



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4104567/2022**

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**Held in Edinburgh on 30 May and 1 & 2 June 2023  
Members meeting 6 June 2023**

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**Employment Judge M Sangster  
Tribunal Member L Brown  
Tribunal Member J Grier**

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**Mr L S Hussain**

**Claimant  
In Person**

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**Almadenah Limited**

**Respondent  
Mr I Wells  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is as follows:

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1. The claimant's complaints under section 23 of the Employment Rights Act 1996 (ERA), in relation to holiday pay and failure to pay the national minimum wage, are successful. The respondent is ordered to pay to the claimant the gross sum of **£6,443.17** which was unlawfully deducted from the claimant's wages, contrary to s13 ERA. This is calculated as follows:

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- a. **£1,393.92** in respect of underpayment of the national minimum wage;  
and
- b. **£5,049.25** in respect of accrued but untaken holiday pay.

**E.T. Z4 (WR)**

2. The respondent failed to give the claimant a written statement of particulars of employment, as required by s1 ERA.
3. In consequence of the claimant succeeding in a claim of a kind mentioned in Schedule 5 of the Employment Act 2002 (namely unauthorised deductions from wages), and the respondent having failed to issue the claimant a written statement of particulars of employment, the Tribunal awards the claimant two weeks' pay (capped at £571 per week), that is £209.00, in accordance with s38(3) of the Employment Act 2002.
4. The claimant's complaints under section 23 ERA, in relation to non-payment of sick pay and tips, do not succeed and are dismissed.
5. The claimant's complaint of breach of contract does not succeed and is dismissed.
6. The claimant's complaint of unfair dismissal, contrary to section 104(A). ERA, does not succeed and is dismissed.
7. The claimant's complaint, under s163 ERA, for a redundancy payment does not succeed and is dismissed.

## REASONS

### Introduction

1. The claimant presented his claim on 18 August 2022, having engaged in early conciliation from 23 June to 27 July 2022. While the claim was initially presented against Mr Mohamed Marwan Naama, proceedings against him were dismissed and Almadenah Limited was sisted as a respondent at an open preliminary hearing on 1 December 2022. A preliminary hearing for case management took place on 16 February 2023. At that preliminary hearing, it was noted that the complaints raised by the claimant were for unauthorised deductions from wages (in respect of sick pay, holiday pay, tips and national minimum wage), breach of contract, detriment and automatically unfair dismissal related to failure to

pay the national minimum wage, redundancy payment and failure to provide a written statement of employment particulars.

- 5 2. The final hearing took place on 30 May and 1-2 June 2023. In advance of the final hearing a joint bundle of documents was lodged, extending to 700 pages. 4 further documents were lodged by the claimant at the commencement of and during the course of the hearing.
- 10 3. The claimant is deaf in one ear, uses a hearing aid in the other ear and cannot read or write. He was assisted by Ms Jabrane, an Arabic interpreter, at the final hearing, who also read documents to him and noted questions he wished to put to witnesses. There was a discussion about reasonable adjustments at the start of the hearing. The claimant indicated that no further adjustments were required, as he had indicated when the matter was discussed at the preliminary hearing for case management in February 2023.
- 15 4. The claimant gave evidence on his own behalf at the final hearing and called two further witnesses:
- 20 a. Muhannad Hamed (**MH**), formerly a delivery driver for Palmyra Pizza; and  
b. Omar Al Aghbar (**OAA**), formerly a chef at Palmyra Pizza.
- 25 5. The respondent led evidence from:
- a. Mohamed Marwan Naama (**MMN**), the respondent's sole director; and  
b. Mohamed Said Sawan (**MSS**), manager of Palmyra Pizza.

### Issues to be Determined

- 30 6. The issues to be determined by the Tribunal were discussed at the outset of the hearing, with reference to the issues identified at the preliminary hearing for case management on 16 February 2023. The following points were noted:

5 a. The respondent indicated that they conceded that the claimant had not been paid any holiday pay in respect of the period from 9 May 2021 to 15 May 2022 and that he had not been provided with a statement of employment particulars in respect of his employment with the respondent.

