



EMPLOYMENT TRIBUNALS

Claimant: Sivakumaran Saravanapavaiyar

Respondent: Coventry Shri Sidhi Vinayagar Devasthanam

Heard at: Midlands West (by Cloud Video Platform)

On: 21 and 21 September 2022, 11 and 12 January 2023.

Before: Employment Judge C Knowles (sitting alone)

Representation

Claimant: Ms. Lucy Taylor, Counsel

Respondent: Mr. Tufail Hussain, Litigation Consultant.

RESERVED JUDGMENT

- 1. The claimant's claim for breach of contract on the basis that he was paid below the national minimum wage for the months March 2020, April 2020, May 2020, June 2020, July 2020 and August 2020 succeeds. The respondent is ordered to pay to the claimant the gross sum of £3,699.87.**
- 2. The claimant's claim that he was wrongfully dismissed in breach of contract succeeds. The respondent is ordered to pay to the claimant the gross sum of £3,705.**
- 3. The claimant's claim for unpaid holiday pay under regulation 30 of the Working Time Regulations 1998 succeeds to the extent that the respondent failed to pay the claimant for 2.24 days of accrued but untaken holiday. The respondent is ordered to pay to the claimant the gross sum of £191.52 (being 9 hours per day x £9.50 x 2.24 days).**
- 4. The tribunal has no jurisdiction to hear the claimant's claim that the respondent made unlawful deductions from his wages between March and September 2020, and that claim is dismissed.**

5. The total award payable by the respondent to the claimant is £7,596.39 gross (£3,699.87 + £3,705 + £191.52).

The respondent may deduct tax and /or national insurance from the gross sums referred to in this Judgment if required to do so for the purposes of accounting to the Commissioners for Her Majesty's Revenue and Customs.

REASONS

1. By a claim form presented to the tribunal on 24 August 2021, the claimant brought claims for breach of contract, unlawful deduction from wages and unpaid holiday pay (confirmed before me as being a claim pursuant to the Working Time Regulations 1998).

Claims and Issues

2. The claimant and the respondent agree that the claimant was employed by the respondent under a contract of employment between 3 March 2020 and 29 April 2021.
3. Prior to the hearing before me, the parties had not produced a list of issues. On the morning of 21 September 2022, Ms. Taylor and Mr. Hussain agreed to cooperate to prepare a draft list. An initial draft list was produced and was discussed by the tribunal with the parties, and Ms. Taylor and Mr. Hussain produced a final agreed list of issues on the 22 September 2022.
4. The parties agreed that the issues were as follows:

Breach of contract (pay)

1. Whether the tribunal has jurisdiction to hear the claimant's claim?
- a. Was the claim brought within three months of the effective date of termination [Article 7 The Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994]?
- b. Was it reasonably practicable for the claimant to present his claim within the relevant time limit?

- c. If not, was the complaint presented within such further period as the tribunal considers reasonable?
2. Whether the claimant was owed any arrears of wages from March 2020 to September 2020?
 - a. How many hours did the claimant work?
 - b. Whether the amount paid was less than he was contractually entitled to be paid?
 - c. Whether the amount paid was less than the national minimum wage?
 - d. If so, what is the amount owed to the claimant?

Unlawful deductions from wages

3. Does the tribunal have jurisdiction to hear the claimant's claim?
 - a. Was the claim brought within three months of the last deduction [Section 23 ERA 1996]?
 - b. Was it reasonably practicable for the claimant to bring this claim within the relevant time limits?
 - c. If not, was the complaint presented within such further period as the tribunal considers reasonable?
4. Between March and September 2020, was the claimant paid less than the national minimum wage?
5. Did the respondent deduct £630 a month from the claimant's wages between March and September 2020?
6. Did that amount exceed the offset amount the respondent was entitled to under regulation 16 of The National Minimum Wage Regulations 2015?
7. Was any amount charged in excess of the offset amount an unlawful deduction from his wages?
8. If so, what is the amount owed to the claimant?

Breach of contract - Wrongful Dismissal/Notice Pay

9. Whether the claimant was in repudiatory breach (or a series of breaches collectively considered as repudiatory) of the terms of his employment contract?
10. Whether the respondent was entitled to summarily dismiss the claimant?
11. Whether the claimant was owed any notice pay?

Holiday pay (Working Time Regulations 1998)

12. Whether the claimant is owed any holiday pay for the year 2020/2021? *(To answer this question it was necessary to decide what holiday the claimant had accrued, and what holiday he had taken and been paid for).*
13. Whether the claimant was entitled to carry over his holiday to the following year?
14. Whether the claimant is owed any holiday pay for the year 2021/2022?
15. If so, what is the amount of holiday pay owed?

Procedure, documents, and evidence heard

5. Page references within this Judgment are to the page numbers of the 111 page hearing bundle, unless otherwise stated.

Procedural history

6. This case had originally been listed for a 2 hour final hearing due to take place on 8 February 2022. On that occasion, it was adjourned by Employment Judge Ali because 2 hours did not provide sufficient time to hear the case. At this time, it was expected that only the claimant would require the assistance of a Tamil interpreter, and Employment Judge Ali listed a final hearing with a time estimate of two days to take place on 21 and 22 September 2022.
7. On 13 July 2022, Employment Judge Bennett allowed in part an application by the claimant to substitute his original Grounds of Complaint dated 24 August 2021 (p17 – 21) with Amended Grounds of Complaint dated 8 March 2022 (p38-42). In part, this deleted the claimant's claim that it was a breach of contract for the respondent to deduct money for food and accommodation from his pay and for reimbursement of that sum (this followed Employment Judge Ali drawing to the parties' attention

regulation 5 (b) of the Employment Tribunals (Extension of Jurisdiction) Order 1994). However, Employment Judge Bennett refused the claimant's application to amend his claim to include a claim that the respondent had failed to pay him the national minimum wage *after* September 2020 (amounting to a breach of contract and / or unlawful deduction from wages) (p48-49). This meant that at the final hearing before me, the entire claim for unlawful deduction from wages and the claim for breach of contract relating to alleged non-payment of the national minimum wage was focused on the period between March and September 2020 only, and this concerned the amounts that the claimant had been paid for work done in March, April, May, June, July, and August 2020.

8. The case came before me for final hearing on 21 and 22 September 2022. Due to a combination of reasons, including the number of preliminary matters that I was asked to give a decision about on 21 September 2022, some difficulties in witnesses accessing the correct hearing link or doing so on time, and the fact that evidence through an interpreter necessarily takes time, it was not possible to complete the evidence within those two days. The hearing had to be adjourned part-heard. The hearing resumed on 11 and 12 January 2023 when I heard further evidence and oral submissions. Neither party submitted written submissions or referred me to any case law. As submissions did not finish until after 5pm on 12 January 2023, I could not reach a decision on that day.

Preliminary issues on 21 September 2022

9. On the morning of 21 September 2022 I was asked by the parties to reach decisions on a number of preliminary issues. I decided that:
 - a. Mr. Kumarathas should be permitted to give his evidence with the benefit of a Tamil interpreter.
 - b. The English language witness statement of Mr. Kumarathas which had been served in accordance with the tribunal's earlier orders, could be read to him in Tamil by the interpreter and Mr. Kumarathas could be asked to confirm, in the usual way, whether that was his statement, and whether it was true.
 - c. The documents at pages 62, 63, 66 and 69 of the respondent's bundle would be admitted into evidence. The claimant did not object to p1 of the respondent's bundle being admitted into evidence.

10. I gave my reasons orally for these decisions on 21 September 2022. The parties then agreed that:

- a. The respondent's bundle would be used as the agreed hearing bundle (it being almost identical to that prepared by the claimant apart from the fact that the respondent's bundle had five additional pages at 1, 62, 63, 66 and 69);
- b. The respondent would not seek to rely upon a letter from Mr. Sittambalam dated 20 September 2022, nor a partial written Tamil translation of the English witness statement of Mr. Kumarathas dated 16 September 2022. These documents had only been served on the claimant shortly before 11am on 21 September 2022.

Evidence considered by the tribunal

11. The final agreed hearing bundle was 111 pages. It was formed of the bundle that had originally been the respondent's 109 page bundle plus two further pages, which became 69A and 69B, which both parties agreed should be added on 11 January 2023. I informed the parties that unless I was taken to a document in the bundle, I would not read it.

12. In addition, I watched 4 videos at the request of the parties. These were titled:

- a. Money Theft Video 2021-04-07 at 10.48.53 (which the parties agreed in fact showed CCTV taken on 26 March 2021 from 18.52);
- b. SS SIfExp Vid 1 2021-04-07 at 10.53.27 (showing CCTV taken on 30 March 2021 at 20.18);
- c. SSPriest Abuse JeyaramPriest 2021-04-18 at 15.30.47 (which the parties agreed in fact showed CCTV taken on 10 April 2021 from 20.19);
- d. SSPriest verbalAbuse of JR Priest 10April 2021 8.20pm V2 (which the parties again agreed showed CCTV taken on 10 April 2021 from 20.19, but from a different angle).

13. I heard from four witnesses, each of whom confirmed the truth of their witness statement(s) before being questioned. They were:

- a. The claimant (whose witness statement was dated 14 September 2022).

