



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Jogender Singh

**Respondents:**

1. Birkramjit Singh
2. Manjit Singh
3. Jatinder Kaur
4. Gurmuk Singh Das
5. Gurdiyal Singh
6. Balvinder Kaur
7. Dara Singh

**Members of the Management Committee of the Sri Guru Nanak Prakash Singh Sabha (the Bristol Sikh Temple) (an unincorporated association)**

**Heard at:** Bristol

**On:** 13, 14 and 15 May 2023

**Before:** Employment Judge Oliver

## Representation

**Claimant:** Miss Crawshay-Williams, counsel

**Respondent:** Mr Chehal, consultant

# RESERVED JUDGMENT

1. The claims for unauthorised deduction from wages succeed. The Respondents failed to pay the Claimant the following:
  - a. Payment for all hours worked at the rate of the national minimum wage.
  - b. Payment for accrued but untaken holiday on termination of employment.
2. The exact sums deducted and amounts payable to the Claimant by the Respondents will be determined as a separate remedy hearing. This has been listed for one day to be heard at the Bristol Employment Tribunal on **27 July 2023** commencing at 10am.

# REASONS

1. This is a claim for unauthorised deduction from wages (failure to pay the national minimum wage), and failure to pay holiday pay. Claims for unfair dismissal and breach of contract were dismissed by EJ Livesey following a Preliminary Hearing held on 19 to 21 July 2022 when the Claimant was found to be a worker but not an employee.

## Issues

2. There was a Case Management Preliminary Hearing on 24 February 2022. The remaining issues were agreed as follows:

1. **Unauthorised deductions (Part II of the Employment Rights Act 1996)**

1.1 Did the Respondents make unauthorised deductions from the Claimant's wages and if so how much was deducted? In particular, did the Respondents fail to pay the national minimum wage?

1.2 Was the Claimant engaged in 'salaried work', 'time work' or 'unmeasured work' for the purposes of the National Minimum Wage Regulations 2015?

1.3 How much is the Claimant owed?

2. **Holiday Pay (Working Time Regulations 1998)**

2.1 Did the Respondents fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?

2.2 What was the Claimant's leave year?

2.3 How much of the leave year had passed when the Claimant's employment ended?

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

2.5 How much paid leave had the Claimant taken in the year?

2.6 Were any days carried over from previous holiday years?

2.7 How many days remain unpaid?

2.8 What is the relevant daily rate of pay?

## Evidence

3. There was an agreed bundle of documents. I read all of the typed documents that were provided in English. The bundle also contained a large number of handwritten documents recording various payments, in both Punjabi

and translated into English. I looked at these pages if referred to them by the parties during the hearing.

4. I had written witness statements and read them before the start of the hearing.

5. For the Claimant, I heard evidence from the Claimant himself and from Harjit Singh, who later worked for the Respondents in the same role.

6. For the Respondent, I heard evidence from Manjit Singh, Bikramjit Singh, and Satpal Singh. I also started to hear evidence from Gurmukh Singh, who was head Granthi of Chelsea Road Temple in Bristol. However, during cross-examination it transpired that large parts of his written statement were not true, and he was withdrawn as a witness. I also had a written statement from Gurdiyall Singh, which I have not taken into account for reasons explained below (paragraph 18).

7. All witnesses apart from Bikramjit Singh gave evidence through a Punjabi interpreter.

8. I had written and oral submissions from both parties, and I thank the representatives for preparing the written submissions to assist with making my reserved decision.

## **Facts**

9. I have considered all of the evidence and submissions, and find the facts necessary to decide the issues in the case.

10. The Respondents comprise the Management Committee responsible for the running of the Bristol Sikh Temple, or Gurdwara, in Fishponds, Bristol. They were members of the Committee from September 2020 at least until the end of the Claimant's engagement. They were responsible for dealing with the day-to-day management of the Temple.

11. The Claimant worked for the Respondents between 30 August 2017 and 25 November 2020. He presented his claim on 3 March 2021. He is a qualified Giani (Sikh Priest – minister of Sikh religion), having completed 5 years of training in India. He worked as a Giani at Bristol Sikh Temple.

## **Credibility**

12. This case involves a stark conflict of evidence. The Claimant says he worked for 85 hours a week, while the Respondents say he worked for no more than 20 hours a week on average. I have made an overall assessment of the credibility of the witnesses on both sides to assist with my findings of fact.

13. **The Claimant.** I found his evidence to be contradictory at times, and he tended to give different answers to the same question. A number of times his oral evidence was different from his witness statement on relevant points. For example, his statement says he would travel to Birmingham for two days every second week to see his family, while in oral evidence he said he would actually

leave on Sunday and return on Wednesday. Similarly, his statement says that during the Covid-19 pandemic he continued working as normal except there were fewer special ceremonies of events, while in oral evidence he confirmed that the Temple was completely closed between late March and mid-June. This type of discrepancy makes a significant difference to the number of hours he is claiming to have worked.

14. **The Claimant's witness.** Harjit Singh worked for the Respondent as a Giani from 20 September 2021 until 14 March 2022. His account of the way he was required to work in practice substantially matches with the account given by the Claimant. His oral evidence was consistent. I have no reason to doubt his credibility. However, as he worked for the Respondent some time after the Claimant, he was not able to provide direct evidence about the Claimant's working hours.

