EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Ivanova**

Respondent: **Kapucin Ltd**

Heard at: London South Croydon**,** in public, by CVP

On: 2 October 2024

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Mr A Rentoul, lay representative
Respondent: Ms P Andersson, Croner

PARTIALLY RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The rule 21 Judgment is revoked;

2. The respondent's application to extend the time limit in which to present its response is granted;

The Reserved Judgment of the Employment Tribunal is as follows:

3. The claimant's complaint in respect of holiday pay is well-founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended. The respondent shall pay the claimant £2,668. The claimant is responsible for paying any tax or National Insurance.

4. The claimant's complaint in respect of pension contributions is not well founded either as an unauthorised deduction from the Claimant's wages or as damages for breach of contract.

REASONS

Background

1. Today's hearing is the resumption of the hearing which was postponed on 4 September 2024 for the reasons set out in the Case Management Order which was sent to the parties on 30 September 2024. It is listed for three hours starting at 10 am.

2. The claimant had previously indicated that she required the services of a Tribunal appointed interpreter but she was quite clear at the hearing on 4 September 2024 that she did not need one.

3. The hearing is to consider the respondent's request for a reconsideration of the rule 21 Judgment that was sent to the parties on 29 February 2024 and its application to extend the time limit in which to provide its response to the claimant's claim.

4. The claimant was employed as a Cook by the respondent, a small business operating a café, from 27 May 2022 until 18 June 2023. She presented a claim to the Tribunal on 1 November 2023 through her representative, Mr Rentoul. This raised complaints of unauthorised deduction from wages in respect of non-payment of contributions by the respondent to the claimant's workplace pension scheme and unpaid entitlement to holiday pay. The claimant had entered into ACAS early conciliation between 12 September and 24 October 2023.

5. Notice of the claim was sent to the respondent on the 20 December 2023. This attached a copy of the claim and a blank ET3 response form. The notice of claim letter indicated that the response form had to be received by the Tribunal Office by 17 January 2024 and, if it is not, a Judgment may be issued against the respondent.

6. Notice of the date for the full hearing was sent to the parties on 22 January 2024. The full hearing was listed to be heard on 10 June 2024, with a time estimate of 2 hours. The letter attached standard case management orders.

7. No response was received from the respondent by the return date. On 2 February 2024, the matter was referred to me by the Tribunal's Legal Officer and I made the rule 21 Judgment which was sent to the parties on 29 February 2024.

8. In that Judgment, I awarded the claimant what she had claimed in her claim form. That is, £1009.82 gross in in respect of unauthorised deductions from wages in that no contributions were made to a workplace pension scheme and £3,816.18 gross in respect of failure to pay her accrued but untaken

statutory holiday entitlement. The hearing set for 10 June 2024 was consequently vacated.

9. The respondent made its application, through representatives, Croner, for a reconsideration of the rule 21 Judgment and to extend the time limit within which to present a response in a letter dated 24 March 2024. The letter was supported by a completed ET3 response form and a separate document headed "Respondent's Response", containing its grounds of resistance.

10. By letter dated 13 May 2024, I instructed the Tribunal's administration to write to the parties indicating that after an initial consideration, I was of the opinion that the application for a reconsideration should proceed.

11. The letter stated that my provisional view was that the application for a reconsideration should be granted because notwithstanding the clear notification within the notice of claim that a response had to be submitted by 17 January 2024 or a Judgment could be issued, given the nature of the claim, which was clearly in dispute and potential time limit issues, it was in the interests of justice to revoke the rule 21 Judgment and allow the matter to proceed to a full hearing.

12. The claimant was given until 3 June 2024 in which to respond and both parties were also required by the same date to set out their views as to whether the reconsideration application could be determined without a hearing.

13. Mr Rentoul replied by letter dated 31 May 2024 setting out his grounds of objection to both the reconsideration and the extension of time applications.

Today's hearing

14. For today's hearing I had the Tribunal's case file containing the pleadings, the rule 21 Judgment and the inter partes correspondence. In particular: Croner's letter to the Tribunal dated 14 March 2024 making it applications; Mr Rentoul's letter to the Tribunal dated 31 May 2024 objecting to the respondent's application; the claimant's grievance letter to the respondent dated 11 August 2023; and the claimant's statement of terms of employment issued by the respondent dated 1 June 2022.

