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**THE EMPLOYMENT TRIBUNAL**

**SITTING:** at London South (By CVP)

**BEFORE:** Employment Judge Tueje

**BETWEEN:**

**Ms Whitney Hay**

**Claimant**

**and**

**Ms Tika Mesha Williams**

**Respondent**

**ON:** 24<sup>th</sup> May 2023 and 7<sup>th</sup> June 2023

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** In person

**JUDGMENT**

1. The complaint in respect of breach of contract, relating to Ms Williams's failure to pay Ms Hay in lieu of one month's notice, is well-founded.
2. The complaint of unauthorised deductions from pay is well-founded. Ms Williams made an unauthorised deduction from Ms Hay's pay for the period she worked from 10<sup>th</sup> August 2021 to 4<sup>th</sup> October 2021.
3. The complaint of unfair dismissal is well-founded. Contrary to section 104 of the Employment Rights Act 1996, Ms Hay was dismissed because she asserted her statutory right under section 17 of the National Minimum Wage Act 1998, and her statutory right to rest breaks under regulation 12 of the Working Time Regulations 1998. Therefore, her dismissal was automatically unfair.

4. On Ms Hay accepting Ms Williams paid her £10.00 on 13<sup>th</sup> April 2022 to reimburse her for the cost of a pediatric first aid course, the claim for special damages arising from this cost, is dismissed.
5. Accordingly, Ms Williams is liable to pay Ms Hay the sum of £5,433.98, calculated as follows:
  - 5.1 Breach of contract (notice pay) in the agreed sum of £836.00. This figure has been calculated using gross pay to reflect the likelihood that Ms Hay will be taxed on it as Post Employment Notice Pay.
  - 5.2 Unauthorised deductions from pay in the gross sum of £417.98.
  - 5.3 Compensation for unfair dismissal in the sum of £4,180.00.
6. On Ms Hay confirming she received universal credit, the Recoupment Regulations apply as follows:
  - 6.1 For the purposes of the recoupment provisions, the amount of the prescribed element is £4,180.00.
  - 6.2 The prescribed element is attributable to the period from 18<sup>th</sup> November 2021 to 7<sup>th</sup> June 2023.
  - 6.3 The total amount awarded exceeded this sum by £1,253.98.

## **REASONS**

### **Introduction**

1. On 10<sup>th</sup> August 2021, Ms Hay began working as a childcare nursery assistant for a childminding service run by Ms Williams. By a voice message left on her mobile telephone on 17<sup>th</sup> November 2021, Ms Hay was dismissed with effect from 18<sup>th</sup> November 2021.
2. Ms Hay claims she was entitled to one month's notice under her contract, but that she was dismissed without proper notice. She also claims she was dismissed because she asserted her statutory rights. In particular, she requested backpay to bring her earnings during the period prior to 4<sup>th</sup> October 2021 up to national minimum wage pay levels. She had also mentioned to Ms Williams that she had not been allowed sufficient breaks.
3. Ms Williams contests the claim. She argues Ms Hay was self-employed. She also argues, if Ms Hay was employed, the period of employment didn't satisfy the two-year qualifying period. She further argues, Ms Hay was dismissed because she was not the right fit for the position. Ms Williams says Ms Hay was unsuitable because of complaints she had received from parents, and she also became concerned about Ms Hay's personality following their conversation on 17<sup>th</sup> November 2021. As to the unauthorised deduction from wages, Ms Williams states she paid Ms Hay the amount Ms Hay proposed, namely £50 per day.

### **The hearing**

4. I heard the claim on 24<sup>th</sup> May 2023. Ms Hay prepared a bundle of documents, including telephone voice message, which had been sent to the Tribunal. Ms

Williams also confirmed she received the same bundle in April 2022. These documents were in the case file but not in order. I therefore asked Ms Hay to re-send them to the Tribunal, copying in Ms Williams.

5. Ms Williams had sent witness statements. She confirmed all other documents she intended to rely on were in Ms Hay's bundle.
6. Therefore, I considered Ms Hay's ET1 claim form received on 10<sup>th</sup> January 2022, and Ms Williams's ET3 response form received on 8<sup>th</sup> March 2022.
7. I also considered the following documents Ms Hay re-sent on 24<sup>th</sup> May 2023:
  - Ms Hay's undated witness statement.
  - An e-mail statement from Marisha George sent 10<sup>th</sup> June 2022.
  - An e-mail statement from Amifa sent on 13<sup>th</sup> June 2022.
  - An e-mail statement from Iga Sloan sent 13<sup>th</sup> June 2022.
  - An e-mail statement from Gavin Edwards sent on 6<sup>th</sup> September 2022.
  