15. **The Respondents' witnesses.** Gurmukh Singh was withdrawn as a witness part-way through cross-examination because, despite having confirmed that his statement was true, he went on to say a lot of it was not correct. These were not minor errors, but went to the heart of why he was being called as a witness at all. For example, the written statement says he was friends with the Claimant, they would spend a lot of time together, and they frequently went to shopping centres together and for long walks in the local park. His oral evidence was that he met the Claimant once in the park and might have met him once or twice in the temple. The statement also says that they worked together on many occasions, while his oral evidence was that he never worked with the Claimant at all. I did not receive a clear explanation for how or why this happened. Gurmukh Singh does not read English. At one point he said a part of the statement was not as dictated by him. This raises a serious concern about how witness statements were prepared for witnesses who are unable to read English.

16. It was also striking that the wording of many paragraphs in other witness statements was very similar or identical. The wording for the 17-paragraph statements for Manjit Singh and Bikramjit Singh was identical throughout, apart from two minor changes. Bikramjit Singh is the only witness who has English as a first language. He confirmed that the wording in his own statement was his. Manjit Singh said he did not type the statement himself but these were his words, but he was not able to explain why the wording in his statement was identical to that in Bikramjit Singh's statement. The majority of the paragraphs in Satpal Singh's statement were also identical to the wording in both Bikramjit Singh's and Manjit Singh's statements. This was not limited to identical facts. It included identical colloquial phrases and expressions of opinion such as, "*He would not refuse their work generally as he had so much time on his hands*", and "*We expect that there's a significant amount of undeclared income by the Claimant through other income and I am not sure how this may translate or benefit him through state benefits that he may or may not be claiming*".

17. I asked Satpal Singh how his witness statement had been prepared for the hearing. He said that he spoke to the vice treasurer on the management committee in Punjabi. The vice treasurer typed up a statement in English for him. There was no typed Punjabi version of his statement. He said that the statement being used in the hearing was the same as the one that had been typed by the vice treasurer. He insisted that these were his words in the statement. He was

not able to explain why other statements contained identical wording.

18. It is entirely implausible that three witnesses could have independently produced statements with identical wording. These witnesses cannot have been giving be a true explanation of how the statements were prepared. I have also taken into account what happened with Gurmukh Singh's statement, and the fact he was withdrawn as a witness when it transpired that his written statement was not correct in material respects. I am unable to have any confidence that any of the information in the Respondent's written statements is either in their own words or is correct. For this reason I have given no weight to Gurdiyul Singh's statement, because it was only provided in writing and he did not give oral evidence.

19. Two other incidents are relied on by the Claimant's representative in relation to credibility of the Respondents.

20. Firstly, she submits that all of Manjit Singh's oral evidence is unreliable because he had a number of papers with him while giving evidence, and a version of his witness statement with a handwritten note in Punjabi. Unfortunately, due to the sight lines of the Tribunal room I was unable to see the desk being used by the witnesses. The additional paperwork was noticed by the Claimant's representative part-way through Manjit Singh's evidence. She says he was reading from these notes. The Respondents' representative said he was not aware of this (although he was seated closest to the witness table). Manjit Singh said he had the papers in case they needed to be shown to the Tribunal. I did not receive any explanation for the handwritten note on the statement he was using (which was noticed later). I do not agree that this incident alone is sufficient to discredit all of his oral evidence. However, it is another example of an unprofessional approach by the Respondents towards how they presented their evidence. It further damages their credibility.

21. Secondly, she submits that the Respondents failed to disclose an events diary for the Temple which is relevant to the proceedings. The Claimant had requested this before the hearing and had been told it would be disclosed. The Respondents' witnesses confirmed that this diary does exist, and Satpal Singh said it would record the fee paid to the Giani for special events. It appears that this diary is directly relevant to the issues in the proceedings – particularly if it records payments made to the Claimant and shows how many events he was involved with in his role as Giani. The Respondent provided no explanation for why it had not been disclosed. The Claimant's representative submits I should draw an inference that the Respondents had something to hide. I agree that this is another example of conduct that damages the Respondents' credibility.

22. This is a significant number of serious issues with the Respondents' credibility. Taken together, they lead me to prefer the Claimant's evidence on issues where the parties have given conflicting versions of events. I have not accepted all of the Claimant's evidence if there is a reason other than the Respondents' evidence to find that something different happened.

## **Findings of fact**

23. A number of relevant findings of fact were made by EJ Livesey in his Preliminary Hearing judgment on whether the Claimant was an employee or worker. Some of these findings of fact were central to EJ Livesey's decision and I should not depart from them. I do not consider myself to be bound by other findings of fact that were not central to the earlier decision, if there is a reason to depart from them due to additional evidence presented at this hearing. However, I have not departed from these findings of fact where there is no reason to do so.

24. The Claimant received free accommodation above the Temple throughout his time working there. This included all bills. He was paid a basic flat rate of £200 per week in cash.

25. The Claimant received tips from attendees at Sunday services and special ceremonies or events. These were collected by the Respondents and given to the Claimant at the end of the week in cash. He additionally received payments directly from individuals for smaller services such as saying of prayers.

26. The Claimant also received set payments for his involvement in special ceremonies or events, such as weddings. There was no record of these payments and when they were made. The Committee of the Temple charged a fixed fee for these ceremonies and then paid a fixed amount to the Claimant, which he says would be a fixed price of between £50 and £200 depending on the event. The payments came from the families or individuals who had requested the special event, but were collected by the Respondents and the fixed fee was then paid to the Claimant.