- b. Mr. Raveendran Sinnathambi (whose witness statements were dated 6 January and 6 February 2022). Mr. Sinnathambi had been a Trustee and the Secretary of the Respondent between October 2012 and December 2020. He gave evidence on behalf of the claimant.
 - c. Mr. Kanapathipillai Sittambalam (whose witness statement was dated 16 September 2022). Mr. Sittambalam has held the honorary position of Chairman of Trustees of the respondent since mid-2019. He gave evidence on behalf of the respondent.
 - d. Mr. Balasubramaniam Kumarathas (whose witness statement was dated 16 September 2022). Mr. Kumarathas was a Trustee and Treasurer of the respondent between July 2019 and September 2021.
14. Mr Sittambalam gave his evidence in English. The claimant and Mr Kumarathas both gave their evidence through a Tamil interpreter. Mr Sinnathambi had provided an English witness statement and he is able to read English, but it is not his first language. It became apparent during cross-examination that in order to fully understand and answer the questions being posed to him, he required the assistance of a Tamil interpreter. Mr Hussain sensibly raised no objection to this and Mr Sinnathambi gave the remainder of his evidence through a Tamil interpreter.

Findings of Fact

15. The respondent is a charity which runs a Hindu Temple in Coventry. The respondent is run by a voluntary team of trustees, each of whom form part of the respondent's committee. At any one time there are also two or three non-trustees on the committee.
16. Mr Sinnathambi was a founding member of the Temple and a trustee and Secretary from around 2012. In 2019, Mr Sittambalam was appointed to the honorary position of Chair of Trustees, and Mr Kumarathas became a trustee and Treasurer.

Recruitment of the claimant

17. As Secretary, Mr Sinnathambi's responsibilities included the recruitment of new Priests and the management of their employment. In late 2019 / early 2020, the respondent had a vacancy for a new Priest to start employment in March 2020. Mr Sinnathambi telephoned the Claimant, who was then working as a Priest in

Malaysia, and asked the claimant if he would like to come to the United Kingdom to work as an Assistant Priest in the Temple. He told the claimant that if he did agree to work for the respondent, the respondent would arrange for a work-permit in the UK, would pay him a salary, would provide him with food and accommodation free of charge and that in addition he would be allowed to keep any gifts or tips paid by devotees directly to him, or given to the respondent for him. The claimant agreed to come to the UK to work for the respondent on this basis, and he gave his passport details to Mr Sinnathambi, who arranged for the necessary work permit to be obtained.

18. By the date of the hearing before me, Mr Sinnathambi was no longer a trustee of the respondent, and he gave evidence on behalf of the claimant. The respondent did not accept that there had been an agreement to provide the claimant with free food and accommodation. However, at the time of the telephone call, Mr Sinnathambi was Secretary of the respondent and was acting on the respondent's behalf. I accept the evidence of the claimant and Mr Sinnathambi as to what was said in the telephone call in which the claimant was recruited, and that it was agreed that the respondent would provide free food and accommodation. No other trustee of the respondent was present on this telephone call, and Mr Sinnathambi did not produce a note of it for them. He told the other trustees that he had selected the claimant as the new Priest, and that there had been one other candidate he had considered.

Written contract, and agreement about hours of work and pay

19. The claimant arrived in the UK on 2 March 2020. He was collected from the airport by some trustees of the Temple, and he met others, including Mr Sittambalam, Mr Kumarathas and Mr Sinnathambi when he arrived at the Temple.
20. The respondent had produced a document in English titled "*Contract of Employment and Non-Disclosure Agreement*" (p54-59). The claimant's first language is Tamil, and when he arrived in the UK he was unable to read English and was not a fluent English speaker.
21. On 3 March 2020, and in his role as Secretary of the respondent's trustees, Mr Sinnathambi met with the claimant and verbally translated the written Contract into Tamil, before the claimant and Mr Sinnathambi signed and dated it. That this had happened was recorded in the Contract itself, which stated: "*This contract written in English has been read over and verbally translated to me in Tamil language I understand.*" I find that when the Contract itself was translated into Tamil, Mr

Kumarathas and Mr Sittambalam were not present, and I will explain my reasons for making this finding of fact in the next section.

22. The Contract contained the following express terms (I have included any typographical errors which appear in the Contract):

“1.2 The first 3 months of your employment shall be a probationary period....

2.1 You are employed as Assistance Priest of the Temple and report to the Secretary, to the Trust. Your duties are set out in the job description provided to you.

...3.1 Your normal place of work in Coventry CSSVD or such other place within UK as we may reasonably determine.

...4.1 Your basic salary is £17,000 to £18,000 per year which shall accrue from day to day and be payable monthly in arrears on or about the 5th day of each month directly into your bank or building society account.

4.2 We shall be entitled to deduct from your salary or other payments due to you any money which you may owe to us at any time.

...5.1 Your normal hours of work are between 09.00AM and 02.00PM and then 5.00PM to 09.00PM 5 days work exclusive of lunch break. You may be required to work such additional hours as may be necessary, specially on special function days.

5.2 You are required at all times to comply with our rules, policies and procedures in force from time to time.

...6.1 Our holiday year runs from 1st April to 31st March of the following year. If your employment starts or finishes part way through the holiday year, your holiday entitlement during that year shall be calculated on a pro-rata basis.

6.2 You are entitled to 24 days' paid holiday during each year. [This includes the usual public holidays. If you are required to work on a public holiday or on your day off, the temple will pay you or give you a day off in lieu.

6.3 You shall give at least 2 weeks' notice of any proposed holiday dates that you may choose to take and in the first year we would request that you don't take more than three days at one time, and these must be agreed by Trust Secretary in writing in advance. When temple special occasions and festivals occur, we may require you not to take holiday on particular dates.

6.4 You cannot carry forward untaken holiday from the holiday year to the following holiday year unless you have been prevented from taking it in the relevant holiday year due to one of the following: a period of sickness absence or statutory maternity leave, paternity, adoption, parental or shared parental leave. In cases of sickness absence, carry-over is

limited to three weeks' holiday per year less any leave taken during the holiday year that has just ended.

6.5 Any payment in lieu of untaken holiday shall be limited to your statutory entitlement under the Working Time Regulations 1998, and any paid holidays (including paid public holidays) shall be deemed first to have been taken in satisfaction of that statutory entitlement.

...8.1 After successful completion of the probationary period referred to in clause 1.2, the prior written notice required from you or us to terminate your employment shall be as follows: (a) In the first two years of continuous employment: 2 calendar month notice;

8.2 CSSVD may at its discretion terminate your employment with one month's notice and make a payment of basic salary in lieu of notice, in exceptional circumstances.

8.3 CSSVD shall also be entitled to dismiss you at any time without notice or payment in lieu of notice if you commit a serious breach of your obligations as an employee, or if you cease to be entitled to work in the United Kingdom, as a temple priest.

9.1 Your attention is drawn to the disciplinary and grievance procedures applicable to your employment, which you take up with Secretary to the CSSVD Trust. If you are not still satisfied please request the matter to be considered by the Trustees.

10. We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change."

23. I find that this written Contract did reflect the terms of employment which had been agreed between the claimant and the respondent, subject to two issues about pay and accommodation, which I will address below.

24. In particular, I find that the agreement between the claimant and the respondent was that the claimant would work 45 hours per week as clause 5.1 of the Contract says, and that this is what the claimant did. Although Mr. Hussain invited me to find that the Contract had been varied so that the claimant's contractual hours reduced to 40 hours per week, I found that there had not been such a variation. Mr. Hussain did not suggest to the claimant in cross-examination that his Contract had been varied in this way, and this was not suggested in the respondent's Grounds of Resistance. It was suggested for the first time by Mr. Sittambalam in answer to questions by me. If there had been any variation to the Contract of Employment, it is likely that this would have been recorded in writing and notified to the claimant, as clause 10 of the Contract required. Mr. Sittambalam referred in his evidence to there being rotas, but these were not produced in evidence before me.

25. Although clause 4.1 of the Contract was somewhat confusing, in that it referred to the claimant's salary being £17,000 to £18,000 a year, I find that the agreement reached was that the claimant would receive a salary of £1,423.04 gross /£1,262.56 net for the first month and £1,511.44 gross /£1,331.31 net per month after that. This is consistent with a letter dated 2 July 2020 from Mr Sinnathambi on behalf of the respondent. The letter was addressed "*to whom it may concern*", and stated that the claimant had been employed by the respondent since 3 March 2020 and "*will be receiving a salary of £1331.31 per month after tax at the moment*" (p61).
26. Whilst the Contract referred to a job description and to disciplinary and grievance procedures, no job description, disciplinary or grievance procedures were provided by the respondent to the claimant.
27. Once the claimant arrived in the UK, he provided his passport to Mr Sinnathambi who held it on behalf of the respondent. It was returned to him some time after February 2021.

Agreement about accommodation and food on 3 March 2020

28. During the meeting on 3 March 2020 at which Mr Sinnathambi translated the written Contract of Employment, I find that he once again told the claimant that his food and accommodation with the respondent would be free, although I find that the claimant was mistaken in oral evidence when he recalled Mr Kumarathas and Mr Sittambalam being present when this was discussed. The claimant did meet Mr Kumarathas and Mr Sittambalam when he arrived at the Temple, but I find that once the discussion moved to the claimant's terms and conditions of employment, it was only Mr Sinnathambi and the claimant who were present.
29. The claimant did not specifically mention Mr Kumarathas and Mr Sittambalam being present for this discussion in his witness statement, and Mr Sinnathambi could not remember them being present. Given that the recruitment and management of employed Priests was Mr Sinnathambi's role and that up to this point he had managed the recruitment process without much input from the other trustees, it seems unlikely that they would stay whilst Mr Sinnathambi translated the claimant's Contract in full. There was no reason why they would need to do so. I do not however think that the claimant's mistake on this issue undermines his evidence that he was told by Mr Sinnathambi both before he arrived in the UK and once he had arrived in the UK, that the respondent would provide free food and accommodation.