15. After the hearing, I belatedly received an electronic bundle of documents from the respondent's representatives, consisting of 49 pages and with a separate index. Mr Rentoul had only received this 40 minutes before the hearing and not had the chance to look at it although I note that he was able to refer to a particular page of it during the hearing.

16. In addition, I had access to the Tribunal's case file relating to the claim brought by the claimant's husband, Mr Vanteyn Ivanov, against the same respondent. Mr Ivanov was employed as a Barista from 10 September 2022 until 31 May 2023 and also brought complaints of unauthorised deduction from wages in respect of outstanding holiday entitlement and failure to make contributions to his pension scheme, albeit in different amounts to the claimant. Mr Ivanov was also represented by Mr Rentoul and his holiday pay

claim was successful and he withdrew the pension claim at a full hearing. The respondent director, Mr Jevric, represented the Respondent at that hearing. The Judgment does not contain written reasons.

Agenda for the hearing

17. At the start of the hearing I indicated that I was proposing to follow the following course of action:

    a. Reconsideration of the rule 21 Judgment;
    b. If I decide to revoke or vary it, whether to extend time and except the ET3;
    c. If I accept the ET3, to go on and hear the case; and
    d. If I decide not to accept the ET3, to hear the case and allow the respondent to participate to the extent that I deem appropriate.

The reconsideration application

18. The Tribunal's powers concerning reconsideration of Judgments are contained in rules 70 to 73 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules of Procedure").

19. A Judgment may be reconsidered where "it is necessary in the interests of justice to do so."

20. Applications are subject to a preliminary consideration. They are to be refused if the Judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the Judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

21. Under rule 71, an application for reconsideration must be made within 14 days of the date on which the judgment (or written reasons, if later) was sent to the parties. I accept that this application was clearly made in time.

22. I had expressed my concerns at the last hearing, prior to Ms Andersson's belated attendance, as to the respondent's reasons for failing to submit its ET3 within the time limit. I went through these briefly when she was in attendance at that hearing. I amplified these further today so that Ms Andersson understood my concerns. These concerns arise from the fact that both the claimant and her husband, Mr Ivanov, brought claims against the respondent at more or less the same time and by comparison of the dates of various events in each claim.

23. Whilst I ran through the dates and at the hearing I have set them out more fully below for the sake of completeness:

Event	**Mrs Ivanova**	**Mr Ivanova**
ET1 received	1 November 2023	25 October 2023
Notice of Claim	20 December 2023	3 November 2023
Return date for ET3	17 January 2024	1 December 2023

Notice of full hearing	22 January 2024	28 November 2023
ET3 received	n/a	28 November 2023
Mr Jevric's wife torn ligaments	27 December 2023	
Wife's operation	27 January 2024	
Full hearing date	10 June 2024	16 February 2024
Rule 21 Judgment sent	9 February 2024	n/a
Respondent instructed Croner	29 February 2024	
Full hearing Judgment sent	n/a	8 March 2024
Application for reconsideration	14 March 2024	n/a

24. My particular concerns which I expressed more fully when considering the extension of time application are as follows:

    a. box 3.1 of Mr Ivanov's claim form referred to his wife intending to file her own claim imminently;

    b. by the time the respondent received a notice of the claimant's claim, and a copy of her claim, it had already received notice of Mr Ivanov's claim and a copy of his claim;

    c. their claims are identical save for the amounts claimed;

    d. Mr Jevric was able to submit an ET3 in response to Mr Ivanov claim and yet was unable to present what would have been virtually identical ET3 to the claimant's claim either at the same time or at any point prior to his wife's injury and indisposition;

    e. Mr Rentoul sent a letter to the Tribunal, cc the respondent, on 11 January 2024, in which he made reference to the claimant's claim;

    f. notwithstanding his wife's injury and indisposition, Mr Jevric was able to attend Mr Ivanov's full hearing on 16 February 2024;

    g. this took place seven days after the rule 21 Judgment sent to the parties.

