 and 14 of the terms and conditions. Clause 13 provides, as relevant:

Holiday entitlement is eligible from continuous employment only.

[…]

Holidays must be taken in the holiday year of entitlement and may not be carried forward to the following year.

The holiday year is from 15th Jan 2021.

Clause 14 then goes on to provide (as relevant):

Holiday pay will be paid at the basic rate and accumulate by weeks worked. Upon termination of employment, the Employee will be entitled to pay in lieu of any unused holiday entitlement…

[…]

Holiday entitlement commences from date of continuous employment.

(6) Both Respondents are named as the Claimant's employer.

Overtime

61. On 9 February 2022, the Claimant sent a text message to Mr Willis, which read as follows:

> *May I have overtime/bonus? It costs me a lot of extra time to work on payroll, HMRC, and setting, and still get blame for delaying accounts work? Thanks.*

62. Mr Willis sent a text message in response on the same day, in which he wrote:

> *The job you applied for was 16hrs per week that has already increased to 24hrs…if your [sic] not happy with the terms of our employment then you should consider your position, I have not authorized overtime and believe you have been allowed more than enough man hours to carry out your duties. Please consider your position. I'm not happy with this approach.*

63. The Claimant told me that, at some point prior to these messages being sent, she and Mr Willis made a verbal agreement that she would be paid overtime in respect of any work that she did in excess of her contracted 24 hours per week. Mr Willis denied that any such agreement had been reached.

64. In respect of this matter, I reject the Claimant's evidence, and prefer that of Mr Willis, for the following reasons:

(1) The Claimant's account was vague, and she did not give details of when the conversation about overtime had taken place, nor any clear details of what was said.

(2) I consider that the text message exchange quoted at paragraphs 61 and 62 above is inconsistent with a contention that there was a prior agreement that overtime would be worked and paid. This is so for at least three reasons. First, in the Claimant's original text message, she asks Mr Willis to agree to her working and being paid overtime. There would be no need for such an agreement if Mr Willis had already agreed this orally. Second, Mr Willis's message in response clearly refuses to agree to pay overtime. This is inconsistent with a suggestion that he had previously agreed to pay overtime. Third, if Mr Willis had agreed to pay overtime previously, then his 9 February text message was reneging on that agreement. If that was so, I would have expected to see a further message from the Claimant challenging this, but there was none, and, indeed, she does not mention the alleged previous agreement anywhere in that exchange.

65. The Claimant alleged that she had worked a total of 70 hours' overtime, in addition to her contracted hours. In support of this, she produced, as her documents 14A to 14I, handwritten notes purporting to show the hours that she had worked in certain weeks, and purporting to record overtime worked.

66. Even disregarding my finding that there was no agreement for the Claimant to work or be paid overtime, I do not find that the Claimant did work hours in excess of those which she was contracted to work. The handwritten notes are, in my view, insufficient to establish this – there is nothing to show me when they were created, and there is no suggestion

that they were agreed by the Respondents. Moreover, they are inconsistent with the schedule of hours which the Claimant produced and asked Mr Willis to sign on 17 January 2022. For example, the Claimant's handwritten notes suggest that in the week commencing 13 December 2021 she worked 34.5 hours, but the schedule presented to Mr Willis records her as working 24 hours in that week. A number of other weeks recorded in the schedule as 24-hour weeks are also shown in the handwritten notes as featuring longer hours. When I asked the Claimant about this discrepancy, she said that she did not ask Mr Willis for overtime pay when she produced her schedule, because it was not worth her while. I find this explanation difficult to follow, since I cannot see why a person who had worked 34.5 hours would put in writing that they had only worked 24 hours.

67. Overall, I reject the contention that it was ever agreed that the Claimant would work or be paid for overtime, or that she in fact worked more than her contracted hours.

The Claimant's dismissal

68. As the text message exchange on 9 February shows, by February 2022 the relationship between the Claimant and Mr Willis was becoming strained. On 16 February 2022, Mr Willis e-mailed the Claimant, dismissing her. He stated that she would receive one week's notice, in reliance on clause 23 of the contract signed by the Claimant on 31 January 2022.

69. The Claimant contends that she was in fact entitled to two weeks' notice, pursuant to the provisions of her contract quoted at subparagraph 60(3) above. She also claims that she was not, in fact, paid any sum in respect of her notice.

70. One document in particular has been of assistance to me in ascertaining whether the Claimant received any sum in respect of her notice period. This is the Respondents' document 20, which records all of the Claimant's earnings over the course of her employment. There was no suggestion before me that the figures given in the document were inaccurate.