30. I reject the respondent's suggestion that the claimant was lying about this. I find that the absence of any reference to food and accommodation in the written Contract does not assist one way or another. It may equally be said that if it had always been the agreement that the claimant would pay the respondent for accommodation and food (as the respondent suggests), it is likely that this would have been recorded in a written agreement. The fact that free food and accommodation had been specifically offered to the claimant by Mr Sinnathambi in the earlier telephone call makes it likely that it would also be confirmed to him by Mr Sinnathambi once his terms were being discussed on his arrival in the UK. I accept the claimant's evidence that as a Priest in Malaysia he was not charged for food and accommodation and I find that this is likely to have been a relevant consideration for him. Whilst Mr Sinnathambi subsequently resigned from his position as a Trustee, and I accept that the relationship between Mr Sinnathambi and the respondent broke down in late 2020, this is not a claim brought by Mr Sinnathambi himself and there is no evidence that he stands to gain anything from this claim by falsely asserting that he promised the claimant free food and accommodation at the outset of his employment. The respondent did not produce any documentation in support of its assertion (disputed by Mr Sinnathambi) that another Priest, Mr Maheshkumar, who had been recruited by Mr Sinnathambi in 2019, was having £630 per month deducted from his wages prior to the claimant's recruitment. In any event, that would not mean that Mr Sinnathambi did not promise the claimant free food and accommodation in order to persuade him to come to the UK.

Claimant's pay between March and September 2020

31. On 25 March 2020, the first "lockdown" measures came into force in response to the COVID-19 pandemic. At that time, the claimant did not yet have a UK bank account into which his salary could be paid.

32. The respondent produced pay slips in the bundle showing pay between March and 1 September 2020 as follows:

| Page | Date | Hours | Gross hourly rate | Gross pay | Net pay |
|------|-----------|--------|-------------------|-----------|-----------|
| 93 | 31-Mar-20 | 173.33 | £8.21 | £1,423.04 | £1,262.56 |
| 94 | 30-Apr-20 | 173.33 | £8.72 | £1,511.44 | £1,331.31 |
| 94 | 31-May-20 | 173.33 | £8.72 | £1,511.44 | £1,331.31 |
| 95 | 30-Jun-20 | 173.33 | £8.72 | £1,511.44 | £1,331.31 |
| 96 | 31-Jul-20 | 173.33 | £8.72 | £1,511.44 | £1,331.31 |
| 97 | 31-Aug-20 | 173.33 | £8.72 | £1,511.44 | £1,331.31 |

33. I prefer the claimant's evidence that he did not in fact receive copies of these pay slips during his employment. The pay slips did not reflect what the claimant was actually paid between March and September 2020. Mr Kumarathas' evidence to me that he handed the pay slips to the claimant was not evidence that he gave in his witness statement.

34. I find that at the end of March 2020, Mr Kumarathas told the claimant that he would receive £700 for his first month's salary, but in fact the claimant was only paid £500 in cash, on or around 31 March 2020. The claimant asked Mr Kumarathas why he had only been paid £500 and was told that he needed to pay £630 for food and accommodation.

35. On 11 May 2020, the claimant was paid £900 (which represented £200 for March and £700 for April). On each of 14 June 2020, 15 July 2020, 5 August 2020 and 1 September 2020 the claimant was paid £700. A comparison with the net salary shown on the pay slips shows that deductions from the claimant's pay were made as follows:

| Payslip date | Gross pay shown on payslip | (A) Net pay shown on payslip | (B) Actual pay received by reference to that month | (C) Deduction made (difference between (A) and (B)) |
|--------------|----------------------------|------------------------------|--|---|
| 31-Mar-20 | £1,423.04 | £1,262.56 | £700.00 | £562.56 |
| 30-Apr-20 | £1,511.44 | £1,331.31 | £700.00 | £631.31 |
| 31-May-20 | £1,511.44 | £1,331.31 | £700.00 | £631.31 |
| 30-Jun-20 | £1,511.44 | £1,331.31 | £700.00 | £631.31 |
| 31-Jul-20 | £1,511.44 | £1,331.31 | £700.00 | £631.31 |
| 31-Aug-20 | £1,511.44 | £1,331.31 | £700.00 | £631.31 |

36. There was a conflict of evidence as to who decided that these deductions should be made from the claimant's pay. Mr Sinnathambi denied that he had given Mr Kumarathas an instruction to do this. Mr Kumarathas and Mr Sittambalam maintained that it was Mr Sinnathambi who told them that money was to be deducted for the claimant's food and accommodation.

37. I weighed up all the evidence about this issue carefully and I find that the decision to only pay to the claimant £500 in March 2020 was made by Mr Sittambalam and / or Mr Kumarathas and that it was due to a combination of their view that £630 should be deducted for food and accommodation and that the lockdown meant that the Temple was experiencing some cash flow issues. Similarly, I find that the decision to pay the claimant £900 in May 2020 and £700 each month after that until September 2020 was also made by Mr Kumarathas and / or Mr Sittambalam.
38. Mr Kumarathas accepted in evidence that he had spoken to Mr Sittambalam before paying the money to the claimant, and that Mr Sittambalam had agreed that they were treating the claimant very fairly, and impartially. If it had been Mr Sinnathambi who had instructed Mr Kumarathas to make the deduction, it is unlikely that Mr Kumarathas would then have needed to go to speak to Mr Sittambalam before making it, because it was Mr Sinnathambi who had recruited the claimant and had responsibility for dealing with the management of his employment. The fact that Mr Kumarathas did speak to Mr Sittambalam before paying the claimant suggests that it is more likely that he knew that the payment the respondent was making was less than the amount Mr Sinnathambi had told him to pay. The fact that Mr Sittambalam expressed a view that the claimant was being treated fairly and impartially suggests that there was some understanding that the claimant and / or Mr Sinnathambi held a view that a deduction would not be fair. No one could explain to me what proportion of the deductions made each month until September 2020 represented payment for accommodation and what reflected payment for food. However, Mr Sittambalam told me that he “*guessed*” that Mr Sinnathambi had decided that the net payment in the claimant’s hand should be £700 per month and that anything above that should be taken away. Mr Sittambalam told me that this figure of £700 per month seemed to be the general average in some Temples and then that whatever donations the Priest got were theirs to keep. I find that it is more likely that this reflected Mr Sittambalam’s own view that the claimant should keep no more than £700 net per month because he understood this to be the general practice in Temples.
39. I also find that the claimant complained to Mr Sinnathambi about the fact that he had been paid less than promised and that Mr Sinnathambi raised this at a meeting attended by Mr Gajendran, Mr Kumarathas and Mr Kirupaharan. I find that Mr Sinnathambi said that the respondent was in breach of the employment agreement with the claimant and that Mr Gajendran, Mr Kumarathas and Mr Kirupaharan told him that the claimant was too expensive. I accept that as Secretary, Mr

Sinnathambi had made notes of the meeting, which he left at the Temple when he resigned from his post.

40. Mr Kumarathas denied that Mr Sinnathambi had complained about deductions being made from the claimant's pay or that he had said the claimant was too expensive, but the respondent did not disclose to the claimant or produce in the bundle notes of the committee meetings in its possession, which would have enabled the tribunal to see what was recorded as being discussed. Whilst Mr Sittambalam denied that a complaint had been made to him about pay, Mr Sinnathambi did not allege that Mr Sittambalam had been present during this conversation. Further, whilst Mr Sittambalam denied that any meetings took place with other trustees where he was not present, he would not necessarily know about every meeting that took place in his absence. The fact that the claimant did not raise any written grievance against the deductions is not inconsistent with the claimant's evidence in circumstances where the claimant did not have a Tamil copy of his written Contract, nor had he been provided with any grievance procedure. Similarly, the fact that the claimant in fact remained in the employment and accommodation of the respondent at this time (March to September 2020) is not inconsistent with his case that it had previously been agreed that his food and accommodation would be free. Whilst the claimant did have some friends and relations in the UK, the country was in "lockdown" during the early part of his employment, English was not his first language and he did not have a lot of money with which to explore alternative accommodation options.

Deteriorating relationship between the respondent and the claimant

41. During the course of 2020, the relationship between Mr Sinnathambi and the other trustees and committee members deteriorated. In part this was because of Mr Sinnathambi's poor perception of one of the other Priests employed at the Temple, Mr Maheshkumar, whom Mr Sittambalam and Mr Kumarathas regarded highly. In part it was because of the perception of Mr Sittambalam, Mr Kumarathas and some other trustees that Mr Sinnathambi wanted to replace Mr Maheshkumar with a different Priest and that Mr Sinnathambi was responsible for spreading negative rumours about Mr Maheshkumar.
42. On occasions the claimant was called to committee meetings and spoken to by Mr Sittambalam about his presentation in the Temple or his performance as a Priest. Both the claimant and Mr Sittambalam told me that the claimant had been requested to, and did, attend meetings, although they had different accounts of why and what had happened. I was not provided with any documentary evidence

which pointed one way or another. Mr Sittambalam told me that the respondent had located the minutes of these meetings and that they were meetings at which the claimant was discussed, but that the respondent had not disclosed the minutes to the claimant. I was told that this was because the minutes themselves did not include reference to the issues about the claimant. Mr Sittambalam suggested that this was the result of incomplete record keeping by Mr Sinnathambi, in other words that Mr Sinnathambi had written minutes of the meetings but left out the parts in which the claimant was discussed. The minutes were not in the bundle. I find that during the course of 2020, Mr Sittambalam did regard the claimant as underperforming as compared to the other Priest Mr Maheshkumar and that he was forming the view that the claimant was aligned with Mr Sinnathambi, whose relationship with the other trustees was deteriorating. I also find that Mr Sittambalam did raise with the claimant some minor issues about his presentation and performance, and that the claimant perceived this as unfair criticism. I find that the respondent did not issue the claimant with any disciplinary warnings.

