EMPLOYMENT TRIBUNALS

Claimant: Mrs S Pangeni

Respondent: EU Plants Limited

Heard at: Southampton **On:** 20 - 23 June 2024 and 4 - 6 July 2024

Before: Employment Judge Self
Mr J Evans
Mrs K Symonds

Appearances

For the Claimant: Mr F Magenis – Counsel

For the Respondent: Mr S Brochwicz-Lewinski - Counsel

RESERVED JUDGMENT

1. The Claim of unlawful deduction of wages is not well founded and is dismissed.
2. The Claimant of Indirect Race Discrimination is not well founded and is dismissed.
3. The Respondent was in breach of their obligation under section 1 of the Employment Rights Act 1996, in that they failed to give to the Claimant particulars of her employment.
4. The Respondent was not in breach of its obligation to provide itemised pay statements.
5. The Claim for breach of contract is not well founded and is dismissed.

REASONS

1. By a Claim Form dated 6 June 2023 the Claimant brought claims of Indirect Race Discrimination, Unlawful Deduction of Wages (including unpaid accrued holiday pay), Failure to provide written particulars of employment, Failure to provide written payslips and a breach of contract.

2. The Claimant's employment terminated when she resigned summarily on 17 January 2023 having worked for the Respondent for just under two months under the Seasonal Workers' Visa Scheme. The visa itself was granted until 15 May 2023. She was recruited for the role through the agency AG Recruitment and her job title at the Respondent's farm was Casual Worker for Harvest. The Claimant moved onto another farm after working for the Respondent and remained in the UK after the end of her Visa having applied for asylum.

3. Early Conciliation was between 2 April 2023 and 14 May 2023 and there are no time issues that arise in this case. There was a Case Management Hearing on 29 November 2023 heard by EJ Livesey and he gave directions and set out the issues in the case as follows:

1. Indirect discrimination (Equality Act 2010 s. 19)

1.1 A "PCP" is a provision, criterion, or practice. Did the Respondent have or apply the following PCPs:

1.1.1 Engaging staff on an hourly rate of £10.10 but paying on a piece rate.

1.2 Did the Respondent apply the PCP to the Claimant?

1.3 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic (British and/or EU and/or non-Nepalese workers), or would it have done so?

1.4 Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom she did not share the characteristic?

1.5 Did the PCP put the Claimant at that disadvantage in that she had a greatly reduced ability to enforce her rights by virtue of the requirement to leave the UK when her visa expired?

1.6 The Respondent disputes the existence of such a PCP. It does not, in the alternative, seek to argue that it was justified.

2. Holiday Pay (Working Time Regulations 1998)

2.1 This claim was withdrawn and has been dismissed (see the Judgment of even date).

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

3.1 The Claimant and Respondent agree that her hourly rate was £10.10.

3.2 Did the Respondent make unauthorised deductions from the Claimant's wages? Did they fail to pay her that rate for all hours of work undertaken? The Claimant claims that she was underpaid. Her underpayment is said to have amounted to approximately £3,700.

3.3 Was any deduction required or authorised by a written term of the contract?

3.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

3.5 Did the Claimant agree in writing to the deduction before it was made?

3.6 How much is the Claimant owed?

4. Breach of Contract (Extension of Jurisdiction Order 1994)

4.1 Did the Claimant's contract of employment include the terms of the scheme under which she was employed?

4.2 Did that contract require the Respondent to provide and pay for any necessary personal protective equipment ('PPE')?

4.3 If so, were the PPE items that the Claimant purchased within the meaning of the Claimant's contract of employment?

4.4 If so, did the Respondent breach that contract by not purchasing the items for the Claimant?

4.5 Did this claim arise or was it outstanding when the Claimant's employment ended?

4.6 The Claimant alleges that her losses amount to £369 (3 items).

5. Other claims

5.1 The Claimant further contends that she;
- 5.1.1 Did not receive a copy of her written particulars of employment;
- 5.1.2 Did not receive all of her itemised pay statements.

4. At paragraph 60 of the Case Management Order, it is recorded that ***"a failure to pay accrued holiday pay in her final payment was rectified by a payment of £192 in May 2023"***. It is noted that payment was made in the course of Early Conciliation or just after and before these proceedings were lodged.

5. This matter was initially listed for four days. On the first day there were problems in locating the hard copies of the bundle which had been ordered to

be delivered to the Tribunal. The Respondent had been told by the courier that they had been delivered the previous week but it transpired that was false information. Some time was lost in seeking to find what was not, in actual fact, available and then printing off all the bundles and statements. The initial bundle ran to 281 pages and taking into account the parties' estimates for essential pre-reading it was decided that because of that and the mooted preliminary applications, the evidence would start on the second day.

6. On the second morning we were informed that there was an application to amend the PCP set out in the List of Issues and also an application by the Claimant to submit a supplementary statement. In addition, we had to print off and then consider a Supplemental Bundle, of some 55 pages, which had been provided from the Respondent overnight. In fact, over the course of the hearing no less than three supplemental bundles were provided as ongoing disclosure from the Respondent, comprising primarily of pay slips of other employees engaged at the same time as the Claimant on the same financial package and a complete set of the Excel spread sheets that the Respondent contended was the basis for calculating the Claimant (and other employees') pay. There were additional statements lodged by both parties as issues crystallised.

7. The Claimant did not oppose a statement that had been filed late by Mr Estimov by the Respondent. In addition, there was an application to adduce certain reports by the Claimant and the Tribunal allowed one to be utilised but ruled that the others were not going to assist the Tribunal Whilst the Claimant had overarching concerns over disclosure in this case and has asked the Tribunal to draw adverse inferences from the same, both parties did not oppose the admission of the further evidence and the documents. The Tribunal sought to allow parties additional time if required to consider the same so as to minimise any disadvantage. We will return to our views on the Respondent's disclosure later in these Reasons.

8. The Tribunal heard the application to amend on the afternoon of Day 2 and the outcome is set out below. There was a need for the Respondent to consider what was required from his side vis a vis rebuttal evidence / further documentation following our decision to permit the amendment and that, and other minor issues that arose, took us to the end of Day 2. Over Days 3 and 4, we considered the Claimant's case which was concluded on Day 5 and then heard the Respondent's evidence until the close of day 6 with closing submissions on Day 7. The original listing was for four days and so there was a break of some two weeks between days 4 and 5.