71. Superficially, this document shows that the Claimant received all the sums that she was due (assuming for the time being that the Respondents' positions on matters including the correct length of the Claimant's notice period, the Claimant's entitlement to be paid for 24 (as opposed to 16) hours per week, and the Claimant's holiday entitlement are correct). It records that her total net earnings were £5,695.17, and that she has been paid £5,695.17. However, on a more detailed analysis of the document, it does appear to show that the Claimant has not been fully paid in respect of her notice period.

72. The Respondents' document shows the sums earned by the Claimant as consisting of the following:

(1) £288 gross per week from the week commencing 29 October 2021 to the week commencing 11 February 2022 (inclusive).
(2) There is then recorded '2 days in hand' in respect of the week commencing 15 October 2021, which is a further £288 gross.
(3) There is then recorded '4 days in hand – notice period', which is a further £566 gross.
(4) Finally, there is £547.20 recorded as a payment in lieu of accrued but untaken annual leave.

73. What appears to be missing from this document is any acknowledgement that the Claimant was employed during the week commencing 22 October 2021. It follows that a sum of £288 gross has been left off the sums due to the Claimant, even if the Respondent's figures are otherwise accepted.

74. It thus seems to me that at the point of dismissal the Claimant was owed one week's pay more than the Respondents' document suggests. On the basis that payments made by the Respondents are to be attributed to the earliest outstanding debt, it seems to me that the sum that the Respondents paid in respect of the notice period was not £566, but was rather £288.

75. There was correspondence between Mr Willis and the Claimant following the Claimant's dismissal. I do not propose to set this out in detail. I do, however, note that on 25 February 2022 Mr Willis sent a lengthy e-mail to the Claimant, in which he quoted extensive past correspondence, referred to figures derived from QuickBooks (in this instance, the admittedly erroneous original figures contained in the Respondents' original log), and, in no uncertain terms, accused the Claimant of seeking to commit criminal fraud against the Respondents by claiming payment of the sums which I have described as forming 'unlawful deductions from wages (1)'. He sought an explanation of the discrepancies between the QuickBooks figures and the hours set out in the Claimant's schedule that he had signed on 17 January.

76. The Claimant did not provide such an explanation. I do not hold this against her, and have not given it weight in my considerations of whether the Claimant did indeed work twenty-four hours per week. This is because, first, it was likely to be extremely difficult for the Claimant to respond to figures set out in an e-mail, without seeing the underlying documents on which they were based. Second, the figures set out in the e-mail were in any event materially incorrect, and I find that no inference can be drawn from a failure to respond to such incorrect figures. Third, the tone of the e-mail from Mr Willis was unreasonably and unnecessarily belligerent, in particular in its allegations of fraud. I do not consider that it was unreasonable for the Claimant to decline to engage with correspondence of this type.

Holiday pay

77. The Claimant did not take paid annual leave during her employment with the Respondents. The Claimant's final payslip shows that she was paid £558 in respect of accrued but untaken annual leave, representing 3.9

days. The Claimant contends that she had in fact accrued 6.6 days' annual leave, and that she should accordingly have been paid £950.40. She calculates the shortfall due to her as £392.40.

78. In support of its position, the Respondents relied on their use of a holiday pay calculator on the gov.uk website. However, ultimately the calculation of how much holiday the Claimant had accrued will be a simple mathematical matter, which I will deal with below.

The PAYE refund

79. On around 11 March 2022, the Claimant received a payslip in the name of the Second Respondent. This was said to cover the period from 20 February to 5 March 2022. It recorded that a sum of minus £84 was to be deducted in respect of PAYE. In other words, as I read the payslip, £84 more had been deducted from the Claimant's earlier pay in respect of PAYE than had in fact fallen due, and the Claimant was due a refund of £84. This sum has not in fact been paid to the Claimant.

Other PAYE claims

80. The Claimant seeks to bring other claims in respect of PAYE. These take two forms.

81. First, it is said that for much of the Claimants' employment, she was paid through the First Respondent, but that the First Respondent was not registered as a payroll provider at the material time. While this point was put vociferously by Mrs Anthoney on behalf of the Claimant, I was referred to no documentary evidence to substantiate it. However, based on the alleged lack of registration it was contended that a sum totalling £484.27 had been deducted from the Claimant's pay and not accounted for to Her Majesty's Revenue and Customs. This contention did not feature in the ET1, but was raised in the Claimant's schedule of loss and witness statement.

82. In their evidence, both Mr Willis and Mrs Johnston (who took on responsibility for the Respondents' payroll and tax payments following the Claimant's dismissal) were clear that tax and national insurance deducted from the Claimant's wages had been accounted for to HMRC. There was no documentary or other direct evidence to gainsay this, and I accept the evidence of Mr Willis and Mrs Johnston on this point.