25. I heard submissions from both parties.

26. Ms Andersson relied upon the content of the letter from Croner dated 14 March 2024 in which the essential explanation for the failure to submit an ET3 within the time limit was: the respondent company consists of a sole director, Mr Jevric; he is not legally trained; his wife suffered torn ligaments on 27 December 2023; as a result he had to manage the family situation and run his business on his own; in addition he was taking his wife to hospital appointments and for an operation on 27 January 2024; he instructed Croner to act for the respondent on 29 February 2024 and also received the rule 21 Judgment on that day.

27. In addition, Ms Andersson made the following oral submissions: the timeline of both claims is not identical; Mr Jevric's wife was severely injured and had to be hospitalised; he was looking after their children and his wife as well as running the business at the same time; in addition he was dealing with Mr Ivanov's claim, which arose before the claimant's and clashed with the events

relating to his wife's injury. He offers his profuse apologies, stresses that the failure to submit the ET3 was by no means intentional. He was capable, able and willing to act, and soon became aware of the proceedings he dealt with the matter.

28. Mr Rentoul relied upon his letter of 31 May 2024. By way of oral submissions, he stated that there is very little he wished to add but he said as follows. The application is unsupported by medical evidence and so we know very little about Mr Jevric's wife's injury. He felt Ms Andersson's oral submissions went "a bit far", as he put, it given that Mr Jevric had known about the claim since November 2023 and did not attend to it or comply with the interlocutory orders.

29. By way of right of reply, Ms Andersson reiterated that Mr Jevric did engage and did not ignore Mr Ivanov's claim, and had it not been for personal circumstances he would have done so with the claimant's claim and is now fully able to do so.

30. After a short adjournment, I gave my decision that it was in the interests of justice to revoke the rule 21 Judgment. This was for the same reasons that I had already decided to do so at the last hearing which I set out below.

31. Aside the credibility issues which I have pointed to above, there are jurisdictional issues as to whether the claimant's claim had been presented in time, which in turn required a consideration of whether there were a series of deductions the latest of which fell within the time limit to bring the claim and as to whether the Tribunal has jurisdiction to deal with deductions in respect of the pension contributions. These matters require resolution at a full hearing rather than by way of what was in effect a default judgment.

Extension of time application

32. Under rule 20 of the Rules of Procedure, an application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing that shall be requested in the application. The claimant may within seven days of receipt of the application give reasons in writing as to why the application is opposed.

33. Relevant considerations in determining whether to allow an application for an extension of time include whether there has been an explanation for the delay, the quality of any explanation, the strength of the employer's defence to the claim and the prejudice to each side if the Tribunal allows or refuses the application (Grant v ASDA UKEAT/0231/16).

34. In Kwik Save Stores Ltd v Swain & Ors [1997] ICR 49, the Employment Appeal Tribunal ("EAT") stated that the Tribunal should look at the following matters:

a. The employer's explanation as to why an extension of time is required:
The more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A Judge is entitled to form a view as to the merits of such an explanation;

b. The balance of prejudice:
Would the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted?

c. The merits of the defence:
If the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time - otherwise the employer might be held liable for a wrong which it had not committed.

35. In Thorney Golf Centre Ltd v Reed & Reed [2024] EAT 96, the EAT has recently held that the starting point should be a consideration of the extent of the delay in presenting the response. The balance of prejudice between the parties should be considered as at the point that the application to extend was made. Furthermore, when assessing the extent of the prejudice that would be caused to the respondent if the extension of time were refused, the impact of the respondent not being able to advance its case on the substantive merits of the claim should be considered.

36. I heard submissions from the parties.

37. Ms Andersson again relied on the letter of 14 March 2024 and the issues pertaining to Mr Jevric's wife. In addition, the letter states that it would be in accordance with the Tribunal's overriding objective to grant the extension of time and, if not, the respondent would be greatly prejudiced in its ability to properly defend the claim whereas the prejudice to the claimant would be lesser given that the claim is at an early stage and no further hearing date has been set by the Tribunal. In oral submissions, Ms Andersson also stated that there are time issues that need to be determined and it would prejudice the respondent if it could not engage in the process.

38. Mr Rentoul again relied on his letter of 31 May 2024. In oral submissions he said as follows, If Mr Jevric story is true, and there is no evidence before the Tribunal as to his wife's ill-health, it seems remarkable that he kept his business going throughout that period and did not have the energy seek help or turn to advisers when he needed it. It was only the reality of the rule 21 Judgment that got him to engage and make the application for a reconsideration on the last day of the time limit in which to do so. It was a farrago of nonsense to allow the respondent to get its defence on its feet and that the defence put forward is risible.