10 b. The claimant stated that he was not pursuing a complaint of detriment related to failure to pay the national minimum wage, but did wish to continue with his complaint that his dismissal was related to the fact that he took action with a view to enforcing his right to receive the national minimum wage.

15 7. It was agreed that the issues to be determined by the Tribunal were therefore as follows:

20 a. Did the respondent make unauthorised deductions from the claimant's wages (Section 13 ERA) in relation to

- 20 i. Holiday pay  
ii. Sick pay  
iii. Share of tips  
iv. NMW

25 if so, how much was deducted?

b. Did the respondent act in breach of contract by changing the claimant's hours of work from 40 to 11 hours per week, without consulting the claimant, at the end of 2019.

30 c. Was the claimant dismissed by the respondent? If so,

- i. Was the sole or principal reason the claimant was dismissed the fact that he took action with a view to enforcing his right to receive the national minimum wage, contrary to s104A ERA?

- ii. Is the claimant entitled to a redundancy payment under s163 ERA?
- d. If the claimant was unfairly dismissed contrary to s104A ERA, what compensation is due to him?
- 5 e. If the claim for unfair dismissal/unauthorised deductions from wages is successful, is it appropriate to make any award under section 38 of the Employment Act 2002?

### Findings in Fact

- 10 8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
9. The respondent operates a restaurant called Palmyra Pizza. It currently  
15 operates mainly as a take away, but has three tables. Prior to the Covid pandemic it also operated with around 30 seats, in a room which is no longer used.
10. Palmyra Pizza opened in 2000. At that time it was operated by MMN  
20 Limited. Biblos Edinburgh Limited took over in/around July 2015 and the current respondent took over on or around 1 December 2019. MMN was the sole director of each of those companies. The restaurant has traded continuously since 2000. When each new limited company took over the  
25 business of Palmyra Pizza, and all employees working there, were simply transferred to the new company. On each occasion there was a relevant transfer, for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006.
11. The claimant worked with the respondent as a kitchen porter. He  
30 commenced working them on 1 May 2009. He was not provided with a statement of employment particulars at any point during his employment.

12. The manager of Palmyra Pizza was MSS. He had day to day contact with all the staff who worked there and reported back to MMN. MMN had little/no contact with the employees who worked at Palmyra Pizza.
- 5 13. Given that Palmyra Pizza was primarily a takeaway there were limited tips. Any tips were shared among the serving staff and chefs. The claimant did not receive a share.
- 10 14. The claimant worked a minimum of 11 hours per week during his employment. As at the start of April 2019, the claimant was working 40 hours per week.
- 15 15. On 26 April 2019 the claimant had an operation on his shoulder. He informed MSS that he would require to take time off work for the operation and to recuperate. MSS stated that he would inform MMN. A few days following his operation the claimant handed MSS a fit note. MSS stated that fit notes were nothing to do with him and the claimant would not receive sick pay from the respondent. He stated that the claimant should claim benefits instead. MSS indicated that, when the claimant was fit to return to work, he should let MSS know.
- 20 16. The claimant submitted a claim for benefits on 30 April 2019. He did not receive any sick pay from the respondent during his absence from work. His employment was not however terminated, and he did not receive a P45.
- 25 17. In/around December 2019, the claimant contacted MSS and stated that he was now fit to return to work. MSS stated that he could provide him with 11 hours work per week. The claimant accepted this and returned to work for the respondent. The claimant worked at weekends only.
- 30 18. Thereafter the claimant worked continuously for the respondent, until his employment terminated on 15 May 2022. He was issued with P60s in

2020, 2021 and 2022. He was not issued with a P45 at any point prior to May 2022.