The alleged theft of deity jewellery

43. On 31 October 2020, the Prime Minister announced that there would be a second national lockdown in response to COVID-19.
44. I accept the claimant's evidence that around this time Mr Sinnathambi telephoned him and asked him to keep some gold-plated decorative jewellery in his accommodation, and to return this to the Temple when Mr Sinnathambi returned. This jewellery was referred to before me as Goddess Durga deity jewellery. Whilst it did not have a particular financial value, it could not be bought in the UK and so would not have been easy to replace had it gone missing. The claimant put the deity jewellery in his room for safekeeping.
45. In November 2020, Mr Sinnathambi resigned from his role of Secretary of trustees.
46. In late January 2021, Mr Maheshkumar started to look for the Goddess Durga deity jewellery. Mr Maheshkumar and Mr Kirupaharan (the respondent's Deputy Chair of trustees) asked the claimant whether he had seen jewellery. The claimant did not immediately understand that it was the specific Goddess Durga deity jewellery that he had been asked to keep in his room, but when he went back to his room and saw the jewellery, he realised that it may be, and he provided it to Mr Kirupaharan and explained that he had been asked to keep it in his room for safe keeping by Mr Sinnathambi.

47. The respondent invited me to find that the claimant had deliberately hidden the deity jewellery with a view to setting up Mr Maheshkumar and blaming him for the theft of it after he had departed at the end of his service term in early March 2021. I accept Mr Sittambalam's evidence that the trustees other than Mr Sinnathambi are unequivocal in their belief that the claimant did act with a view to setting up Mr Maheshkumar, but I find that was not what the claimant had in fact done. The reason that the claimant put the deity jewellery in his room is that he had been asked to do so for safekeeping by Mr Sinnathambi. Neither Mr Maheshkumar nor Mr Kirupaharan provided evidence to the tribunal. Mr Sittambalam was not himself involved in the search and whilst he told me that the claimant only disclosed the jewellery after he knew that there had been 3 to 4 days of searching and because he was told that he would have to pay for the jewellery if it was not found, the claimant denied this. The claimant was the only person who was directly involved in the search who gave evidence to the tribunal. It does not make sense that the claimant or Mr Sinnathambi would, in late October 2020, hatch a plan to collude to blame Mr Maheshkumar for something once he had left the respondent's employment five months later. There would be no obvious benefit to either of them in doing so. The explanation that the claimant gave to the tribunal for having the jewellery in his room is consistent with that he first gave to Mr Kirupaharan, and that explanation was also supported contemporaneously by Mr Sinnathambi, as well as in Mr Sinnathambi's evidence to me. In a letter emailed to Mr Sinnathambi on 23 February 2021, Mr Sittambalam asked Mr Sinnathambi whether he had instructed the claimant to keep the jewellery in his room, and on the same day Mr Sinnathambi replied "*Yes what [the claimant] said is correct*" (p62, p64).

48. About one week after the claimant had returned the deity jewellery, he was called into a meeting by Mr Kirupaharan, Mr Kumarathas and Mr Gajendran, who accused the claimant of having stolen the deity jewellery and told him that he must admit it and apologise. The claimant said that it would be a sin to steal the deity jewellery and repeated his explanation that he had been instructed by Mr Sinnathambi to keep the deity jewellery safe in his room. Mr Kirupaharan, Mr Kumarathas and Mr Gajendran continued to accuse the claimant of theft and told him that he had to fall to their feet and apologise. Mr Kumarathas did not address this meeting at all in his witness statement, but in cross-examination, he accepted that the claimant had apologised but denied that anyone had asked him to. On the contrary, Mr Kumarathas said that they had told the claimant that a Priest should not ask for forgiveness. I prefer the claimant's account of this incident. That the claimant only apologised under duress is consistent with the fact that he had been instructed by Mr Sinnathambi to keep the deity jewellery in his room. If he had

voluntarily apologised and accepted wrongdoing it is also likely that this would have been mentioned by the respondent in its grounds of resistance or by Mr Kumarathas in his witness statement, which it was not.

Alleged theft of money on 23 March 2021

49. At around 18.52 on 23 March 2021, the claimant was approached by a devotee of the Temple who asked him to find a date on which his daughter could be married. The claimant booked in the date, and before leaving the devotee gave to the claimant £20.
50. I find that the claimant reasonably believed that he was being given this £20 as a gift, and that in accordance with what he had been told by Mr Sinnathambi at the start of his employment, he was entitled to keep this gift. I do not accept that the claimant asked the devotee for money or that he was dishonest, or committed theft, by keeping it.
51. There was an inconsistency between the claimant's evidence to me as to the reason why the devotee had given him a gift, namely that the devotee gave him £20 as a gift or tip after he had booked in a wedding for the devotee's daughter, and paragraph 23 of his witness statement in which he suggested that the money had been given to him because the devotee was pleased with his Pooja. I gave careful consideration to whether this undermined the claimant's evidence that the money had been given to him as a gift at all, but found that the evidence overall was consistent with the account that the claimant gave me at the tribunal.
52. The CCTV footage of this incident has no audio but the video is consistent with the claimant's account. It starts at 18.52.38 and it shows the claimant in the office writing something down in a book whilst the devotee stands at the office counter. Initially another Priest, Mr Jeyaramasarma is in the office but he leaves at 18.52.53. At 18.53.09 the claimant can be seen pointing his finger, and he does that twice more before a younger woman comes initially to the counter, and then to the door of the office with her mobile phone and at that point the claimant starts to write something down in the book. The claimant can be seen to stop writing at 18.53.47 and to start to tidy up the book in which he has been writing and some other books on the desk. At 18.53.57 the male devotee comes into the office with some money in his hand and he and the claimant can be seen speaking. The male devotee then briefly turns back towards the women before turning back towards the claimant and unfolding two £10 notes. At this point the claimant appears to shake his head at around the same time that the male devotee appears to nod or move

his head, and places the two £10 notes into the claimant's right hand. The devotee then leaves, the claimant tucks the £20 into his waist band and he tidies away a book titled "Temple Pooja 2021".

53. I did not find that I could place reliance on the document titled "*complaint re CSSVD priest Sivakumar at the Temple Office on 23rd March 2021*" (p65) when deciding what had actually happened. Mr Sittambalam told me that this document had been written by him based on an account given to him by the devotee. The devotee said that he had offered £10 to the temple and that the claimant had said this was inadequate and had demanded more money. When he was cross-examined as to when he had written this document, Mr Sittambalam said that it may have been 3 or 4 months after the event, in around June 2021, and suggested that the date of January 2022 on the top right-hand corner of the document may have been the date on which the document was converted from a word document to a PDF document. He accepted that the date of the incident referred to in the document did not match the CCTV and was wrong. He later accepted that part of the document must have been written after early January 2022 because the third paragraph from the bottom referred to an alleged conversation in early January 2022, although he maintained that the first part of had been written earlier. Significantly, Mr Sittambalam said that the reason that the devotee had not signed the document is that the devotee had retracted his allegations against the claimant. The devotee did not give evidence before me. Mr Sittambalam was not present on 23 March 2021 and cannot give direct evidence as to what actually happened.
54. Whilst Mr Sittambalam said that the claimant would have known that he could only retain money given to him by a devotee if it was given in front of the deity, on a tray with flowers and a beetle leaf, and that this was custom and practice in all the Temples of Sri Lankan or Indian origin that he knew of in the UK, the respondent had no written policy in place regarding this. This was not what the claimant had been told at the start of his employment. Further, in the document produced by the respondent titled "*letter to [the Claimant] – Notifications and Warnings*", bearing the date 24/04/2021 (p69A), the respondent's criticism of the claimant was not that he had dishonestly taken money that he ought to have known belonged to the Temple, or even that he had accepted a gift not given in the correct way, but that he had not abided by the "*agreed procedure for sharing Thadchchanai with your colleague priest Jeyarama Sarma.*" I was told that "*thadchchanai*" referred to the sharing of a gift or tip with a Priest.

55. Further, the claimant was well aware that there was a CCTV camera in the office because it was shown on the TV screen on the right hand side of the office. It is unlikely that he would dishonestly take money that he knew he should not in circumstances where he would also have known that the respondent was recording everything that happened in the office.

Alleged self-exposure on 30 March 2021

56. At around 20.18 on 30 March 2021, and during the course of his employment the claimant was recorded on CCTV holding a paintbrush in his right hand and wearing a red garment on the lower half of his body. Initially he was wearing this garment so that it sat above his knees. At around 20.18.19, he placed his paintbrush down on top of a pot of paint, and at 20.18.25, he first pulled out a layer of the garment so that it became full-length, and then he opened the garment, moved it slightly from side to side, and re-tied it around his waist, before picking up his paintbrush to resume his work. During the period of around two seconds when the garment was open and being adjusted from side to side, the claimant's genitals were exposed and this was recorded on CCTV.

57. Mr Sittambalam told me that the CCTV of this incident had not been discovered until after the claimant had been dismissed. He suggested that the CCTV showed a deliberate act of self-exposure. I accept the claimant's evidence that he was simply fixing his clothes before continuing to paint the trolley and I find that he did not intend to deliberately expose himself to anyone else. Although he was aware that there was CCTV in the Temple, he was not looking at the CCTV camera or doing anything else which suggested that he was deliberately seeking to expose himself to other people. The claimant's account is also more consistent with the fact he was alone in the room and the exposure was for no more than two seconds. The respondent's Grounds of Resistance did not rely on this incident and it was not suggested to the claimant in cross-examination that he had deliberately sought to expose himself.

