



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100002/2023 (V)**

5

**Held in Glasgow via Cloud Video Platform (CVP) on 20 March 2023**

**Employment Judge Murphy (sitting alone)**

10 **Mr C McLaughlin**

**Claimant  
In Person**

15 **Mr A Whitty**

**Second Claimant  
In Person**

20 **Mr A Lamont**

**Respondent  
Represented by:  
Mr T Muir -  
Consultant**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the  
30 First Claimant the sum of **FIVE HUNDRED AND FIFTY NINE POUNDS STERLING AND THIRTY PENCE (£559.30)** in respect of a deduction from wages payable for work undertaken in the week commencing 5 December 2022 which ought to have been paid on or about 12 December 2022.
2. The respondent has made an unauthorised deduction from wages contrary to  
35 section 13 of the Employment Rights Act 1996 and is ordered to pay to the Second Claimant the sum of **FOUR HUNDRED AND EIGHTEEN POUNDS STERLING (£418)** in respect of a deduction from wages payable for work

undertaken in the week commencing 5 December 2022 which ought to have been paid on or about 12 December 2022.

3. The respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the  
5 Second Claimant the sum of **TWO HUNDRED AND SIXTY FOUR POUNDS STERLING (£264)** in respect of pay in lieu of accrued untaken holiday outstanding on termination.
4. The Respondent has failed to give the First Claimant a written statement of employment particulars as required by section 1 of the Employment Rights  
10 Act 1996 and this failure persisted when the First Claimant initiated these proceedings. Under section 38(3) of the Employment Act 2002, the tribunal orders the Respondent to pay the First Claimant two weeks' gross pay (capped) in the sum of **ONE THOUSAND ONE HUNDRED AND FORTY TWO POUNDS STERLING (£1,142)**.
- 15 5. The Respondent has failed to give the Second Claimant a written statement of employment particulars as required by section 1 of the Employment Rights Act 1996 and this failure persisted when the Claimant initiated these proceedings. Under section 38(3) of the Employment Act 2002, the tribunal  
20 orders the Respondent to pay the Second Claimant two weeks' gross pay in the sum of **EIGHT HUNDRED AND THIRTY SIX POUNDS STERLING (£836)**.
6. The sums awarded in items 1- 3 are expressed gross of tax and national insurance. It is for the respondent to make any deductions lawfully required to account to HMRC for any tax and employees' national insurance due on  
25 these sums, if applicable.

## REASONS

### Preliminary discussions

1. The claimants bring complaints of unauthorised deductions from wages in relation to accrued untaken holiday they alleged was outstanding on the

termination of their employment. They also claim unpaid wages for hours worked in the week commencing 5 December 2022.

2. At the outset, a number of matters were discussed and clarified.

3. The respondent makes a number of averments in his response regarding the claimants' failure to serve their notice periods as well as other allegations concerning their conduct and performance. I explained to parties that, as neither of the claimants have brought a claim for breach of contract, there is no scope for the respondent to make counter claims against the claimants in relation to alleged losses suffered by the respondent as a result of alleged breaches of contract by the claimants. I further explained that allegations that the claimants or either of them had performed poorly as employees or indeed that allegations that they were guilty of misconduct or gross misconduct do not have a bearing on the issues for the Tribunal to decide in this case. I asked parties to give evidence only in relation to relevant matters which would help me decide the issues for determination in the claims.

4. The First Claimant clarified he claims £559.30 in respect of unpaid wages for work undertaken in the week commencing 5 December 2022 (i.e. 35 x £15.98 per hour). The Second Claimant clarified he claims £418 in respect of unpaid wages for work undertaken in the week commencing 5 December 2022 (i.e. 38 x £11 per hour).

5. The First Claimant clarified that he claims a payment in lieu of holiday accrued in the preceding holiday year which he had not taken and which he alleged had carried over to his final holiday year. The First Claimant indicated he was claiming 78 hours in respect of annual leave carried forward from leave year 21/22.

6. The Second Claimant initially indicated he did not know what his accrued entitlement was or the exact number of hours he was claiming. I offered him the opportunity to adjourn briefly to consider and calculate this. However, in the meantime, the respondent referred to payslips which contained calculations of outstanding holiday entitlement and which, for the Second Claimant, indicated an outstanding holiday entitlement of 24 hours on

5 termination. The respondent acknowledged that, although the payslip had been generated, the sums recorded in it had not, in fact, been paid. In these circumstances, the Second Claimant indicated that he was claiming 24 hours' accrued untaken holiday which, based on the respondent's calculations, was outstanding on the termination of his employment.