9. It is fair to say that administratively this was not the smoothest of hearings with a number of bumps along the way but the Tribunal and the parties persevered and although perhaps somewhat later than would have been

ideal the hearing was completed, with all parties contributing and looking for solutions to the various issues that presented themselves. The Tribunal were able to come to their decision on the afternoon of Day 7, but unfortunately finding time to write the same up in final form has not been an easy task, hence the delay in producing this reserved decision.

10. The Claimant required the assistance of a Hindi interpreter and one was provided. The totality of the Claimant and Ms Rai's evidence was conducted via the interpreter and a Hindi interpreter was available at the Tribunal throughout the claim. Ms Tairova was a witness for the Respondent who had travelled to the UK from Bulgaria in order to give evidence. Although there were a number of issues in securing a Bulgarian interpreter there was one available by CVP for Ms Tairova's evidence. We thank all the interpreters for their invaluable assistance. There were a number of Hindi and Bulgarian speakers in the court and there were only two queries as to whether there was an error in translation and in those circumstances the questions and answers were asked again. We are satisfied that the best has been made of difficult circumstances. We are mindful of the difficulties that those who do not have English as a first language often have and have taken that into account when coming to our conclusions.

11. The Claimant submitted evidence in the form of written witness statements from:

    a) The Claimant (2 statements)
    b) Anku Rai – Co-worker
    c) Pravesh Singh Bisht
    d) Susheel Pangeni

12. Of those witnesses a) and b) attended at the Tribunal and were cross examined. c) and d) were available to be cross examined by way of a CVP link but the Respondent declined the opportunity to cross examine them, making it clear that whilst he did not necessarily accept what the witnesses said he did not consider that their evidence was germane to the issues in the case. We have taken into account all that evidence as if it were challenged.

13. The Respondent submitted evidence from two witnesses and they were cross examined:

    a) Tsvetomir Eftimov – Operations Manager (Four statements)
    b) Fatme Tairova – Supervisor.

14. We had a number of Bundles /additional documents as explained above as follows:
    a) Main Bundle – 281 pages (B)
    b) First Supplementary Bundle – 55 pages (SB1)

c) Second Supplementary Bundle – 77 pages (SB2)
d) Third Supplementary Bundle – 44 pages (SB3)
e) Fourth Supplementary Bundle – 9 pages (SB4)
f) Report
g) Claimant's bundle of correspondence re disclosure applications /issues.

15. Both counsel provided very helpful written closing submissions with tables attached which sought to summarise various elements of the Claim. Both counsel expanded their submissions orally. We record here that we are grateful to both counsel for the effort that they have put in to master the fine detail of this Claim. Their skill and expertise has assisted the Tribunal greatly.

The "Amendment" Application

16. The Claimant applied for an amendment to be made to the PCP for the race claim between days 1 and 2 of the hearing.

17. The PCP as pleaded in the List of Issues read ***"Engaging staff on an hourly rate of £10.10 but paying them on a piece rate"***. Within the Claim Form itself the PCP was outlined as being:

"Engaging employees pursuant to a contract stipulating a minimum hourly rate of £10.10 but then paying them at a piece rate thereby making unlawful deductions from their wages and paying them less than £10.10 per hour".

18. The new PCP or rather two PCPs were proposed as being:
a) Engaging employees pursuant to a contract stipulating a minimum hourly rate of £10.10 but then paying them at a piece rate
b) Making unlawful deductions from their wages.

19. So far as the second limb of that PCP was concerned it was clarified that making unlawful deductions in wages included:
a) Paying at a piece rate as opposed to minimum hourly rate;
b) Deductions arising from failing to properly record hours worked and breaks;
c) Deductions on account of the failure to pay accrued holiday pay.

20. The Claimant's application made the following points:
a) That the proposed amendment was a paradigmatic example of a mere relabelling exercise and that it clarified what was originally presented.
b) There are no time limit issues.
c) That the application to amend had been mooted before this hearing in correspondence. In actual fact there was an application to amend the List of Issues made on 10 May (and not the Claim itself) so as to add to the

existing issue (which was in itself an amendment to the Claim) and which read ***"Engaging staff on an hourly rate but paying on a piece rate"*** a second PCP of ***"Failing to pay holiday pay correctly or at all"***. That was also the general gist of discussions on the first day before the parties were asked to go away and consider their positions on the PCP issue.

21. At the Case Management Hearing the holiday pay claim was dismissed upon withdrawal as it was accepted that the outstanding sum had been paid.

22. The schedule of loss and the updated schedule seems to rely on the fact that there was a mis recording of hours by the Respondent deliberate or otherwise which led to the alleged deductions and not that piece work was responsible for it.

23. We have been referred to **Vaughan v Modality Partnership (2021) ICR 535** wherein HHJ Taylor reminded Tribunals that (paragraph numbers relate to those in the Vaughan Judgment):

    a) Amendments are a case management decision and so there is a broad discretion (para.4);
    b) The Tribunal should look at all the circumstances of the case but in particular should consider any injustice or hardship to the parties, the decision to amend will cause (para.12);
    c) The Selkent factors that may be relevant to an application to amend are not a checklist to be ticked off but factors to be taken into account when considering the balance of injustice / hardship (para.16);
    d) The greater the difference between the factual and legal issues raised by the proposed amendment, the less likely they are to be allowed (para.20);
    e) There should be a focus upon why the amendment requested is of practical importance (para.22);
    f) The Selkent factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. Those examples are to assist the fundamental balancing exercise and other factors may also be important (para. 23);
    g) No one factor is likely to be decisive and the balance of justice is key (para.25);
    h) The key factor at all times is the balance of justice (para.28).

24. Many applications to amend are relatively straightforward with the answer clear and obvious. This application was not one of those.

25. We fundamentally disagree with the Claimant's counsel's contention that this is a minor amendment and/or a relabelling. It is not. The PCP that he proposes is entirely different moving from a very narrowly prescribed PCP that he himself had drafted under which he would have to demonstrate that it was the piece rate that caused the unlawful deduction of wages to a far more

general statement of subparagraph (b) that the Respondent simply had a PCP of unlawfully deducting wages for which he already has had a concession in terms of one of the two elements of wages claimed – holiday pay.

26. The Claimant's own schedule of loss is not pleaded on the basis that the piece rate was in any way relevant to the deductions which appears to rest solely on a different view of how many hours were worked on a given day as opposed to the rate of pay paid for each hour.

