EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr David Piddington	**v**	**Wolf Armouries Limited**

Heard at: London Central (in person)

On: 1 & 2 May 2025

Before: Employment Judge P Klimov (sitting alone)

Appearances:

For the Claimant: Ms D Kesar, counsel

For the Respondent: Ms J Scarbrough-Lang, litigation consultant

JUDGMENT with oral reasons having been announced to the parties at the hearing on 2 May 2025, the written Judgment having been sent to the parties on 8 May 2025, and written reasons having been requested by the claimant on 16 May 2025, in accordance with Rule 60(4) of the Employment Tribunal Procedure Rules 2024 ("**ET Rules**"), the following reasons are provided:

Reasons[1]

Introduction

1. On 18 April 2024, the claimant submitted a claim form, containing complaints of unfair dismissal, notice pay, unauthorised deduction from wages, and for holiday pay. The holiday pay complaint, having been withdrawn by the claimant during the hearing, was dismissed upon withdrawal.

[1] These written Reasons are prepared in accordance with the requirements set out in Rule 60 of the ET Rules. In the interests of proportionality, not every evidence, fact, or argument advanced by the parties is covered in the Reasons. However, in coming to my decisions I duly considered all the evidence and arguments presented by the parties. If a particular evidence, fact, or argument is not mentioned in these Reasons does not mean that it has not been considered.

2. The claimant also claimed compensation for failure to provide him with a written statement of employment particulars, contrary to s.1 of the Employment Rights Act 1996 ("**ERA**").

3. On 28 July 2024, the respondent entered a response denying all the claims.

4. On 19 August 2024, the claim was listed for a 2-day final hearing on 11 and 12 December 2024. Standard case management directions were given to the parties. On the respondent's application, the final hearing was postponed and re-listed for 1 and 2 May 2025.

5. At the hearing both parties were legally represented. I am grateful to both representatives for their submissions and other assistance to the Tribunal.

6. There were two witnesses for the claimant: the claimant himself and Ms Tanya Louise Norman (mother of Chelsea Marie Heathcote ("**CMH**") – the claimant's girlfriend and a former employee of the respondent). There were four witnesses for the respondent:

    (i) Mr Max Robinson, the respondent's managing director ("**MR**"),
    (ii) Mr David Robinson, a business consultant at the respondent; Max Robinson's father ("**DR**"),
    (iii) Mr Tony Pereira, the respondent's shop manager ("**TP**"), and
    (iv) Ms Ching Nam Lai, a translator for the respondent ("**CNL**").

7. The respondent also submitted a short witness statement by Mr Jon Oster-Ritter, an engineer at the respondent ("**JOR**"). However, JOR was not called by the respondent to give evidence under oath. As his evidence was not tested in cross-examination I gave little weight to his witness statement.

8. During the hearing I was referred to various documents in the 281-page bundle of documents submitted by the parties in evidence. As I explained to the parties at the start of the hearing, I only read the documents referred to in the witness statements, or to which my attention was drawn during the hearing. At the start of the hearing, the claimant sought to introduce additional documents: his grievance and appeal letters and five screen-shorts. The respondents objected to these documents being admitted in evidence. I allowed the claimant's application and admitted these additional documents, for the reasons I announced to the parties at the hearing.

9. The respondent also submitted several video clips as evidence. No objection was raised by the claimant to the video clips being admitted in evidence. Limited extracts from the video clips were played during the claimant's cross-examination.

The Facts

10. The respondent is a small retail business specialising in airsoft[2] equipment. It operates from a single shop in Camden Town, London. At the relevant times it employed 3-5 staff, working in the shop. MR is the managing director of the respondent. However, at the relevant times, he was not involved in a day-to-day running of the shop and was coming to the shop when and if required.

11. The claimant is an airsoft enthusiast. Before becoming an employee of the respondent, the claimant was a regular customer of the shop. He was also known to the respondent's staff through his participation in airsoft events organised by the respondent ("skirmishes").

12. In November 2021, a vacancy appeared in the shop due to one of the three staff leaving the respondent. On recommendations of JOR, MR offered the claimant the sales staff job and outlined to him the main responsibilities of the role. The offer was made and accepted orally. Nothing was put in writing at that time or later. The claimant commenced his employment with the respondent on 29 November 2021.