Meeting on 10 April 2021

58. On the evening of 10 April 2021 the claimant was approached by Mr Kumarathas who asked him to attend a meeting of the respondent's Executive Committee. The claimant had not received an earlier invitation and he initially declined to do so, but he agreed when Mr Kirupaharan approached him and told him that it was about Pooja business.

59. I find that at this meeting Mr Sittambalam, Mr Kirupaharan, Mr Kumarathas, and Mr Kajenthiran (trustee responsible for Temple consumables) were present. I reject a suggestion by the claimant that there were 25 devotees present at this meeting, I find that he mistakenly confused the number of attendees at the meeting on 10 April 2021 with the number present at a later meeting on 17 April 2021. I do not however find that this undermines the reliability of the claimant's evidence as a whole or on significant issues. Paragraph 41 of the claimant's witness statement in which he refers to 25 devotees does not actually give a date for that meeting, and when he was cross examined specifically about the meeting on 10 April 2021 the claimant referred to there being four men there. That is broadly consistent with the number of attendees recorded on the respondent's note of the meeting (p66). Mr Sittambalam also had difficulty remembering the exact number of people present at the 10 April meeting, saying that it was no more than 8, and I bear in mind that the witnesses were being asked to remember a meeting that had taken place more than a year earlier.
60. I find that at this meeting on 10 April, Mr Sittambalam initially asked the claimant whether he had stolen money from the Temple, rather than specifically asking him about the £20 that he had been seen on CCTV tucking into his waistband on 26 March 2021. The claimant was not shown the CCTV. As a result, the claimant did not at first understand what he was being asked to comment on, and he reasonably appeared not to understand the allegation against him. Mr Sittambalam did not appreciate that the respondent's lack of prior warning of the meeting and lack of clarity might be making it difficult for the claimant to respond fully. He felt that the claimant was not being candid, and the tone of the meeting deteriorated. Mr Sittambalam then told the claimant that he had been seen on CCTV and that they wanted the truth and the claimant began to appreciate that he was being criticised for keeping money that he believed had been given to him by devotees. He felt the criticism was unjust. He was particularly upset having already previously having been accused of dishonestly hiding deity jewellery when he had been acting on instruction from the Secretary. I find that voices became raised on both sides, both sides became frustrated, and the claimant walked out of the meeting.
61. The respondent produced an English note of this meeting (p66), which Mr Sittambalam told me was created by him about a week or so after the meeting when the notetaker, Mr Kajenthiran, had read the original Tamil notes out to Mr Sittambalam and Mr Sittambalam had translated them into English as he typed.

62. I do not find that the note was created as a deliberately false account of the meeting. Whilst the metadata annexed to the claimant's witness statement shows that the note (p66) was only created at 11.03 on 5 January 2022, it also shows that it was last modified at 11.03 on 5 January 2022. The notes take up a full A4 page and it is unlikely that the whole note could have been created from start to finish in one minute. It is more likely that Mr Sittambalam made an earlier note and then copied and pasted it into a new document for service on the claimant. However, I do not find the note to be a wholly accurate account of what happened at the meeting on 10 April 2021. The notes suggest that warnings were given to the claimant on six issues and that it was after this that the claimant left the meeting, whereas Mr Sittambalam in his own evidence said that not all warnings had been given to the claimant, but said that 2 or 3 had been. The original Tamil note was not disclosed by the respondent to the claimant. I find that the note at p66 comprised a mixture of what the respondent planned to address with the claimant on 10 April 2021, what actually happened at the meeting, and the respondent's interpretation that the claimant in becoming upset and raising his voice was "shouting abuse". I find that the claimant in fact left the meeting before any warnings could be clearly communicated to him and that voices were raised on both sides.

Incident involving the Priest Mr Jeyaramasarma on 10 and 11 April 2021

63. I find that having left the Executive Committee meeting on 10 April 2021, the claimant was upset and felt that he had been treated unjustly, and that he did approach the counter of the office where the Priest Mr Jeyaramasarma was working. The respondent's account that the claimant verbally abused Mr Jeyaramasarma using foul language was denied by the claimant. I find that the claimant did express his frustration to Mr Jeyaramasarma with the way that he had just been treated in the meeting, and that he did so by banging his hand on the counter once, and that he asked him if he had been invited to the meeting whilst pointing his finger towards Mr Jeyaramasarma. The claimant did not swear at Mr Jeyaramasarma and was not personally abusive to him. He did not verbally abuse him with foul language on 11 April 2021 either.

64. There is CCTV of the claimant's interaction with Mr Jeyaramasarma on 10 April 2021 taken from two different camera angles. It has no audio, but it does show the claimant banging his hand once on the counter and pointing his finger towards Mr Jeyaramasarma. It also shows Mr Jeyaramasarma remaining calm. He does not appear at all upset or troubled by what the claimant has just said to him, which is

inconsistent with the suggestion that the claimant had verbally abused him using foul language.

65. The respondent produced a note titled "*Tuesday 13/04/2021*" (p67) addressed to the Temple Administration Committee, which Mr Sittambalam told me was typed by him based on what Mr Jeyaramasarma had told him. It is not signed by Mr Jeyaramasarma and Mr Jeyaramasarma did not give evidence to the tribunal. Whilst the note accuses the claimant of having verbally abused Mr Jeyaramasarma with foul language on 10 April 2021, and says he did so the following morning as well, it gives no detail of what the foul language was. The warning letter which the respondent says was later produced and is dated 24 April 2021 (p69A) did not suggest that the claimant had used "foul language". Mr Sittambalam did not witness the incident on 10 April 2021 himself and was unable to give direct evidence about what the claimant had actually said to Mr Jeyaramasarma. No CCTV was produced of 11 April 2021 and Mr Sittambalam was not present then either and so could not give direct evidence about that.

15 April 2021

66. In around April 2021, the claimant asked Mr Kumarathas for a breakdown of the amounts that had been paid to him since the start of his employment. On 15 April 2021, Mr Kumarathas gave him the table at p89 of the bundle.

17 April 2021

67. On 17 April 2021 a general meeting of devotees was held at the temple to discuss arrangements for the forthcoming annual festival. Mr Sinnathambi attended with his family. By this stage, the other trustees had removed Mr Sinnathambi as a trustee, and they did not think well of him. In particular, they believed that Mr Sinnathambi and the claimant had deliberately and dishonestly hidden the deity jewellery in an effort to get Mr Maheshkumar into trouble. Mr Sittambalam made this allegation against Mr Sinnathambi at the meeting. Mr Sinnathambi denied the allegation and called the claimant into the meeting to explain what had happened, which the claimant did. Mr Sittambalam viewed Mr Sinnathambi, and the claimant as having disrupted the meeting, whereas Mr Sinnathambi viewed Mr Sittambalam as having disrupted the meeting by making allegations against him.

Warning Letter dated 24 April 2021

68. In his witness statement Mr Sittambalam said that a warning letter was given to the claimant a couple of days after the meeting on 10 April. Under cross-examination he said that the letter had been in Tamil and had been posted on the door of the claimant's room, and that the letter at p69A and 69B dated 24 April 2021 was an English translation of that. Whilst I accept that the respondent may have written this warning letter on 24 April 2021, I accept the claimant's evidence that he did not actually receive a copy.

Holiday

69. The evidence about what holiday, if any, the claimant took, was unsatisfactory from both parties. Having considered all the evidence carefully, I find that throughout the entirety of his employment the claimant took 20 days holiday but that he was prevented from taking the holiday which he accrued between 3 March 2020 and 31 March 2020 because of the effects of the pandemic and the national lockdown and that he was not able to take the whole of his holiday between 1 April 2020 and 31 March 2021 because of the effects of the COVID-19 pandemic and the national lockdowns. That is consistent with the respondent's counter-schedule of loss (p47) which says the claimant had taken 20 days holiday, and which impliedly accepts that some holiday entitlement rolled over to 2021/22. It is likely that the reference to this specific number followed the respondent looking at some records, although such records were not produced to the tribunal.

70. I did not find that the pay slips assisted me one way or another when making a finding as to how much holiday (if any) the claimant had taken, because it is clear that the pay slips were not fully accurate. They did not, for example, record the pay the claimant had actually received between March and September 2020.

71. I do not accept the claimant's evidence that he had made specific requests for holiday of Mr Sittambalam and Mr Kirupaharan that had been refused. This is not an allegation that he made in his claim form or grounds of claim (p2-21). The claimant's schedule of loss (p38-46) and amended schedule of loss (p50-53) did allege that the respondent "*had denied him the chance to take holiday leave*" during the holiday year to 31 March 2021, but no further particulars were given of this. The only evidence about holiday pay in the claimant's witness statement was at paragraph 56, where he said "*I can also confirm that the respondents have not paid me for my holiday entitlement on dismissal.*" He did not suggest in his witness statement that he had made specific requests for holiday that had been refused. The first time that it was alleged that he had made specific requests to Mr Sittambalam and Mr Kirupaharan that had been refused was under cross-

examination, but this was inconsistent with him telling me that he was not aware that he was allowed to have a holiday. The claimant accepted that he had relations in Coventry and that he had gone to Coventry in June (rather than July) 2020, but denied that he had ten days holiday there in July 2020, saying he had been sent for the whole of June 2020 to do the Pooja in a Temple there. He denied having any other holidays, or having friends in Liverpool. I think it is likely that he had some time with relatives during his employment when he was not working and can properly be said to have been on holiday, from July 2020 and during periods that were not affected by COVID-19 lockdowns, as the counter schedule suggests, but not as much as Mr Sittambalam suggests.