27. It is not the minor changes to the sentence or syntax that are relevant but the effect of the change which is in our view substantial. The timing of the application to amend is unfortunate as it is at the outset of the final hearing which would inevitably have consequences on how we proceeded and indeed did because of substantial additional statements and documents that were subsequently disclosed. Having said that the issue of unlawful deductions had been live from the outset.

28. The potential prejudice to the parties are substantial on either side. Our initial view as at the point of the application, was that if the PCP remained the Respondent was likely to be successful in defending the Claim and the Claimant would have lost the chance to put forward the totality of their argument. That is a big loss to the Claimant on a claim which does have potentially an interesting and wide-ranging reach. If the claim is amended then the Respondent will have to contest a claim for which they were not prepared. We note that counsel drafted the original claim, was present at the Case management Hearing and attends today. We do not know what he was told or knew at any given time.

29. We do reflect back however on Vaughan that the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

30. We take into account paragraphs 27 and 28 of Vaughan which reads as follows:

"Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it."

"***An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and***

avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice".

31. What are the ramifications of not allowing the amendment – it means that the Claimant will need to proceed on a PCP for which there does not appear to be any supportive evidence because of the way it is drafted. If it is not then the new PCP will be in place and the Respondent will need to be given time to fully consider the new PCP and to provide witness evidence that will deal with the change to the Claim. That is possible and even though we accept that any application for a costs order may be difficult to enforce, if not impossible, it does seem to us that despite the numerous matters weighing against allowing the amendment the balance of hardship does fall in favour of allowing the amendment.

32. Paragraphs 16-31 above have been largely reproduced from the oral decision given in respect of the Amendment at the start of the hearing. As an ex post facto view following the hearing we are quite satisfied that the Respondent was fully able to respond to the amended PCP fully by way of further documentation and witness evidence and whilst they suffered the prejudice of having to act "on the hoof", we are satisfied that they were able to defend the new PCP appropriately despite its late arrival.

The Facts

33. The Respondent is a family run fruit plant farming business based in Wokingham. The business produces plants for the soft fruit industry. On the "Farm Info" that was provided to the Claimant (114-116) it states that there are two farms called Manor Farm and Church Farm, respectively.

34. The Claimant is a Nepalese national and came to the UK as a seasonal worker and her employment commenced on 19 November 2022 and concluded on 17 January 2023 when the Claimant resigned and moved to a different farm / employer. The Respondent was not told where she had moved to after she left somewhat peremptorily.

35. The Claimant was recruited for the role by AG Recruitment and Management SRL (AG) who were an organisation that were licensed to recruit seasonal workers for the Visa Scheme. They are a company registered in Bucharest, Romania. There are a number of documents in the bundle from AG (Mediation Agreement – (100 to 101) and AG Seasonal Worker Contract – (103 to 105) but none are signed by the Claimant and we were not informed whether the Claimant saw those documents and, if she did, whether she considered them in any detail. We note that they are both documents written in the English language.

36. The “Farm Info” doc (114-116) document sets out a number of pieces of information as follows:

a) That the Claimant should bring enough money for at least 2 weeks. This was on account of the likely delay between commencing work and being paid her first salary. We were also told that the Claimant and others were “subbed” part of their wages by the Respondent prior to pay day to ameliorate any delay in receiving the first pay.
b) That the accommodation would be in caravans and would cost £9 per day with the only additional expense being electricity.
c) That the work would be a combination of picking, weeding, pruning, and packing over Monday to Saturday.
d) The pay rate would be £10.10 per hour and that the pay slip would be provided between 28th and 1st /2nd of each month.
e) That there was a twenty-eight-day holiday entitlement.

37. Within the bundle there is a signed contract of employment which is written in the English language (123-126). It is signed by the Claimant but she asserts that she was not given a copy. Material terms within that contract are as follows:
    a) Para 2: ***“When work is available you will be offered work as a Casual Worker for Harvest, for reasons of crop, weather, and customer demand, work, cannot be promised at any time.”***

    b) Para 3.1 – “***You will be paid a minimum hourly rate of £10.10 per hour. Holiday entitlement is payable in accordance with national law based on a pro rota (sic) entitlement of 5.6 weeks average weekly pay per annum.***

    c) Para 3.2 – ***“We shall give you a pay slip each month that you work….. it will also show any additional monies you have earned as a result of any piece work rate set during the month. You will also receive a weekly summary which will show the days you have worked each week and your earnings per day”.***

    d) Para 4 and 4.1 – “***The majority of work on our farm will be on a piece work basis when weather plus state of the crop will play a part.***

    The farm usually works six days a week – crop, weather, and customer demand permitting - with basic hours of no more than eight in any day. Due to the nature of your role, there are no set or standard hours of work for you. Whilst we will provide you with a minimum of 20 hours in each full week that you work (averaged over a 28-day reference period). You are not otherwise guaranteed a minimum number of hours of work each week.

e) Para 4.2 – **"The working day is dictated by the team leader and no harvesting will take place until he or she is present".**

f) Paras 12.4 and 12.5 **- The Claimant would pay £9 per night for any company provided accommodation and she would be charged for electricity based upon meter readings.**

38. The Claimant explained that when she arrived at the farm she was presented with documents which she was asked to sign. It is apparent that one of those documents was the contract of employment. The Claimant indicated that she was provided those documents by Ms Marinova and that after they were signed the documents were removed and she was not given a copy of them. In her oral evidence she said that one of her friends had a similar document to the contract in the bundle and that she ***"had a similar thing as well***". Ms Marinova did not give any evidence before us.

39. Although the evidence is somewhat confusing we are satisfied on the evidence we have that the Respondent did not provide the Claimant with her contract of employment but simply asked her to sign the document and took it back. The Respondent was in breach of their obligation pursuant to section 1 of the Employment Rights Act 1996. There is no financial remedy per se but we will bear this finding in mind if the Claimant is successful on any other claims as in those circumstances compensation could be derived from Section 38 of the Employment Act 2002.