39. By way of reply, Ms Andersson stated that the respondent needed some time to instruct a representative, he came to Croner promptly, wanting guidance and has given his apologies for the delay.

40. I expressed more fully my concerns as to the chronology of each of the claims and the quality of the explanation being put forward, as I have set out above.

41. I put the question to Ms Andersson: why was Mr Jevric able to attend to Mr Ivanov's claim but not the claimant's? Surely he would have been attending to both or neither, given the personal circumstances put forward? Ms Andersson replied that it is an indication that it is purely a mistake and was overlooked because of the personal events.

42. In response, Mr Rentoul said that, whilst he did not have the detailed dates of Mr Ivanov's claim in front of him, he believed that I was entitled to take into account the entire approach to the case which goes back to even before the claims were issued. He referred to what he called a very detailed case which was sent by the claimant to the respondent dated 11 August 2023 to which Mr Jevric had responded "okay, I look at it, can you both send me signed contracts I gave you, signed Vlad". He added that the claimant was very surprised that Mr Jevric was asking for document he already had but the implication from what he said was that he would respond to it but instead there was silence. This, he said, was typical of the way in which Mr Jevric dealt with business matters.

43. I was aware of the letter of 11 August 2023 but was not able to locate it during the hearing and there was some confusion as to whether it been sent and if so where it was. However, Mr Rentoul had sent it to the Tribunal well before the hearing and indeed I had read it on the case file.

44. I felt at this point it was best to reiterate the test to determine whether or not to allow the extension of time. In addition, I reminded the parties that, in any event, if I disallowed the application, the respondent could participate in the process to the extent to which I deemed appropriate and there are several matters that would require its input.

45. I then adjourned to reach a decision. On my return I gave my decision to grant the extension of time to accept the respondent's response.

46. I then gave my reasons for doing so as follows.

47. The time limits in which to submit a response to a Tribunal claim are not a strict as time limits for submitting a claim for. The reason for this is that the time limits regarding submission of claims come from the original statutory rights and are a matter of the Tribunal's jurisdiction. The time limits within which to submit a response purely a matter of procedure;

48. Applying the above tests to this case. There was a two-month delay between the return date for the ET3 and the extension of time application. The respondent's explanation is plausible albeit not backed up with medical evidence. The grounds of resistance are meritorious but that needs testing at a hearing. The prejudice to the respondent is greater than to the claimant who still has to have a substantive consideration of her case, the rule 21 Judgment having been revoked. Were I to refuse the extension of time, I would minded to allow the respondent to participate in the hearing given the jurisdictional and factual issues. Thus either way the respondent gets an opportunity to defend its position.

The substantive hearing

49. We then moved on to deal with the substantive claim brought by the claimant. The respondent was somewhat reluctant to continue given the limited time left by this point but Mr Rentoul was adamant that we should continue. I suggested we start with the time limit issue and then review the position.

Time limits

50. Under section 23 of the Employment Rights Act 1996 ("ERA"), a claim in respect of unauthorised deductions from wages must be received by the Tribunal within three months (plus the period of time in which the matter is before ACAS under the early conciliation procedure) of the date payment to the wages from which the deductions were made or if there were a series of deductions, the claim was made within three months (plus the early conciliation extension) of the last one.

51. Given the dates on which the claim is presented and the period of early conciliation, the earliest date on which an act was in time was 13 June 2023.

52. The claimant's position is that the deductions were made between 27 May 2022 and 18 June 2023.

53. In Fulton and Baxter v Bear Scotland Ltd UKEATS/0010/16/JW, the EAT found that whether there will have been a series of deductions or not is a question of fact. Series is an ordinary word, which has no particular legal meaning and involves two principal matters: is there a sufficient similarity of subject matter, such that each event is factually linked to the next in the same way as it is linked with its predecessor and since such events might either be stand-alone events of the same general type or linked together in a series, is there a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link.