72. In his witness statement Mr Sittambalam suggested that the claimant had as many as 24 working days holiday throughout his employment, 7 of which were after 1 April 2021. I do not accept that the claimant had so many days holiday. Nor do I accept that there was nothing which had ever prevented the claimant from taking holiday, given the effects of the COVID-19 pandemic on the country, in particular the national lockdowns. Mr Sittambalam's calculation of 24 days was inconsistent with the respondent's own counter-schedule of loss (p47), which said the claimant had taken 20 days leave during the whole of his employment and accepted that the claimant's untaken holiday from previous leave years carried over, because the counter schedule suggested that the claimant was entitled to payment for 8 days holiday (i.e. more than he accrued between 1 April 2021 and his dismissal). I do not accept Mr Sittambalam's evidence under cross-examination that there were times when the claimant would "*disappear*" with a relative and then phone the respondent and say he could not come. That suggestion was not raised in his witness statement or the respondent's grounds of resistance.

Claimant's Dismissal

73. On 29 April 2021, Mr Sittambalam called the claimant into a meeting, at which Mr Kumarathas, Mr Kirupaharan, Mr Gajendran and Mr Selvaratnam were already present. Mr Sittambalam handed to the claimant a letter dated 29 April 2021 (p68). The letter was in Tamil, but it was translated into English for the purposes of the tribunal hearing (p69). The letter informed the claimant that he was being dismissed with immediate effect, stating:

"For the past several months in numerous matters your conduct and actions has created massive dissatisfaction to the Temple administration, colleague Priests (non-co-operation) and to Devotees.

On this basis, it is with great sadness that we notify you that you may not continue to serve in this temple from 29/04/2022 [sic] (14.00).

Soon after arrangements for your return travel to Sri Lanka have been made, you will be notified of the same. Also, we notify you that you need not work until then. Until your travel date, you are notified to remain, only in your allocated place (food area and room of stay) only, at the temple.”

74. The reference to 2022 is a typographical error which appears in the English translation (p69), but not the Tamil original (p68).

75. The claimant was not given any notice or pay in lieu of notice.

76. On 27 July 2021, the claimant notified ACAS for the purposes of early conciliation and a certificate was issued on the same date. The claimant presented his ET1 to the Tribunal on 24 August 2021.

The Law

The National Minimum Wage

77. Section 1 of the National Minimum Wage Act ('the **NMWA**') 1998 requires a person who qualifies for the national minimum wage ('the **NMW**') to be paid in respect of work in any pay reference period at a rate which is not less than the national minimum wage.

78. Where a worker who qualifies for the NMW is actually paid less than the NMW in any pay reference period, Section 17 of the NMWA provides that the worker is to be taken to be contractually entitled to be paid at the NMW. The way in which the shortfall in pay is to be compensated is set out in Section 17. Section 17(1) to (4) of the National Minimum Wage Act ('the **NMWA**') 1998 provides that:

(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of—

(a) the amount described in subsection (2) below, and

(b) the amount described in subsection (4) below.

(2) The amount referred to in subsection (1)(a) above is the difference between—

(a)the relevant remuneration received by the worker for the pay reference period; and

(b)the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.

(3)In subsection (2) above, “relevant remuneration” means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.

(4)The amount referred to in subsection (1)(b) above is the amount determined by the formula—

$$\frac{A}{R1} \times R2$$

where—

- A is the amount described in subsection (2) above,*
- R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and*
- R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.”*

79. Section 28 of the NMWA 1998 reverses the usual burden of proof and creates a presumption that the claimant qualifies for the national minimum wage at the relevant time, and that the claimant was paid at less than the national minimum wage, unless the contrary is established:

“(1)Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.

(2)Where—

(a)a complaint is made—

(i)to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages), or

(ii)to an industrial tribunal under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996, and

(b) *the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above,*

it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.

(3) Where in any civil proceedings a person seeks to recover on a claim in contract the amount described as additional remuneration in section 17(1) above, it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.”

80. In the NMWA 1998, “civil proceedings” includes “*proceedings before an employment tribunal*” (section 55 (1) of the NMWA 1998).
81. The determination of the hourly rate of pay and the applicable minimum rate is set out in the National Minimum Wage Regulations (‘the **NMWR**’) 2015.
82. Regulation 4 provided for a single hourly rate of the NMW for the purposes of section 1(3) of the NMWA 1998 (“the national living wage”) in so far as it is relevant to this case, of £8.21 in March 2020, and £8.72 between 1 April 2020 and September 2020. The single hourly rate at the date of this decision is £9.50.
83. Regulation 6 of the NMW defines the pay reference period as being 1 month, or for any worker who is paid wages by reference to a period of shorter than one month, that period.
84. Regulation 7 of the NMW specifies that to determine the hourly rate at which a worker is to be treated as having been paid in any pay reference period, the pay in the pay reference period is to be divided by the hours worked in the pay reference period. Regulations 8, 9 and 10 specify how the pay paid in any reference period is to be ascertained.
85. Regulation 10 provides that (so far as relevant to this case) “*The following payments and benefits in kind do not form part of a worker’s remuneration – (f) benefits in kind provided to the worker, whether or not a monetary value is attached to the benefit, other than living accommodation.*”
86. Chapter 2 of the NMWR addresses reductions which reduce the worker’s remuneration. Regulation 14 (1) provides: “*The amount of any deduction the*

employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period, as adjusted, where applicable, in accordance with regulation 15, is treated as a reduction to the extent that it exceeds the amount determined in accordance with regulation 16, unless the payment or deduction falls within paragraph (2).” Paragraph (2) is not relevant to this case. Essentially, regulation 14 makes clear that accommodation is a benefit in kind that can count towards the national minimum wage, but only to the extent that does not exceed the rate set out in regulation 16.

87. Regulation 16 sets out the way in which the amount with regard to the provision of living accommodation should be calculated for the purposes of regulations 9 (1) (e), 14 and 15. As at March 2020 it allowed for accommodation to be offset against the national minimum wage of £7.55 for each whole day that living accommodation was provided, and from 1 April 2020 that rose to a daily rate of £8.20.
88. Regulation 17 sets out how the hours of work in any pay reference period are to be applied. Regulations 21 to 29 apply to salaried hours of work. Under regulation 21, salaried hours of work are those for which a worker is entitled to be paid an annual salary (or annual salary plus performance bonus and / or salary premium) in respect of a number of hours in a year (whether or not specified in the contract) and is not entitled to other payments for those hours. The worker must also be entitled to be paid, where practicable, in equal instalments of between 1 week and 1 month (or quarterly if those payments occur by way of monthly payments).
89. Regulations 22 to 29 set out how the hours of work in any pay reference period are to be calculated.

Breach of Contract

90. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the **1994 Order**) gives the tribunal power to hear a claim for breach of contract brought by an employee if the claim, if it arises or is outstanding on the termination of the employee's employment, and if it is not one to which Article 5 of the 1994 Order applies.
91. Article 5 of the 1994 Order applies to a claim for breach of certain contractual terms, including: “(a) a term requiring the employer to provide living accommodation for the employee; (b) a term imposing an obligation on the

employer or the employee in connection with the provision of living accommodation.” The tribunal does not have power to hear such claims.

92. Article 7 of the 1994 Order sets out the time limit within which a breach of contract claim must be brought, and provides that, subject to an extension of time to facilitate ACAS early conciliation where notification is given within the primary time limit, the tribunal *“shall not entertain a complaint in respect of an employee’s contract claim unless it is presented – (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within [the primary time limit] within such further period as the tribunal considers reasonable.”*

93. Article 8B of the 1994 Order provides for the time within which a breach of contract claim must be brought to be extended to facilitate early conciliation:

(1) *This article applies where this Order provides for it to apply for the purposes of a provision of this Order ('a relevant provision').*

(2) *In this article—*

(a) *Day A is the day on which the worker concerned complies with the requirement in subsection (1) of [section 18A](#) of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

(b) *Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

(3) *In working out when the time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

(4) *If the time limit set by a relevant provision would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

(5) *Where an employment tribunal has power under this Order to extend the time limit set by a relevant provision, the power is exercisable in relation to that time limit as extended by this regulation.*

94. As set out above, where a worker who qualifies for the NMW is actually paid less than the NMW in any pay reference period, Section 17 of the NMWA provides that the worker is to be taken to be contractually entitled to be paid at the NMW.

95. Dismissal without notice will be wrongful (and a breach of contract) unless the employer can show that summary dismissal was justified because of the employee’s repudiatory breach of contract, or that it had a contractual right to make

payment in lieu of notice and did so. To amount to a repudiatory breach of contract, the employee's conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment (**Briscoe v Lubrizol Ltd** [2002] IRLR 607). The employee's conduct should be viewed objectively. The tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation by the employee (**Shaw v B and W Group Ltd** EAT/0583/11).

96. An employer faced with a repudiatory breach of contract by an employee can choose to waive that breach and affirm the contract. If the employer waives the breach and affirms the contract, the employer will not be able to justify a later summary dismissal of the employee by relying on that breach which was waived (**Cook v MSHK Ltd** [2009] EWCA Civ 624).

