Case No: 3312562/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr A Johnson

Respondent: African Caribbean Leadership Company Limited

Heard at: Watford
On: 18-19 January 2023

Before: Employment Judge Caiden

Representation
Claimant: In person
Respondent: Not in attendance on 18 January 2023, Mr Fell a Director of Respondent on 19 January 2023

JUDGMENT

1. The name of the Respondent is amended to African Caribbean Leadership Company Limited.

2. The Claimant's application to amend his claim, to include in his existing unlawful deduction of wages claim (relating to non-payment of overtime) that his furlough pay has also been incorrectly calculated as overtime has not been included, is granted.

3. The Claimant's complaint that there was an unauthorised deduction from his wages is well-founded and succeeds in the following respects:
    a. the Claimant is owed the 'week in hand' payment of £189.65 gross which was taken at the start of his employment and due to be repaid upon termination. The Respondent is ordered to pay the Claimant this sum and the Claimant is responsible for any income tax or national insurance contributions which may be become due for this gross sum;
    b. the Claimant is owed overtime pay that was never paid between 30 June 2019-4 April 2020 and the Respondent is ordered to pay the Claimant the gross sum of £1,018.04. The Claimant is responsible for any income tax or employee national insurance contributions which may become due for this gross sum;
    c. the Claimant is owed holiday pay outstanding upon termination of employment and the Respondent is ordered to pay the Claimant the sum of £375 gross, for which the Claimant is responsible for any income tax or national insurance contributions which may become

due.

4. The Claimant's complaint that there was an unauthorised deduction from his wages by virtue of furlough payments is not well-founded and is dismissed.

5. The Claimant's complaint of wrongful dismissal (breach of contract claim for failure to pay all the required statutory notice pay) is well-founded and succeeds. The Respondent is ordered to pay the Claimant £131.36.

6. The Claimant's complaint of outstanding statutory redundancy pay is well founded and succeeds. The Respondent is ordered to pay the Claimant £184.80.

REASONS

A) Introduction and issues

1. The claim was made by an ET1 presented on 30 June 2021 following his dismissal for redundancy on 30 April 2021.

2. The claim was due to be heard on 18 March 2022. However, that hearing, before Employment Judge Bloom, was ineffective due to the significant disclosure issues. At that hearing the scope of the claims were discussed and it appears, given the Record of Preliminary Hearing and lack of response to the order to raise matters of disputes within 14 days, agreed. The claims, issues and respective positions of the parties are set out below:

   2.1. unlawful deduction of wages, namely:

      2.1.1. failure to pay all of his first week's wages as it was held back as a 'week in hand' which he says was never paid and should have been. The Claimant's position is that a 'week in hand' is in effect a deposit that is commonly held and then repaid upon employment terminating assuming the employee does not owe outstanding sums. The Respondent position is this is incorrect, and it is just payment in arrears ["**Week in hand claim**"];

      2.1.2. failure to pay for overtime worked between 30 June 2019-4 April 2020. The Claimant says that he worked on average 3.1 hours of overtime during this period (his furlough starting after 4 April 2020) and his hourly rate of pay was national minimum wage. The Respondent says that he took 'time off in lieu' so is owed nothing and had no entitlement to overtime pay. In relation to the latter point the Claimant says he is only asking for national minimum wage and so any agreement is immaterial ["**Overtime claim**"];

      2.1.3. a shortfall in his furlough pay as the Claimant alleges the overtime hours he regularly worked should have been factored in and not simply his basic pay ["**Furlough claim**"];

2.1.4. a failure to pay outstanding unused holiday upon termination as the Claimant alleged that the 1-day he was paid was less than what was outstanding [“**Holiday pay claim**”].

2.2. wrongful dismissal (a claim for outstanding notice pay). The parties agree that the notice period would be 11 weeks’ pay but the area of dispute being what a week’s pay should be which it is agreed should be ‘furlough pay’. The Claimant’s position is that week’s pay should include the overtime that he alleges he worked and was not paid for, and the Respondent’s position is that this should not be included [“**Notice pay claim claim**”].

2.3. outstanding statutory redundancy pay. The dispute is simply about what amounts to a week’s pay, and whether in particular the overtime should be included [“**Redundancy pay claim**”].