7. It was a matter of agreement that no written contract of employment or written statement of employment particulars had been given to either claimant at the beginning of their employment or at all.

### Issues

- 10 8. The Issues to be determined for each claimant are:-

*Unauthorised deductions: pay for w/c 5 December 2022*

- 15 a. Were the wages paid to the claimants on or about 12 December 2022 for the week commencing 5 December 2022 less than the wages they should have been paid?
- b. Was any deduction required or authorised by statute?
- c. Was any deduction required or authorised by a written term of the contract?
- d. Did the claimant have a copy of any such contract or written notice of any such contract term before the deduction was made?
- 20 e. Did the claimant agree in writing to the deduction before it was made?
- f. How much is the claimant owed?

*Holiday outstanding on termination (unauthorised deduction)*

- g. what was his annual leave year?
- h. How much of the leave year had passed when his employment ended?
- 25 i. How much leave had accrued for the year by that date?
- j. How much paid leave had the claimant taken in the year?

- k. Were any days carried over from previous holiday years?
- l. How many days remain unpaid?
- m. What is the relevant rate of pay?

*Failure to give a written statement of employment particulars*

- 5 n. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
- o. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the  
10 Tribunal must award two weeks' pay and may award four weeks' pay.
- p. Would it be just and equitable to award four weeks' pay?

**Findings in Fact**

- 9. The claimants gave evidence on their own behalf. Reference was made by  
15 the witnesses to an electronic joint bundle prepared by the respondent. I make the following findings in fact on the balance of probabilities:
  - 9.1 The respondent is a sole trader who operates a business manufacturing machinery for the wood working industry.
  - 9.2 The First Claimant was employed by the respondent as an engineer  
20 from 1 May 2020. The Second Claimant was employed by the respondent as an engineer from August 2021.
  - 9.3 The employment of both claimants terminated on 12 December 2022 by reason of their resignations without the provision of notice.
  - 9.4 The First Claimant was paid at the rate of £15.98 per hour at the time  
25 his employment terminated. The First Claimant had managerial responsibilities in the workshop. The Second Claimant was paid at the rate of £11 per hour at the time his employment terminated Both

claimants were paid weekly in arrears by BACS. They usually worked Mondays to Fridays though their hours of work on these days varied slightly on occasion from week to week. They were usually paid the following Monday or Tuesday for the preceding week's work.

5 9.5 The claimants were provided with no contracts of employment or written particulars of employment. The First Claimant asked the respondent about a contract and the respondent suggested he might generate his own. The claimants were provided with no documentation regarding their respective entitlements to annual leave or the  
10 arrangements for taking annual leave. The respondent did not discuss the holiday leave year with them or how holiday hours or pay would be calculated.

9.6 In the week commencing 5 December 2022, the First Claimant worked 35 hours. The respondent did not pay him for these hours.

15 9.7 In the week commencing 5 December 2022, the Second Claimant worked 38 hours. The respondent did not pay him for these hours.

9.8 The respondent and the Second Claimant agree that, on the termination of his employment, he had accrued 24 hours' untaken holiday in the leave year which he had not taken. The respondent and  
20 the Second Claimant agree that he was not paid in lieu of these hours by the respondent when the employment terminated.

9.9 In the period from 1 May 2022 until his employment ended on 12 December 2022, the First Claimant agrees with the respondent that he took and was paid for 142 hours' holiday, as recorded in the  
25 respondent's spreadsheet. In the 52 weeks before the Claimant's employment terminated, he worked an average of 39.88 hours per week in accordance with the respondent's spreadsheet.

9.10 In the period from 1 May 2021 to 30 April 2022, the First Claimant agrees with the respondent that he took and was paid for 188 hours' holiday, as recorded in the respondent's spreadsheet. In the 52 weeks  
30

of the annual leave year commencing 1 May 2021, the First Claimant worked an average of 39.86 hours per week.

5 9.11 The respondent did not pay the First Claimant any sums in lieu of accrued untaken annual leave outstanding on the termination of his employment.