  - Document titled Compensation/Loss Breakdown dated 29<sup>th</sup> March 2022 ("Loss Breakdown").
  - Document titled Pay Discrepancy for Period 10.8.21 to 4.10.21 ("Pay Discrepancy").
  - Ms Hay's NatWest bank print out showing payments from Ms Williams from 17<sup>th</sup> August 2021 to 22<sup>nd</sup> November 2021.
  
  - A transcript of WhatsApp messages between the parties from 24<sup>th</sup> July 2021 to 20<sup>th</sup> November 2021.
  - E-mail and attachment sent 2<sup>nd</sup> September 2021 by Ms Williams to Ms Hay with attaching a job offer letter.
  - WhatsApp messages between Ms Hay and Amifa sent 25<sup>th</sup> September 2021.
  - A written contract between the parties signed on 6<sup>th</sup> October 2021 ("the contract").
  - WhatsApp messages between Ms Hay and Amifa exchanged between 11<sup>th</sup> and 13<sup>th</sup> October 2021.
  - WhatsApp messages exchanged between the parties on 22<sup>nd</sup> November 2021.
  - Written offer of employment from Look Ahead to Ms Hay dated 17<sup>th</sup> March 2022.
  - Message from Look Ahead to Ms Hay sent on 8<sup>th</sup> June 2022.
  - WhatsApp messages (undated) between Ms Hay and Marisha.
8. The original bundle Ms Hay sent in April 2022 included voicemail recordings, and e-mails between the parties with the subject heading "offer". The files containing recordings were too large for her to e-mail them in a format that could be used during the hearing. We therefore agreed that any recordings being relied on should be played for all participants to hear. I informed the parties I would not be considering any communications between them where offers and/or settlement was discussed.

9. Finally, I considered statements in the form of e-mails prepared in support of Ms Williams, consisting of:
  - Ms Williams's statement sent on 6<sup>th</sup> July 2022.
  - E-mail from Keisie Storer dated 16<sup>th</sup> October 2022.
  - E-mail from Filipa Endrich dated 17<sup>th</sup> October 2022.
10. Both Ms Hay and Ms Williams were unrepresented. Both gave evidence under affirmation: they gave oral evidence in chief and were cross examined. Neither party called any other live witnesses.
11. I heard oral evidence on 24<sup>th</sup> May 2023, before adjourning the case part-heard. The hearing resumed on 7<sup>th</sup> June 2023, when I heard closing submissions from Ms Williams, followed by Ms Hay.
12. I explained to the parties how to access section 17 of the National Minimum Wage Act 1998 online. We took a break for them to read the legislation and to decide what arguments, if any, they wished to make in light of it.
13. I retired before delivering judgment orally. By an e-mail from Ms Williams, sent to the Tribunal on 8<sup>th</sup> June 2023, she requested written reasons. These are my written reasons.
14. These written reasons are not intended to repeat all of the evidence and argument. It contains the findings of fact I have made that are relevant to the issues in the case.

### **Preliminary matters**

15. At the beginning of the hearing on 24<sup>th</sup> May 2023, before I heard any evidence, I dealt with the following preliminary matters.
16. By an order made at a hearing on 7<sup>th</sup> October 2022, Ms Williams was directed to e-mail a handwritten copy of her response form. At the final hearing before me, Ms Hay argued Ms Williams had breached that order, and her response should therefore be struck out. However, the Tribunal wrote to Ms Hay on 19<sup>th</sup> December 2022 confirming Ms Williams's response form had been received and accepted by the Tribunal Service. I therefore did not grant Ms Hay's request.
17. There is correspondence amongst the case papers suggesting Ms Williams's childminding service may operate as a company called Little Love Bugs. I asked Ms Williams to clarify whether her childminding service operates as a firm or a company. She told me she runs the service from her home, it was newly established, it didn't have a business name, and was not run as either a company or a firm.

### Issues for the Tribunal

18. Before I heard any evidence, I clarified with the parties the issues in this claim. Those issues are set out at paragraphs 18.1 to 18.7 below.

### Unfair Dismissal claim

- 18.1 Was Ms Hay an employee as defined by section 230 of the Employment Rights Act 1996.
- 18.2 Was the reason or the principal reason for dismissal that Ms Hay asserted her statutory right to be paid the national minimum wage pursuant to section 17 of the National Minimum Wage Act 1998.
- 18.3 Was the reason or the principal reason for dismissal that Ms Hay asserted her statutory right to rest breaks under regulation 12 of the Working Time Regulations 1998.