B) Preliminary and procedural matters

Non-attendance of Respondent

3. The Claimant attended the hearing and came with one witness, Mr Irish. The Respondent did not appear. The Tribunal made enquiries via one of its clerks who were told that the Respondent thought the hearing was due to take place on 23-24 January 2023 and no one would be attending. This was confirmed in an email sent at 11:19 (am) by Mr Fell. Mr Fell is a Director at the Respondent and the author of a letter that acted as a cover sheet to the bundle, dated 28 November 2022, that stated:

   The above matter is ordered for hearing by an Employment Judge sitting alone at Radius House, 51 Clarendon Road, Watford on 18th and 19th January 2023…Subject to any further Directions by the Tribunal the Respondent will submit further written submissions and proposes to offer oral representations at hearings on 118th and 19th January 2023.

4. Mr Fell’s email of 18 January 2023 at 11:19 said:

   I write on behalf of the above Respondent Company to apologise to the Employment Tribunal for the failure to appear or be represented at the hearing on 18 January 2023.

   Due to administrative error the diary entry for the date of the hearing was 23 and 24 January 2023.

   I should explain that the Respondent Company is unfunded and its administration is dependent on unpaid volunteers. Its operational centre has been closed since March 2020 due to Covid-19 and for health and safety reasons remains closed to date by order of the Landlord due to subsidence and internal dilapidation. Access to building for recovery of mail and documentation is strictly controlled and limited and all administration is conducted remotely by Zoom.

   The administrative error giving rise to failure to appear at the hearing today is very much regretted and the Respondent offers their most humble apology to the Judge and Tribunal. The Respondent would be most grateful if the Tribunal should reschedule to hearing to a new date.

5. The Tribunal took this email to be an application to postpone. It considered Rule 29 to Schedule 1 of the Employment Tribunals (Constitution and Rules of

Procedure) Regulations 2013 ("ET Rules") that deals with general case management discretion, Rule 47 ET Rules that deals with the non-attendance of parties, Rule 2 that deals with the overriding objective and Presidential Guidance. Ultimately it is a matter of discretion, and the Tribunal rejected the postponement application and decided to hear the matter in the Respondent's absence because:

5.1. the notice of hearing was clear as to the start time (it is page 234 of the Respondent's own bundle, see paragraph 6.1 below);

5.2. the cause of the non-attendance was an administrative mistake and all other matters set out by Mr Fell were not material to this. After all the Respondent knew the dates for the hearing as Mr Fell's own cover letter in the bundle sent on 28 November 2022, so just under 2 months before this hearing, set out the correct dates;

5.3. the matter has been going on for quite some time, nearly two years since the termination of employment, and this will be another hearing that is not effective and for which it would again be the Respondent that ultimately was the reason for this;

5.4. the Respondent had a lot of time to prepare, took steps to prepare and said that it was going to provide further documents in writing. Whilst this may point in favour of allowing a postponement, it could also be taken to point the other way. That is because, even allowing for the diary mistake, it was only 3 business days before the hearing was due to commence on the Respondent's own view and upon being told of the mistake it was not able to send anything in writing nor did it make any suggestion that it would attend later in the 'trial window' (although as set out below it later did);

5.5. there will be considerable further delay until a further hearing occurs and this could, given some of the matters raised in the Respondent's email itself, effect the Claimant's ability should any claims succeed to realise any funds from the Respondent. There is therefore potential prejudice to the Claimant in a delay;

5.6. the matters were not significantly factual, and the Respondent has set out its case at the earlier Preliminary Hearing in relation to the issues. Therefore, the Tribunal has a fairly good idea of what any counter-arguments raised would be;

5.7. the sums at issue – see paragraph 11-12 – are comparatively small and it appeared disproportionate for the matter to have to return for a further two days of Tribunal time to be taken;

5.8. overall taking all matters into account, the interest of justice falls in refusing the adjournment and proceeding to hear the case in the Respondent's absence.

<u>Documents for the hearing</u>

6. The Tribunal was provided with the following documents at the start of the hearing on 18 January 2023:

6.1. a bundle prepared by the Respondent which ran to 235 pages and included an Appendix 1 of some further 45 pages;

6.2. a document entitled "Submissions and Quantification of Loss" by the Claimant;

6.3. a witness statement of Carlyle Forrester, who did not attend the hearing;

6.4. a witness statement of Herman Irish, who attended the hearing and took an oath following which he confirmed the truth of the content of his witness statement (an earlier version was found in the bundle prepared by the Respondent in the appendix section);
6.5. a witness statement of the Claimant, who attended the hearing and took an oath following which he confirmed the truth of the content of his witness statement provided (an earlier version was found in the bundle prepared by the Respondent in the appendix section);
6.6. 22 pages worth of exhibits to the Claimant's witness statement;
6.7. a document entitled "Calculation of Claim" that set out the Claimant's position in respect of each of the claims and the Respondent's position.