40. The working day would be as follows. The Respondent would determine what tasks the workers were going to be set around the farm. The supervisor would indicate, often by What's App message, what the scheduled start time was and the staff who were onsite would gather at that time unless they had been informed that a later start time was necessary. Ms Tairova indicated that changes to start times were reasonably common because many tasks were weather dependant and in particular, wet and /or cold weather. We note that the Claimant was employed in the last half of November, December and the first part of January which is in the depths of an English winter. Whilst neither party has provided the Tribunal with any specific breakdown of the weather during that period our own collective experience suggests that wet and / or very cold weather would a reasonably regular occurrence at that time of the year. Ms Tairova, who also lived in a caravan on site, gave evidence that if there was a delay she would often just go to the caravans to inform the workers that there would be a delay. The Tribunal did not consider that evidence to be an unlikely scenario and accept that she did so from time to time.

41. No work would take place until the supervisor was on hand (as set out in the contract) and we were told and accept that as much as possible the farm labourers took breaks at the same time and for the same period and normally

finished at the same time. There were times when a certain group of workers may work for longer on a given day. The process described in this paragraph seems sensible and would certainly make the record keeping far more straight forward for the supervisor.

42. There were three scheduled breaks each day, two of 15 minutes, one in the morning and one in the afternoon and a lunch break of 30 minutes. Staff either went back to their caravan for these breaks or found another area to take it. Ms Tairova explained that some breaks were extended if the weather were adverse and she would always try and work in fifteen-minute cycles if possible. If everybody in the team was not available to start then a break would be extended. Any of the above breaks were not paid.

43. We were told that the working day would end when the assigned tasks were completed so an extended break would simply mean that the working day was longer, but with the same working hours worked over it. As an example, if the lunch break were designated from 1 to 1.30 and for a rain reason it was delayed to 1.45,there was the same work to be done and all that would happen is that the working time would start fifteen minutes later and the finish time would be fifteen minutes later. The only time where the workers may miss out on hours would be when a day was cut short by weather in such a way that the assigned tasks could not be completed. Save for the minimum it was open to the Respondent to give the Claimant as much or as little work as they needed to have done.

44. At the core of the Claimant's contention that the Respondent made unlawful deduction of wages claim is the proposition that the Claimant and other employees were not paid for the working time they did because that working time was regularly, either by accident or deliberately, mis recorded. The Claimant's focus was very much that it was done systematically and deliberately in order to reduce wage costs. It is, therefore, important to look at the process by which those hours were recorded.

45. Ms Tairova, as supervisor, would be responsible for the hours logged on the Respondent's system in the first instance. The Claimant had been a labourer herself prior to being promoted to supervisor. There was no automated system for clocking in and out and she told us that she had a notebook and in that she would mark down all the information that was required on the day which included the start time, the finish time, the length of breaks taken and the number of units recorded by each worker so as to be able to calculate any necessary piece rate.

46. At the end of the shift or (at the latest) the next morning she would transpose the information from her notebook onto the spread sheets that we have been provided with, primarily in the First Supplementary Bundle, which she would then send onto the office for further processing. The office would pass the

data onto the external pay roll office /accountants who would generate the pay slips which Ms Tairova stated she would deliver personally to the workers at their caravans when available.

47. The Claimant has asserted that she was not given itemised pay statements. We do not agree. We accept that whilst the Claimant was working at the farm she was provided pay statements by Ms Tairova which explained her pay adequately and the only reason for the delay in the last pay slip was on account of her peremptory departure with no forwarding address. We find that the Respondent has subsequently provided the claimant with her remaining pay slip.

48. We have seen the spreadsheets for the relevant days. We have not seen any of Ms Tairova's notebooks. She stated that once the notebook was full she would dispose of the notebook. She had left the business in 2023 and had not retained any notebooks at all. She was satisfied that she had transposed the information onto the spreadsheets sufficiently proximate to having made the notes to be sure that the figures she had recorded were accurate. When asked about specific days she could not recollect them individually (in the main) but was certain that the spreadsheets were accurate and reflected the reality of the work done. We have not been made privy to the various communications that sent the spreadsheets through any other part of the chain that led to pay slips being issued.

49. In her oral evidence she did not accept that she was in any way pressurised by management to either falsely record working hours or to resolve any ambiguity in favour of the employer. She pointed out that she herself had been a farm labourer before being promoted to supervisor and that she simply would not seek to cheat those who were in a similar position to that which she had been a relatively short time ago. Mr Eftimov also denied that there was any general desire on the part of the Respondent to under record hours and that he was not aware of any such policy or practice and he had certainly done nothing like that, nor had he been instructed to do so.

50. It was accepted by the Claimant that each week, Ms Tairova would provide a slip of paper upon which was recorded the number of hours worked and the pay for each day within it (p.184-185). Ms Tairova stated that this was a clear opportunity for each worker to tell her if any hours of work were incorrect and that if they did she would go back to her notebook and, if necessary, return to the other administrators in the main office to effect any changes. In her oral evidence, Ms Tairova explained that the Claimant did come and query her hours once and the Claimant explained to her that she thought she should be paid from the time that she left her caravan until the time she returned to the caravan and Ms Tairova explained that was incorrect and not all of that was working time. She would be paid from the point that actual field work commenced. In her statement the Claimant stated:

"That after the first week of working my supervisor gave me a slip of paper which was supposed to show my hours of work and pay. The slip of paper did not show the correct hours worked and pay due. The other workers had the same problem. We discussed this problem and six of us went to (the supervisor's) caravan and told her that the slips of paper were showing fewer hours in the hours we actually worked. The supervisor said it was not her job to deal with problems with pay."

Ms Tairova denied that there had been any such conversation and that she would not have said that because it was precisely her role to deal with any pay queries that arose in the sense that she would check to see if there was any validity in the query and she was aware that it was her role to communicate any amendments to the office if any were identified. We do not accept that Ms Tairova told the workers that pay issues were not her problem.

51. The Claimant also stated that there were other occasions when she sought to raise pay issues, but she was brushed off Ms Tairova. We do not accept that evidence. The Claimant said that she found it difficult to communicate with the manager of the farm as she did not speak English (although neither, according to the Claimant does she) and that the manager blocked workers who tried to speak with her including herself. The What's App message the Claimant cites in support at page 206 does not show that she was blocked.

52. So much for the Respondent's process for recording the hours that the Claimant undertook what records did the Claimant keep? The Claimant at paragraph 13 of her statement suggests that a few days after starting she spoke to her brother Susheel about the slips showing an under recording of hours and he advised her to keep her own record from that point on. Text messages confirm that there was such a conversation although the dates of those conversations are not apparent.