27. The Claimant did not have a written contract of employment. There is no written record of the hours that the Claimant was expected to work, or any written record kept by the Respondents of the hours that he actually worked. The Claimant's evidence was that there was no agreement with him that he should work for only 20 hours a week, or any agreement at all about his hours of work. The Respondents did not provide any evidence about a specific agreement on hours of work. I have seen some pay receipts from 13 September 2020 until the end of the Claimant's employment which record weekly wage payments of £200 and, in some but not all cases, hours ranging from 14 to 19. This does not give a clear record of actual hours worked. The Claimant signed these receipts, but says he cannot read English and so did not pay attention to the hours recorded on some of the documents.

28. **Usual hours of work.** The Claimant's evidence on his hours of work was as follows. The Claimant's case is that he was on duty all day from 4.30am to 7.30pm when the Temple was closed, and sometimes later if members of the congregation were still present. The Claimant says he was responsible for opening and closing the Temple each day, leading or contributing to special ceremonies/events hosted by the local Sikh community or in peoples' homes, keeping the Temple clean and tidy, and generally 'manning' the Temple during opening hours.

29. The Claimant described a typical day as follows. He would wake at 4am, prepare the sacred food offering at 4.30am, and open the Temple at 5am ready for regular attendees who typically started arriving at 5.30am. He had to deliver

Nitnem (a series of five prayers), which took around 1 hour. He would also deliver Hukamnama (a personal religious reading) for attendees on request, typically between 1 and 3 each morning. He would then do some cleaning. From 9.30, things were much quieter. He would generally go for a walk for up to an hour and a half. However, he would return to the Temple to host visitors and deliver prayer readings as required. He says that his telephone number was visible at the entrance to the Temple so he could be contacted by visitors. He also regarded himself as being 'on call' if he left the Temple to do other errands during the day. During the day he would welcome visitors at the Temple and assist them if required, and clean during quiet periods (including washing clothes from the prayer hall and floor sheets). There was also what he called 'passive waiting time' when his active attention was not required, when he would sometimes spend time in his room or go out for another walk, but would typically remain in the Temple. In the evening the Claimant delivered evening prayers for 20-25 minutes before closing the Temple at around 7.30. On Sundays there was a Sunday service from 9am to 1.30pm, and he was busy throughout this time in addition to his usual duties.

30. The Respondents disputed this version of the Claimant's working hours. Their case is that the Claimant's duties were: (a) performing the morning prayer (which takes around an hour) between the hours of 5 and 7am, (b) performing the evening prayer between 5.30 and 6.30pm, and (c) taking part in the Sunday Service between 11am and 2pm. Outside these duties, they say that the Claimant was free to do whatever he wanted. They deny that the Claimant was on call or required to host visitors to the Temple during the day. They say his telephone number was not available outside the Temple, although they would call him if there was a visitor to the Temple and would give out his number if people asked for it. They say he was free to accept or decline bookings for special ceremonies, and he was not required to return to the Temple to host visitors or provide prayer readings for them unless he wanted to.

31. I asked each of the Respondent witnesses whether they were saying they would have been happy for the Claimant to go out all day every day, and never respond to requests to return to the Temple to assist visitors or take part in special ceremonies. They all said this was up to the Claimant – he would be losing out on payment for these extra services, but this was his choice. I find this implausible. I accept the Respondents' evidence that the Claimant could refuse individual bookings (meaning they would book a different Giani), or he could arrange a different time for delivering a prayer reading for a visitor if he was out. However, I do not accept that the Respondents would have accepted a Temple priest who was never in the Temple except for the short periods of required prayer, never responded to requests for individual prayer services, and always refused to take part in special ceremonies.

32. The Respondents also said that the Claimant carried out work at three other Temples in Bristol, and (in identical wording in the statements), "*He would not refuse their work generally as he had so much time on his hands*". The Claimant denies this. His evidence was that he worked at Chelsea Road Temple once, for two nights – 8pm to 10pm the first night, and then 10pm to 12am and 2am to 4am the second night. His evidence on the point was clear. He denied ever working at other Temples. The Respondents had called Gurmukh Singh, who worked at the Chelsea Road Temple, to corroborate the fact the Claimant worked

elsewhere. However, before he was withdrawn as a witness, Gurmukh Singh said he had never worked with the Claimant. I prefer the Claimant's version of events on this point.

33. On the balance of probabilities, I accept the Claimant's evidence about the nature and extent of his duties. This is largely due to my assessment of credibility as discussed above, and the implausibility of the Respondent's position that the Claimant's duties were as limited as they have described. I also note that the Claimant's position is largely corroborated by the evidence from Harjit Singh. Although he worked at the Temple after the Claimant, his evidence was clear about the expectation that a Giani would be available during the day to assist visitors to the Temple if required. The same conclusion was also reached by EJ Livesey at the Preliminary Hearing, who found that the Claimant, "*was engaged to 'man' the Temple, to have been a presence who was able to facilitate its use as a place of faith and prayer. He was expected to answer the door to congregational members during the day, to have facilitated access to the Temple and to have tended to the needs of anyone who called upon him to do so*". On the evidence I have heard there is no reason to depart from this finding. Arguably, this finding by EJ Livesey was central to his decision that the Claimant was a worker and so I should not depart from it. In any event, I have reached the same conclusion as EJ Livesey on the evidence I have heard.