54. In British Airways plc v De Mello and ors [2024] EAT 53, HH Judge Auerbach, gave clarification as the current position of a series of deductions (at paragraph 82 of the Judgment):

> *"While the question is, in a given case, one of fact, I conclude that the proper approach for the tribunal to take to the facts found in a given case, is that, if, at a particular level of abstraction, there are similar features of the deductions, such that they would meet the test of similarity for these purposes, then it should conclude that there is sufficient similarity, notwithstanding that, if it descended to a more granular level of factual analysis, differences of factual detail might be detected. That approach serves the statutory purpose and provides tribunals with a firmer footing for the exercise of evaluation of the facts in the given case that it is for them to carry out."*

55. I asked Ms Andersson, having considered the above and the circumstances of the alleged deductions, whether she was willing to concede that there were a series of deductions albeit not the factual dispute as what was owing given that still needs to be determined. Ms Andersson conceded the point. I was of the view anyway that the claim was presented in time.

56. We then all agreed that it was simply the amount of any deduction and whether unlawful that needs to be determined.

Jurisdiction to hear pension contributions complaint

57. I then turned to deal with the issue of whether it was possible to claim unauthorised deductions from wages in respect of unpaid pension contributions. My initial view, expressed at the previous hearing, was that pensions did not fall within the definition of wages as set out in section 27(2) ERA although it could form the basis of a complaint of damages for breach of contract under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

58. Mr Rentoul referred me to the case of University of Sunderland v Drossou UKEAT/0341/16/RN as authority for the proposition that the Tribunal does have jurisdiction to consider the claim in respect of pension contributions. I considered that case and explained that I was of the view that it dealt with a different point as to what fell within the definition of a week's pay the purposes of the Employment Rights Act.

59. Mr Rentoul also referred me to the case of Somerset County Council v Chambers UKEAT/0417/12/KN. In that case, the EAT found that section 27(2) specifically excludes pension contributions made by an employer to a pension provider on the claimant's behalf as payment of wages. Thus, not those in respect of the employee.

60. In the case before me, as I understood it during the hearing, the claimant was seeking repayment of the deduction of the employee contributions from her wages which she asserts were not paid over to the pension provider. I expressed my gratitude to Mr Rentoul for drawing this case to my attention.

61. The parties agreed that this element of the claim could proceed as an unauthorised deduction from wages complaint albeit the respondent denies that any unauthorised deductions were made.

62. At this stage it was 12 noon and the case had only been listed for three hours finishing at 1 pm. Mr Rentoul was still keen to continue and said that his client evidence would take about five minutes.

63. He also expressed concern that the bundle of documents had only arrived 40 minutes for the hearing and he had not had the opportunity to even look at it. Indeed I did not have it at this stage. Mr Rentoul made his thoughts graphically clear as to how he felt respondent acted in the belated production of what he believed to be an incomplete bundle. My response was that I was not going to go into the rights or wrongs of this but look at moving it forward if it was possible to and have a fair hearing. As it turned out, this bundle had not even been copied to the Tribunal and I only received it after the hearing concluded as I have indicated above.

64. I posed the question whether it was possible to continue with the hearing without it. Mr Rentoul said yes and Ms Andersson responded that in that case yes.

65. We therefore continued although I indicated that if we completed evidence and submissions and had no time left, I would reserve my Judgment.

Findings

66. I then heard evidence from the claimant and from Mr Jevric from which I made the following findings. I considered all of the evidence but have only made findings on those matters relevant to the complaints before me.

67. The claimant is from Ukraine. She came to the UK as a refugee following the war in Ukraine. She had only been in the UK for 5 to 7 days before she started working for the respondent. She had 1 day on the 26 May to understand the work she had to do and then she started work the following day on 27 May 2022. Initially her English was very limited but improved over time.

68. The claimant was employed continuously by the respondent as a Cook from 27 May 2022 until her resignation with effect from 14 June 2023.

69. The respondent is a small coffee shop business called Cappuccino. Mr Jevric has been running it for 6.5 years at that present has six employees, none of which are in the government workplace pension scheme.

70. The amounts the claimant seeks in respect of the unauthorised deductions from wages are contained with in the letter of 11 August 2023 and the documents in support. The amounts that she seeks are the same as set out in the particulars of claim document attached to her claim form.