83. Second, the Claimant relied upon a record obtained from HMRC, which showed that the Second Respondent had informed HMRC that on 28 January 2022 it had paid the Claimant £1,152, which she had in fact not been paid. It appears to me that this sum may have been reported as part of the Respondents' attempts to balance its books. The Claimant's case (raised in her schedule of loss and witness statement, but not in her ET1) was that, as HMRC had been told that this sum had been paid to her, she should now receive it. However, there was no evidence before me to suggest that the Claimant had in fact earned a sum of £1,152 which had not been paid. The Claimant's case appeared to be simply that because

the Second Respondent had reported payment of this sum to HMRC, she was not entitled to have it paid to her.

Relevant Law

The significance of the claim form

84. I have noted above that in respect of a number of the matters that the Claimant now seeks to raise, I will need to consider whether the Claimant is entitled to raise them, given that they were not raised in her ET1.

85. In her witness statement, the Claimant described these claims as matters that were 'missing in my previous claim' and refers to her ET1. However, it is important to be clear that there is only one set of claims before the Tribunal, and the parameters of what the Tribunal has to determine are set out in the ET1 and the ET3 (these documents are sometimes referred to as 'the pleadings'). It is not ordinarily open to a Claimant to introduce new claims in her schedule of loss or witness statement, if they are not set out in the ET1. It is possible to apply to amend an ET1 to add new claims, but no such application was before me.

86. The importance of looking at the ET1, and not at later documents, when ascertaining what claims are before the Tribunal was emphasised by the then-president of the Employment Appeal Tribunal, Mr Justice Langstaff, at paragraphs 17 and 18 of his judgment in ***Chandhok v Tirkey*** [2015] IRLR 195, as follows:

> *17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying*

amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

Unlawful deductions from wages

87. Subsection 13(1) of the **Employment Rights Act 1996** 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.*

88. The term 'wages' for these purposes is defined in section 27 of the **Employment Rights Act**. As relevant here, it will include '*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise'*.

89. Of relevance to the Claimant's claims in respect of PAYE is subsection 14(3) of the **Employment Rights Act**, which provides as follows:

> *Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.*

This will include payments in respect of income tax or national insurance.

90. Section 23 of the **Employment Rights Act** 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.

Contractual interpretation

91. One of the claims that arises in this case is whether the Claimant received the correct sum in respect of her notice period. I regard this as a breach of contract claim.

92. In order to determine whether the Claimant received the correct sum, it will be necessary for me to determine whether the Claimant was entitled to one week's or two weeks' notice. As is clear from paragraph 60(3) above, the Claimant's contract of employment is inconsistent in respect of her notice entitlement. As such, I will have to consider how such inconsistency may be resolved. I am likely to be assisted in this by three particular principles of contractual interpretation:

    (1) First, where a term of a contract is ambiguous it is construed *contra proferentem* – i.e. against the party who produced the agreement. Here, the Respondents produced the various agreements, so any ambiguity in those agreements must be interpreted against the Respondents, at least unless there is some other way of deciding between the inconsistent provisions.

    (2) Second, where two clauses are inconsistent, then if there is no other way of resolving the inconsistency, then the provision that appears first in the contract is likely to prevail: see Lewison, *The Interpretation of Contracts,* 7th edition, 9.73-9.77.

    (3) Third, in determining which of two inconsistent clauses is to take precedence, greater weight is likely to be given to clauses which have been individually chosen by the parties, than to clauses which appear as part of standard terms and conditions: see the judgment of the House of Lords in the commercial case of ***Homburg Houtimport BV v Agrosin Private Ltd*** [2003] 2 WLR 711.

93. Most fundamentally, when deciding what the effect of the Claimant's contract of employment was, I must consider how it would be understood by a reasonable observer in possession of all the facts available to the Claimant and the Respondents when the contract was entered into: see the judgment of the House of Lords in ***Investors Compensation Scheme v. West Bromwich Building Society*** [1998] 1 WLR 896.

Payment in lieu of accrued but untaken annual leave

94. 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. In the case of the Claimant, that meant that she was entitled to either 11.2 days' annual leave per year (if she was contracted to work two days per week) or 16.8 days (if she was contracted to work three days per week).

95. 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.

96. Clause 14 of the Claimant's contract of employment confers a contractual right analogous to the statutory right conferred by regulation 14.

97. While holiday entitlement is commonly expressed by reference to days, or sometimes even by reference to hours, it is important to note that the **Working Time Regulations** express the entitlement by reference to weeks. In determining what is a week's pay for the purposes of a claim to accrued but untaken annual leave, the relevant provision is subsection 221(2) of the **Employment Rights Act 1996**, which provides as follows:

> *Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.*

While this provision is 'subject to section 222', there is nothing in section 222 (which concerns employees whose remuneration varies according to the time or the days of the week on which they work) which is applicable to this case.

Tribunal's Jurisdiction: Pension claims

98. An employment tribunal only has the jurisdiction given to it by statute. It does not have a freestanding jurisdiction to hear all disputes arising from employment. This is particularly relevant to the claim for pension contributions.