34. There is one aspect of the Claimant's evidence that I do not accept. His written statement says he had to ask for permission from the Respondents whenever he went for a walk, or whenever he left the Temple during opening hours. His oral evidence on this point was very inconsistent, and at one point he said he did not need permission for walks or shopping on an ordinary day. The Respondents said that the Claimant did need to tell them if he was going away, such as to visit his family in Birmingham, but did not need to do this for local absences from the Temple. On balance of probabilities, I find that the Claimant did not require permission to leave the Temple during opening hours if he was remaining in the local area.

35. The Claimant also took part in special ceremonies and events, including weddings, funerals, birthdays, prayer services, baptisms, events to mark festivals in the Sikh calendar. These events could last from part of a day to two days, and he was paid a fixed fee by the Respondent for his participation. As noted above, the events diary has not been disclosed by the Respondents. I have seen no record of these events. The Claimant says that these events were usually organised by the Respondents and typically occurred once or twice a week most weeks.

36. The Claimant would visit his family in Birmingham every other week. His written statement said this was for two days. His oral evidence was that he would leave at 3 or 4pm on Sunday, and return between 12 and 1pm on Wednesday.

37. ***During the Covid-19 pandemic.*** All places of worship were shut during the first lockdown for Covid-19 starting on 24 March 2020. This applied to the Temple. The parties did not have exact dates for the closure. The Claimant confirmed in oral evidence that it was closed in April, May and some of June. There were also periods when it was open for private prayer only. This would



inevitably have affected the amount of work he was required to do. He continued to be paid throughout this time and was never placed on furlough.

38. I find it surprising that the Respondents did not address this issue in their witness evidence as the pandemic spanned some eight months of the Claimant's employment, apart from saying he was paid £150 per week during pandemic (which oddly contradicts the Claimant who says he was paid £200 throughout). As neither party had precise dates, the representatives agreed that I could take note of the lockdown dates and rules that are given on government websites. Places of worship were required to close altogether between 24 March and 14 June 2020. They reopened for private individual prayer only on 15 June, and for public communal worship on 4 July 2020. They were required to close again on 5 November 2020 except for private individual prayer. The Respondents' witnesses confirmed that they would have followed the government's rules.

39. The Claimant's written statement suggests that his duties were the same during the Covid-19 pandemic, except there were not special ceremonies or events. In oral evidence he accepted that the Temple was closed from late March until mid-June, which meant there were no visitors to host or give prayer readings to, and there were no Sunday services. He confirmed that during this time he would do all the required prayers, but there was no need for him to be available for people to come in and pray as nobody was allowed in. He said that he was still carrying out 3 to 4 hours of cleaning/housekeeping each day, but I find this implausible on the basis that the Temple was shut to all visitors. Once the Temple was open for private prayers with social distancing, he said people were not visiting the Temple as much, and would ring the bell only once or twice a day.

40. **Other matters.** The Respondents raised points about the Claimant selling clothes at the Temple, claiming benefits, and completing tax returns which did not show his income. I note that it appears the Claimant was paid entirely in cash and the tax returns I have seen in the bundle record very little income. However, it is not necessary for me to make findings on these points in order to decide the issues in the case.

## **Applicable law**

41. The applicable law is section 13 of the Employment Rights Act 1996 ("ERA"). There will be a deduction from wages where the total amount of wages paid to a worker on any occasion are less than the total amount properly payable to the worker on that occasion. "Properly payable" means a legal entitlement. This is not necessarily a contractual entitlement, but generally the tribunal will be looking for terms in the contract in relation to wages. Tribunals do have jurisdiction to construe the terms of the contract for this purpose.

42. Under sections 23(4A) and (4B) of the ERA, there is a two-year limit on the amount that can be awarded for most types of claim for unauthorised deduction from wages – "*An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*" (section 23(4A)).

43. There will be an unauthorised deduction from wages if there has been a failure to pay the national minimum wage for work done ("NMW"). The National Minimum Wage Act 1998 ("NMWA") section 1(1) provides that - "*a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage*". The NMW applies to all workers.

44. There is a reversal of the burden of proof in NMW claims for unauthorised deduction from wages (section 28(2) NMWA):

(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)...*

*...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.*

45. Regulation 59 of the National Minimum Wage Regulations 2015 ("NMWR") imposes a duty on employers to keep records that are sufficient to establish that they are remunerating the worker at a rate at least equal to the national minimum wage.

46. Tips do not form part of remuneration for the purposes of the NMW (regulation 10(m) NMWR). This is defined as, "*payments paid by the employer to the worker representing amounts paid by customers by way of a service charge, tip, gratuity or cover charge*".

47. There are various types of work under the NMWR. These include:

- a. Salaried hours work (regulation 21(2)-(5) NMWR) – where a worker is paid under their contract for an ascertainable basic number of hours per year.
- b. Time work (regulation 30 NMWR) – where the worker is paid solely by reference to the length of time that they work, or according to output.
- c. Unmeasured work (regulation 44 NMWR) – any other work that does not fall into one of the other categories of types of work. For unmeasured work, the hours of work in a pay reference period are "*the total number of hours...which are worked in that period*" (regulation 45(a)) (or "*treated as worked*" in relation to training and travel time under regulations 46 and 47).