71. The claimant was issued with a written Statement of Terms of Employment by the respondent. This shows her employment commencement date of 1 June 2022, wages of £9.50 per hour, a minimum 40 hours a week and that the holiday year runs from July to June with an enticement was to 20 days' paid holiday pay year. The document is signed by both the claimant and Mr Jevric and dated 1 June 2022.

72. I note that whilst the document quotes the Working Time Regulations as authority for 20 days, in fact the entitlement under the legislation is greater than that.

73. In addition, whilst the document shows a commencement date of 1 June 2022, in its grounds of resistance, the respondent accepts that the claimant commenced work on 27 May 2022.

74. The claimant was not paid for any holidays that she took or any holiday pay. She was simply paid for the hours she worked. Mr Jevric accepts this.

75. The claimant states that she had no conversations with Mr Jevric regarding her pension and pension contributions. She states did not appreciate anything about a pension scheme until this was explained to her by Mr Rentoul after she left the respondent's employment.

76. Mr Jevric's position is that he had discussions with the claimant on a daily basis about employment rights and other rights in the UK including entitlement to a pension. These discussions were as best as he could using Google Translate because at that point the claimant could not speak "a word

of English" as he put it. His further position is that they discussed her opting out of pension scheme and the claimant wanted to opt out.

77. Mr Jevric stated that the only discussed the pension scheme because the claimant wanted the pension contributions paid straight into her bank account rather than having to pay them.

78. Mr Jevric stated that the pension clause within the Statement of Terms of Employment is in error and should indicate that the claimant opted out. On later considering the document after the hearing and during my deliberations, I could not find any such clause and was not sure what Mr Jevric was referring to.

79. Mr Jevric concedes that the claimant is entitled to the amount of holiday pay which was calculated by his accountant and is at page 10 of the bundle. This has been calculated on 28 days holiday per annum and the rate for each day on the basis of contract allows a 40 per week. This amounts to £2,688 gross.

80. This is also set out at paragraph 6 of the grounds of resistance which states that the claimant is entitled to 224 days of holiday pay amounting to £2,688 gross. Whilst the claimant's pay was initially £9.50 per hour by the end of her employment it had risen to £12 per hour. However, this calculation is made on the basis of £12 multiplied by 244.

81. It was put to the claimant that she had conversations about income tax and wanted to be paid in cash to avoid payment because she as sending money back home. The claimant's position is that had no discussions about income tax. All that she saw was what was written on payslips and there was one occasion when she worked 300 hours and Mr Jevric said to her that she would pay a lot of tax. The claimant's further position is that she did not ask to be paid in cash to avoid paying tax.

Submissions

82. I invited the parties to make closing submissions but they both declined.

83. However, Mr Rentoul contested the admissibility of the document 10 of the bundle which he asserted was a without prejudice document. Ms Andersson contested this and pointed out that it is not headed "without prejudice". Mr Rentoul rightly pointed out that it does not have to be and it had been provided through the ACAS early conciliation process. Whilst I agreed with this proposition I said I would have to consider it in context as part of my decision. I will also take into account the late stage at which this bundle was provided and whether our not to accept the documents.

84. By this stage it was after 1 pm and so I reserved judgment as to the substantive matter.

Conclusions

85. Document 10 is at page 36 of the bundle and it simply reflects the workings given by Mr Jevric as to what he called his accountant's calculation of the

claimant's entitlement to outstanding holiday pay. The figure of £2,688 is a gross figure based on 224 hours assuming a 40 hour per week contract at £12 per hour. I can see nothing to indicate that this information is without prejudice or privileged. It is simply what Mr Jevric asserts that the claimant is entitled to. In any event the same calculation is pleaded as part of the respondent's grounds of resistance.

86. Given that Mr Rentoul was able to find this document in a bundle which he had only received 40 minutes before the hearing, it struck me that notwithstanding the lateness of its production it did not really cause any prejudice to the claimant and so I had no qualms in allowing its admission.

87. Indeed the other documents within the bundle which I had not seen before, at documents 12 to 18, would take a matter of minutes to peruse if indeed they are relevant to the issues.

88. I would note that I have only been provided with the claimant's payslips for March to June 2023. For some reason there are two payslips for June. There are no deductions showing from the gross entitlement to pay other than in respect of income tax and national insurance.