### Breach of Contract claim

- 18.4 What, if any, notice period was Ms Hay entitled to.
- 18.5 If she was entitled to notice, was she given proper notice or paid in lieu of notice.

### Unauthorised Deduction from Wages claim

- 18.6 What were the amount of wages properly payable to Ms Hay from 10<sup>th</sup> August 2021 to 4<sup>th</sup> October 2021.
- 18.7 Was Ms Hay paid the amount of wages referred to at paragraph 18.6 above.

### **Findings of fact**

19. My findings of fact are as follows.
20. Ms Williams runs a childminding service from her home address. Ms Hay learnt through a friend that Ms Williams needed help, and on 24<sup>th</sup> July 2021 they exchanged WhatsApp messages about Ms Hay filling this position. Ms Williams needed someone to work the following hours:
- Mondays from 8am to 1pm;
  - Tuesdays from 8am to 6pm;
  - Wednesdays from 8 am to 5pm;
  - Thursdays from 8am to 1pm; and
  - Fridays from 8am to 5pm.

21. Ms Hay was happy with those hours. She asked to be paid off the books, although said she would work on the record if Ms Williams preferred. Ms Williams agreed to pay Ms Hay off the books, stating she could refer to Ms Hay as a “*family freelancer / volunteer*”, and then record her pay as payment for travelling and lunch expenses. Ms Hay proposed payment of £50 per day with an hour for lunch. She calculated this would be £6.25 per hour on the basis that a full day was 8 hours work, plus an unpaid lunch hour.
22. Ms Williams accepted those terms. Her evidence was that she paid Ms Hay £50 for each full day worked, and £25 for each half day. Ms Williams added she may have sometimes paid Ms Williams a little more than £25 for half days worked. She could not say what the hourly rate was because she paid Ms Hay at a daily rate in accordance with Ms Hay’s proposal.
23. Ms Hay began working on 10<sup>th</sup> August 2021. She was 22 years old throughout the period of employment. It was agreed she was paid one week in arrears, she received her first payment on 17<sup>th</sup> August 2021. It follows her last payment for the period worked up to 4<sup>th</sup> October 2021, was due in the week beginning 11<sup>th</sup> October 2021. Therefore, 11<sup>th</sup> October 2021 is the date I have used to determine the Tribunal’s jurisdiction.
24. Ms Hay says she often didn’t receive a lunch break. So in effect, she earned £50 and worked 9 hours, which was £5.55 per hour. Around 2 weeks after she started working, she felt the pay was insufficient, so asked Ms Williams if she could go on the books, working part time instead.
25. Ms Williams explained she had not employed anyone before, so wanted to ask her accountant about this. In the meantime, Ms Hay continued working off the books at the previously agreed rate. She periodically chased Ms Williams about going on the books, but Ms Williams explained she was waiting for her accountant to get back to her.
26. In around September 2021 a parent informed Ms Williams that her child said they did not like Ms Hay. Ms Williams regarded this as a complaint about Ms Hay, but didn’t discuss the parent’s comment with Ms Hay.
27. On 25<sup>th</sup> September Ms Williams asked Ms Hay whether she would be interested in speaking with another childminder, Amifa, who needed help. This would be in addition to Ms Hay continuing her existing role with Ms Williams. Ms Hay expressed an interest, so Ms Williams forwarded Amifa’s information to her.
28. In around early October 2021, Ms Williams’s accountant got back to her regarding Ms Hay’s request to be employed on the books. Her accountant advised it would be better for her financially if Ms Hay was self-employed rather than an employee. Ms Williams also learnt about the national minimum wage from her accountant, as she had previously been unaware of this.