13. As a perk for its staff, the respondent allows the employees to purchase, at a significant discount, the airsoft equipment and other items it sells to the public. The staff is allowed to take an item they want to purchase without paying for it immediately. However, the staff must record all the items they took/purchased on their personal electronic ledger ("**staff account**"), and pay for the items by instalments (by putting money into their staff account), or by allowing the respondent to deduct a specified amount from their salary. The arrangements are informal and largely based on trust. The expectation is that each member of staff must keep his/her staff account up to date and discuss with MR how any outstanding balance would be cleared.

14. TP trained the claimant on his work responsibilities and the respondent's systems and processes. TP also explained to the claimant the arrangements concerning purchasing items from the respondent's stock. In particular, TP told the claimant that he should put money into his staff account monthly to avoid running up a large bill. TP told the claimant that he (TP) personally puts £100 each month into his staff account to pay off any stock he wanted to buy. The claimant said that it would not be a problem for him, as his grandmother would give him money, if the need arose.

15. The claimant was a quick learner. He demonstrated strong computer skills, including by installing himself the CCTV system in the shop. The claimant never raised any concerns about not understanding how the respondent's computer systems or operational processes worked or asked for extra training or help.

[2] Airsoft, also known as survival game (Japanese: サバイバルゲーム, romanized: sabaibaru gēmu) in Japan where it was popular, is a team-based shooting game in which participants eliminate opposing players out of play by shooting them with spherical plastic projectiles shot from airsoft guns. (source: https://en.wikipedia.org/wiki/Airsoft)

16. When TP was working in the shop, he was recording staff purchases on their staff accounts. TP, as the shop manager, was also responsible for controlling the stock, including making sure that the items recorded in the respondent's stock system tallied up with what was physically in the shop. Unfortunately, due to TP's health issues, he was unable to freely move around the premises. In particular, he was not able to go downstairs to the storage room.

17. On one occasion, in or around December 2022, TP asked the claimant to go to the storage room downstairs and bring up to the showroom an airsoft rifle (Tokyo Marui MTR Gold – retail price £547.99), which showed on the computer system as being in stock. The claimant went downstairs and came back without the rifle. He said that it was not in the storage room. After the claimant had left the respondent's employment, the respondent discovered that the rifle was in CMH's (the claimant's girlfriend) possession.

18. Unfortunately, in January 2023 TP was hospitalised and could no longer work in the shop. That meant that the claimant assumed TP's responsibilities, as the shop manager, including with respect to placing orders with suppliers and booking in deliveries. TP, however, was available to assist the claimant remotely, if required.

19. From January 2023, the claimant placed various orders with the respondent's suppliers. In those orders he included items for personal use. He, however, did not log those personal used items onto his staff account, or otherwise informed TP or MR that these items were ordered for his personal use.

20. Towards the end of 2023, the claimant asked MR to hire CMH as a sale staff. The claimant did not tell MR that CMH was his girlfriend. Like the claimant, CMH was an airsoft enthusiast. She too was a regular customer of the shop and a participant in skirmishes.

21. The respondent did not have a vacancy in the shop, however, the claimant persisted, and MR agreed to hire CMH by reducing working hours of another staff member.

22. On 18 December 2023, there was an argument between CMH and JOR in the shop. The argument was over an issue with some customisation work on a Hi Cappa pistol, which JOR had done for CMH. The pistol failed to work properly at the skirmish, and CMH wanted JOR to fix it. The argument became heated, and JOR left the shop. CMH was not meant to be at work on that day. The claimant was working on that day and witnessed the argument.

23. The claimant called MR and said that because JOR had left the shop, he was going to close the shop as he was the only staff left in the shop. MR asked the claimant not to close the shop and that he would be coming to the shop shortly.

24. When MR arrived, the claimant and CMH were in the shop. On entering the shop, MR noticed that there was damp dog's smell in the shop. There was a German Shepherd young dog in the shop, which belonged to CMH. The dog came towards MR and wanted to investigate him like puppies do. The dog did not respond to CMH's commands to come back.

25. The claimant told MR about the argument between CMH and JOR. The dog continued to nuzzle and trying to play with MR. At that point, MR said: "*I can see your dog is clean, but I am concerned that the shop smells of damp dog*". In response CMH started to scream and shout at MR that it was her cardiac alert dog, and that she needed it with her at all times. MR tried to calm the situation down, but CMH continued to shout and eventually left the shop. She tried to make the claimant to leave the shop with her, but the claimant stayed behind. CMH later posted negative comments about the respondent on social media. The claimant persuaded her to remove the comments.