- 5 19. Palmyra Pizza remained open and trading, as a takeaway only, throughout the Covid pandemic.
- 10 20. The claimant was paid in cash on a weekly basis, on a Sunday, for the week up to the day before. The cash was placed in an envelope by MSS. Generally, there was also a wage slip in the envelope. However, for the first 4 years of the claimant's employment, and for some periods during the claimant's employment, there was not. The sums the claimant received each week did not reflect what was on the payslip. The payslip reflected the national minimum wage, but the claimant did not receive that. Instead, the claimant received paid £7.00 per hour in 2020, £7.50 per hour in the period from 1 January 2021 to 30 April 2022 and £8.00 per hour from 1-15 May 2022.
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- 20 21. At the start of 2022, the claimant asked MSS on a couple of occasions if his hours and rate of pay could be increased.
- 25 22. The claimant generally took a month off each September, after the busy festival period. The exceptions to this were as follows:
- a. 2019, when he was absent recuperating from his shoulder operation; and
  - b. 2020, when he took two weeks in May as his father died, and no time off in September 2020.
- 30 23. The claimant was not paid for any holidays he took while working at Palmyra Pizza. The respondent kept no records in relation to holidays taken by employees. They did not take any steps to encourage employees to take holidays, or inform them that they would lose holiday entitlement if holidays were not taken in the holiday year.

24. The claimant's employment terminated on 15 May 2022. The respondent subsequently recruited someone else into the role of kitchen porter.

### Observations on Evidence

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25. The claimant gave clear and consistent evidence. The Tribunal, generally, accepted his evidence.

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26. The respondent's evidence was undermined in a number of significant respects, for example:

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- a. Within the bundle, the respondent produced weekly 'Employer's Summaries' showing the weekly wages and deductions for all of the respondent's workers, as well as the same summaries in respect of Biblos (Edinburgh) Limited. MMN gave evidence these sheets were created and submitted to HMRC on a weekly basis. He stated they were 100% accurate. He stated that he saw these sheets on a weekly basis. From 8 December 2019 however each weekly sheet referenced 'Furloughed Workers'. They appeared to demonstrate that approximately 6 out of 22 of the respondent's workers were furloughed from 8 December 2019 onwards. This continued on each weekly sheet thereafter to 4 April 2021 (albeit that the number of furloughed workers increased from April 2020 onwards). MMN could not explain why the respondent's records referenced workers being furloughed at the start of December 2019, over three months before the UK Government first announced the potential of furlough, in the form of the Coronavirus Job Retention Scheme, on 20 March 2020. This, in the Tribunal's view, very significantly undermined the integrity of the respondent's records, and the credibility of their evidence.

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- b. MMN gave evidence that the payslips in the bundle were accurate and that all of the payslips given to the claimant were included in the bundle. On the payslip dated 21 April 2019, MMN had written the



5 words 'last payslips'. Having heard MMN's evidence, the claimant produced a further payslip, dated 28 April 2019. MMN's immediate response was that this was a fake payslip. He pointed to the fact that the format was different to all of the others in the bundle (which had been produced from the respondent's system). He maintained this position despite the fact that the claimant exhibited all of the hardcopy payslips he had received from the respondent, and they all followed the format of the additional payslip which the claimant had produced. MMN stated that he had personally checked the respondent's systems and the payslip dated 21 April 2019 was the last one on the system, hence why he added the words 'last payslip' to that. Having reviewed all the hardcopy payslips in the claimant's possession, including the additional payslip, the Tribunal concluded that the additional payslip produced by the claimant was genuine. The Tribunal concluded that the integrity of the respondent's records, and the credibility of their evidence, was undermined by the production of the additional payslip, as well as MMN's insistence that the payslip had been forged by the claimant.

20 c. In their ET3 the respondent stated that the claimant was only employed in 2020 from 16 February to 5 April 2020. In evidence however they stated that his dates of employment were in fact from 10 February to 22 March 2020. They could not explain why there was a discrepancy and why the dates they asserted the claimant was employed were not clear from their systems.