29. Ms Hay and Ms Williams therefore signed a contract dated 6<sup>th</sup> October 2021. It was a standard template document, designed to cover individuals who are employed or self-employed, but the heading suggests it's the self-employed/zero hours description that applied here. However, the contract also indicates Ms Hay's normal hours would be 4 to 9 hours daily. Pay was £8.36 per hour, being the national minimum wage for Ms Hay's age. Ms Hay was entitled to 25 days' annual leave, which appears to have been paid leave.
30. In reality, before 6<sup>th</sup> October 2021, Ms Hay's hours were irregular, and judging from the pay she received, she didn't work the hours stated at paragraph 20 above. She continued to work irregular hours after 6<sup>th</sup> October 2021. And from that date she was supposed to submit invoices in order to be paid. Ms Williams provided Ms Hay with a copy of an invoice for Ms Hay to adapt, enter her hours worked, and then submit for payment.
31. After 6<sup>th</sup> October 2021, Ms Hay appears to have worked on all the days Ms Williams requested, except on days she was unwell.
32. In around mid-October, Ms Williams was told by a parent that her daughter had complained about Ms Hay. Ms Williams's initial oral evidence was that she hadn't raised this complaint or the September 2021 complaint (at paragraph 26 above) with Ms Hay. She later corrected this, saying she had asked Ms Hay about the October complaint.
33. I asked Ms Hay why she maintained she was not self-employed after she signed the contract. She told me she had taken legal advice, and been informed her arrangement with Ms Williams didn't meet the criteria of self-employment. This was because Ms Williams remained her boss: she said Ms Williams controlled all aspects of her work, how many hours she worked, when and where she worked, when she took her lunch break, and if she had one.
34. I asked Ms Williams what changes there were in Ms Hay's working arrangements before she signed the contract compared to afterwards. Ms Williams told me that Ms Hay's hours of work had changed, because the contract stated Ms Hay's normal hours of work would be between 4 to 9 hours per day. Ms Williams also explained Ms Hay's pay had changed too, because she received the national minimum wage from 6<sup>th</sup> October 2021. I asked whether that was all that had changed, and Ms Williams confirmed it was.
35. At around lunchtime on 17<sup>th</sup> November 2021 Ms Hay raised a number of points with Ms Williams regarding her work. She asked why it had taken almost two months to change her contract to the self-employed contract that provided for the national minimum wage. Ms Hay complained that if she had signed the contract earlier, she would have started receiving the minimum wage earlier, and consequently she had lost out on being paid that rate sooner. She also asked about receiving a back payment for August and September 2021 when she had been underpaid at the rate of £5.55 per hour instead of £6.25. She mentioned not having regular and proper breaks, but stated breaks were not her main concern.

36. Ms Williams says that things were tense between them after that conversation, and that they didn't speak to one another for the remaining six hours of the working day. She was concerned this would undermine the children's welfare because of the tension between them, but also that they weren't communicating, which is necessary to ensure the children's wellbeing. Ms Williams explained her main concern was safeguarding the children in her care. After the conversation, Ms Williams was concerned Ms Hay was not the right fit for the childcare role in Ms Williams's childminding service.
37. Ms Williams accepts in the lunchtime conversation Ms Hay asked her about her pay, but Ms Williams says she didn't fully understand Ms Hay's complaints. She also accepts Ms Hay raised the issue of breaks, but she disagreed Ms Hay was denied breaks.
38. During the hearing, Ms Hay played in full the voicemail message left on 17<sup>th</sup> November 2021. In the message, Ms Williams refers to their conversation earlier that day, saying it startled her, made her feel uncomfortable and was not the environment she wanted to work in. She said it caused a tense atmosphere, which was not in the children's interests, and the children were her priority. Ms Williams also said she hadn't fully understood Ms Hay's complaints, and hadn't had the ear to listen to them properly. But asked Ms Hay to provide more information about the breaks she was requesting. She also asked for Ms Hay's calculations of the pay she claimed to be owed, saying she would pay this. She concluded by saying there was no ill-will, but she wanted to work in a harmonious and not a negative atmosphere. Ms Williams did not mention the parents' complaints received in September and October 2021 during the message. Ms Williams dismissed Ms Hay with immediate effect, asking her not to go in to work the following day.
39. In cross examining Ms Williams, Ms Hay asked whether she would have been dismissed if they hadn't had the conversation on 17<sup>th</sup> November 2021. Ms Williams responded that without the conversation she would not have dismissed Ms Hay.

## The Law

40. The following law applies in this case.

### Unfair Dismissal claim

- 40.1 An employee is defined at section 230 of the Employment Rights Act 1996 ("the 1996 Act") as someone who works or worked under a contract of service. That is interpreted in ***Ready Mixed Concrete (SE) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433*** as applying to a written or oral contract of employment by which it's agreed:
- One individual ("A") is obliged to provide A's own work or skills for the other person ("B");
  - B agrees to pay A for their work or skills;
  - A agrees to be under B's control to a sufficient degree that makes



- them A's boss; and
- Other parts of the contract are consistent with the agreement being a contract of employment.

40.2 In most cases, an employee must have at least two years continuous service before they are entitled to bring a claim for unfair dismissal. There are some exceptions to the two-year qualifying period. The exceptions to the qualifying period include where an employee claiming the reason or principal reason for dismissal was because they asserted a statutory right.