48. There are some specific provisions about on call and standby time for time work, but these don't apply to unmeasured work. The issue of what counts as hours "worked" for the purposes of on-call time was considered by the Supreme Court in **Uber BV and others v Aslam and others** [2021] IRLR 407. This case concerned the status of Uber taxi drivers. The Employment Tribunal had found that Uber drivers were carrying out unmeasured work, and they were "working" under a worker's contract whenever they (a) had the Uber app switched on, (b) were within the territory in which they were authorised to use the app, and (c) were ready and willing to accept trips. The Supreme Court had no grounds for

interfering with the decision that this was unmeasured work. They also found that the Tribunal was justified in finding that “*all time spent by a driver working under a worker's contract with Uber London, including time spent ‘on duty’ logged onto the Uber app in London available to accept a trip request, is “working time...”*”. This specific finding was made in the context of working time under the Working Time Regulations rather than the NMWR, but the decision goes on to uphold the Tribunal’s finding on unmeasured work and there is nothing to suggest the test for hours worked would be different for the purposes of payment of the NMW. The Court also noted that, “*the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work*” (Lord Leggatt paragraph 126).

49. **Holiday pay.** A worker is entitled to payment for accrued but untaken holiday on termination of employment (regulation 14 of the Working Time Regulations 1998, “WTR”). Where no relevant agreement applies, the calculation is: **(A x B) - C**, where **A** is the period of leave to which the worker is entitled, **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.

50. A worker is entitled to 5.6 weeks’ leave per year, at the rate of a week’s pay. This is split into 4 weeks of leave under regulation 13(1) WTR (which is derived from the 4 weeks required by the Working Time Directive), and an additional 1.6 weeks of leave under regulation 13A WTR. For workers who do not have normal working hours, the amount of a week’s pay is the amount of the employee’s average weekly remuneration in the period of 52 weeks ending with the calculation date (section 224 ERA, as amended from 6 April 2020 by regulation 16(3)(e) WTR).

51. In most cases annual leave can only be taken in the leave year in which it is due (regulation 13(9)(a) WTR in relation to 4 weeks of leave under regulation 13(1)). However, the right to paid annual leave can carry over indefinitely where an employer refuses to allow a worker to take paid leave.

52. In **King v Sash Window Workshop Ltd** (C-214/16) EU:C:2017:914, the European Court of Justice held that, if a worker had not exercised their right to paid holiday because the employer refused to provide holiday pay, they should be permitted to carry over their paid holiday rights until termination of employment. The Court also held that it was irrelevant whether or not the worker had made requests for annual leave. This principle was followed by the Court of Appeal in **Smith v Pimlico Plumbers** [2022] ICR 818, where the claimant had taken holiday but not been paid for it. As stated by Simler LJ (paragraph 102), “*A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.*”

53. These decisions are based on the requirements of the Working Time

Directive, and so only apply to the 4 weeks of leave under regulation 13(1) WTR. Regulation 13(9)(a) can be disapplied in these circumstances in order to reflect the requirements of EU law. Although this case was brought after the UK had withdrawn from the EU, the European Union (Withdrawal) Act provides that the supremacy principle of EU law continues to apply on or after 31 December 2020 (“IP completion day”) so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day (section 5(2)).

## Conclusions

54. My conclusions are as follows, taking the issues in turn.

### Deduction from wages

55. The Respondents have the burden of showing that a worker was paid the NMW. The Tribunal’s task here is illustrated by **Ajayi v Abu (No 2)** [2018] IRLR 1028, at paragraphs 97 to 98, where the High Court determined the claimant’s claim for underpayment of the NMW. Her Honour Judge Hampton (sitting as a High Court Judge) held:

*“Section 28(3) of the 1998 Act provides that where in civil proceedings a person seeks to recover on a claim in contract an amount described as additional remuneration in section 17(1) (that is, the underpayment of the national minimum wage as calculated under that section) it is presumed for the purpose of the proceedings that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established. Accordingly, the burden of proof of the amounts the Claimant was paid and the hours for which she was paid rests on the Defendants. The Defendants had a statutory duty to maintain records under section 9 of the 1998 Act and the regulations made under that Act. They have failed to do so....Given the lack of any reliable documentation or precise evidence as to the hours the Claimant worked and the precise amounts she was paid, it is impossible to make a precise calculation of the amount to which she is entitled under the 1998 Act following the Master’s judgment. The court can only do its best using the material which is available.” [emphasis added]*

56. The most difficult part of my task is to assess the hours that the Claimant worked at different times during the two years prior to dismissal. I have no documentary evidence at all, apart from some pay receipts from September 2020 onwards which in some cases note a number of hours. I have general oral evidence from the parties about the tasks the Claimant did during the opening hours of the Temple, which differs widely between the parties. As noted in **Ajayi v Abu**, this will inevitably be an inexact calculation, and all I can do is my best based on the material available. I bear in mind that the burden of proof in NMW cases, meaning it is presumed that the Claimant was paid less than the NMW unless the contrary is established. I have also done my best to be fair to all parties based on the evidence available to me and my assessments of witness credibility.

57. **Was the Claimant engaged in ‘salaried work’, ‘time work’ or ‘unmeasured work’ for the purposes of the National Minimum Wage**

**Regulations 2015?** I start with this issue as it is relevant to how time spent 'on call' should be treated. I find that the Claimant was engaged in unmeasured work.