53. Susheel provided text messages and translation attached to his statement. We note the Claimant sent a number of messages which are unfortunately undated. A typical one is:

"Every day I worked for 7:00 to 8:00 hours but they only pay four to five hours sometimes only for three hours" - Claimant

54. The Claimant's records, which were made as notes on her mobile phone are as follows:

a) Document 1 (186-187 of which part is replicated at page 188) – Document headed Dec 21 which together provides a record from 21 December until January 15 which has information pertaining to the task she was

undertaking, on occasion who with and the amount of that task she has done. There are no times on this document at all.

b) Document 2 (189) – Document that covers the period between 31 December and 17 January which is largely as per the document at (a) with the major material difference of the times that she worked added for each of those days.
c) Document 3 (189A) – This document was added during the course of the hearing (third day) and provides times for the period 21 December to 7 January. Part of this replicates the document at (b) but the 22 December to 30 December period now has times on it.
d) Whilst not contemporaneous there is the Claimant's schedule of loss which sets out the number of hours claimed and after that there was a document headed Updated Schedule of Loss.

55. The Claimant was asked about the two notes on her telephone and her evidence was clear initially that she had made two separate notes – one with times and one with just productivity. She was unable to give a satisfactory answer about why she would keep details of her productivity when her position had been that she did not believe that she was on piece time and solely on an hourly rate. This caused the Tribunal to have concerns about the veracity of the Claimant's evidence as it made no sense at all to keep how much she had done if she did not believe that was the basis of her pay.

56. It was then pointed out to her when the Claimant was adamant that she had drafted two separate documents that it was remarkable that she had made exactly the same typos in the two documents and the Tribunal agree that such a coincidence is outside the realms of possibility, as the typos were numerous. At that point, the Claimant stated that she had cut and paste the original document but contended that she had added the times of work on the day they took place. The Tribunal did not consider that to be an accurate or true account and considered that the most likely explanation was that the Claimant had added the times at a later point and that the times had not been written down contemporaneously. This caused the Tribunal grave concerns about the accuracy of the times which were recorded.

57. We were told that we would receive metadata to show when each was created but that was never supplied. Subsequently we received another version of the note which had times for every day since she started which was wholly inconsistent with her case that she only started doing it when she was told to do so by her brother.

58. The Tribunal accepts the points made by counsel for the Respondent in his closing submissions at paragraph 15 about:

a) The unlikelihood of the same timing of breaks every day.

b) Days when she asserted she worked after Ms Tairova. The contract is quite clear that would not happen and we do not accept that it happened in practice. It is possible that Ms Tairova worked longer on account of her having to do various admin duties.

59. We have considered the table produced by Mr Eftimov, who we also found to be a credible witness and note that the detail set out therein was not challenged in detail and is supportive of the Respondent's calculations.

60. Taking all this evidence into account we are not satisfied that the times that the Claimant has recorded were done contemporaneously and her account on this issue which was central to the core of the case caused the Tribunal some concern over her credibility. We consider that these times were created well after the event in order to support her claim and that the evidence that they were made contemporaneously is false.

61. Set against that we have the Respondent's records. The Tribunal considered Ms Tairova's evidence to be clear and truthful. Whilst, of course, there could be an electronic means of recording the hours there is nothing unsound intrinsically about an individual who is on site at the material time making a contemporaneous note and then transferring that data onto a spreadsheet for onward transmission. We acknowledge that there is room for human error or indeed deliberate manipulation on the part of Ms Tairova, but on the evidence we have before us we do not accept that she was responsible for either. The Tribunal do not accept that there is anything suspicious about the original notebooks not being retained in the circumstances described. It is no different to hand-written notes being taken of a meeting and then they are typed up soon after and that then becomes the record of the meeting.

62. **Holiday Pay** – When the Claimant left the farm she informed the Respondent by text message that she was leaving and did not notify them where she had moved on to. The Respondent did fail to pay the Claimant her accrued holiday pay and could have done so as they did produce a last pay slip. When the matter was identified in Early Conciliation the Respondent made a payment which was accepted and so at the outset of these proceedings there was no holiday pay outstanding, but there had been a relatively short time when there was. We acknowledge that the sum although not large would have been of great importance to the Claimant.

The Law

63. Indirect discrimination, as Lady Hale described in **Chief Constable of West Yorkshire Police v Homer (2012) IRLR 601** ***"is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic".***

64. Section 19 of the Equality Act 2010 reads as follows so far as relevant:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

65. There are effectively 4 stages that must be considered when determining cases involving indirect race discrimination:
    a) What is the neutral "provision criterion or practice" (PCP) that the employer has applied (or would apply)?
    b) Does that PCP place people of the Claimant's race at a particular disadvantage when compared to those not of that race?
    c) Has the Claimant experienced that particular disadvantage?
    d) Has the employer shown that the PCP is justified as a proportionate means of achieving a legitimate aim?

    In this case the Respondent has not availed itself of the defence set out at (d) because failing to pay monies legally due to employees would be impossible to align with a legitimate aim.

66. **PCP** – This is not defined in the Equality Act 2010. A provision may relate to a contractual provision or the provision of a non-contractual policy. Practice covers a wide range of situations and could emerge from something that took place just once if there is evidence that what happened was indicative of a practice.

67. In **Ishola v Transport for London (2020) ICR 1204 CA**, it was stated that

"…all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a particular case would be treated if it occurred again. "Practice" connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP to have been applied to anyone else in fact. Something may be a practice or

done in practice if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises."

68. A PCP in an indirect race claim should be a neutral provision that is applied regardless of race. It is clear from **MOD v DeBique (2010)** that a Claimant may make a complaint that they are placed at a disadvantage if they are placed at a disadvantage by a combination of PCPs.

69. A PCP must place persons who share the Claimant's characteristic at a particular disadvantage when compared to persons who do not have that characteristic. This is referred to as group disadvantage. Disadvantage is not defined in the EqA but the EHRC Code indicates that "It could include denial of an opportunity or choice, deterrence, rejection, or exclusion and likened it to a detriment which is something that a reasonable person would complain about. There does not need to be actual loss (quantifiable or otherwise) and it is enough for the worker to sat that they would have been preferred to have been treated differently.

70. Not everybody with the protected characteristic in the group needs to experience the disadvantage and the legislation requires the Claimant to show "particular disadvantage". Assessing that is a comparative process between groups of employees.