40.3 By section 104 of the 1996 Act, this exception applies where the employee asserts their statutory right to the national minimum wage, and their right to rest breaks. Where a claimant satisfies the Tribunal that was the reason or primary reason for the dismissal, the dismissal is automatically unfair.

40.4 The right to bring a claim for unlawful dismissal under the 1996 Act applies to employees only; it does not apply to an individual who is self-employed.

#### Breach of Contract claim

40.5 The amount of notice an employee or self-employed individual must be given depends on the terms of their contract.

#### Unauthorised Deduction from Wages claim

40.6 The amount of wages properly payable to an employee is based on the terms of the employee's contract.

40.7 By the date an employee is due to be paid, if they have received less than the amount properly payable to them, the deficiency in pay amounts to an unlawful deduction of wages.

40.8 Where an employee's contract provides for an hourly rate that is lower than the national minimum wage, by section 17 of the National Minimum Wage Act 1998 ("the 1998 Act"), the contract will be read as entitling the employee to the national minimum wage.

40.9 By section 49 of the 1998 Act, an employee cannot contract out of section 17 of that Act.

#### **Conclusions on Liability**

41. The relevant law is set out at paragraphs 40.1 to 40.9 above. I have applied the relevant law to my findings of fact to reach the conclusions set out below.

### Unfair Dismissal claim

42. My conclusions regarding the claim for unfair dismissal will deal firstly with Ms Hay's employment status, and secondly, the reason for her dismissal.

### Employment Status

43. It is common ground that when Ms Hay started working on 10<sup>th</sup> August 2021, she did so as an employee. The reference to her being described as a "*family freelancer*" was simply a convenient way to explain her wages, which at that time, would be paid off the books. The parties did not initially intend her to be a freelancer as it was envisaged she would work the fixed hours stated at paragraph 20 above.
44. The reason for proposing Ms Hay becomes self-employed had nothing to do with their working relationship or arrangements, it was because it would be to Ms Williams's financial benefit if they did so. As Ms Hay points out in her witness statement, she had limited choice about signing the contract, if she wanted to continue working there.
45. Therefore, I have considered whether there was any change in the nature of their working arrangements such that it changed from Ms Hay being employed to being self-employed after 6<sup>th</sup> October.
46. The first change was that they had signed the contract. While I take into account the contract is expressed to be for self-employment, in accordance with ***Uber BV and others v Aslam and others [2021] UKSC 5***, whether the actual arrangement is consistent with the statutory definition of employee or worker status, is relevant.
47. The statutory definition is at section 230 of the 1996 Act, and has been interpreted in in ***Ready Mixed Concrete (SE) Ltd*** (see paragraph 40.1 above). Applying that definition and interpretation to this case, I conclude as follows:
- 47.1 Ms Hay was obliged to provide her own services to Ms Williams. Their arrangement does not seem to envisage Ms Hay would delegate or sub-contract the work. And that didn't happen throughout the period of Ms Hay's employment.
- 47.2 Under the contract, Ms Williams agreed to pay Ms Hay £8.36 per hour for her services.
- 47.3 I conclude that Ms Williams exercised a sufficient amount of control over Ms Hay, for Ms Williams to be Ms Hay's boss, and therefore Ms Hay to be her employee. That is my conclusion for a number of reasons. Firstly, Ms Hay's evidence that Ms Williams controlled where, when and the number of hours she worked is supported by the WhatsApp messages. Ms Williams didn't dispute her control over Ms Hay's working arrangements was effectively unchanged. Secondly, Ms Hay started as

an employee under Ms Williams's control, and there was no material change in the control Ms Williams exercised before, as compared to after, they signed the contract. To an extent, Ms Williams's evidence was to the same effect. She said the differences in their working relationship before and after the contract was signed, consisted of a change in Ms Hay's stated normal working hours, and in her rate of pay. Under the contract, Ms Hay's stated daily working hours varied between 4 to 9 hours. In reality, the number and variability of those hours is similar to her working hours before they signed the contract. That is evidenced in the Pay Discrepancy document, which shows between 10<sup>th</sup> August to 4<sup>th</sup> October, Ms Hay's weekly hours varied from 11.8 hours to 27.2 hours per week. In other words, Ms Hay never worked the 37-hour week as set out at paragraph 20 above.