- a. The Claimant was paid a flat rate of £200 per week for his general duties, plus fixed fees for work on specific ceremonies/events.
- b. This was not salaried work, because the Claimant did not have an ascertainable basic number of hours per year. There was no written or oral agreement about his hours of work, and the Respondents had no records of hours of work (apart from pay receipts from September 2020 onwards which recorded various weekly hours).
- c. This was not time work, because the Claimant was not paid solely by reference to the length of time he worked, or according to his level of output. He was paid a basic flat rate of £200 per week irrespective of the number of hours worked – including during weeks when he was away for part of the time visiting his family, and throughout the closure of the Temple when his hours of work would clearly have been reduced.
- d. This was unmeasured work. The Claimant was essentially paid £200 per week for completing certain duties, irrespective of the number of hours actually worked.

**58. Did the Respondents make unauthorised deductions from the Claimant's wages and if so how much was deducted? In particular, did the Respondents fail to pay the national minimum wage?** I find that the Respondents did fail to pay the national minimum wage to the Claimant from the start of his employment until the Temple was closed on 24 March 2020, and again from 15 June 2020 until the end of his employment. The periods of time break down as follows.

**59. From the start of employment until 23 March 2020.** I have accepted the Claimant's position that he started work at 4.30am, opened the Temple at 5am, and was 'on call' throughout the opening hours of the Temple until 7.30pm. Throughout this time he was expected to 'man' the Temple, facilitate access to the Temple for visitors, and tend to the needs of anyone who called upon him to do so. He was permitted to go for walks, fetch shopping and attend local appointments without prior permission. I also find that he could refuse or rearrange requests from visitors for prayer services if necessary. However, I have rejected the Respondents' evidence that he was under no obligation to do any work during this time. The Claimant was not free to refuse most or all requests, and was expected as part of his duties to fulfil this function.

**60.** As this is unmeasured work, I have considered whether all of this on call time falls within the definition of hours "worked" under regulation 45(a) NMWR. I find that it does, based on the decision of the Supreme Court in **Uber v Aslam**. The Supreme Court confirmed that drivers were engaged in unmeasured work, and upheld the Employment Tribunal's finding that they were working during times when they were logged onto the relevant app and waiting to do trips for Uber. The Claimant was effectively on duty throughout the hours the Temple was open in the same way as the Uber drivers while they were in the territory where they

worked and logged into the app as available to accept trips. The duties that the Claimant performed throughout this time were for the benefit of the Respondents. He did not have to stay in the Temple, but his mobile number was available at the entrance and he was expected to respond to calls from or about visitors who required assistance. He had to inform the Respondents if he was going to be away from the local area so they could cover his duties. He was free to refuse some but not all of the requests for assistance during the day – as noted in **Uber v Aslam**, the right to refuse work is not critical, so long as there is an obligation to do some amount of work.

61. The Respondents provided submissions based on the Supreme Court's decision in **Royal Mencap Society v Tomlinson-Blake** [2021] UKSC 8. They argue that the Claimant's time during the day was his personal time, and this can be equated to what in the circumstances of a care worker was "sleeping time" in the **Mencap** case. However, I do not find this case assists for two reasons. Firstly, this decision related to time work rather than unmeasured work, and the applicable provisions for time work in the NMWR. Secondly, the decision relates specifically to time spent sleeping but being available for calls, which is not an issue in this case.

62. The Respondents also referred to Regulation 20 WTR, which provides an exemption for "*workers officiating at religious ceremonies in churches and religious communities*" (20(1)(c)). This does not assist with determining working time under the NMW. Firstly, it relates to the WTR, not the NMWR. Secondly, these are exemptions from specific provisions in the WTR for those with unmeasured working time, such as the 48 hour week and the right to rest breaks. The exemption does not relate to calculation of hours worked.

63. The Respondents also referred to the case of **Walton -v The Independent Living Organisation** [2003] EWCA Civ 199, which was referred to by Lady Arden in the **Mencap** case. The **Walton** case did deal with unmeasured work and concerned a carer providing 24-hour care. The Court of Appeal found that time spent asleep was not unmeasured work for the purposes of payment of the NMW. However, I do not find that the **Walton** decision determines the outcome in this case. It again concerned sleeping time during which a worker was on call. It was decided under the National Minimum Wage Regulations 1999, not the current NMWR. Most importantly, it was decided well before **Uber v Aslam** - which is a decision of the Supreme Court and a clear parallel with the current case. My finding that all time spent on call falls within the definition of "hours worked" means that the Respondents failed to pay the NMW for a very significant number of hours. However, the Respondents did not provide any submissions on the **Uber v Aslam** decision, or explain how or why that case could be distinguished from the current case.

64. I have also considered the position with special ceremonies and events. The Claimant was paid a separate fixed fee for these, in some cases a significant sum of up to £200. The Claimant argues that these are equivalent to tips, as they are paid by the people who book the event. He also argues that they would have been included on the payment vouchers if they were regarded as wages. I do not agree. As pointed out by the Respondents, the Temple is not a business. It is funded by donations. For special events and ceremonies, the Temple charges an overall fee and then pays a fixed fee to the Giani. This is very

different from variable tips from individuals, or sums paid directly by visitors to the Giani for an individual service. I find that these fixed fees were additional pay from the Respondents to the Claimant for specific work, and so count towards the NMW in addition to the £200 per week.

65. There is no record of these payments or the hours of work that they relate to. It may be that the level of payments was sufficient to top up the NMW for some of the Claimant's on-call time, as well as the events themselves. However, I have no evidence to show this, and the burden of proof is on the Respondents to show that the NMW was paid. On the balance of probabilities, I find that these fixed fees were sufficient to cover the NMW (after accommodation offset) for the hours that the Claimant worked on these special ceremonies, but no more.