Unauthorised deduction from wages

97. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to section 23 of the Employment Rights Act (the **ERA**) 1996.
98. Section 48 (3) (a) of the ERA 1996 provides that a claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, or where the deduction was part of a series of similar deductions, the last in the series of deductions. Section 48 (4A) provides an extension for early conciliation if the notification was made to ACAS within the primary time limit.
99. That primary time limit is subject to an exception, where it was not reasonably practicable for the claimant to present the claim within the period set out in section 48 (3) (b) and the claimant can show that he presented the claim within such further period as the tribunal considers reasonable.
100. "Reasonably practicable" does not mean reasonable, nor does it mean physically possible. It means something like "reasonably feasible" (**Palmer & anor v Southend-on-Sea Borough Council** [1984] ICR 372, CA). What is reasonably practicable is a question of fact. The test should be given a liberal construction in favour of the employee, but the onus is on the claimant to prove that it was not reasonably practicable for him to present his claim in time (**Porter v Bainbridge Ltd** [1978] ICR 943,CA). Where the reason for failing to present the claim in time relates to ignorance of rights, that ignorance must be reasonable (**Dedman v**

British Building and Engineering Appliances Ltd [1974] 1 All ER 520). The question is whether the claimant ought to have known of his rights (**Porter**).

101. A claim for unlawful deduction from wages that is in time (or in respect of which time has been extended) cannot be brought in respect of deductions which took place more than 2 years prior to the presentation of the claim (Section 23 (4) of the ERA 1996).

102. Section 13 of the ERA 1996 provides that “(1) *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 their agreement or consent to the making of the deduction.

....(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

103. Section 27 (1) (a) of the ERA 1996 provides that wages means “*any sums payable to the worker in connection with his employment.*”

Working Time Regulations 1998

104. Under the Working Time Regulations 1998 (the **WTR 1998**) a worker is entitled to 5.6 weeks’ of annual leave in each year (4 weeks under regulation 13 and an additional 1.6 weeks under regulation 13A), pro rata if the worker starts work part-way through a leave year.

105. Where a worker’s employment is terminated during the course of his leave year, and on the date on which the termination takes effect, the proportion he has taken of the leave to which he is entitled in the leave year differs from the proportion of the leave year which has expired, the employer shall make a payment in lieu of leave (regulation 14 (1) and (2)). Regulation 14 (3) sets out how to calculate the payment due.

106. In relation to carrying forward untaken leave from a previous leave year, with effect from 26 March 2020 (at 9pm) regulation 13 (10) and (11) of the WTR 1998 provide as follows:

“(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which he worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society) the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.”

107. Regulation 14 (5) of the WTR 1998 provides: *“Where a worker’s employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13 (10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.”*

Conclusions

Breach of Contract (Pay)

Does the tribunal have jurisdiction to hear the claim?

108. The tribunal does have jurisdiction to hear the claimant’s complaint that the respondent breached his contract of employment by not paying to him the national minimum wage. The claimant’s effective date of termination was 29 April 2021. He notified ACAS for the purposes of early conciliation within 3 months of the effective date of termination, on 27 July 2021 (“Day A”), and a certificate was issued on the same date (“Day B”). The claimant presented his ET1 to the tribunal on 24 August 2021 within one month of Day B. Applying Article 7 and 8B of the 1994 Order this means that the claim for breach of contract was in time.

109. In oral submissions, the respondent argued that the breach of contract claim relating to alleged non-payment of the national minimum wage was out of time because there was no “dispute” mentioned about the national minimum wage at the point of termination of the claimant’s employment. Mr Hussain did not refer me to any authorities on this point, and I reject the argument. The 1994 Order does not set out any requirement that an employee must have raised a complaint

about the breach of contract in order for the tribunal to have jurisdiction to hear it, or for that complaint to be considered “outstanding” at the time he left (Mitie Lindsay Limited v Lynch EAT/0034/03/MAA). In any event, the claimant had complained to Mr Sinnathambi and he had requested a breakdown of his pay from Mr Kumarathas because he was not satisfied that he had been fully paid.

How many hours did the claimant work?

110. As I have found above, the claimant’s contract required him to work 45 hours per week and he did so.

Was the amount that the claimant was paid less than he was contractually entitled to be paid?

111. The burden would lie with the respondent to prove that the claimant did not qualify for the NMW. The respondent did not suggest that the claimant was excluded from the protection of the NMWA 1998 by Section 44A. It was not argued by the respondent that the purpose of the claimant living in the respondent’s accommodation was to practise or advance a belief of a religious or similar nature, and indeed the respondent’s grounds of resistance asserted that the claimant could have chosen to live elsewhere.
112. The effect of the Section 17 of the NMWA 1998 is that the claimant was contractually entitled to be paid at the national minimum wage.

Was the claimant paid less than the national minimum wage?

113. The burden is on the respondent to show that the claimant was paid the national minimum wage (Section 28 of the NMWA 1998).
114. Applying regulation 6, the claimant’s pay reference period was a month. I have found that he was entitled to be paid an annual salary in respect of 45 hours of work per week. He was paid monthly. His work was salaried hours work within the meaning of regulation 21 of the 2015 regulations. His hours in each reference period of a month were 195 hours per month (i.e. (45 hours per week x 52 weeks = 2340 hours per year) and 2340/12 gives the hours per month).
115. The claimant’s gross monthly salary for March 2020 before any deductions was £1,423.04, which on my findings of fact equates to a gross hourly rate of £7.35 (£1,423.04 / 195). That is less than the applicable NMW of £8.21 per hour. The claimant’s gross monthly salary for the months April, May, June, July, and August

2020 was £1,511.44, which on my findings of fact equates to a gross hourly rate of £7.75. That is less than the applicable NMW of £8.72.

116. A further calculation has to be made because the respondent provided the claimant with accommodation and charged him for that. For the purposes of assessing whether the claimant has been paid the NMW, regulation 14 (1) requires the accommodation charge to be deducted from the claimant's pay to the extent that it exceeds the offset amount set out in regulation 16. The offset amount in regulation 16 was £7.55 a day in March 2020, and £8.20 from 1 April 2020.

117. In submissions, Mr Hussain argued that the respondent was entitled to offset the entirety of the actual accommodation charges, because the respondent's case was that the claimant and the respondent had entered into a completely separate contract for the provision of accommodation. I reject this argument for two reasons:

- a. I have found that there was not a separate contract under which the claimant had agreed to pay the respondent for food and accommodation. The respondent had agreed to provide the claimant with food and accommodation free of charge as part of his agreeing to be employed by the respondent.
- b. In any event, regulation 14 of the NMWR 2015 applies in respect of "*the provision of living accommodation by the employer to the worker*" and in this case both the claimant and the respondent agreed that the living accommodation was provided by the employer. Whilst Mr Hussain did not refer me to any authorities, I did consider **Commissioners for HMRC v Ant Marketing Ltd** [2020] IRLR 744, EAT but that case concerned a situation where the accommodation was provided not by the employer, but by a separate property company. That is distinguishable from this case.

118. Applying the NMWR to my findings of fact I conclude that the claimant's hourly wage was £5.54 for March 2020, £5.78 for April and June 2020, and £5.82 for May, July, and August 2020, below the NMW. My calculation is as follows:

| Period | Gross pay before deduction | No. of days in accommodation | Actual accommodation deduction | Statutory offset rate for the period | Pay less actual accommodation deduction plus statutory offset | Hourly wage |
|------------|----------------------------|------------------------------|------------------------------------|--------------------------------------|---|-------------------------------|
| March 2020 | £1,423.04 | 29 | £562.56 (29 days x £19.40 per day) | £218.95 (29 x £7.55) | £1,079.43 (£1,423.04 - £562.56+£218.95) | £5.54 (£1,079.43 / 195 hours) |
| April 2020 | £1,511.44 | 30 | £631.31 (30 x £21.04) | £246 (30 x £8.20) | £1,126.13 (£1,511.44-£631.31+£246) | £5.78 (£1,126.13 / 195 hours) |
| May 2020 | £1,511.44 | 31 | £631.31 (31 x £20.36) | £254.20 (31 x £8.20) | £1,134.33 (£1,511.44 - £631.31+£254.20) | £5.82 (£1,134.33 / 195 hours) |
| June 2020 | £1,511.44 | 30 | £631.31 (30 x £21.04) | £246 (30 x £8.20) | £1,126.13 (£1,511.44-£631.31+£246) | £5.78 (£1,126.13 / 195 hours) |
| July 2020 | £1,511.44 | 31 | £631.31 (31 x £20.36) | £254.20 (31 x £8.20) | £1,134.33 (£1,511.44 - £631.31+£254.20) | £5.82 (£1,134.33 / 195 hours) |
| April 2020 | £1,511.44 | 31 | £631.31 (31 x £20.36) | £254.20 (31 x £8.20) | £1,134.33 (£1,511.44 - £631.31+£254.20) | £5.82 (£1,134.33 / 195 hours) |

How much is the claimant entitled to be paid?

119. The claimant's pay fell below the NMW. Applying the formula set out in Section 17 of the NMWA 1998, the respondent must pay to the claimant the gross sum of £3,699.87, calculated as follows:

| Pay period | NMW at the time (R1) | Hourly shortfall (NMW less hourly wage calculated in the Table at paragraph 118) | Shortfall for the pay period (hourly shortfall x 195 hours) (A) | NMW applicable at the date of determination (R2) | Compensation due (A/R1)x R2 |
|------------|----------------------|--|---|--|-----------------------------|
| Mar-20 | £8.21 | £2.67 | £520.65 | £9.50 | £602.46 |
| Apr-20 | £8.72 | £2.94 | £573.30 | £9.50 | £624.58 |
| May-20 | £8.72 | £2.90 | £565.50 | £9.50 | £616.08 |
| Jun-20 | £8.72 | £2.94 | £573.30 | £9.50 | £624.58 |
| Jul-20 | £8.72 | £2.90 | £565.50 | £9.50 | £616.08 |
| Aug-20 | £8.72 | £2.90 | £565.50 | £9.50 | £616.08 |
| | | | | TOTAL | £3,699.87 |

Unlawful deduction from wages

Does the tribunal have jurisdiction to hear the claimant's claim?