71. So far as personal disadvantage is concerned the Claimant is obliged to show that she experienced the disadvantage.

72. The legislation for unlawful of deductions comes from the Employment Rights Act 1996. Section 13 of that Act states, so far as is material:

13 Right not to suffer unauthorised deductions.
(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

73. In this case there is no suggestion that any deduction was made because of any agreement, statutory provision, or term of the contract. The deductions alleged in this case are encapsulated by sub section (3) because the Claimant is simply asserting that the Respondent failed to pay the wages properly payable to her taking into account the hours she worked. `

Conclusions

74. Have there been deductions from the Claimant's wages? We start by considering the Claimant's representations over piece work. This was not really pursued at this hearing. It is quite clear to the Tribunal that at all material times the Claimant was paid at least what she was guaranteed as a minimum. We are equally satisfied that any application of the piece rate when that minimum was exceeded led to the Claimant being paid more than the minimum. There was, in fact, no challenge at all to the sums paid to the Claimant by way of piece work nor was there any suggestion that Ms Tairova made an error in terms of her recording of the piece work figures or that she had deliberately under recorded the amount of fruit picked or jobs done. The Tribunal consider it strange that Ms Tairova, if she were instructed by more senior management, or of her own volition had determined that the pickers would be underpaid that she would not have sought to manipulate those figures as well. Alternatively, it seems to the Tribunal that she would be as likely to make a recording error in terms of piece work as in the hours worked, but at no point did the Claimant allege or challenge that.

75. It has not been demonstrated that any issues relating to piece work caused any deduction to the Claimant's or indeed any other worker's wages.

76. We move to the under recording of hours. The Claimant indicated that it could have been by accident or deliberately, but it was readily apparent that their belief was that there was a systematic and deliberate policy of cheating the workers. We have no doubt that the Claimant believes that she was underpaid but that is very different from demonstrating the same. In considering an unlawful deduction of wages claim or indeed the discrimination claim the motive or how it came about does not matter. As a matter of basic fact hours could be under recorded if:

a) An incorrect start time was recorded;
b) An incorrect finish time was recorded;
c) An incorrect period for breaks was recorded.

77. We start with the methodology of collecting the data. The Respondent proposed that this case may not have been necessary, had there been some form of automated system. Whilst such a system would have given us an electronic record the data would still have to be entered in some way either by the supervisor or the employee and arguments could still ensue about the validity of that entry – was it punched when work started or was there delay at the end of the day or was it cut short. Did the individual employee clock out? Although some electronic scheme could have been utilised we have no evidence to suggest whether in this industry it is customary to have electronic data and also how easy it would be to set such a system up.

78. The big point from the Claimant was that there was no such system because it made it easier for the Respondent to skim pay from the Claimant and others. We have already expressed the view that intrinsically we can see no issue with a supervisor making a contemporaneous note and then reproducing that information on a spread sheet. Obviously, we have to be satisfied that the supervisor is undertaking that task diligently and in good faith. Having considered Ms Tairova's evidence we are satisfied that she did approach that task in that way.

79. In closing, counsel or the Claimant made representations that Ms Tairova was **"spiky and defensive"** and that the Tribunal should exercise some caution before accepting her evidence that when she stated that she had become a supervisor from being a worker that betrayed some ***"uneasiness - almost guilt"*** about her involvement in ***"the processes by which the Company skims money off workers here and there at various points of the work day."*** The Tribunal did not form the same view. Ms Tairova's evidence was clear and consistent and whilst not a loquacious witness we consider that she reacted in a manner wholly consistent with anybody else who was essentially, and properly, having their integrity impugned in cross examination.

80. Further in closing the Claimant complains about the ***"withering scrutiny"*** on the Claimant's recording of hours compared to similar scrutiny being placed on the Respondent for destroying the notebooks. Again, we do not agree with the Claimant. We consider that, whilst it would be of assistance to see the original notebooks, we are satisfied that the spreadsheets we have seen are a faithful representation of what was contained and were drafted very soon after whilst matters were fresh in Ms Tairova's memory. Further, we formed the view that Ms Tairova, on the balance of probabilities, was competent at her job. Her capabilities had been identified and she had been promoted.

81. In contrast the Claimant had initially produced notes on her phone that only stated the piece work rates, although her case was that she did not know /

understand about piece work. She then told us that she had redrafted from scratch but when the typo issue was pointed, stated that they were two separate documents and the full schedule came very late in the day. We have taken into account that the Claimant required an interpreter, but note that so did Ms Tairova, and have weighed all of that in the balance. On this key area the Claimant was an unsatisfactory witness and we do not accept that the hours she worked were recorded contemporaneously but were prepared at some later point. On balance we consider that the hours recorded by the Respondent are a more reliable and accurate account of the hours worked.

82. The Claimant is the closing submissions set out a number of angles whereby she asserted the mis recording of hours could be seen. We will deal with each of these in turn:

a) **High Piece Work Averages** - The Claimant asserts that because it can be seen that some individuals regularly earned more and sometimes much more on the piece rate than the minimum pay rate that this was demonstrative of the under recording of hours of many staff. We are unable to subscribe to that conclusion. The Claimant is right that by under recording hours that would increase the piece rate when converted to an hourly rate. Equally it could be that the staff are very productive and skilled which would also lead to an in increased piece rate. Alternatively, the Respondent may be providing the staff with a good piece rate deliberately so that they are incentivised and the hourly rate is linked to an enticing piece rate. It could be all, none, or some of these. The Tribunal has absolutely no means of knowing and all the Respondent has done, at best, is identify a possible reason for why staff hit a higher hourly rate on piece rate. We will, of course bear that in mind when considering the totality of the evidence.

The Claimant has not asserted at any time of this hearing that the amount of piece work logged on the spreadsheet is wrong and nor has it been alleged that the piece rates themselves were wrongly applied and so the Claimant has not challenged any of the figures where the pay is above the £10.10 figure save when it asserts that the number of hours actually worked multiplied by the guaranteed minimum rate exceeds the piece rate work. As stated earlier in this Judgment it is accepted therefore that the numerous figures provided in the spreadsheets by Ms Tairova for the piece work done is accurate. A challenge could have been made on the piece part of the pay (daily yield or payment rate) from the outset but it has not. It seems to the Tribunal that it would have been as easy (if not easier) had the Respondent been so minded to ensure that the piece rate figures were also under recorded and that would be in keeping with the Claimant's general case that the Respondent was looking for any avenue to reduce the Claimant's pay. The fact that they did not and it has not

been challenged appears not to be in keeping with the Respondent's alleged devious and deliberate policy to unlawfully deduct wages.

b) **Gross pay analysis** - The Claimant's counsel states in his closing that if there was under recording of hours then you would expect to see staff working substantially less than the forty-hour average. As the Claimant were not earning the equivalent of 40 hours per week or close to it that is further evidence of under payment of hours.