66. Unfortunately, there is no specific evidence of the number and length of these special events. The Claimant's evidence was that there were one or two events a week. The Respondents provided no evidence about the number and length of these events. On balance of probabilities, and doing the best that I can with the evidence available, I find that on average seven hours a week of the Claimant's time would have been taken up by these ceremonies/events.

67. The Claimant went to Birmingham every other week from Sunday until Wednesday, and based on his evidence I find that on average he would leave at 3.30pm on Sunday and return at 12.30pm on Wednesday.

68. I therefore find the following:

- a. During weeks when the Claimant was in Bristol throughout, he worked for the purposes of the NMW from 4.30am to 7.30pm every day, a total of 15 hours a day. Seven hours of this were paid at the rate of the NMW through a separate fixed fee. This leaves 98 hours for which he was paid £200.
- b. During weeks when the Claimant went to Birmingham to see his family, he worked from 4.30am to 3.30pm on Sunday (11 hours), from 12.30 to 7.30pm on Wednesday (7 hours), and from 4.30am to 7.30pm Thursday to Saturday (45 hours). This gives a total of 63 hours. Seven hours of this were paid at the rate of the NMW through a separate fixed fee. This leaves 56 hours for which he was paid £200.
- c. This means that over the period of 14 days the Claimant was paid £400 for 154 hours of work. He was not paid at the rate of the NMW for this work. There was a deduction from his wages for this period.

69. ***While the Temple was closed from 24 March 2020 until 14 June 2020.***

The Claimant was required to perform the set prayers in the morning and evening during this time, and some cleaning/housekeeping. However, I do not find that he was 'on call' during the rest of his time, because no visitors were allowed at the Temple. The Claimant's representative submitted that he may have been required to answer telephone calls, but I heard no evidence about calls that were not related to Temple visits. On the balance of probabilities, I therefore find that the £200 a week he was paid during this period did satisfy his entitlement to be paid the NMW (after accommodation offset). There was no deduction from

wages during this period.

70. **From 15 June 2020 onwards.** The Temple reopened for private prayer from 15 June, and for communal worship from 4 July. The Claimant's duties would again include hosting visitors as soon as the Temple reopened. There were fewer visitors during this time, but the Claimant was still required to be available if needed. The Claimant's statement says there were very few ceremonies or events during the pandemic, and the Respondents have provided no evidence of ceremonies/events and associated fixed fee payments during this period. On the balance of probabilities, and bearing in mind that the burden of proof is on the Respondents, I therefore find that the Claimant did not receive any additional fixed fee payments during this period. This is also borne out by the lack of any fixed fee payments shown on the payment receipts from September 2020 onwards.

71. I had no evidence about whether the Claimant continued to go to Birmingham during this period. The schedule of loss I have seen is based on this continuing. I have assumed that he did continue to work the same pattern. He was no longer receiving fixed fee payments for seven hours a week for special ceremonies/events. He was therefore paid £400 over each period of 14 days for a total of 168 hours of work. He was not paid at the rate of the NMW for this work. There was a deduction from his wages for this period.

72. Although I have found no deductions between 24 March and 14 June 2020, this period is less than three months and so does not even arguably break the series of deductions from wages (*Bear Scotland Ltd v Fulton and another* UKEATS/0047/13).

73. **How much is the Claimant owed?** It was agreed with the parties that the calculation of the amount the Claimant is owed would be dealt with separately after I had made my findings on liability. This calculation will need to be based on: (a) my findings on the numbers of hours for which the NMW has not been paid, (b) the accommodation offset rates at the time of each deduction, (c) the applicable NMW rates at the time, and (d) the formula for calculation in section 17 of the NMWA. In accordance with section 23(4A) ERA the award is limited to two years dating back from when the claim was presented (3 March 2021).

### **Holiday pay**

74. **Did the Respondents fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?** The Respondents did fail to pay the Claimant anything for annual leave. The Respondents sought to argue in submissions that the Claimant was paid his full holiday pay because he took holidays when he was visiting his family in Birmingham. This had not been pleaded and was not in any of the Respondents' witness statements. The Respondents' original case was that the Claimant was self-employed and so was not entitled to paid holidays. EJ Livesey found at the Preliminary Hearing that he had been miscategorised as self-employed and was in fact a worker. I had no evidence that the Claimant had ever been informed of a right to take paid holiday, or told either before or after his trips to Birmingham that this was being treated as paid holiday. The reality is that the Claimant was never given any paid holiday because the Respondents treated him as self-



employed.

75. **What was the Claimant's leave year?** There was no relevant agreement specifying the leave year, meaning that each leave year commenced on 30 August (the date the Claimant started work and each anniversary of that date, regulation 13(3) WTR).

76. **How much of the leave year had passed when the Claimant's employment ended?** The Claimant's work ended on 25 November 2020. This is 87 days out of a 365-day leave year.

77. **How much leave had accrued for the year by that date?** The Claimant was entitled to 5.6 weeks of leave each year under the WTR. He had worked for 23.8% of the leave year. He had therefore accrued 1.3 weeks' leave by the date his engagement ended (rounded to the nearest whole decimal point)

78. **How much paid leave had the Claimant taken in the year?** None.