10 9.12 The First Claimant often asked for annual leave on specified dates and found that his request was not accommodated for the dates he had initially asked for. The respondent tended to grant leave at later dates, according to the demands of the business. Sometimes this might be between two and six weeks after the dates the First Claimant had originally requested. One occasion he specifically recalled was when he had asked for annual leave around 26 March 2022 to coincide with a family celebration. The respondent declined the request for a week's leave but permitted the week's holiday to be taken around 8  
15 April 2022. There were no other specific instances about which the First Claimant led evidence. There were no occasions when the First Claimant was not permitted the requested holiday at all; it was a question of the dates often being postponed to later than those he had requested.

## 20 **Observations on the evidence**

10. As it transpired, there was little if anything in dispute between the parties when it came to the relevant issues in the case. The First Claimant agreed with the hours of work and holiday attributed to him in the spreadsheet prepared with the respondent, with the exception that he disputed having been paid for 11  
25 hours' holiday in the week after his employment ended. The respondent accepted these eleven hours were not paid.

11. The First Claimant suggested that he had carried forward 78 hours into his final holiday year but when asked to elaborate on how he had calculated this, he advised he was unable to do so. He suggested it was based on the  
30 respondent's records of holiday taken, measured against an annual entitlement of 214 hours. I asked how he had arrived at the figure of 214 hours

and he said he was unsure in the absence of any contract of employment or paperwork about annual leave entitlement.

12. The respondent had produced no spreadsheet indicating hours worked or holidays taken and paid for the Second Claimant. Nor did the Second Claimant produce any records. However, the parties were in agreement that he was owed 24 hours of accrued untaken leave on termination which had not been paid by the respondent.
13. Nor was there any dispute by the respondent that the claimants had not been paid for the hours they had worked in the week commencing 5 December 2022. There was a slight discrepancy in that the respondent had recorded that the Second Claimant worked 37 hours in that week while his evidence was that he had worked 38 hours. However, the claimant was not challenged on this in cross examination though the respondent was reminded that the claimant should be asked about anything that was in dispute.
14. The respondent was upset about the manner in which the claimants ended the employment relationship including their failure to serve a notice period and their decision to work for a business in competition with the respondent's. The respondent was concerned that the claimants had initiated the venture before their employment terminated and that they may have been seeking to solicit customers of the respondent's business. I had explained to the respondent that, in the absence of any jurisdiction to hear a counter claim, these matters did not bear on the issues which I required to determine.

### **Relevant Law**

#### *Unauthorised Deductions from Wages*

15. Under the section 13 of the Employment Rights Act 1996 ("ERA"), a worker has the right not to suffer unauthorised deductions from his wages. Under section 23 of ERA, a worker may complain to an employment tribunal that an employer has made a deduction from his wages in contravention of section 13. Where a tribunal finds such a complaint well founded, it shall make a



declaration to that effect and order the employer to pay the amount of the deduction (section 24 ERA).

16. Under section 13, an employer cannot make any deductions from wages which are payable unless the deduction is required or authorised by a statutory provision (s.13(1)(a)) or a relevant provision of the worker's contract or where the worker has previously signified in writing their agreement or consent to the deduction (s.13(1)(b)). Section 14 sets out certain excepted deductions to which section 13 doesn't apply. None of the circumstances outlined in section 14 have any application in this case and are not, therefore, outlined in full.

*Holiday Pay and unauthorised deductions*

17. The Working Time Directive 2003/88/EC (WTD) was adopted in 1993 as a health and safety measure. The domestic implementation, the Working Time Regulations 1998 (WTR) came into effect in 1998. Under the WTR, workers are entitled to 5.6 weeks' annual leave. The right is made up of:
- a. A basic entitlement a minimum of four weeks' annual leave each year, implementing the right to annual leave under the WRD (referred to in this judgment as the 'Basic Entitlement'; and
  - b. An additional entitlement to 1.6 weeks' annual leave each year, which is a right under UK domestic legislation only ('Additional Entitlement').
18. The difference in the provenance of the entitlements means that the two types of leave sometimes require to be treated differently as decisions of the European Court of Justice will apply to the Basic Entitlement but not always to the Additional Entitlement.
19. Under the WTR, employees are entitled to accrued untaken holiday outstanding at the date of termination. A failure to pay in lieu of annual leave which has accrued on termination can be enforced by way of a claim for an unauthorised deduction from wages under section 13 of ERA.