7. As the Tribunal commenced hearing the case in the Respondent's absence it wanted to ensure that it was not relying upon documents that the Respondent had never seen. It asked the Claimant if these were provided, and he confirmed that they had been. Further, the documents at paragraphs 6.2-6.7 above were provided to the Tribunal in an email of 17 January 2023 at 17:29. Below this in the email chain there is the Claimant's email address sending documents to "*info@aclc.uk*" (on 27 December 2022) which is the email address the Respondent provided in the ET3. The Tribunal is therefore satisfied it only considered documents that the Respondent had been sent.

<u>Claimant's application to amend name of Respondent</u>

8. At the start of the hearing the Claimant explained he wished for the Respondent's name to be amended. The Respondent had notice of this application as it was included in the document entitled "Submissions and Quantification of Loss".

9. The Claimant explained that "Limited" title was missing from the Respondent's name as he had written it on the ET1. The Tribunal noticed that the name "African Caribbean Leadership Company Limited" was included in the ET3 and on various letters to the Tribunal sent by the Respondent. It was satisfied that this, the same name that appeared on Companies House matching the number the Respondent provided at the footer on its letters, was the correct name of the Respondent. Some of the Tribunal's own documentation had this name and others missed the "Limited" title. The Tribunal was not clear on whether a formal amendment had been made but granted the application for the amendment in case this had yet to be formally done. It is important that the correct name of the Respondent is used in proceedings including to ensure that any judgment is properly enforceable. Refusing the amendment would cause significant prejudice to the Claimant. It is not in the interest of justice for this amendment, which the Respondent itself appeared to want to correct given the ET3, to be refused.

<u>Claimant's application to include Furlough Claim</u>

10. The Claimant's document entitled "Submissions and Quantification of Loss" and an earlier document included in the Respondent's bundle mentioned that the Claimant wished to amend to include the Furlough Claim. The Tribunal considered the ET1 which was drafted by the Claimant as a litigant in person. It was satisfied that an amendment should be granted; the balance of prejudice

favoured granting it. In the main it appeared that the claim fell factually within the 'overtime' and unlawful deduction of wages claim. Indeed, it was in effect the very basis for the notice pay claim (that notice was calculated on furlough pay that was itself underpaid as overtime should have been factored in). Further, it was not for a significant sum of money and appeared to feature early in the claims for money owed. Of course, it would be something that the Respondent would have to defend but the basis of its defence was that which it was already pursuing – namely overtime is simply not included in the pay so would never feature in the furlough pay.

Sums alleged outstanding

11. The Tribunal explained to the Claimant that it could only order sums that had not already been paid by the Respondent. It asked the Claimant to clarify what sums had now been paid given the correspondence indicated accepted mistakes. The Claimant helpful explained that everything in the document entitled "Calculation of Claim" that set out the Respondent's position had now been paid. Accordingly, using the headings set out in paragraphs 2.1-2.3
    - 11.1.1. Week in hand claim: the Claimant claims £189.65 outstanding for this as the Respondent has never paid anything towards it;
    - 11.1.2. Overtime claim: the Claimant claims £1,018.04 as the Respondent has never paid anything for this;
    - 11.1.3. Furlough claim: the Claimant claims £40.80 as the Respondent has never paid anything for this;
    - 11.1.4. Holiday pay claim: the Claimant claims it should have been £678.16 and not the £36.78 paid, which results in £641.38 being claimed as outstanding;
    - 11.1.5. Notice pay claim: the Claimant claims it should have been £1,724.91 as opposed to the £1,444.96 he eventually received. Thus, the claimed outstanding amount is £279.95;
    - 11.1.6. Redundancy pay claim: £2,587.37 is the amount he believes he should have received and not the £2,167.44, meaning the sum at issue is £419.93.

12. Globally therefore the sum of £2,589.75 was in dispute as being owed if all the Claimant's claims succeeded.

Late attendance of Respondent on day 2 and application to admit evidence

13. Following the close of evidence and submissions by the Claimant (although in oral submissions the Claimant just referred to his written document) the Respondent emailed at 10:34 on 19 January 2023 submissions and new "Time Cards for 7 April 2019" to the administrative address of Watford Employment Tribunal. These were provided to the Tribunal at 14:18.