27. There were a number of significant conflicts in evidence between the respondent and the claimant. These were resolved as follows:

30 a. The claimant's status from April 2019 to February 2020. The respondent's position was that the claimant had resigned from his employment to take up another job and wanted to travel. The Tribunal found this was not credible. The claimant's medical records were

produced demonstrating that he had indeed had shoulder surgery on 24 April 2019. That was a planned operation. It is not credible that he would tell the respondent that he was leaving to take up alternative employment and/or to travel in these circumstances. The Tribunal instead accepted the claimant's evidence that he informed the respondent that he was having an operation on his shoulder and would be unable to work for some time as a result.

b. The claimant's status in the period from 22 March 2020 to 9 May 2021.

The respondent's position was that the claimant had again left to work elsewhere. The claimant's evidence was that he worked continuously for the respondent, including in this period. The Tribunal did not find it credible that the claimant would leave secure employment on 22 March 2020, immediately prior to the first lockdown as a result of the covid pandemic. Additionally, the claimant was able to give clear and comprehensive evidence regarding how the respondent operated during the covid pandemic. The Tribunal concluded that he would not have been able to provide that level of detail had he not in fact been working for the respondent during that period.

c. Holiday pay. The respondent stated that the claimant was paid for all holidays, other than in the last 12 months of his employment. They produced no records of when holidays were taken, or payments made during those holidays. MSS stated that no such records were available. There was no satisfactory explanation as to why the claimant would have been paid previously for holidays, but not in the last 12 months of his employment. The claimant stated that he was never paid for holidays taken. AH, who worked at Palmyra Pizza for 9 years, from 2006 to 2015 stated that during that time he was not paid for holidays and neither were any of his colleagues. OAA also gave evidence that he was not paid for holidays and this is why he decided to leave the respondent's employment, after a short period. The

Tribunal accepted the evidence of the claimant and his witness that they were not paid for holidays while employed by the respondent.

5 d. In relation to the date the claimant commenced employment with the respondent, the claimant gave clear and consistent evidence that he commenced employment with the respondent on 1 May 2009. This accorded with his ET1. The respondent's evidence was, from MMN, that the claimant commenced in 2013 *'as this is what our records show'*. MSS stated that he didn't recall when the claimant started, but  
10 indicated that he understood this was around 2013. The Tribunal concluded that there was no reason for the claimant to lie in relation to his start date. Taking into account the concerns which the Tribunal had in relation to the credibility of the respondent's evidence generally, the Tribunal found that it was more likely that the claimant did indeed  
15 commence working in 2009 and accepted the claimant's evidence in relation to this.

e. Sums received by the claimant. The Tribunal accepted the claimant's evidence that the sums he received in cash did not reflect what was  
20 stated on the payslip, when a payslip was provided. The claimant gave clear and consistent evidence in relation to this, and this matched the position he had previously stated in correspondence and in his claimant's ET1. The respondent was unable to provide any evidence of the sums actually paid to the claimant, given that the claimant was  
25 paid in cash, rather than into his bank account. Given the general concerns the Tribunal had in relation to the credibility of the respondent and the integrity of their records, the Tribunal, on balance, preferred the evidence of the claimant in relation to this.

### Respondent's submission

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28. In summary, the respondent submitted that:

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- a. The evidence of the respondent's witnesses should be preferred where there is any conflict.
  - b. The claimant's continuous service was restricted to the period from 9 May 2021 to 15 May 2022, given the breaks in his employment prior to that.
  - c. Even if that is not accepted, there could be no continuity, given the change in the employing entity.
  - d. The respondent's records accurately reflect the claimant's periods of employment and sums received by the claimant. He was paid for all the hours he worked, at the appropriate national minimum wage rate.
  - e. The claimant was not dismissed for redundancy, so is not entitled to a redundancy payment.
  - f. The respondent accepts that the claimant is entitled to payment for holidays for the period from May 2021 to May 2022. No further sums are due in respect of holidays. The claimant was able to take holidays and was paid for these when he did so. The 2-year limit in s23 ERA would apply if the complaint succeeds.
  - g. The claimant was not dismissed in May 2022. There is no evidence upon which it could be held that he was dismissed for asserting his right to receive the national minimum wage.
  - h. No further sums are due to the claimant in respect of tips or sick pay.
  - i. The respondent did not breach the claimant's contract: he never worked 40 hours.
  - j. It is accepted that he was not provided with a statement of employment particulars. The minimum award should be made in relation to this.

### **Claimant's submission**

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29. The claimant gave a very brief submission stating, in summary, that:
- a. The sums stated on his payslips did not reflect what he received.
  - b. The respondent's credibility was undermined by the production of an additional payslip, which they asserted did not exist and was fake.

**Relevant Law***National Minimum Wage*

30. The National Minimum Wage Act 1998 (**NMWA**) states, at section 1, that  
5 *'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.'*

31. S28(2) NMWA states that, the purposes of a complaint for failure to pay  
10 the national minimum wage, made under s23 ERA, that *'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.'*

*Annual leave*

15 32. Under the Working Time Regulations 1998 (**WTR**) workers are entitled to 5.6 weeks' annual leave. The right is made up of basic leave of 4 weeks and additional leave of 1.6 weeks. The maximum aggregate of the basic and additional entitlement is 28 days.

20 33. Annual leave must be taken in the holiday year in which it accrues (unless there is a relevant written agreement to the contrary or, in the case of basic leave, an exception applies). It may not be replaced by a payment in lieu except upon termination of employment. Where there is no relevant written agreement, the leave year begins on the anniversary of an employee's start date.

25 34. A worker is only permitted to carry over basic leave where the worker is unable to take leave because they are absent on sick leave or maternity leave or there is no effective opportunity to take leave (e.g. because the employer refuses to provide paid holidays). The Court of Appeal in **Smith v Pimlico Plumbers** [2022] EWCA Civ 70 stated that paid annual leave  
30 is a *'single composite right'* and unpaid annual leave does not satisfy the requirements of that right. Providing unpaid annual leave is to be treated

as the same as if no annual leave were provided at all. A worker can only lose the right to take leave at the end of the leave year 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. They concluded that the following words should be read into the Regulation 13 to render it compatible with case law -

*“(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”.*

35. Where there is to be a carry forward basic leave is presumed to have been taken first given that the entitlement to 1.6 weeks is described as additional.

36. There is no right to carry forward additional leave for any reason.

37. A week's holiday pay is calculated with reference to the average gross pay in the 52 weeks preceding termination.

*Unauthorised deductions from wages*

38. S13 ERA provides that an employer shall not make a deduction from a worker's wages unless:

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a. The deduction is required or authorised by statute or a provision in the worker's contract; or

b. The worker has given their prior written consent to the deduction.

10 39. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church*** [2000] IRLR 27).

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*Automatically Unfair Dismissal*

40. S104A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right conferred on the employee by virtue of the NMWA, in respect of which the remedy is a complaint to the Employment Tribunal. S108 ERA provides that an employee does not require to have two years' service to bring a complaint of unfair dismissal under s104 ERA.

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*Failure to provide statement of employment particulars*

41. S1 ERA provides that where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

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42. S38(3) of the Employment Act 2002 provides that where an award is made to an employee in respect of relevant proceedings specified in Schedule 5 of that Act (unauthorised deductions from wages falling within the scope of that), and where, when the proceedings began the employer was in breach of his duty under s1 or s4 ERA, the Tribunal must increase the award by an amount equal to 2 weeks' pay and may, if it considers it just and equitable, increase the award by a sum equal to four weeks' pay.