99. It is correct that in certain circumstances an employer will be obliged to auto-enrol an employee in a workplace pension scheme: see **Pensions Act 2008**, section 3(2). However, nothing in the statutory provisions imposing this obligation gives an employment tribunal the power to hear a complaint that an employer has failed to enrol an employee. Rather, enforcement of such an obligation is a matter for the Pensions Regulator, which, pursuant to Chapter 2 of the **Pensions Act**, has a range of powers available to it to enforce obligations in respect of auto-enrolment.

100. Section 34 of the **Pensions Act** provides that a breach of an employer's duty in respect of (among other things) auto-enrolment does not give rise to a claim for breach of statutory duty.

101. The definition of 'wages' for the purposes of the unlawful deductions from wages provisions does not include employer's pension contributions, and a Tribunal will not have jurisdiction to make an award under the unlawful deductions provisions in respect of an employer's failure to make pension contributions: see the judgment of the Employment Appeal Tribunal in ***Somerset County Council v Chambers*** (2013) UKEAT/0417/12.

Decision and Analysis

102. I now turn to set out my conclusions on the issues that I identified at paragraph 15 above.

Unlawful Deductions from Wages (1)

First Issue: Were the sums claimed by the Claimant in respect of the ten days allegedly worked but unpaid by the Claimant between 22 November 2021 and 26 January 2022 wages that were properly payable to the Claimant, having regard to sections 13 and 27 of the Employment Rights Act 1996?

103. This relates back to the questions of whether (i) it was agreed that the Claimant would work and be paid for three days per week rather than two; and (ii) whether the Claimant in fact did work three days per week rather than two.

104. In light of my findings at paragraphs 33 to 52 above, I find that the wages claimed by the Claimant under this heading were properly payable. I have found both that, with effect from 24 November 2021, the Claimant's contract was varied such that she was to work three days per week, and that she in fact did work three days per week. It follows, therefore, that she was entitled to be paid for three days' work per week.

Second Issue: If the sums claimed for these ten days were wages that were properly payable, were deductions made from those wages?

105. As I observed when summarising the issues, there is no dispute that the Claimant was only ever paid for two days' work per week. Given my finding that she was entitled to be paid for three days' work per week from 24 November 2021, it follows that she has suffered deductions over the period between 22 November 2021[3] and 26 January 2022 at the rate of one day's pay per week.

106. No lawful basis for these deductions was advanced, and accordingly I find that they were unlawfully deducted, and the Claimants' claim in respect of these deductions succeeds.

[3] This is the start date to the series of deductions, as set out in the Claimant's ET1. The contractual variation in fact took effect slightly later that week, as set out above.

Third Issue: If deductions were made, what sum was deducted?

107. I have found that the Claimant had ten days' pay deducted. Her daily pay was £144 gross. It follows that she has suffered unlawful deductions in the total sum of £1,440 gross.

Unlawful Deductions from Wages (2)

Fourth Issue: For the two weeks covered by the payroll period 6 to 19 February 2022, was the Claimant entitled to be paid for three days or two days?

108. The answer to this question follows from my conclusions in respect of the previous questions. The Claimant was, I find, contractually required to work three days per week after 24 November 2021, and contractually entitled to be paid for three days per week. There was nothing that changed this in respect of the two weeks in question.

Fifth Issue: In light of issue (4), were unlawful deductions made from the Claimant's wages?

109. Given that the Claimant was entitled to be paid for three days in respect of these two weeks, but was only paid for two days, it follows that she has suffered deductions. Again, no lawful basis for these deductions has been advanced, and accordingly the Claimant's claim for unlawful deductions from wages in respect of these two weeks succeeds.

Sixth Issue: If deductions were made, what sum was deducted?

110. The Claimant suffered deductions of two days' gross pay, at the daily rate of £144. She accordingly suffered unlawful deductions of £288 gross in respect of this part of her claim.

Unlawful deductions from wages: time limits

Seventh Issue: Were any of the Claimant's claims in respect of unlawful deductions from wages brought outside the time limit for bringing a claim to the Tribunal?

111. I have explained at paragraph 90 above how time limits work in respect of unlawful deductions from wages claims. Some of the Claimant's claims related to wages which fell due for payment more than three months before she commenced ACAS early conciliation on 11 March 2022. As such, these claims were *prima facie* out of time.

112. However, I also explained that if there has been a series of deductions, then time for making a claim in respect of all of the deductions only runs from the date of the last deduction. Here, I am satisfied that all of the deductions that I have identified formed part of a single series. Each of those deductions related to the same issue, namely the non-payment of the Claimant for the third day each week that it had been agreed she would be paid. The deductions were each made for the same reason, which was initially the fact that the parties had agreed that payment could be deferred until the Respondents' financial position improved, and latterly

the fact that the Respondents began to dispute that the Claimant had in fact worked the full three days each week. For these reasons, I find that time for bringing a claim in respect of all deductions ran from the date of the final deduction.