14. The Tribunal treated the "Time Cards for 7 April 2019" as an application by the Respondent to admit and consider the new evidence. It invited the Respondent to make any further oral representations on this. Having done so the Tribunal refused the application. This is because:
    - 14.1. the evidence was disclosed extremely late and after evidence had been heard;

14.2. there was no adequate explanation for this late disclosure let alone a good explanation, after all the Respondent thought the hearing was next week and that would still have been a very late disclosure;

14.3. the orders sent by Employment Judge Bloom to the parties on 28 March 2022, having been given orally at the hearing pm 18 March 2022, required these documents and the Claimant repeatedly chased for them. This was therefore not something ‘new’;

14.4. the Respondent stated that the documents had been sent to the Claimant before the hearing. Initially it stated it was in November 2022 but upon the Tribunal querying the bundle not including them and that the submissions of the Claimant which were sent on 27 December 2022 to the Respondent it was later stated it was after this. The Respondent stated an email of 28 December 2022 sent it and the administrative address of the Tribunal was copied in. The Tribunal was never provided with this email and the Claimant denied seeing it. Even if the Respondent was right the disclosure was still very late;

14.5. the documents themselves are very difficult to read and cannot be tested by evidence in the time remaining. Even if disclosed on 28 December 2022 to the Tribunal and Claimant it would not have been of further assistance given the lack of legibility of the PDF provided. The Respondent stated it had originals, but this fact was only presented during the course of its submissions and there would be insufficient time to deal with the case even if the originals were clearer;

14.6. the result if the Respondent application were granted, given the need to read/set it out in a form that it could be properly analysed, test it, and so on would mean a postponement (now adjournment as the hearing had commenced) would have to occur. On balance the Tribunal does not consider that to be the right course for the very reasons already given at paragraph 5 above;

14.7. taking all the matters into account, having regard to the overriding objective, the competing prejudices and the interest of justice, the Tribunal is persuaded that the correct course is for the application to be refused.

15. In relation to the written submissions the Tribunal has considered them, allowed the Respondent to orally add to it and allowed the Claimant to reply. In fact, neither added anything material to it. Unlike the new evidence the Tribunal considered it in the interest of justice to take these into account.

C) Findings of fact

16. The Tribunal heard live evidence from the Claimant and asked him questions. Additionally, it considered the documentation that had been provided to it (other than the new evidence provided on 19 January 2023 as set out above). It makes the following findings of fact on the balance of probabilities of those areas that were material to the decision it had to make.

17. The Claimant commenced employment with the Respondent in January 2010. This is confirmed by a letter of 15 December 2009 which states that he has been appointed to the “*Post of Part-Time Caretaker*” and that the terms will be set out in a contract of employment (page 216 of the Respondent’s bundle). It

was not found in the Respondent's bundle and the Claimant confirmed he did not have a copy. He did have and showed at page 1-2 of his Exhibits something titled "Terms and Conditions of Contractual / Mutual Agreement / Line Manager / Principal Officer Holder / Administration Personnel". The Tribunal is unsure if this is the document referred to as a contract of employment. This document had the following clauses that appeared relevant to the dispute:

17.1. Clause 8: No payment will be made for more than one hour beyond contractual finishing time;

17.2. Clause 23: Caretakers' Weekly Duty Rota sheet must be signed appropriately for personnel attention;

17.3. A statement at the end that the notice period is only two weeks;

17.4. As an aside, there were no clauses that related to payment in lieu of notice or what a week's pay for this would be and nothing that concerned the amount of holiday leave at all.

18. He remained employed until his dismissal for redundancy on 30 April 2021. As an aside, it was agreed between the parties that his continuous period of employment was 11 years which for the purposes of statutory redundancy pay calculation is 16.5 given he was 64 at the time of his redundancy.

19. The Claimant throughout his employment was paid fortnightly but his evidence is that in his first payslip he was only paid for some of his actual earnings. He was told by Mr Nembhard that this was because the Respondent would keep a 'week in hand'. It was the Claimant's understanding from the discussion that at the end of his employment assuming no sums remained for him to pay to his employer that this initial 'week in hand' would be repaid. The Tribunal accepts this evidence. The reason for accepting this evidence and indeed accepting all the evidence that is set out below is:

19.1. there was no documentary evidence that was materially inconsistent with this, and the Respondent was the party who one would expect to be in possession of such evidence if any existed;

19.2. the Claimant was a candid witness and gave evidence which was not purely helpful to his case in general. By way of example although he was claiming in the submissions that 28 days was the amount of annual leave, he corrected this (the document was prepared by someone on his behalf) to 17 days. He also did not assert that any overtime was compulsory in the sense that he had to do it, he wanted to help the Respondent out as it were and felt it would be an issue if no one did it but admitted there were occasions when he declined to do a request to do additional hours (see paragraph 21 below).

20. Throughout the Claimant's employment he was employed by the Respondent as a part-time caretaker. Initially he was working 20 hours per week, but from 10 June 2019, so before the relevant dates of this claim, he moved down to 16 hours per week. He was not the only care-taker, Mr Irish also did this role.