- 47.4 As to other parts of the contract, they are capable of being consistent with a contract of service. For instance, the contract refers to 25 days' annual leave, which would normally be associated with an employee/employer relationship. Someone who is self-employed doesn't require annual leave if they can work or not work at their choosing. The contract also suggests that the annual leave may be paid, and any ambiguity in the contract would be interpreted against Ms Williams's interests, as she provided the contract. Therefore, if the contract provides for paid annual leave, that points towards Ms Hay being an employee.
48. Furthermore, the above factors, particularly at paragraphs 47.1 and 47.2 above, demonstrate the arrangement involved mutual obligations between the parties.
49. Amongst the changes introduced by the contract was that Ms Hay was to be paid £8.36 per hour. That is the national minimum wage, and the fact her pay was set at national minimum wage levels, could be taken as an indication that she was an employee. Because the national minimum wage applies to workers and/or employees, but not to the self-employed. On its own, that factor is not significant.
50. However, taking a step back to consider in the round, all the matters set out at paragraphs 44 to 49 above, I find a contract of self-employment did not reflect the reality of the situation.
51. Therefore, I conclude Ms Hay was an employee when she started working on 10<sup>th</sup> August 2021, and remained an employee up to the point she was dismissed, including the period after the parties signed the contract.

#### The Reason for Ms Hay's Dismissal

52. Ms Williams says there were a number of reasons she dismissed Ms Hay, none of which relate to her asserting a statutory right. My conclusion regarding each of Ms Williams's stated reasons are as follows.

53. I don't consider the September 2021 complaint was the reason or principal reason for Ms Williams dismissing Ms Hay. Ms Williams hadn't treated this as sufficiently serious to warrant raising the complaint with Ms Hay, and she took no further action in connection with the complaint.
54. I also take into account that Ms Williams recommended Ms Hay as a childminder to Amifa shortly afterwards, and subsequently entered into the contract. This further suggests the September complaint had little, if any, effect on Ms Hay's employability.
55. Although Ms Williams did raise the October 2021 complaint with Ms Hay, I don't consider that was the reason or principal reason for her dismissing Ms Hay. This is because Ms Williams did not consider that complaint warranted any disciplinary, or even informal action, being taken either at that time, or in the following month prior to Ms Hay's dismissal.
56. The other reason Ms Williams gives was the 17<sup>th</sup> November 2021 lunchtime conversation with Ms Hay, and what, according to Ms Williams, this revealed about Ms Hay's personality. Ms Hays says that the conversation was the sole reason she was dismissed. In particular, Ms Hay says she was dismissed because she asked Ms Williams about her rate of pay, about not being paid the national minimum wage sooner, and also raised rest breaks. I find this conversation was the reason or principal reason Ms Hay was dismissed. Ms Williams's evidence that without that conversation, she would not have dismissed Ms Hay, supports my conclusion that this was the only or principal reason for the dismissal.
57. Ms Williams accepts Ms Hay's pay and breaks were discussed during that conversation. But Ms Williams says Ms Hay raising these issues was not the reason she dismissed her. Instead, Ms Williams says it was how Ms Hay conducted herself during that conversation. She also said it was the tense atmosphere following that conversation. These matters, and the past complaints, left her believing Ms Hay was not a suitable fit for that working environment. In Ms Williams's voicemail message left later that day, she speaks in general terms about being unhappy about how the conversation went. However, she doesn't say anything specific about what aspect of Ms Hay's behaviour meant she was no longer a suitable fit.
58. But in the voicemail message, Ms Williams specifically refers to Ms Hay raising backpay for the underpayment. In her witness statement and oral evidence, Ms Hay said during that conversation she also complained about the delay in receiving the national minimum wage. During the hearing Ms Williams didn't address that point directly, she focused on the fact that she did not understand how Ms Hay was underpaid when she paid the amount Ms Hay had proposed. In the absence of any challenge to Ms Hay's consistent and direct evidence on this point, I find during the 17<sup>th</sup> November conversation, she did raise the failure to pay her the national minimum wage sooner. In so doing, Ms Hay asserted her statutory right under section 17 of the Minimum Wage Act 1998.
59. In the message, Ms Williams also says Ms Hay complained about breaks. I

understand that while Ms Hay mentioned breaks, for her, that was not the priority. However, Ms Williams's message, and the subsequent WhatsApp exchanges indicate that Ms Williams believed Ms Hay considered the issue of breaks to be significant.