113. The final deduction was the non-payment in respect of the week commencing 14 February 2022. As I understand the Respondents' schedule of payments (Respondents' document 20) payment in respect of this week was made on 25 February 2022. The Claimant thus had until 24 May 2022 to bring her claims, and she had completed ACAS early conciliation and issued her claims by 2 April 2022. I accordingly find that all of these claims were brought in time.

Notice Pay

Eighth Issue: To what notice period was the Claimant entitled?

114. The Claimant's contract contains two inconsistent statements as to what was her contractual notice period. The Claimant argues that I should rely on the provisions set out in the 'statutory information' section, which provides for two weeks' notice, while the Respondents say that I should rely on the provisions set out in clause 23 of the 'terms and conditions' section, which provides for one week's notice.

115. These provisions are simply inconsistent with one another. There is nothing in the express wording of the contract which tells me which should take precedence.

116. I therefore have to assess which provisions a reasonable observer would consider were intended to take precedence. Adopting this approach, and having regard to the principles outlined at paragraphs 92 and 93 above, I have come to the conclusion that the provisions in the 'statutory information' section should take precedence. This is for the following reasons:

(1) It appears to me that those provisions are the product of bespoke drafting, intended to serve the purpose of complying with the Respondents' obligations under section 1 of the **Employment Rights Act 1996** to provide the Claimant with a written statement of the main terms of her employment. By contrast, the provisions of clause 23 of the terms and conditions appear to be general boilerplate provisions, not specifically directed to this particular contract. Indeed, Mr Willis relied on this very point as part of his argument that this contract was not intended to embody the parties' agreement at all. It seems to me that, other things being equal, a bespoke term is more likely to reflect the parties' intentions than a boilerplate provision.

(2) I also note that the Respondents produced this document and provided it to the Claimant. Applying the doctrine of *contra proferentem*, this indicates that the contract should be construed in the manner less favourable to the Respondents, which would in this instance mean that the more generous notice provisions in the 'statutory information' section took precedence.

(3) If I were wrong to apply both the above analyses, then I would find that the 'statutory information' provisions took precedence, because they occur first in the document. However, such reasoning is likely to be appropriate only as a last resort, and it is not necessary for me to have recourse to it because I have reached the same conclusion based on my analysis in the preceding subparagraphs.

117. I accordingly find that the provision governing the length of notice to which the Claimant was entitled was that set out in the 'statutory information' section of her contract. She was therefore entitled to two weeks' notice.

Ninth Issue: What notice did the Claimant receive?

118. As I have described above, the Claimant was given one week's notice of her dismissal. This was less than the notice to which she was entitled, and the Respondents were accordingly in breach of their contractual obligation to give two weeks' notice.

Tenth Issue: What was the Claimant paid for the notice period that she served?

119. I dealt with this question at paragraphs 68 to 74 above, and concluded that the Claimant was paid £288 gross in respect of her notice period.

Eleventh Issue: What was the Claimant entitled to be paid during her notice period?

120. The Claimant was entitled to be paid for two weeks' work, on the basis that for each week she was entitled to three days'/24 hours' pay at her hourly rate of £18. Over two weeks, she was therefore entitled to be paid for 48 hours at £18 per hour, which comes to £864.

Twelfth Issue: Having regard to issues (8) to (11), is the Claimant owed any outstanding notice pay or payment in lieu of notice? If money is owed, how much?

121. There is clearly a shortfall between the £864 that the Claimant was entitled to receive, and the £288 that she did receive. The difference is £576, and there will be judgment for the Claimant for breach of contract in that amount.

<u>Accrued but untaken annual leave</u>

Thirteenth Issue: How much annual leave entitlement had the Claimant accrued but not taken at the point that she was dismissed?

122. In answering this question, it is first necessary to decide when the Claimant's annual leave entitlement accrued from. Clause 13 of the contract of employment from January 2022 provides that '*the holiday year is from 15th Jan 2021*'. The same clause provides that holiday must be taken in the year of entitlement, and may not be carried over into the next holiday year.

123. On the face of it, these provisions would seem to have the effect that the Claimant's leave year ran from 15 January of each year to 14 January of the next, and that any leave accrued by the Claimant between the commencement of her employment on 15 October 2021 and 14 January 2022 had to be taken by her prior to the start of the new leave year on 15 January 2022, or it would be lost. If this was the case, then the Claimant would only have accrued around one-twelfth of her annual leave entitlement by the time of her dismissal.