20. There are restrictions on contracting out of the rights regarding annual leave under the WTR. Any agreement is void in so far as it purports to exclude or limit the operation of the respective legislation unless specified stringent conditions are satisfied (Reg 35).

5 21. A body of caselaw from the European Court of Justice has developed on the interpretation of the WTD and UK domestic caselaw gives a great deal of authoritative guidance on the purposive construction to be given to the WTR to achieve consistency with the Directive. Following Brexit, the approach to be taken in determining questions on the meaning, validity or effect of retained  
10 EU law in UK courts and tribunals depends on whether it has been modified by UK law (European Union (Withdrawal) Act 2018 section 6). Questions on the meaning of retained EU law which has not been modified by the UK are determined in accordance with relevant retained caselaw and principles, using a purposive interpretation where the meaning is unclear (taking into  
15 account the original purpose of the original underlying EU law, compatibility with the EU Treaties and the limits of EU competence). The UK has indicated a specific intention to retain the WTR as set out in the explanatory notes to the Withdrawal Act. The WTR must, therefore, subject to any future modification by Parliament, be interpreted purposively in a manner consistent  
20 with the ECJ's interpretation of the WTD, if possible.

22. Those parts of the WTR which are of most relevance to the issues are reproduced:

***Reg 2: Interpretation***

...

25 *“relevant agreement”, in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer;*

...

*“worker” means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

- (a) *a contract of employment; or*
- (b) *any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

10 **Reg 13: Entitlement to annual leave**

- (1) *Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.*

...

- (3) *A worker's leave year, for the purposes of this regulation, begins—*

- 15 (a) *on such date during the calendar year as may be provided for in a relevant agreement; or*
- (b) *where there are no provisions of a relevant agreement which apply—*

...

- 20 (ii) *if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.*

...

- 25 (5) *Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the*

*proportion of that leave year remaining on the date on which his employment begins.*

...

5 (9) *Leave to which a worker is entitled under this regulation may be taken in instalments, but—*

(a) *subject to the exception in paragraphs (10) and (11),] it may only be taken in the leave year in respect of which it is due, and*

10 (b) *it may not be replaced by a payment in lieu except where the worker's employment is terminated.*

15 (10) *Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the 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.*

20 (12) *An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.*

...

25 **Reg 13A: Entitlement to additional annual leave**

(1) *Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).*

(2) *The period of additional leave to which a worker is entitled under paragraph (1) is—*

...

(e) *in any leave year beginning on or after 1st April 2009, 1.6 weeks.*

5 (3) *The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.*

(4) *A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.*

10 (5) *Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.*

15 (6) *Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—*

(a) *the worker's employment is terminated; or*

20 (b) *the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or*

...

(7) *A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.*

25 ...

**Reg 14: Compensation related to entitlement to leave**

(1) *Paragraphs (1) to (4) of this regulation apply where —*

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

**(A x B) – C**

where—

**A** is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

**B** is the proportion of the worker's leave year which expired before the termination date, and

**C** is the period of leave taken by the worker between the start of the leave year and the termination date.

...

- 5 (5) *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.*

**Reg 15: Dates on which leave is taken**

- 10 (1) *A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).*

- (2) *A worker's employer may require the worker—*

(a) *to take leave to which the worker is entitled under regulation 13 or regulation 13A; or*

15 (b) *not to take such leave (subject, where it applies, to the requirement in regulation 13(12)),*

*on particular days, by giving notice to the worker in accordance with paragraph (3).*

- (3) *A notice under paragraph (1) or (2)—*

20 (a) *may relate to all or part of the leave to which a worker is entitled in a leave year;*

(b) *shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*

25 (c) *shall be given to the employer or, as the case may be, the worker before the relevant date.*

- (4) *The relevant date, for the purposes of paragraph (3), is the date—*

(a) *in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and*

5 (b) *in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.*

(5) *Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.*

10 **Reg 16: Payment in respect of periods of leave**

(1) *A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.*

15 (2) *Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) and the exception in paragraph (3A).*

(3) *The provisions referred to in paragraph (2) shall apply—*

(a) *as if references to the employee were references to the worker;*

20 (b) *as if references to the employee's contract of employment were references to the worker's contract;*

(c) *as if the calculation date were the first day of the period of leave in question; . . .*

(d) *as if the references to sections 227 and 228 did not apply;*

25 (e) *subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—*



- (i) *in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or*
- 5 (ii) *in any other case, 52; and*
- (f) *in any case where section 223(2) or 224(3) applies as if—*
- (i) *account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—*
- 10 (aa) *where the calculation date is the last day of a week, with that week, and*
- (bb) *otherwise, with the last complete week before the calculation date; and*
- (ii) *the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of*
- 15 *weeks of which account is taken*

...