21. In relation to the Claimant's working hours or working pattern from 10 June 2019 onwards (save for periods of furlough) the Claimant stated in live evidence, and the Tribunal accepts, that:

21.1. his usual hours were 10:00-14:00;

21.2. he was on the rota for 4 days a week, with Wednesday being a non-working day. Therefore, he would be rota'd for 10:00-14:00 for Monday, Tuesday, Thursday, and Friday;

21.3. once or twice a month he may be asked to cover if someone did not turn up on the Wednesday, which would amount to some potential overtime hours claimed;

21.4. depending on what was happening at the Respondent he may be asked to come in a littler earlier or stay a little later, such as when a meeting was happening.

22. There were occasions when the Claimant was asked to work extra hours, but he declined to do so. He stated, and the Tribunal accepts, that this was not often but he gave examples of needing to see his daughter. He was never disciplined for refusing to do any extra hours, 'overtime', and he did not believe the Respondent could lawfully do so.

23. The Respondent uses clocking in and out slips but as confirmed by Mr Nembhard's letter of 2 May 2022 that it could only find theses from 2014 period until 31 March 2019. These clocking in and out show that the Claimant between 2 April 2017 – 31 March 2019 that each week on average the Claimant did 3.12 hours of overtime. The Claimant stated, and the Tribunal accepts, that after this date (when not on furlough) there was no material difference. There were the same duties as such and the same number of employees.

24. The Claimant's payslips for 30 June 2019 onwards show that prior to furlough the Claimant was paid fortnightly for 32 hours (which would be 16 hours each week) at a rate of £8.21. He got £262.72 fortnightly as pay and the gross and net figure is the same on the payslips (page 191 of the Respondent's bundle onwards). This equates to £131.36 per week. The only payslips which show anything different are those which state that 'furlough' was paid namely 1 April 2020 – 11 November 2020 (pages 203-212 of the Respondent's bundle). In relation to his rate, £8.21, the Tribunal notes that this was consistent with the national minimum wage (National Living Wage) for someone over 23+ years. From 1 April 2020 however this would have increased to £8.72 and then from 1 April 2021 it was £8.91.

25. The Claimant was furloughed on 4 April 2020 until his redundancy on 30 April 2021 and the parties agreed that his furlough pay was based on a base rate of pay of £131.36.

D) Relevant legal principles for claims

Deduction of wages

26. The right not to suffer unauthorised deductions is set out in s.13 Employment Rights Act 1996. A deduction can be made if it is authorised by statutory provisions, or relevant provision of the worker's contract, or if the worker has previously signified in writing agreement/consent to the deduction (s.13(1)). The time limits for bringing unlawful deductions claim is within 3 months of the deductions, subject to extensions provisions for ACAS early conciliation and the deduction being part of a series (s.23). In contrast to contractual breach claims for which one can recover sums that are 6 years before commencing a claim, unlawful deductions can only recover sums 2 years before commencing the claim (s.23(4A)).

27. In an unlawful deduction of wages context it is the worker who bears the burden of establishing on the balance of probabilities that there has been a 'deduction' (see *Timbulas v Construction Workers Guild Ltd* EAT/0325/13 [17], a case where the Claimant was unsuccessful in claiming lack of holiday pay as a deduction of wages as he failed to provide evidence to indicate which days holiday was taken and merely pointing to payslips showing some days were not paid was not enough).

Holiday pay

28. Regulation 14 Working Time Regulations 1998 provides for payment in lieu of untaken leave following termination. At reg.14(3) it provides a formula for working out this in the event there is no relevant agreement.

29. Claims for outstanding holiday payments in lieu of untaken leave at termination may be brought before a Tribunal by virtue of an unlawful deduction of wages claim (*Revenue and Customs Commissioners v Stringer* [2009] UKHL 31; [2009] ICR 985 at [29]-[33]) or directly as a breach of Working Time Regulations 1998 under reg.30.

30. For calculating normal pay for holiday pay purposes although reference is made to the ss.221-229 Employment Rights Act 1996 in fact voluntary overtime, which is ordinarily excluded in the definition of week's pay, as explained in the analysis section below, is included: *Dudley MBC v Willetts* [2017] IRLR 870 (paras 37-44) applying the CJEU cases of *Williams v British Airways Plc (C-155/10)* and *Lock v British Gas Trading Ltd (C-539/12)* to voluntary overtime.

Statutory Notice Pay and Statutory Redundancy Pay

31. Employees with more than two years notice have a right to statutory notice pay (s.135 Employment Rights Act 1996). This is calculated in accordance with a formula set out in s.162 Employment Rights Act 1996 and has been applied by the parties. What is in dispute is the week's pay which is set by ss.221-224 Employment Rights Act 1996.