### Discussion & Decision

#### 10 *Breach of Contract*

43. The claimant asserted that the respondent had acted in breach of contract by reducing his hours from 40 to 11, when he returned to work following sick leave in December 2019. There was no evidence that the claimant objected to that change and the Tribunal noted that the claimant continued to work for over two years after that. In these circumstances the Tribunal concluded that the claimant had impliedly agreed to the change: he acquiesced and simply continued to work without protest. Given this, the complaint of breach of contract does not succeed.

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#### *Sick Pay - s1 3 ERA*

44. The Tribunal considered the claimant's claim that the respondent had made unauthorised deductions from his wages by failing to pay him sick pay for the period from 21 April to December 2019. The time limit for raising a complaint of unauthorised deductions from wages is three months from the date of the deduction or, where the deduction is part of a series, within three months of the last such deduction (section 23 ERA). Section 23(4A) ERA also operates to limit the deductions that can be recovered to those that took place in the two years preceding the date of the claim. In this case, both provisions operate to prevent the Tribunal determining the claimant's complaint for unauthorised deductions from wages in respect of sick pay.

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*Tips- s13 ERA*

45. The Tribunal considered the claimant's complaint that the respondent had made unauthorised deductions from his wages by failing to pay him a share of tips. The Tribunal noted that a deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them. The claimant has not demonstrated any contractual or legal entitlement to a share of tips, during his employment with the respondent. For this reason, his complaint in relation to this does not succeed.

*National Minimum Wage - s13 ERA*

46. In relation to the claimant's complaint that the respondent had made unauthorised deductions from his wages by failing to pay him the national minimum wage, the Tribunal found that the claimant was paid less than the national minimum wage. Given the terms of section 23(4A) ERA, the Tribunal was restricted to considering what deductions were made in the two years preceding the date of the claim i.e. in the period from 19 August 2020 to 18 August 2022. It was accepted by both parties that the claimant worked 11 hours per week in that period. The respondent asserted that there were breaks in the claimant's employment, but the Tribunal found this was not the case and that the claimant's employment with the respondent was continuous in that period. The Tribunal found that the claimant was paid £7.00 per hour in 2020, £7.50 per hour in the period from 1 January 2021 to 30 April 2022 and £8.00 per hour from 1-15 May 2022.

47. The relevant national minimum wage rates in that period were as follows:

a. 19 August 2020 to 31 March 2021 (32 working weekends) - £8.72

- b. 1 April 2021 to 31 March 2022 (52 working weekends, less 4 weekends in September 2021 when claimant on annual leave (but not paid) = 48 working weekends) - £8.91
- c. 1 April 2022 to 15 May 2022 (7 working weekends) - £9.50

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48. The deductions made in those periods were:

- a. **£533.94** from 19 August 2020 to 31 March 2021 (£8.72 - £7 x 11 hours x 19 weeks = £359.48, plus £8.72 - £7.50 x 11 hours x 13 weeks = £174.46)
- b. **£744.48** from 1 April 2021 to 31 March 2022 (£8.91 - 7.50 x 11 hours x 48 weeks = £744.48)
- c. **£115.50** from 1 April 2022 to 15 May 2022 (£9.50 - £8 x 11 hours x 7 weeks = 115.50)

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49. The total gross sum of **£1,393.92** was accordingly deducted from the claimant's wages by the respondent in this period.

*Holiday Pay- s13 ERA*

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50. The Tribunal considered the claimant's complaint that the respondent had made unauthorised deductions from his wages by failing to pay him accrued but outstanding holiday pay on the termination of his employment, in accordance with his legal entitlement under Regulation 14 of the Working Time Regulations 1998.

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51. The respondent's position was that the claimant was entitled to be paid in respect of 61.6 hours of accrued but untaken holidays. This amounted to £585.20 at the national minimum wage rate of £9.50. The respondent accepted that this sum ought to have been paid to the claimant on the termination of his employment, but it was not. They stated however that no sums were due beyond that.