- (3B) *For the purposes of paragraphs (3) and (3A) “week” means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.*
- 20

...

- (5) *Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.*
- 25

23. The provisions of ERA referred to in Reg 16 of WTR, so far as relevant, are reproduced:

**Chapter II A week's Pay**

...

5 **Employments with no normal working hours.**

- (1) *This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.*
- (2) *The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—*
- 10 (a) *where the calculation date is the last day of a week, with that week, and*
- (b) *otherwise, with the last complete week before the calculation date.*
- 15 (3) *In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.*
- 20 (4) *This section is subject to sections 227 and 228.*

*Carry forward of untaken annual leave into later holiday years*

24. Under Reg 13(9) of WTR, leave to which a worker is entitled may only be  
25 taken in the leave year in respect of which it is due. There are two Covid related exceptions which were introduced in March 2020 and are contained in R13(10) and R13(11). Where it was not reasonably practicable for the worker to take some or all of the leave as a result of the effects of coronavirus,

they shall be entitled to carry such untaken leave forward to the two leave years immediately following the leave year in which it was initially due.

25. There are other limited circumstances in which Basic Entitlement leave under the WTR can be carried forward. These exceptional circumstances have developed as a result of European caselaw. In its judgment in **Smith v Pimlico Plumbers** (Rev 1) [2022] EWCA Civ 70 (1 Feb 2022), the Court of Appeal provided a helpful appendix with a revised formulation of Regulations 13, 14 and 30 of the WTR to take into account the Court's judgment along with earlier caselaw as to how these regulations must be read to be compatible with Article 7 of the Working Time Directive and related ECJ decisions. The reformulation applies to the Basic Entitlement of four weeks. The Court has no power to draft regulations, as it acknowledged, but it proposed the formulation which it considers best reflects the relevant judgments. Those judgments bind this Tribunal. The Court added the following sub paragraphs to Regulation 13 of WTR:

(14) *Where in any leave year a worker was unable or unwilling to take some or all of the leave to which the worker was entitled under this regulation because he was on sick leave, the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (15).*

(15) *Leave to which paragraph (14) applies may be carried forward and taken in the period of 18 months immediately following the leave year in respect of which it was due.*

(16) *Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years.*

### **Reason for termination of the employment relationship**

26. In determining an employee's entitlement to payment in lieu of accrued outstanding holiday on termination, the reason for the termination is not

relevant. Article 7(2) of the WTD, as interpreted by the European Court of Justice, lays down no condition for entitlement other than that the employment relationship has ended and that the worker has not taken all annual leave to which he was entitled. The reason for which the relationship has ended is not relevant and nor is the fact that a worker terminates the relationship at his own request (**Maschek v Magistratsdirektion Der Stadt Wien**, ECJ [2016] IRLR 801).

*Failure to provide a written statement of employment particulars*

27. Section 38 of the Employment Act 2002 provides that where a tribunal finds in favour of a claimant in respect of a claim to which the section applies and the respondent was in breach of his duty when the proceedings were begun to provide a statement of particulars of employment or of changes to the particulars, the Tribunal must increase the award by two weeks' pay and may increase it by four weeks' pay. This requirement applies unless there are exceptional circumstances which would make an award or increase unjust (s.38(5)). Section 38 applies to claims for unauthorised deductions from wages, among other types of 'substantive' claim.

**Submissions**

28. The claimants both gave brief submissions that they would like to be paid what they were owed in terms of unpaid wages and holidays.

29. The respondent observed that he had not denied not having paid the claimants for their final week of work. However, he contended that this omission had to be considered in an overall context. He suggested the claimants had damaged his business and that he had lost thousands of pounds because of them.

**Discussion and Decision**

30. The respondent's concerns about the manner in which the claimant had ended their employment and the decision to set up a competitive business is not relevant to the issues for determination. Nor was the claimant's accepted failure to give prior notice of their resignation.