120. On behalf of the claimant Ms Taylor accepted that the claimant had not notified ACAS or presented his claim within three months of the last of the series of deductions he complains about, but submitted that it was not reasonably practicable for the claimant to have brought his claim within time because of the language barrier.

121. The claimant prepared his witness statement with the assistance of solicitors and an interpreter, but it said nothing about why it was that the claimant did not bring his claim within three months of the last of the deductions complained of in September 2020. I accept that the claimant would have been unlikely to have known about the possibility of bringing a claim to the tribunal when he first came to the UK, and I accept that he was not able to read English and he required a Tamil interpreter to participate fairly in the tribunal proceedings. However, the claimant did have friends and relations in the UK, and I heard no evidence from him about whether he made enquiries with them about his options, or if he did not why not. I am not satisfied that the claimant has established that it was not reasonably practicable for him to have brought his claim by December 2020. Even if it was not reasonably practicable for him to have brought his claim then, I do not find that his claim was presented within such further period as was reasonable. By 15 April 2021 the claimant must have had in mind some potential complaint about his pay because he had asked Mr Kumarathas for a pay breakdown and had received one. By 27 July 2021 the claimant had notified ACAS for the purposes of early conciliation, and so he must by that point at the very latest have understood that he could bring a claim to the tribunal and had access to means of obtaining advice about that process, but he did not bring a claim for almost a further month.

122. The tribunal therefore has no jurisdiction to hear the claim for unlawful deduction from wages.

Breach of contract – wrongful dismissal (notice pay)

Was the claimant in repudiatory breach (or a series of breaches) of his contract of employment?

123. The respondent submitted that the claimant was in serious, or repudiatory breach of his contract, entitling it to dismiss him without notice, as set out at clause

8.3 of the Contract. In particular, the respondent relied upon the alleged hiding of the Goddess Durga deity jewellery to get Mr Maheshkumar into trouble, the alleged stealing of £20 on 23 March 2021, his alleged conduct towards the other Priest Mr Jeyaramasarma, and his behaviour towards trustees at a public meeting. Reliance was also placed by Mr Sittambalam on the alleged self-exposure on 30 March 2021.

124. Whilst the claimant had put the Goddess Durga deity jewellery in his room, this was at the request of the then Secretary Mr Sinnathambi and it was not in an attempt to get Mr Maheshkumar into trouble. The claimant was responding to an instruction by the Secretary and this did not amount to a repudiatory breach of his contract.

125. The claimant did not steal the £20 on 23 March 2021. He was given the £20 as a gift by the devotee and in the circumstances he honestly and reasonably believed that he was allowed to keep it. This did not amount to a repudiatory breach of contract.

126. The very brief exposure on 30 March 2021 occurred whilst the claimant was in a room on his own and was fixing his clothes. He did not intend to expose himself to anyone, and his conduct did not amount to a repudiatory breach of contract.

127. Whilst the claimant did initially decline to attend the meeting on 10 April 2021 when requested to do so by Mr Kumarathas, he did ultimately agree to attend after Mr Kirupaharan's request. He did raise his voice at the meeting and he did walk out of the meeting, but this conduct occurred in the context that is described in my findings of fact, and in that context the claimant's conduct in raising his voice and walking out did not amount to a repudiatory breach of contract. The claimant did not initially understand that he was being asked to comment on what had happened on 26 March 2021 because the allegation had not been clearly put to him. Unfortunately, the claimant's lack of understanding was interpreted by Mr Sittambalam as a lack of candour. Once the claimant understood that he was being accused of stealing the £20 which had been given to him on 26 March, he felt unjustly criticised and this response was understandable given that he had previously been accused by the respondent of dishonestly hiding the Goddess Durga deity jewellery when he had put it in his room following an instruction from the then respondent's Secretary. Voices became raised on both sides.

128. Following that meeting on 10 April 2021, the claimant did approach Mr Jeyaramasarma and did express frustration with the way that he had just been treated in the meeting, by banging his hand on the counter once, and he did ask him if he had been invited to the meeting whilst pointing his finger towards Mr Jeyaramasarma. In the context of what had just happened, this did not amount to a repudiatory breach of contract. The claimant did not use foul language and the claimant's conduct did not appear to bother Mr Jeyaramasarma.

129. At the meeting on 17 April 2021, the claimant did attend the public meeting at the request of Mr Sinnathambi, and he did repeat his account that Mr Sinnathambi had asked him to keep the Goddess Durga deity jewellery in his room. This was an account that the respondent's trustees strongly believed was false. They believed that the claimant and Mr Sinnathambi had conspired to hide the Goddess Durga deity jewellery in order to get Mr Maheshkumar into trouble once he had left the respondent's employment, but I have found that they were wrong in their belief. By repeating his account of what had happened, the claimant was not making false accusations against the trustees, and his conduct at this meeting was not in repudiatory breach of contract.

130. I have also given careful consideration to whether the respondent has proved that the claimant's conduct as a whole amounted to a repudiatory breach of contract, and I find that it does not. Some issues had been raised with the claimant prior to February 2021, but I was given little detail of the nature of these issues and they had not been serious enough for any warning to be issued. It would have been better if the claimant had reacted in a more calm way on 10 April 2021 in particular, and if he had not left that meeting, and had not approached Mr Jeyaramasarma, but I do not find that his conduct either in isolation or cumulatively was so serious that it amounted to a repudiatory breach.

Was the respondent entitled to summarily dismiss the claimant?

131. The respondent was not entitled to summarily dismiss the claimant because he was not in repudiatory breach of contract.

Was the claimant owed any notice pay?

132. The claimant was entitled to receive 2 calendar months' notice of dismissal according to clause 8.1 of the Contract. The respondent did not give to the claimant any notice and did not pay him in lieu of notice and the claimant is therefore owed two months' notice pay.

133. The effect of Section 17 of the NMWA 1998 is that the claimant was contractually entitled to be paid at the NMW. Applying Section 17 of the NMWA, I calculate the notice pay that the respondent must pay to the claimant to be £3,705 gross of deductions for tax and national insurance. I have calculated this in the following way:

| Pay period | NMW at the time (R1) | Hourly shortfall (NMW less hourly wage) | Shortfall for the pay period (hourly shortfall x 195 hours) (A) | NMW applicable at the date of determination (R2) | Compensation due (A/R1)x R2 |
|--------------|----------------------|---|---|--|-----------------------------|
| May-21 | £8.91 | £8.91 | £1,737.45 | £9.50 | £1,852.50 |
| Jun-21 | £8.91 | £8.91 | £1,737.45 | £9.50 | £1,852.50 |
| TOTAL | | | | | £3,705.00 |

Holiday Pay

134. Whilst the respondent's counter-schedule had conceded that some holiday pay was due (p47), Mr Hussain submitted to me that this was an error and that he did not rely upon it. The holiday pay claim was included as a live claim in the agreed list of issues, and both parties had the opportunity to give evidence and make submissions upon it.

What holiday did the claimant accrue and what did he take?

135. The Contract provided that the respondent's holiday year ran from 1 April to 31 March each year.

136. The period 3 March 2020 to 31 March 2020 represented 8% of a leave year. During that period, under the WTR 1998 the claimant accrued an entitlement to 2.24 days leave (28 days x 8%). However, the period between 27 March 2020 and 31 March 2020 represented only 1% of the holiday year, and during this period the claimant only accrued 0.28 days in total, of which less than 0.2 of a day was under regulation 13. Whilst it was not reasonably practicable for the claimant to take any leave in March 2020 and this was because of the COVID-19 pandemic and the national lockdown, he had not accrued a full day of holiday during this period and I do not find that any holiday entitlement carried over to the following holiday year (1 April 2020 – 31 March 2021).

137. In the complete leave year 1 April 2020 to 31 March 2021, the claimant accrued 28 days leave under the WTR (20 days, being 4 weeks, under regulation 13, equivalent to 71% of the full year entitlement; 8 days, being 1.6 weeks, under regulation 13A, equivalent to 29% of the full year entitlement).

138. The period 1 April 2021 to 29 April 2022 was 8% of a leave year, and during that period, under the WTR the claimant accrued an entitlement to 2.24 days leave (28 days x 8%). 1.6 days of this was leave which accrued under regulation 13, and the remainder accrued under regulation 13A.

139. During the holiday years 1 April 2020 to 31 March 2021 and 1 April 2021 to 29 April 2021, I have found that the claimant did take 20 days of holiday overall but that it was not reasonably practicable for him to take his full holiday entitlement in the holiday year 1 April 2020 to 31 March 2021 because of the effects of the COVID-19 pandemic and the national lockdowns. The untaken element of the 2020/2021 leave entitlement which accrued under regulation 13 therefore carried over under regulation 13 (10) into the holiday year 2021/2022. The claimant did not have a relevant agreement with the respondent that any holiday under regulation 13A could be carried over.

What holiday pay is the claimant entitled to?

140. Only the annual leave entitlement that accrued under regulation 13 was capable of being carried over under regulation 13 (10), i.e. up to 20 days.

141. The maximum leave entitlement which can be counted as having accrued at the date of termination is therefore 22.24 days (20 days from 2020/21 and 2.24 days from 2021/22). I have found that in total during the leave years 2020/21 and 2021/22 the claimant had taken 20 days leave. That means that at the date of termination he had 2.24 days which he had accrued but which was untaken, and for which he was entitled to be paid.

142. The claimant was contractually entitled to be paid at the rate of the NMW. Applying Section 17 of the NMWA, the respondent must pay to the claimant gross holiday pay of £191.52 (being 2.24 days, at 9 hours per day x £9.50).

Employment Judge **C Knowles**
08 March 2023