60. I take into account that it was what was in Ms Williams's mind that is relevant to the reason for dismissal. Therefore, irrespective of the significance Ms Hay actually attached to the issue of breaks, Ms Williams thought Ms Hay was concerned about this.
61. I find that as Ms Hay said she had not received the breaks she was entitled to, she was stating that her legal right had been infringed. That amounts to asserting her legal right.
62. Additionally, Ms Williams did not mention either the September or October complaints in her voicemail message. This further supports my conclusion that those complaints were not Ms Williams's reason or principal reason for dismissing Ms Hay.
63. Finally, as regards the voicemail message, it is the dismissal. It is therefore, the most contemporaneous evidence of Ms Williams's reasons. And the specific matters mentioned in that message were Ms Hay's rate of pay, and her saying she had not been given sufficient breaks. I therefore find these were the reasons or principal reasons Ms Williams dismissed Ms Hay.
64. I conclude that during the conversation on 17<sup>th</sup> November 2021, Ms Hay raised the issue of her rates of pay, including that she was not paid the national minimum wage in the period she worked up to 4<sup>th</sup> October 2021. She raised her right to the minimum wage, and therefore asserted her statutory entitlement. I also find she raised the failure to allow her sufficient breaks. Ms Hay had statutory rights to these under section 17 of the National Minimum Wage Act 1998 and regulation 12 of the Working Time Regulations 1998 respectively. These statutory rights are amongst the statutory rights to which section 104 of the 1996 Act apply. Therefore, it follows I also find Ms Hay's dismissal was automatically unfair. Accordingly, the two-year qualifying period does not apply.

#### Breach of Contract claim

65. As Ms Williams is no longer contesting Ms Hay's claim for notice pay (see above at paragraph 4 of the judgment), I do not need to reach any conclusion on this issue.

#### Unauthorised Deduction from Wages claim

66. My conclusions regarding the claim for unauthorised deduction from wages are as follows.
67. Both parties accept their agreement was Ms Williams would pay Ms Hay £50 per day, and £25 per half day, from 10<sup>th</sup> August 2021 to 4<sup>th</sup> October 2021. Ms

Hay breaks down her pay for that period to be £5.55 per hour, because she claims to have worked 9 hours on her full days. She said when she started, she had expected to receive £6.25 per hour, based on an 8-hour working day. Ms Williams said she never calculated the hourly because she simply paid in accordance with their agreement.

68. I find that the amount properly payable for this period would have been £8.36 per hour, being the national minimum wage rate that applied during that period for Ms Hays, who was 22 years old at the time.
69. I acknowledge the parties had agreed a lower amount. At this stage, to determine the issue. However, by section 17 of the 1998 Act their agreement would be read as if they had agreed the national minimum wage as the amount payable. And they cannot contract out of these provisions. Therefore, to the extent Ms Hay as paid less than £8.36 per hour from 10<sup>th</sup> August to 4<sup>th</sup> October 2021, I find the shortfall amounted to an unauthorized deduction from her wages.

#### Claim for an Additional Payment

70. In light of Ms Hay accepting the £10 she paid for pediatric first aid course was repaid on 13<sup>th</sup> April 2022, I do not need to make any finding on this aspect of the claim.

#### **Compensation**

71. At paragraphs 5 to 5.3 of the above judgment, I have awarded Ms Hay £5,443.98 and provided a breakdown of this sum. My reasons for awarding this amount of compensation are as follows.
72. The claim for compensation relates to the period 10<sup>th</sup> August 2021 to 4<sup>th</sup> October 2021, when Ms Hay was employed off the books. I therefore have to consider whether, in light of that arrangement, it's appropriate to make an award.
  - 72.1 I have applied the decision in *Patel v Mirza [2017] A.C. 467*, and taken into account the following factors.
  - 72.2 It was Ms Hay who proposed being paid off the books, but she also confirmed she was willing to be paid on the record. Therefore, the final decision for her to be paid off the books for that period was Ms Williams's.
  - 72.3 Ms Hay has otherwise established that she is entitled to be paid compensation for this period, and in doing so, she is enforcing a statutory right to payment at the rate claimed.
  - 72.4 Depriving Ms Hay of an award would allow Ms Williams to benefit from the arrangement that she was party to, and entered into willingly.

72.5 The award is made on a gross basis, and Ms Williams can satisfy the judgement by paying to HMRC part of the award in the form of tax and national insurance which would have been due had the underpayment not occurred.

73. Taking all of the above matters into account, I conclude it is appropriate to order Ms Williams to pay compensation in the amount stated.

#### Unfair Dismissal

74. I considered Ms Hay's Compensation/Loss Breakdown, which included a schedule of the loss for unfair dismissal. For this aspect, she claimed loss of earnings from 18<sup>th</sup> November 2021 when she was dismissed, to 18<sup>th</sup> April 2022 when she started a new job. She claimed this at the rate of £836.00 per month, being her contractual pay at the date she was dismissed. This amounted to £4,180.00.