79. **Were any days carried over from previous holiday years?** I find that leave was carried over for each of the previous holiday years. The authorities of **King v Sash Window Workshop** and **Smith v Pimlico Plumbers** establish that workers can carry over their full entitlement to leave from year to year until termination, if the employer has not afforded them a reasonable opportunity to take that leave. Allowing a worker to take unpaid leave does not amount to an opportunity to exercise the right to take paid leave. The Respondents did not afford the Claimant a reasonable opportunity to take paid leave, because he was treated as self-employed and so not given any right to paid leave at all. Following the guidance of Simler LJ in **Smith v Pimlico Plumbers**, the Respondents have not met the burden of showing they specifically and transparently gave the Claimant the opportunity to take paid annual leave, encouraged him to take paid annual leave and informed him that the right would be lost at the end of the leave year. My provisional view is that these authorities are limited to the leave entitlement under regulation 13(1) WTR, namely 4 weeks only (as provided by the Working Time Directive), and they do not apply to the additional leave under regulation 13A.

80. The Respondents' submissions referred to the decision in **Lyons v Mitie Security Ltd** UKEAT/0081/09, in which the Employment Appeal Tribunal found that holiday leave not taken at the end of the leave year can be lost provided the employer has not unreasonably denied the employee's request for leave. However, in this case the Claimant was never offered the opportunity to take an leave because he was wrongly categorised as self-employed. This decision has been overtaken by **King v Sash Window Workshop** and **Smith v Pimlico Plumbers**, which make it clear that workers can carry over their full entitlement to leave if the employer has not afforded them a reasonable opportunity to take that leave. It is not necessary for a worker in this situation to ask for and be unreasonably refused paid leave.

81. **How many days remain unpaid?** It was agreed with the parties that the calculation of the amount the Claimant is owed would be dealt with separately after I had made my findings on liability. I did not hear submissions on whether the carried-over leave entitlement should be 4 weeks or 5.6 weeks per leave year

(although I have given my provisional view above). This would relate to 3 complete holiday years (30 August 2017 to 29 August 2020). The carried-over entitlement should be added to the 1.3 weeks owed for the final leave year to give the total payment owed. Due to the Claimant's working pattern it would be more appropriate to calculate the entitlement in weeks rather than days.

82. **What is the relevant daily rate of pay?** Again, this is to be dealt with separately. The Claimant did not have normal working hours. This means that the calculation of a week's pay should be based on an average of all remuneration earned in the previous 52 weeks, ending with the last complete week before the calculation date (section 224 ERA as amended by the WTR). This should be based on the Claimant's actual working hours, in accordance with my findings on the NMW (as in *Uber v Aslam* where time on call was treated the same for WTR and NMW purposes). This calculation will need to be based on the rate of NMW that should have been paid to the Claimant over those 52 weeks, not the payments he actually received from the Respondents. Again, due to the Claimant's working pattern it would be more appropriate to calculate the entitlement in weeks rather than days.

## Remedy calculation

83. The following issues remain to be decided:

- a. How much the Claimant is owed for unauthorised deduction from wages for failure to pay the NMW (limited to two years from the date he presented his claim).
- b. How many weeks of holiday are carried over from previous holiday years (all of which remain unpaid) – my provisional view is that this should be 4 weeks per year.
- c. What is the total entitlement to accrued holiday on termination (1.3 weeks for the final leave year plus holiday carried over from previous years).
- d. What is the relevant weekly rate of pay for holiday, based on average remuneration in the previous 52 weeks (at the NMW rate that should have been paid).

84. Arrears of NMW pay are to be calculated according to a formula in section 17 of the NMWA:

### ***Non-compliance: worker entitled to additional remuneration.***

*(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 this 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.*

85. The NMW rates for adult workers were: £7.50 from 1 April 2017- 31 March 2018; £7.83 from 1 April 2018 – 31 March 2019; £8.21 from 1 April 2019 – 31 March 2020; and £8.72 from 1 April 2020 – 31 March 2021.

86. Accommodation offset – a maximum daily amount can be offset for accommodation provided by the employer, under regulation 16 NMWR. The daily accommodation offset rates were: £6.40 from 1 April 2017- 31 March 2018; £7.00 from 1 April 2018 – 31 March 2019; £7.55 from 1 April 2019 – 31 March 2020; and £8.20 from 1 April 2020 – 31 March 2021.

### **Directions for the remedy hearing**

87. A remedy hearing is listed for **27 July 2023**. I have tried to give sufficient detail in these reasons to enable the parties to calculate and agree the final remedy figure. If that is not possible and the parties still need to attend the remedy hearing, I make the following directions:

- a. The Claimant is to provide a revised schedule of loss / remedy calculation to the Respondents and the Tribunal by **15 June 2023** (6 weeks before the hearing). This should break down the elements of the calculations for unpaid NMW and holiday pay and show how they have been calculated.
- b. If the Respondents disagree with this calculation, they are to provide a counter-schedule of loss / remedy calculation to the Claimant and the Tribunal which explains the reasons for any points of disagreement by **29 June 2023** (4 weeks before the hearing).

88. I note that the Respondents have previously failed to comply with some orders of the Tribunal on time. All parties are to comply with the directions above by the date specified to ensure that the remedy hearing can go ahead as listed. If any of these orders is not complied with, the Tribunal may:

- (a) Postpone a hearing;
- (b) Waive or vary the requirement;
- (c) Strike out the claim or the response;
- (d) Bar or restrict participation in the proceedings;
- (e) Award costs in accordance with the Employment Tribunal Rules.

Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Employment Judge Oliver  
Date: 31 March 2023

Reserved Judgment and Reasons sent to the Parties:  
06 April 2023

FOR THE TRIBUNAL OFFICE