32. Where a contract provides for less than statutory minimum notice, the Claimant is entitled to statutory notice (s.86 Employment Rights Act 1996). In relation to calculating notice pay provided under ss.88-89 Employment Rights Act 1996, s 221-224 Employment Rights Act that deal with a week's pay apply but with the calculation day being the period preceding the first day of notice (s.226(1)).

33. Given the right to statutory notice pay and statutory redundancy pay occurred during furlough, it is notable that special provisions under Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 alter the usual position so that furlough pay does not lower the usual statutory notice pay or redundancy pay.

34. With respect to relevant case law:
    34.1. for the purposes of s 221 Employment Rights Act 1996, that is an employee with normal working hours and a fixed salary, it has been established that only guaranteed compulsory overtime counts (*Tarmac Roadstone Holdings Ltd. v Peacock and Others* [1973] 1 WLR 594 pp.598-599 and *Refrigeration Norwest (Chester) Ltd v Unwin* UKEAT/0394/04 at para 6);

34.2. Tribunals cannot ignore national minimum wage legislation when dealing with a week's pay, the week's pay must be at least compliant with the national minimum wage (*Paggetti v Cobb* [2002] IRLR 861 para 9)

E) Analysis and conclusions

35. The Tribunal sets out its analysis and conclusion on the claims, having regard to the claims, issues, and respective positions of the parties at paragraphs 2 above.

Week in hand claim

36. The week in hand claim turns on what, if any, agreement there was between the Claimant and Respondent. The Tribunal has accepted that the Claimant was not paid his entire wage in his first payslip (see paragraph 19 above). Ordinarily that would be an unlawful deduction of wages claim or breach of contract claim. These claims would have significant time limit issues potentially given the event was in 2010.

37. However, the Claimant's case was that there was an agreement that this sum would be repaid at the end of the employment. This was he stated commonly referred to as a week in hand. The Tribunal though not familiar with its use in this way, it having previously only understood the term to be in effect payment in arrears. However, the nomenclature is not important in reality as the Claimant explained that he did not actually get the sum 'held' back in the next payslip and it was this very first sum that he was claiming that was held back as a 'deposit'. Although the Tribunal does not need to find a reason for an agreement being reached it as an aside notes that the Respondent is small and dependant on volunteers so it may well be that it needed to retain funds, a deposit, to ensure that when employees left or caused some form of damage it would not be 'out of pocket'.

38. The Respondent whilst making submissions that this was not the case and the Claimant received all wages ever owed but it would have just been in arrears did not present any evidence, which one would have expected it had, to establish this (such as payslips from then or a contract setting out the payment dates). The Tribunal in the circumstances accepts the Claimant's evidence and so concludes there was such an agreement.

39. The condition, that is the termination, occurred when the Claimant was made redundant so at that stage, or within that payslip, he should have received this payment back. He did not and so he has suffered an unlawful deduction of wages. The Tribunal concludes he has met his relevant burden and establish the case. The Tribunal therefore awards the Claimant the sought after £189.65 in respect of this deduction.

Overtime claim

40. The starting point in relation to the overtime claim is a dispute as to whether the Claimant actually did any overtime, which includes whether if he did, he just took time off in lieu to make up for him. The Claimant was squarely asked this by the Tribunal, and he denied it. He explained that at one time there was a plan for this to occur but in reality, it did not occur.

41. The documents the Tribunal had (and that were admitted into evidence) did not support the Respondent's case in this regard. There was no clocking in and out to show hours in the relevant period were not overtime. Further there was no documentation showing any time off in lieu. It would be the party that should be keeping such records. In contrast there was evidence that showed all the way up to 2019 the Claimant was working overtime. This only dealt with a period just before the changing of the Claimant's hours from 20 hours to 16 hours and before the start of the time that is in dispute. The Claimant in oral evidence said that he did maintain doing overtime and it was roughly the same amount. He never got overtime pay in the earlier payslips either and he said that nothing much changed in terms of the amount of work he did 'outside' his usual hours even when his hours dropped.

42. Taking all matters into account, the Tribunal accepts the Claimant's evidence. He stated this position in witness statements, in documents he handed up, it is consistent with the previous position, and he gave sworn evidence on the topic. The Tribunal therefore concludes that he did work 3.1 hours overtime on average each week and did not have 'time off in lieu' to mean that his working hours were in effect only the contracted 16 hours per week.