Again, the Tribunal does not accept this hypothesis. In the AG Seasonal Worker contract (103) it makes it clear that **"The farm cannot guarantee your working hours as much of the work is dependent on weather and customer demand. Unexpected weather conditions can result in the decrease of working hours**". It goes onto say, "***Whilst there is no guarantee of working hours most placements are based on an average of 39 hours a week which means you must be available to work at least these hours".*** In a later Job Description (117) it suggests that 40-48 hours would be the average. The contract and what it says about the hours is set out above but a minimum of only 20 hours is guaranteed over a 28-day period.

As a matter of common sense in the depths of winter it would be very difficult to work 40-48 hours per week in the fields. Due to light the longest would be 8 – 4 which ,with rest periods, would be 7 hours a day. The maximum working a 6-day week would appear to be 42. That would be dependent on the weather being acceptable all week and that there were tasks to do for all of that period. It would seem highly unlikely that working over the Claimant's period the weather would be likely to be so compliant. The best the Claimant can get from this point is that any under recording of hours would show up in less pay being received but there are also a large number of other factors primarily the availability of work that would also be a reason for this at all. We accept that it is not something that weighs against the Claimant's case but also consider it to be a matter that does not particularly support the case either. We will, however, weigh it in the balance, with all the other factors

c) **Down Time** – The evidence that we took was that the Claimant's were paid when they were working and not paid when they were not. As a general concept that does not seem to be unreasonable. Ultimately it was for the Respondent to decide how many hours were to be worked and the safeguard for the Claimant and others were that they were guaranteed 20 hours per week over 28 days (80 hours) under the contract no matter what happened.

The Claimant criticises Ms Tairova for waiting until all staff were available before restarting the work. Ultimately it is for the Respondent to dictate

how many hours the Claimant is to work. We have not been taken to any specific occasion where the Claimant was subjected to a detriment because of this and in reality it would just mean that the working hours were spread out over a longer period and the same number of working hours would be logged. This process made sense from an administrative point of view too. Whilst it is right that the days which were weather affected were not clearly marked by the Respondent, similarly they were not clearly marked by the Claimant. Weather delays and fewer hours because of that reason were plainly anticipated and allowed for in the contract. In particular there was no evidence of the Claimant herself working beyond the times asserted, save for her own discredited records.

d) **Discrepancies between Facebook, spreadsheets, and videos** - The Tribunal did not consider that any of the video evidence assisted the Claimant in showing that she was underpaid wages. We do not accept the Claimant's contention that communicating orally as opposed to by What's App the start time ***"stretched credulity."*** Ms Tairova was on site and one can easily imagine a need to take a look at the conditions before making a decision on when to start. Attending on the caravans seems to be the Tribunal to be a perfectly straightforward way to do it. On 7, 14, 17, 21 and 30 December as an example the message, for a later start was conveyed. None of the video evidence shows the Claimant working outside of her allocated times.

e) **Lack of a transparent time recording system** - The recording of the Claimant's hours was the preserve of Ms Tairova and we have listened to her explanation of her methodology, which we have detailed earlier in this Judgment and made our findings on. We fully accept that different systems could be employed. It is possible that a computerised / mechanical system of recording time could have been used but the feasibility or otherwise in terms of equipment / cost is not known to the Tribunal. We are quite satisfied having taken into account the whole of the evidence that the system chosen was not so chosen specifically to provide a smoke screen for Ms Tairova and other supervisors to cheat the employees. As described above we accept that the hours recorded by Ms Tairova were accurate for the reasons given

f) Of course, the process could be tighter. As a simple example there could be a sheet recording the hours at the end of the working day and the workers could sign off their agreement that that was the hours they did that day. That is a tighter version of providing staff with the weekly hours, which Ms Tairova did. We accept her evidence that the Claimant only came to speak to her once about the under recording of hours and she correctly explained the time that the Claimant would be paid for. Perhaps, in future, if the system operated in this case is still in place a change might be put in place so as to get a contemporaneous i.e., daily

agreement that the hours are right. The fact that there could have been a different or even improved system is not evidence that the Claimant had hours that she worked not paid.

g) It is possible that a mathematical error could arise although the reality is the mathematics is very straightforward in recording hours worked. It is possible that an error could arise when transposing the figures from the book to the spreadsheet or at a later point a data entry error could arise. However, that is not really what the Claimant is saying. Their overarching point is that the Respondent had a deliberate policy or practice of trying to underpay the workers for the work they did.

h) **Miscellaneous** – The Claimant asserted that other members of staff had the same issues about being underpaid. The Claimant brought one witness to evidence that Anku Rai. It was clear that she worked at a different farm to the Claimant most of the time. She accepted that she was given a sub by the Respondent in advance of her pay and that she was dismissed after about one month. The witness was questioned about unpaid wages but her oral evidence was vague and did not verify that she had been underpaid. We did not consider that her oral evidence was in any way supportive of the Claimant's case.

Whilst the Claimant may believe that she was underpaid we do not consider that there is sufficient evidence for her to demonstrate that there was any under recording of her hours at all.

83. The Claim that the Claimant is due and owing a sum on account of unlawful deductions from her wages are not well-founded and is dismissed.

84. We now move onto the indirect race discrimination claim and start with whether or not the Claimant has demonstrated that the Respondent applied the PCP asserted. As a reminder the final PCP, after the amendment application in this case was:

a) Engaging employees pursuant to a contract stipulating a minimum hourly rate of £10.10 but then paying them at a piece rate
b) Making unlawful deductions from their wages.

So far as the second limb of that PCP was concerned it was clarified that making unlawful deductions in wages included:

a) Paying at a piece rate as opposed to minimum hourly rate;
b) Deductions arising from failing to properly record hours worked and breaks;
c) Deductions on account of the failure to pay accrued holiday pay.