89. The claimant seeks holiday pay in the sum £3,816.18 gross on the basis of the working shown at page 2 of the grievance letter dated 11 August 2023. I have to say that page 1 and 2 of this letter appear to indicate that the claimant has not provided an exact figure of entitlement but appears to be taking an average of the hours that she worked (which I assume varied from week to week).

90. The burden of proof in an unauthorised deduction from wages claim falls upon the claimant. It is simply not possible from the evidence provided to me to determine what was properly payable to the claimant, what the claimant received, whether there was a shortfall between the two and whether that shortfall amounts to unauthorised deductions. It is not possible to determine how much annual leave the claimant was entitled to with any certainty beyond the amount admitted by the respondent although again that appears to be an assumption rather than based on the claimant's actual working hours from week to week during the period of her employment. However, given the respondent has made a concession that the claimant is entitled to £2,688 gross and there is at least more logic and certainty to this calculation, I am willing to make this as an award of compensation..

91. In addition, the claimant is seeking her pension contributions on the basis of the respondent's alleged failure to enrol her in a workplace pension scheme and contribute towards it. This is in the sum of £1009.82 as set out again at page 2 of the grievance letter dated 11 August 2023.

92. I had formed the impression from Mr Rentoul and the pleadings, possibly my own misapprehension, that the claimant was in effect seeking payment in respect of contributions that had been deducted from wages but not paid over to a pension provider of a workplace pension scheme. However I now realise, during my deliberations, that the claimant was never enrolled in a pension scheme and that Mr Rentoul is attempting to seek those contributions that

should have been made had she been enrolled into a pension as a breach of her rights under the Pensions Act 2008 ("the 2008 Act") either by way of unlawful deduction from wages or breach of implied term of the contract.

93. On considering this matter carefully, I find that the Pensions Act 2008 does not create a contractual entitlement enforceable by an individual. Any breach of the provisions of the Pensions Act 2008 are enforceable only by The Pensions Regulator. This includes non-compliance with the auto enrolment provisions. The Pensions Regulator has various powers available to it, such as issuing notices including fines. Willingly failing to put eligible staff into a pension scheme and knowingly providing force information in a declaration or redeclaration of compliance are criminal offences and the maximum punishment is two years in prison or a fine.

94. The reality of this claim is that the claimant is seeking payment amounts that would have been paid by way of employee and employer contributions to a scheme which she was never enrolled in and there is no certainty as to what exactly would have been paid by her or by her employer.

95. Indeed, Part 1 of the 2008 Act obliges employers to automatically enrol eligible workers into a qualifying pension scheme, known as "automatic enrolment". One of the effects of that legislation is that, if the eligible worker has not opted out, their employer must enrol them into a pension scheme meeting certain quality requirements set out in Part 1, including (in the case of UK money purchase schemes) a prescribed minimum level of contributions to that pension scheme over the relevant pay reference period (the Minimum Total Contributions). The entirety of those Minimum Total Contributions may be paid by a worker's employer in compliance with the 2008 Act, or a lesser proportion with the balance of the Minimum Total Contributions paid by the worker. Part 1 further stipulates that a portion of those Minimum Total Contributions must be met by the worker's employer (the Minimum Employer-side Contributions).

96. Thus the claim is too speculative to amount to a complaint of unauthorised deductions from wages because the reality of it is that there is nothing lawfully payable and even if there were it is not possible to quantify with any certainty. Indeed, I would point out that were it possible to do so, the claimant could not claim the employee contributions because in effect they would have been taken out of her gross wages in any event and so it would potentially amount to a double recovery.

97. In addition, employees' rights under the Pensions Act 2008 do not give rise to contractual rights enforceable by way of a complaint of damages for breach of contract.

98. Given that this is a matter over which have no jurisdiction and given that the matter is disputed as to whether the claimant requested to opt out of the workplace pension scheme or not, I do not feel it is relevant or appropriate for me to make a finding on the matter. However I would note that I have not seen any written opt out agreement or indeed the clause to which Mr Jevric referred during his evidence.

99. I therefore reach the conclusion that the complaint in respect of pension contributions is not well-founded either as an unlawful deduction from wages complaint or a complaint of damages for breach of contract and it is therefore dismissed.

Employment Judge Tsamados
Date: 15 November 2024