43. Next, the Tribunal has to consider the Respondent's argument that any overtime would not be paid. This however is inconsistent with clause 8 of the only type of agreement that the Tribunal has seen (at 17.1). This limits overtime to only 1 hour extra. Contractual finish time is not clear but reasonably could be read as being the contractual finish time for the shift pattern, as opposed to only 1 hour extra per week.

44. In any event, the Claimant would have to be paid the national minimum wage. That can be brought as an unlawful deduction of wages claim. The rules in relation to this are complicated, especially because the Claimant was paid fortnightly which was not allowed for salary hours work until amendments were made under the National Minimum Wage (Amendment) (No 2) Regulations 2020 and would mean the Claimant would fall within 'unmeasured work'. The Tribunal is not able to establish precisely what there was from the admitted documents and just proceeding on the Claimant's evidence would yield in effect the same result.

45. Taking all the above into account it appears that the claimed for 40 weeks at 3.1 hours at a rate of £8.21 per hour yielding £1,018.04 appears broadly correct. It is consistent with the only contractual documentation that has been seen and with the Claimant's evidence which would also have the claim as an unlawful deduction of wages claim. He is only claiming for just over 3 hours each week and that would be within the limit of being no more than 1 hour after.

46. The Respondent, who was also not professionally represented, did not raise any time limit arguments. The Tribunal considered whether it could be that the claim was out of time. On balance it concludes that it would be within time on the basis that:
    46.1. it could be reframed as a simple breach of contract claim on the Tribunal's conclusion that it was contractual so would be within time;
    46.2. as an unlawful deduction of wages claim it could be said to be part of a series of deductions the last of which was within time as effectively the holiday pay that was owed also was short as it did not include the overtime.

47. The Tribunal therefore awards the sought after sum of £1,018.04 for this deduction of wages.

Furlough claim

48. Although the claim is for a modest amount, legally the Tribunal concludes that the claim cannot succeed, and it is dismissed.

49. This is because the claim is that in effect 'more' could have been claimed from the furlough scheme (which could then be passed on to the Claimant). The scheme is something that operates between the Respondent and HMRC/Treasury. The claim before this Tribunal is what wages should have been paid to the employee, the Claimant, by the Respondent and that relates to the agreement it had with him. It was for this reason that as part of furlough employers were coming to agreements with their employees to agree to various changes to be paid as ordinarily full wage would always be payable. The Tribunal conclusion is that the Respondent agreed with the Respondent the pay that he received from them. The fact that he later realised that in fact more could have been claimed under the scheme does not change this.

Holiday pay claim

50. The Claimant was a part-time worker. The only documents setting out his role stated as much and in live evidence he stated he should get 17 days paid holiday per year. The statutory minimum is 28 days for a full-time employee. So, 17 days amounts to nearly 60% of what a full-time employee would get if the Claimant's statement is correct. This would mean that according to the Claimant a full-time employee only had to work just over 26 (that is 16 divided by 60%). That is very low and is only slightly more than he was working before on 20 hours. The Tribunal concludes that the Claimant is mistaken on 17 days holiday being what he was entitled to when his hours were reduced to 16 and finds that in fact it was his entitlement when he worked 20 hours per week. Sense checking matters, if it was 17 days holiday for 20 hours of work this would mean a full-time equivalent worker someone who does 33 hours per week which is near what some employers have as full time equivalent (the range in the Tribunal's experience is normally 35-40 hours). The result of this is that if a full-time worker does 33 hours, someone doing 16 hours is doing 48% of full-time hours and so would only be entitled to 48% of the minimum 28 days which is 13.44.

51. In the relevant leave year that commenced in January, that was how the Claimant understood it and is consistent with him starting in January and many employers' running an ordinary calendar year for calculation annual leave, there were 119 days that had elapsed until he was made redundant. This means that 33% of the leave year had occurred (ie 119/365). If the Claimant was entitled to 13.44 days' worth of holiday each year, he would have accrued 4.4352. There were two bank holidays that occurred on Mondays, a working day for the Claimant, which would leave 2.4352 untaken holidays (the Claimant stated in evidence, and it is accepted, he took no holiday). The Claimant says he was only paid for 1 day holiday at a rate of 36.78. This would mean that there would be according to the Claimant only 1.4352 days of untaken holiday in the leave year where he was made redundant.

52. He says that there were 8 unused holidays from the year before. He explained to the Tribunal that he had asked as is standard practice for these to be rolled over to the next year and that was agreed. Given that there was no reason for the holiday to carry over in working time regulation terms (which requires leave to be taken in relevant leave year subject to limited exceptions) it makes sense to view the claim as one of unlawful deduction of wages. The Tribunal accepts the Claimant's evidence that there was an agreement to carry over the leave and therefore concludes that there are 9 whole days of holiday that would have been outstanding and not paid for. As the Claimant works for only 4 days a week that would amount to 2.25 weeks' worth of holiday for him.