124. However, this analysis was not adopted by either party. The Claimant contended that her accrued annual leave as at dismissal should be calculated based on the period since 15 October 2021, and, in cross-examination, Mr Willis agreed with this. In response to a direct question from Mrs Anthoney, he accepted that holiday entitlement started from day one. Moreover, the Respondents' calculation of the Claimant's holiday entitlement is that she had accrued either 3.8 or 3.9 days' holiday which is considerably more than she would have accrued in the period between 15 January 2022 and her dismissal. Given that neither party has proceeded on the basis of the analysis in the previous paragraph, I will also proceed on the basis that the Claimant's annual leave entitlement had accrued without interruption since 15 October 2021.

125. I must then determine what was the date on which the annual leave entitlement stopped accruing. That date will be the date on which the Claimant's employment ended. The Claimant, in her ET1, put this at 5 March 2022. The Respondents, in their ET3, put it at 16 February 2022.

126. I do not accept either party's case on this point. The Respondents are right to treat 16 February as a significant date, as that is the date on which notice of dismissal was given. However, the dismissal e-mail did not dismiss the Claimant without notice. It dismissed her with one week's notice. She accordingly remained employed for that week, which means that her employment ended on 23 February 2022. She continued to accrue annual leave entitlement so long as she remained employed.

127. As I have found, the Claimant should have been given two weeks' notice of dismissal. Had she been given this much notice, her employment would have continued until 2 March 2022 (not 5 March as the Claimant contends for). However, while the short notice was a breach of contract, the fact is that the Claimant's employment was terminated on 23 February, not 2 March. It is at the actual date of termination that annual leave entitlement stops accruing.

128. In summary, the amount of annual leave accrued by the Claimant is to be calculated by working out how much leave she accrued between 15 October 2021 and 23 February 2022. That is a period of 18 weeks and 5 days (18.7 weeks), out of a 52-week leave year.

129. Having regard to all of the above, the calculation of the amount of annual leave that the Claimant had accrued by the time that her dismissal took effect is as follows:

5.6 weeks divided by 52 multiplied by 18.7 = 2.0 weeks' accrued entitlement (to the nearest tenth of a week).

Fourteenth Issue: How much annual leave had the Claimant taken, and what, therefore, was her outstanding annual leave entitlement at dismissal?

130. It was not in dispute that the Claimant had not taken annual leave. As such, she had two weeks' annual leave entitlement outstanding at the date of dismissal.

Fifteenth Issue: What sum should the Claimant have been paid in respect of this accrued but untaken annual leave?

131. In my view, the answer to this is provided by subsection 221(2) of the **Employment Rights Act**, which I quoted at paragraph 97 above. This provides that '*the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date*'. The calculation date in this instance is the date on which the payment in lieu of accrued but untaken annual leave fell due, which was 23 February 2022. At that point, the Claimant was contractually entitled to receive 24 hours' pay per week, which at the rate of £18 per hour means that her weekly pay was £432. It follows that the sum that she should have been paid in respect of two weeks' accrued but untaken annual leave was £864.

Sixteenth Issue: What sum was the Claimant in fact paid in respect of accrued but untaken annual leave?

132. The Claimant's final payslip shows that she was paid £558 in lieu of accrued but untaken annual leave.

Seventeenth Issue: Having regard to issues (13) to (16) are any further payments due to the Claimant?

133. When the sum that was paid (£558) is deducted from the sum that should have been paid (£864), it becomes apparent that the Claimant is owed a further £306, and this is the sum that I will order to be paid to her.

Overtime

Eighteenth Issue: Should I consider the claim to overtime payments, given that it was not raised in the ET1?

134. In my view, the answer to this is plainly 'no'. I refer to my summary of the law in relation to the significance of the ET1 at paragraphs 84 to 86 above, and in particular the quote from the judgment of Mr Justice Langstaff in ***Chandhok v Tirkey***. When an employment tribunal considers a claim, it considers the matters raised in the ET1. It is not open to a Claimant to add other claims by including them in a schedule of loss or a witness statement. Here, the claim to payment in respect of seventy hours' overtime is not raised in the ET1. In my view, it is simply not before the Tribunal.

135. Having said that, given that both parties advanced evidence and argument on this point, I will briefly set out the conclusions that I would have reached, had the matter been properly before me.

Nineteenth Issue: If the answer to issue (18) is 'yes', was there an agreement that the Claimant would work and be paid for overtime?

136. The answer to this question is 'no', and I refer to my findings at paragraphs 61 to 64 above.

Twentieth Issue: If so, did the Claimant work seventy hours' overtime as she claims?

137. Again, the answer is 'no', and I refer to my findings at paragraph 66 above.

Twenty-first Issue: Having regard to issues (18) to (20), what sum (if any) is due to the Claimant in respect of overtime?

138. Having regard to all my conclusions, I find that no sum is due to the Claimant in respect of overtime. I emphasise that, by reason of my findings on issues (19) and (20), this is the conclusion that I would have come to even had I reached a different conclusion on issue (18).