85. Our findings above and following on from the manner in which the Claim has been pursued we have found as facts that paying at piece rate did not lead to

an unlawful deduction of wages (and nor was it actually suggested by the Claimant during the course of the hearing) and we have found that there were no deductions arising from failing to properly record hours worked and breaks. It follows, therefore that the focus falls solely on the failure to pay holiday pay.

86. To reiterate, certain matters are clear:
    a) The Claimant was not paid her accrued holiday pay upon her resignation;
    b) The payment rectifying that was made in May 2023, prior to the Claim being issued;
    c) That was acknowledged at the Case Management Hearing in November 2023.
    d) Taking into account the issues as drafted by EJ Livesey following input from both sides the issue of holiday pay was not a live one.

87. We consider those facts to be an important backdrop to this case. The pleaded case (p.15 and 16) simply asserts that the Claimant was paid at a rate less that £10.10 per hour and did not pay holiday pay. At paragraph 13a of the Particulars of Claim the reason why they were said to be paid less that £10.10 per hour was because of paying at a piece rate. There is nothing within the Particulars or indeed the Order which states clearly (or indeed arguably at all) that issues were being taken with break periods / skimming the hours.

88. The Claimant is highly critical of the Respondent's disclosure in this case and in particular the later flurry of documents relating to the daily time sheets and pay slips showing holiday pay being paid by other workers at a similar time to the Claimant. We do not consider that criticism to be a fair one and that the disclosure issues primarily arose because of the rectification of the Claimant's case when the amendment was granted. The Respondent was entitled to respond to the pleaded case initially and equally entitled to respond to the amended case when that arose.

89. The Claimant asserts that ***"We're left with the clear impression that the Respondent is "picking and choosing what disclosure to make."*** The Tribunal does not share that concern. The Respondent has reacted to a highly fluid situation during a highly stressful trial situation. Further disclosure of the documents has been very favourable to the Respondent who has been able to provide documents that cause real harm to the Claimant's assertions re unlawful deductions and it is difficult to recall any document disclosed during the trial that has not been of assistance to the Respondent. There was no benefit to the Respondent not to disclose those documents and we are satisfied that the Respondent complied with their obligations vis a vis the pleaded claim and are not prepared to draw adverse inferences against the Respondent as requested.

90. Mr Eftimov provided evidence to the Tribunal. He provided a table that went through in detail he payslips of staff working at the business at the same time as the Claimant. The evidence was that one other worker had not been paid accrued holiday pay upon departure but all others were paid correctly.

91. Taking into account the evidence we do not accept that the fact that two members of staff were not paid accrued holiday pay on departure amounts to a PCP as defined earlier in this Judgment. We consider that the Claimant's intention at all material times was to pay the departing employee for their holiday time and indeed they did so in almost all circumstances. We note that on the pay slips there is a specific place at the bottom left where the Respondent identifies ***"Holiday Pay Left"*** and then a figure. This means that staff were at all times aware of what they were owed in terms of accrued holiday pay. This alert to staff is counter intuitive to an employee who had a provision, criterion, or practice to not pay holiday pay at the end of the engagement. Rhetorically, why advertise so blatantly that which you have a PCP of not paying.

92. We also note the prompt payment of the sum when the Respondent was alerted to it in May 2023 which again seems to the tribunal to be reflective of acknowledging that an error had been made. The fact that the same had happened a second time is not sufficient in our view to demonstrate that there was a PCP of unlawfully deducting wages by not paying accrued holiday pay on termination. We reflect on the words of **Ishola**:

"Practice connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP to have been applied to anyone else in fact. Something may be a practice or done in practice if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises."

93. We are satisfied that the continuum in this case relates to the payment of accrued holiday pay as opposed to non-payment. We do not consider that the PCP has been made out as it has not been applied to the Claimant and nor was it applied to British / EU or non-Nepalese workers. and accordingly, the indirect race discrimination claim fails.

94. Although that disposes of the Claim we go on, to consider the issue of particular disadvantage. We will deal with it more briefly than we would have done had The issues puts it as follows:

"Did the PCP put the Claimant at that disadvantage in that she had a greatly reduced ability to enforce her rights by virtue of the requirement to leave the UK when her visa expired?"

95. In the Claim Form there is an extended form of that which reads:

"a greatly reduced ability to enforce including by legal means and by means of lawful trade union activities their contractual and statutory rights not to suffer unlawful deductions from their wages including by virtue of being forced to leave the United Kingdom at the expiry of their seasonal worker visas".

96. The Tribunal do not accept that the Claimant can demonstrate that she has actually shown any personal disadvantage. If one looks at the "issues" that disadvantage simply did not occur because the Claimant never returned to Nepal at the end of her visa and there is no evidence before us that the Claimant had a greatly reduced ability to enforce her rights. As a matter of fact, she had enforced her rights by May 2023 when she was paid the only sum which has been found due and owing to her around the time of Early Conciliation. By the time she issued proceedings in actual fact there were no sums due and owing to her. At all times, as stated, the Claimant has been represented by counsel and solicitor and at all times during this hearing there have been a number of supporters quite properly offering support.

97. All of those things are in stark contrast to many of the litigants both English speaking and otherwise who seek to press their claims at this Tribunal with no experience of the Tribunal system, possibly mental health issues, reading difficulties who attend on their own and try and make the best of it. As a fact the Claimant was "advantaged". We do not say that in other circumstances this element of the indirect discrimination is impossible to prove but we are satisfied that there is no particular disadvantage, by the alleged PCP, to Nepalese and non-EU workers and especially there is no disadvantage, in fact, to the Claimant.

98. So far as the alleged breach of contract is concerned, whilst the Tribunal accepts that it had an obligation for the Respondent to provide gloves or provide adequate PPE. We accept the evidence that the Claimant was given two pairs of gloves originally by Ms Tairova, but also accept there came a time when replacement was necessary. The evidence before us was that the Claimant was provided gloves by another worker. Accordingly, we consider that the Claimant did have the required PPE at any given time. Even if there was breach of the contract in providing PPE there was no loss as the Claimant did not incur any expenses to provide herself with gloves.

99. It would be remiss at the end of this Judgment not to pay due respect and give full credit to counsel in this case (and I believe solicitors) who represented the Claimant so gamely and pro bono. Their time and effort was a credit to the legal profession and we commend them for all they have done.

Employment Judge Self

4 September 2024