53. In terms of the rate of holiday pay, legally the Tribunal concludes that the Claimant is correct. It should include the pay the Claimant would have received if ordinarily at work which would cover, for holiday pay purposes, voluntary overtime that was worked and, as the Tribunal have concluded above, should have been paid pursuant to the contract of employment subject to a potential increase to the hourly rate to cover the increase in national minimum wage to 8.72. A week's pay for the Claimant for holiday pay purposes would be (3.1 + 16 hours) x £8.72. That is £166.55.

54. The amount outstanding is therefore 2.25 weeks of holiday x 166.55 which is £375 to the nearest pound. The Tribunal awards this sum to the Claimant for the unlawful deduction of wages in the Respondent not paying all accrued but outstanding holiday pay upon his redundancy.

<u>Notice pay claim</u>

55. The claim is for statutory notice pay as the contractual notice was for less than statutory (section 86 Employment Rights Act 1996). Therefore, the breach was failure to give and pay notice in line with the requirements of the Employment Rights Act 1996.

56. At the time the Claimant was furloughed. The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 (the "ERA Regulations 2020") applies to the situation. This sets out the calculation of a week's pay for statutory notice and statutory redundancy amongst other matters (reg. 3 ERA Regulations 2020). In short, in the present circumstances these provide that a week's pay is calculated in line with the usual ss.221-224 Employment Rights act 1996 without the reductions that occur owing to furlough.

57. The result is that the Claimant is incorrect that overtime pay should be included in the claim for statutory notice pay. That is because the Claimant is someone who would fall within s.221 Employment Rights Act 1996 that is someone who has "normal working hours". This flows from the findings at paragraph 21 above and the fact he worked 10:00-14:00 on Monday, Tuesday, Thursday, and Friday. By virtue of this and s 221(2) Employment Rights Act 1996 the overtime that the Claimant did, voluntary overtime, is not included in the calculation. Case law establishes that only overtime that is obligatory on both sides would be counted and the fact that someone may regularly work it does not suffice (*Tarmac Roadstone Holdings Ltd. v Peacock and Others* [1973] 1 WLR 594 pp.598-599 and *Refrigeration Norwest (Chester) Ltd v Unwin* UKEAT/0394/04 at para 6 which is factually very similar to the present case). In this case as

already set out in the factual findings the Claimant, whilst he may regularly do overtime, was not contractually obliged to do it, and the Respondent was not obliged to give it.

58. The correct rate is therefore the weekly rate of pay without furlough or overtime which is what the Respondent appears to have sought to rely upon, £131.36 per week (see paragraph 24 above, pages 35-36 of the appendix to the Respondent's bundle, and fact that it the sum received of £1,444.96 is mathematically the same as 11 weeks x £131.36 pay per week). That is not the end of the story however as the Claimant as at the time of being made redundant was actually being paid less than national minimum wage. Immediately, before going on furlough the rate had increased from £8.21 (which would give him a weekly wage of £131.36) to £8.91 (which would give him a weekly wage of £142.56). This would mean that the Claimant has in fact been underpaid his notice as he should have received £1,568.16 (ie 11 x £142.56) not £1,444.96 (ie 11 x £131.36). The underpayment is therefore £123.20 (ie £1,568.16 – £1,444.96).

59. In *Paggetti v Cobb* [2002] IRLR 861, it was held that an employment tribunal is in effect under a duty to consider the national minimum wage when determining a week's pay for the purposes of s.221(2) of the Employment Rights Act even where not raised by the employee by virtue of national minimum wage legislation (see *Paggetti* para 9 and s.17 of National Minimum Wage Act 1998).

60. Therefore, the Tribunal awards the sum of £131.36.

<u>Redundancy pay claim</u>

61. A week's pay for statutory redundancy purposes is, as already stated in paragraph 56, is calculated in accordance with ss 221-224 Employment Rights act 1996 on the pre-furlough pay. For the same reasons set out above, paragraphs 5759 the allegation for underpayment by not including overtime in the calculation must fail but the correct weekly pay rate was £142.56.

62. The result is that the Claimant should have received £142.56 x 11 x 1.5 worth of pay for statutory redundancy which is £2,352.24. He only received £2,167.44 (ie £131.36 x 11 x 1.5). The Tribunal therefore awards him the shortfall of £184.80.

Employment Judge Caiden
19 January 2023

JUDGMENT AND REASONS
SENT TO PARTIES ON: 23/2/2023

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FOR EMPLOYMENT TRIBUNALS

Notes

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