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52. The Tribunal considered what the claimant's accrued annual leave entitlement was at the time his employment terminated by addressing the following questions, and reaching the following conclusions.

- 5 a. **What was the annual leave year?** Where there is no relevant written agreement, an employee's leave year begins on the anniversary of their appointment. There was no relevant written agreement. Accordingly, the claimant's leave year began on 1 May in each year.
- 10 b. **How much leave had accrued in the claimant's final leave year?** In his final leave year claimant accrued 3.5 hours of holiday (1-22 May 2022 = 21 days/ 365 days x 5.6 weeks x 11 hours).
- 15 c. **How much paid leave had the claimant taken in the final leave year?** The claimant did not take any paid holidays in his final leave year.
- 20 d. **Were any days to be carried forward from previous years?** The respondent did not discharge the burden on them to demonstrate that they 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. The claimant was not provided with employment particulars. There was no evidence to suggest he had ever been
- 25 informed of any entitlement to take paid holidays. He was not encouraged to take holidays by the respondent. Fundamentally however, the Tribunal accepted the claimant's evidence that he was not paid for holidays he took while working at Palmyra Pizza. The respondent accordingly failed to recognise the claimant's right to paid
- 30 annual leave and did not provide any facility for the taking of such paid leave. As a result, the basic leave falls to be carried forward in each of the 12 years the claimant worked for the respondent up to 30 April 2022. This amounted to 48 weeks. Additional leave cannot be carried

forward. The position regarding the claimant's final year is noted above.

5 e. **What is the relevant rate of pay?** The claimant's rate of pay in respect of his final year of employment was £104.50 gross a week (11 hours x £9.50).

f. **What holiday pay was the claimant therefore entitled to on termination?** The claimant was accordingly entitled to £5,049.25 as a payment in lieu of accrued but outstanding holiday pay, on the termination of his employment.

10 53. The claimant did not receive any holiday pay on the termination of his employment. The gross sum of **£5,049.25** was accordingly deducted from the claimant's wages by the respondent on the termination of his employment.

15 *Unfair Dismissal - s104A ERA*

20 54. The Tribunal considered whether the claimant had established that the reason, or principal reason, for his dismissal was that he had taken action with a view to enforcing, or otherwise securing the benefit of, his right to receive the National Minimum Wage Act 1998. The Tribunal concluded that he had not done so. The claimant's evidence, which he repeated a number of times, was simply that he had asked for his hours and pay to be increased, with no reference to the national minimum wage. He provided no evidence of raising concerns related to failure to pay the national minimum wage with his employer, nor any link between concerns being raised and the termination of his employment.

*Redundancy Payment*

30 55. Section 135 ERA provides that an employer must pay a redundancy payment to an employee who is dismissed by reason of redundancy. The Tribunal concluded that the claimant was not dismissed by the respondent

reason of redundancy. There was no evidence which suggested that the respondent's requirement for employees, or kitchen porters in particular, had ceased or diminished, or was expected to do so. Palmyra Pizza continue to operate following the termination of the claimant's employment and another kitchen porter was recruited. The respondent accordingly did not require to pay him a redundancy payment.

*Failure to Provide Written Statement of Employment Particulars*

56. The claimant ought to have received a written statement of employment particulars on, or prior to, commencing employment, but did not. He did not receive that at any point during his employment with the respondent or thereafter. The respondent accepted that this was the case.

57. Given that the Tribunal uphold the claimant's claims for unauthorised deductions, and also finds that the respondent failed to provide a written statement of terms and conditions, the Tribunal is required to make an award equivalent to 2 weeks' pay, namely £209. The Tribunal did not consider that it was just and equitable to award a higher sum, given that the respondent is a small employer, with limited resources.

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**Employment Judge: M Sangster**  
**Date of Judgment: 29 June 2023**  
**Entered in register: 29 June 2023**  
**and copied to parties**

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