31. There was no evidence that the deductions made from the claimant's final pay in respect of the week worked commencing 5 December 2022 was authorised by a statutory provision or a relevant provision of the worker's contract or that the claimants had previously signified in writing their agreement or consent to the deduction.
32. The respondent admitted the claimants had not been paid and that they had worked the week in question.
33. The respondent made an unauthorised deduction from the First Claimant's wages in the amount of £559.30 gross (£15.98 x 35 hours).
34. The respondent made an unauthorised deduction from the Second Claimant's wages in the amount of £418 gross (£11 x 38 hours).

*What were the claimants' annual leave years?*

35. The WTR prescribes that an employee's leave year begins on the date of commencement of his employment or as such date as may be provided for in a 'relevant agreement' (Reg 13(3)).
36. There was no relevant agreement providing for a different leave year for either claimant. A 'relevant agreement' includes any agreement in writing which is legally enforceable as between the worker and his employer'. There was no such written agreement (nor indeed any verbal agreement) between the parties on the question of the leave year. The First Claimant's leave year, therefore, began on 1 May and ran to 30 April every year. The Second Claimant's leave year, therefore, ran from 1 August to 31 July each year (R13(3)(b)(ii)).

*How much of the leave year had passed when the claimant's employment ended?*

37. The claimants' employment ended on 12 December 2022.
38. It is unnecessary to calculate the balance of the Second Claimant's annual leave year since the outstanding entitlement on termination is a matter of agreement between the Second Claimant and the respondent.

39. With regard to the First Claimant, there is no agreement about what was outstanding. The First Claimant's final annual leave year began on 1 May 2022. 7.39 months of that leave year had passed when the First Claimant's employment terminated. This equates to 0.62 of the full leave year (7.39/12).  
5 This in turn equates to a prorated entitlement of 3.45 weeks (0.62 x 5.6 weeks' annual entitlement).

*How much leave had accrued for the year by that date?*

40. The Second Claimant and the respondent agreed that 24 hours had accrued in the leave year which were untaken at the time of the termination of his  
10 employment on 12 December 2022.

41. The First Claimant worked, on average, 39.88 hours per week in the 52 weeks preceding the termination of his employment. By the time his employment terminated, he had accrued 3.45 weeks' leave entitlement, equating to 138 hours.

15 *How much paid leave had the claimant taken in the year?*

42. The First Claimant had taken and been paid for 142 hours' holiday, as recorded in the respondent's spreadsheet. He was accordingly owed no holiday entitlement accrued in the leave year in which his employment terminated and had taken slightly more holiday than that which had accrued  
20 in that year to the date of termination (by circa 4 hours).

43. For the Second Claimant, since the outstanding entitlement is a matter of agreement, it is unnecessary to consider this issue.

*Were any days carried over from previous holiday years?*

44. The Second Claimant makes no contention that any days were carried over  
25 from a previous leave year.

45. The First Claimant asserts that leave carried forward from leave year 21/22 into his final leave year (22/23). He suggested the figure may be 78 hours but was uncertain how this might be calculated.

46. In the period from 1 May 2021 to 30 April 2022, the First Claimant took and was paid for 188 hours' holiday, as recorded in the respondent's spreadsheet. In that annual leave year, the First Claimant worked an average of 39.86 hours per week. His annual entitlement was 5.6 weeks, equating to 223.22 hours. He had, therefore, taken less than his annual entitlement for the 21/22 leave year by 35.22 hours.
47. However, the general rule under Reg 13(9) of WTR, is that leave to which a worker is entitled may only be taken in the leave year in respect of which it is due. Reg 14 provides that where a worker's employment is terminated in the course of a leave year, the employer shall make payment in lieu of the accrued untaken leave in that particular leave year, calculated pro rata, on termination. As implemented, it did not provide for carry forward.
48. An exception was enacted by R13(10) and (11) as a result of Covid pressures. However, there is no evidence before me that it was not reasonably practicable for the First Claimant to take all his annual leave in 21/22 because of the effects of coronavirus.
49. The other exceptions where carry over may be permitted, as developed through ECJ caselaw and listed in the Appendix to **Smith v Pimlico**, apply only to the Basic Entitlement of four weeks under the WTR and not to the Additional Entitlement of 1.6 weeks. The claimant had taken more than four weeks' leave in leave year 21/22, so – proceeding on the assumption that he is deemed to have taken his Basic Entitlement first, there is no scope for carry forward.
50. However, even if that assumption is incorrect and he had some proportion of deemed Basic Entitlement to carry forward, there was no evidence that the claimant was unable or unwilling to take this leave because he was on sick leave at the material times.
51. I considered whether the respondent had failed to recognise the First Claimant's right to paid annual leave in leave year 21/22 and whether it had been unable to show that it provided a facility for the taking of such leave. Even if it is necessary to consider this question because the First Claimant