75. Ms Williams challenged this sum, arguing the award should be zero for the following reasons:

76.1 It was unfair to award Ms Hay interest.

76.2 Ms Hay was not entitled to compensation because she had not been employed for two years.

76.3 Ms Williams had already agreed to pay Ms Williams for the failure to give her notice.

76. I concluded it was just and equitable in all the circumstances to award Ms Hay £4,180. Ms Williams had not raised any relevant arguments in response to the amount Ms Hay claimed. This award was the compensatory element, so was assessed independently of the amount agreed for notice pay. The award was based on Ms Hay's loss of earnings only, it did not include interest, which was neither claimed nor awarded. I had already found that Ms Hay's dismissal was automatically unfair, meaning the two year qualification period did not apply. Finally, loss of earnings from the date of dismissal to the date Ms Hay started a new job was proportionate, it is the usual method to calculate loss of earnings, and reflected the actual loss she had incurred.

#### Breach of Contract (Notice Pay)

77. Ms Williams conceded that Ms Hay is entitled to one month's notice pay as provided for in the contract dated 6<sup>th</sup> October 2021. Ms Williams is therefore ordered to pay Ms Hay the agreed amount of £836.00.

#### Unauthorised Deductions from Wages

78. I found that Ms Hay was not paid the national minimum wage for the period from 10<sup>th</sup> August 2021 to 4<sup>th</sup> October 2021. But to calculate the deficit, I needed to decide whether she was regularly denied breaks, as she claimed. This

would mean her daily rate of £50 equates to £5.55 per hour, where she worked 9 hours without an hour's lunch break. Alternatively, I need to decide whether she usually had breaks, as Ms Williams claimed. This would mean her daily rate of £50 equates to £6.25 per hour for working 8 hours, plus an unpaid one hour lunch break.

79. I must also take into account that Ms Hay is not entitled to the national minimum wage for a one hour lunch break.
80. Ms Hay was unable to give me any indication of how often or when she had breaks, when she didn't, and how long the breaks were when she took them. As Ms Hay was not provided with payslips, she had no breakdown of the hours she worked. She was only able to provide a print out from her bank showing the payments she received, but these do not specify the hours worked or whether breaks were taken.
81. Ms Hay has estimated the hours she worked by dividing the pay she received by her hourly rate of £5.55. On that basis, she calculates she worked 148.75 hours between 10<sup>th</sup> August 2021 to 4<sup>th</sup> October 2021.
82. Ms Williams had some records of the hours Ms Hay worked, but these records were incomplete and inaccurate, because the WhatsApp messages showed Ms Hay worked on some days where Ms Williams's records did not reflect this. The bank print outs also showed Ms Hay received paid for periods where Ms Williams had no record of her working. Therefore I was unable to rely on Ms Williams's records.
83. In her WhatsApp message timed at 21:29 hours on 17<sup>th</sup> November 2021, sent before she dismissed Ms Hay, Ms Williams acknowledges there were sometimes practical difficulties with Ms Hay having breaks. Furthermore, such records as Ms Williams has, indicate Ms Hay worked more hours than she was in fact paid for if she had been paid £6.25 per hour. In some instances, Ms Williams's records suggest Ms Hay worked more hours than she was paid for, even using £5.55 as the hourly rate. For instance the pay received on 17<sup>th</sup> and 23<sup>rd</sup> August 2021, compared to the hours worked. Neither Ms Hay nor Ms Williams were able to explain this.
84. Without complete and accurate records, I have to do the best I can, and rely on what are likely to be the most accurate records. In my judgment, that is Ms Hay's bank printout showing the payments received. This is because Ms Williams would not pay Ms Hay unless she actually worked. Based on these records, I calculate Ms Hay was not paid at £6.25 per hour, otherwise she would have received more than the amount in the bank printouts. On that basis, I conclude the deficit between what Ms Hay was paid and the national minimum wage was £2.81 per hour, being the difference between £8.36 and £5.55.
85. If, as I find, that was the hourly rate Ms Hay was paid, it also means she did not generally take a one hour unpaid lunch break. Therefore, to calculate the hours Ms Hay worked, it is appropriate to adopt her approach of dividing the



pay she received by £5.55. This amounts to 148.75 hours worked during the period 10<sup>th</sup> August 2021 to 4<sup>th</sup> October 2021.

86. Accordingly, I calculate the shortfall as  $£2.81 \times 148.75 \text{ hours} = £417.98$ . This is a correction to the amount announced at the hearing, which was miscalculated as £425.42, being  $£2.86 \times 148.75 \text{ hours}$ .
87. It is for these reasons I have made a total award of £5,433.98.

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Employment Judge Tueje

Date: 6<sup>th</sup> July 2023