<u>PAYE Refund</u>

Twenty-Second Issue: Does the Tribunal have jurisdiction to consider this claim?

139. This question was raised with the parties on 27 October 2022 by a letter from Employment Judge Clark.

140. It seems to me that the claim in respect of the PAYE refund is really a claim in respect of unlawful deductions from wages. On this basis, it is a claim within the jurisdiction of the Tribunal, and the real questions are whether (i) the PAYE refund constitutes 'wages', as defined in section 27 of the **Employment Rights Act**, and (ii) whether the deduction falls within subsection 14(3) of the **Employment Rights Act**, such that it is not an unlawful deduction within the meaning of section 13 of the Act? I refer to paragraphs 87 to 89 above for a summary of these provisions.

141. As I understand the PAYE refund, it was a sum that had previously been deducted from the Claimant's pay in respect of tax liability, but which proved not to be deductible on this basis (presumably because the Claimant's employment had ended earlier than was anticipated when the deduction was made, such that her tax liability was less than anticipated). The sum therefore fell to be refunded to the Claimant.

142. In my view, this sum was 'wages' within the definition in section 27. At its root, it had begun life as a payment of salary. While it was subsequently deducted and then refunded, that does not alter its origin as a salary payment, which would clearly form wages. Moreover, it was in any event a sum that was referable to the Claimant's employment, and which (having begun its life as salary) constituted an emolument.

143. The payment was clearly deducted, because, having become payable as set out in the 11 March 2022 payslip, it was not paid to the Claimant.

144. Was it a payment which fell within subsection 14(3) of the **Employment Rights Act**? I repeat the relevant parts of subsection 14(3), which provides that a deduction will not be an unlawful deduction if it is:

> *…a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker…*

145. I do not think that this deduction was such a deduction. The original deduction of this sum from the Claimant's wages may have been a deduction falling within subsection 14(3). However, once the money had been processed as a 'PAYE refund', it did not fall within subsection 14(3). At that point, it had been determined that the money was not due to the public authority (in this case, Her Majesty's Revenue and Customs), but was to be repaid to the Claimant. Moreover, the deduction was not made in pursuance of a requirement to deduct the money and pay it to HMRC. The original deduction of the money from the Claimant's wages may have been made pursuant to such a requirement, but I am dealing here with the failure to pay the refund to the Claimant. The Respondents did not fail to pay the refund to the Claimant because of a requirement to deduct the money and pass it to HMRC – instead, the refund fell due precisely because there was no such requirement.

146. It follows that, in my view, there is no jurisdictional or substantive reason why the Claimant cannot bring a claim in respect of the PAYE refund.

Twenty-Third Issue: If so, was the Claimant entitled to receive the PAYE refund?

147. As I have found, the PAYE refund was 'wages' as defined in the **Employment Rights Act**, and subsection 14(3) of that Act is inapplicable. In my view, therefore, there was a deduction of wages, and this was on the face of it unlawful. There is nothing else that I have seen to suggest that the deduction was lawful. I will therefore give judgment for the Claimant for this sum of £84.

<u>PAYE/NI Deductions</u>

Twenty-Fourth Issue: Should I consider the claim in respect of PAYE/NI deductions, given that it was not raised in the ET1?

148. For the reasons that I have set out in paragraphs 134 and 135 above, the answer to this question is 'no'. I nonetheless deal with issues (25) to (27), as they were argued by the parties before me.

Twenty-Fifth Issue: Does the Tribunal have jurisdiction to consider this claim?

149. The Tribunal does have jurisdiction. The claim is brought, as I understand it, as a claim of unlawful deductions from wages. The deductions complained of were deductions from the Claimant's salary, which is clearly wages as defined in section 27 of the **Employment Rights Act**.

Twenty-Sixth Issue: Did the Respondents fail to account to Her Majesty's Revenue and Customs for tax deducted from the Claimant?

150. I refer to paragraph 82 above. I accept the evidence of Mr Willis and Mrs Johnston that the sums deducted in respect of tax were passed to HMRC. As such, the factual basis for the Claimant's claim fails.

Twenty-Seventh Issue: If the Respondents did fail to account to HMRC for sums deducted, is the Claimant entitled to an order for payment of the deducted sums?

151. I have rejected the Claimant's contention that the Respondents' failed to account to HMRC for the sums deducted. However, even if the Claimant was correct, I do not consider that that would entitle her to an order for payment of the deducted sums. In my view, subsection 14(3) of the **Employment Rights Act** applies here, such that there is no right to bring a claim of unlawful deductions from wages. Put simply, the Respondents deducted the relevant sums from the Claimant's wages because the money deducted was due from the Claimant to HMRC. This was a deduction falling within subsection 14(3). Even if the Respondents' had failed to pass the money to HMRC, that would not entitle the Claimant to repayment of the money. Rather, it would be a matter between the Respondents and HMRC.