should properly be deemed to have some proportion of his Basic Entitlement outstanding at the end of the leave year ending 30 April 2022, I would find on balance that the respondent did recognise the right to paid leave and did provide a facility to take it. It is not disputed that the First Claimant took more than 4.6 weeks' leave between 1 May 2021 and 30 April 2022. It is not disputed that, in his final leave year, he took all, if not more than, his pro-rated annual leave entitlement under the WTR. I considered carefully the claimant's evidence about often not being given his first choice of dates. However, he accepted that the leave was always eventually accommodated and indeed accommodated, at the latest, within 6 weeks of his preferred dates. That approach appeared to me to be permissible under Regulation 15 of the WTR.

52. There was an occasion towards the end of the 21/22 leave year (in March 2022) when the First Claimant's requested dates were refused and he was permitted instead to take holiday a couple of weeks later (around 8 April 2022). However, the claimant was still permitted to take the requested holiday within the relevant leave year. There was no evidence that the claimant had asked to but been refused the opportunity to take his final 35.2 hours' holiday in leave year 21/22. He had never requested to take the leave.

53. In the circumstances, I find that no leave was carried forward from leave year 21/22 into the First Claimant's final leave year.

*How many weeks remain unpaid?*

54. For the First Claimant, no accrued untaken holiday remains outstanding and unpaid.

55. For the Second Claimant, 24 hours' accrued untaken annual leave remained outstanding and no payment in lieu has been made.

*What is the relevant rate of pay?*

56. For the Second Claimant, the relevant rate of pay is £11 per hour. A payment in lieu in the sum of £264 gross (24 hours x £11 per hour) fell to be made on or about 12 December 2022 and was deducted from the Second Claimant's wages.



*Failure to provide a written statement of employment particulars*

57. When these proceedings were begun, the respondent was in breach of its duty to give the claimants a written statement of employment particulars. The claimants have both succeeded in claims for unauthorised deductions from wages.
58. A week's pay for the First Claimant for these particular purposes is 39.92 hours x £15.98 per hour = £637.92. This is based on the average gross pay in the twelve weeks preceding termination in which the First Claimant worked. However, a week's pay is capped for these purposes at £571. Therefore, two weeks' pay for the First Claimant for present purposes is £571 x 2 = £1,142.
59. A week's pay for the Second Claimant I have found, on the balance of probabilities, to be 38 hours x £11 per hour (based on the only pay slip and evidence available for the first Claimant). This equates to £418.
60. There are no exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002. I therefore must award two weeks' pay to each claimant. I decline to award four weeks' pay. In declining to do so, I took into consideration the undisputed failure of the claimants to provide the respondent with the statutory minimum notice of the termination of their employment.

**Conclusion**

61. The respondent has made unauthorised deductions from the claimants' wages on the termination of their employment by failing to pay them for the hours they had worked in the week commencing 5 December 2022. The respondent deducted £559.30 (£15.98 per hour x 35 hours) from the wages payable to the First Claimant. The respondent deducted £418 gross (£11 per hour x 38 hours) from the wages payable to the Second Claimant.
62. The respondent also made an unauthorised deduction from the wages of the Second Claimant in respect of the failure to make a payment in lieu of his accrued untaken holiday entitlement of 24 hours outstanding on the

termination of his employment. The respondent therefore made a further deduction from the wages of the Second Claimant in the sum of £264 gross (24 hours x £11 per hour).

- 5 63. The respondent has also been ordered to pay two weeks' pay (calculated in accordance with the legislation) to each claimant in respect of his failure to give the claimants a written statement of employment particulars.

10 **Employment Judge: L Murphy**  
**Date of Judgment: 22 March 2023**  
**Entered in register: 28 March 2023**  
**and copied to parties**

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