152. It follows that, on multiple grounds (namely (i) the fact that it was not raised in the ET1, (ii) the fact that I do not find that the Respondents did fail to pass the sums deducted to HMRC, and (iii) the fact that in any event, the deductions fell within subsection 14(3), and were as such a matter for HMRC) the claim in respect of these deduction must be dismissed.

<u>The £1,152</u>

Twenty-Eighth Issue: Should I consider this claim, given that it was not raised in the ET1?

153. For the reasons I have already given, I do not consider that this claim is properly before me. I will nonetheless consider whether the claim would have succeeded, were it before me.

Twenty-Ninth Issue: If so, is this a sum which the Claimant is entitled to be paid?

154. As I have found, it appears that the £1,152 was most probably reported to HMRC as part of an attempt to balance the Respondents' books. There was no evidence before me to suggest that this was a sum that the Claimant had actually earned, which had been withheld from her.

It was not, therefore, wages properly payable to the Claimant. As such, the claim would fail on its merits.

Pension Contributions

Thirtieth Issue: Does the Tribunal have jurisdiction to consider this claim?

155. The answer to this question is straightforwardly 'no'. I refer to my summary of the legal principles at paragraphs 98 to 101 above. There is nothing in any statute providing that the Tribunal has power to consider the Claimant's complaint about the failure to auto-enrol her in a workplace pension. Accordingly, the Tribunal simply does not have any such power. Rather, the issue, if there is one, is one for the Pensions Regulator to resolve.

156. During closing submissions, I asked Mrs Anthoney about the Tribunal's jurisdiction to hear this complaint. Her response was that the Claimant had suffered a loss, and that she would not be able to recover this via the Pensions Regulator. However, whether that is correct or not, the Tribunal can only decide matters over which it has jurisdiction. It does not have jurisdiction over this matter. If that leaves the Claimant without a remedy, then unfortunately for her that simply reflects the decisions that parliament has made as to the routes to enforcement of the auto-enrolment provisions.

157. Given my conclusion on this matter, I have not gone on to consider issues (31) to (33). It would not be appropriate to do so, where the power to decide these matters is reserved to the Pensions Regulator.

Conclusion

158. For the reasons set out above I find that:

(1) The Respondents made unlawful deductions from the Claimant's wages in respect of the period from 22 November 2021 to 26 January 2022, in the gross sum of £1,440.

(2) The Respondents made unlawful deductions from the Claimant's wages in respect of the payroll period from 6 to 19 January 2022, in the gross sum of £288.

(3) The Respondents were in breach of contract because they failed to pay the full sum due to the Claimant in respect of her notice pay. The gross amount of the underpayment was £576.

(4) The Respondents underpaid the Claimant by £306 (gross) in respect of accrued but untaken annual leave.

(5) The Respondents made unlawful deductions from the Claimant's wages in respect of the net sum of £84, in respect of the PAYE refund.

159. Otherwise, the Claimant's claims are either not properly before the Tribunal, as they were not raised in her ET1, or they are not within the

jurisdiction of the Tribunal. On either basis, they fail. Most would fail in any event, because the claims are not made out on their merits.

160. The sums set out in subparagraphs 158(1), 158(2), 158(3), and 158(4) above are gross sums, on which tax and national insurance will fall to be paid. The sum set out in subparagraph 158(5) is a net sum, which is to be paid to the Claimant in full and in respect of which tax is not payable.

161. As a final point, I observe that the judgment is against both Respondents, and they are jointly and severally liable. This means that any sum awarded to the Claimant may be enforced against either Respondent, or against both of them together.

162. I make this point, because all parties agree that the Respondents jointly employed the Claimant. There is authority to the effect that an employee ordinarily cannot be employed by two distinct entities: see, in particular, the judgment of the Employment Appeal Tribunal in ***Patel v Specsavers Optical Group Limited*** (2019) UKEAT/0286/18. However, where all parties are agreed that the Claimant was employed by both Respondents, I am disinclined to engage in the exercise of trying to ascertain which was truly the employer. In any event, I note that in ***Patel***, Her Honour Judge Stacey said that '*in general terms one employee cannot simultaneously have two employers*'. The words 'in general terms' suggest the existence of some exceptions. In my view, this case forms one of those exceptions. Here, the parties have expressly entered into a contract which provides for the Claimant to be employed by both Respondents. There is no objection in general contract law to a contract being formed between two parties on the one hand and one party on the other. Where, as here, the express agreement of the parties was that the Claimant would be employed by both Respondents, I can see no basis for not holding all parties to that agreement.

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Employment Judge **Varnam**
14 February 2022

FOR EMPLOYMENT TRIBUNALS