26. When CMH left the shop, the claimant told MR that she was his girlfriend, that the dog was not a cardiac alert dog, and that CMH was just telling that to people. The claimant said that CMH was autistic and that was the reason for her getting angry like that. The claimant stayed for an hour more, helping MR to complete internet orders, and then left the shop.

27. Having remained alone in the shop, MR checked the shop systems and discovered that the claimant's staff account had £2,500 (£4,500 in retail value) worth of taken but not paid for items.

28. On 21 December 2023, MR and DR met with the claimant. MR was concerned that the claimant might leave the shop under pressure from CMH as a result of the incident on 18 December. MR valued the claimant as a good worker and wanted to keep him. MR told that to the claimant.

29. MR also expressed his concerns about the high outstanding balance on the claimant's staff account and the fact that the claimant had not informed him about that before. MR told the claimant that he had discovered that the two Hi Cappa pistols, over which CMH argued with JOR on 18 December, had been taken from the shop, but not paid for or added to the claimant's staff account. MR said to the claimant that taking items from the shop without paying for them or recording them on the staff account could be seen as stealing. The claimant responded: "*yes, I can see that*". The claimant said that it was an oversight and apologised for that.

30. MR gave the claimant a copy of his staff account, showing all the items on the list and their prices. The total valued of the unpaid items on the claimant's staff account came up to £4,490.37. MR asked the claimant to check the list and confirm that it was complete and accurate. The claimant said that it was. The claimant said that he would pay the outstanding balance, if necessary, by asking for money from his grandmother. The claimant verbally agreed that his wages can be used to pay off the debt too (the claimant's monthly net pay was circa £1,300). The claimant signed each page of his staff account with

the following handwritten statement added by the claimant: "*I agree that this account is mine and is outstanding and will be paid over a period by D Piddington.*"

31. At the same meeting, the claimant asked to be allowed to take holiday until 2 January 2024. Although, it was a busy pre-Christmas period in the shop, MR agreed.

32. The claimant came back on 2 January and asked for more time off. He worked on 2, 4 (leaving 2 hours earlier) and 9 January.

33. On 9 January 2024, MR noticed an invoice from a supplier (Edgar Brothers) from November 2023 for the stock that had not been received into the respondent's stock system. This order included items that the respondent did not sell in the shop, including socks and a thermal base layer. MR asked the claimant about that. The claimant said that he had ordered these items for himself and taken them. He did not add them to his staff account or told MR on 21 December that they were missing from the list he signed.

34. MR was shocked by this and asked the claimant to go home. The claimant asked MR to give him his P45. The claimant also asked for his contract of employment and pay slips. MR said that the respondent did not have a written terms and conditions, and the contract of employment with the claimant was oral on the terms notified to him when he joined. The claimant picked up some items and left the shop, saying that he would come back to collect the rest of his personal belongings.

35. On 11 January 2024, the claimant returned to the shop. He met with MR. The claimant surreptitiously recorded the conversation.

36. Before the conversation started, the claimant started to wipe out his login details from the work computer. He said to MR: "*I am wiping this, because it has my login so I'm gonna set a new login up*". MR asked the claimant if that meant that he was leaving the respondent: "*So can I take that as you're leaving us then? You're wiping your login information from our laptop*". The claimant responded: "*Well it's John's laptop so I'm gonna set his one up it. Um Just in case.*"

37. MR asked the claimant if he had brought any money to pay off his debt. The claimant said no. He said that he would return some of the taken equipment because he was "*leaving airsoft*", which equipment the shop could then re-sell to customers, and that he would pay for the rest when he was paid.

38. The claimant said that he was going to take his "small staff" with him and come back later with the car to pick up his 3D printer[3].

[3] The claimant borrowed money from JOR to purchase the 3D printer. Because the claimant did not return the debt to JOR, he was not allowed to take the printer.

39. MR said that the claimant should pay what he owes to the respondent for the items he had taken, and the respondent would let the claimant to keep these items. The claimant said that it was fine and that the respondent "*might do that*". He repeated that he was going to leave airsoft as he did not have time for that.

40. At that point, MR said: "*I'm sorry that this has come to this stage. I'm genuinely sorry about it. But I hope you can understand where I'm coming from. I just.. whether or not it's deliberate or not or accidental I just can't have somebody here that I can't fully 100% trust of the time. And I don't want it to be a personal issue at all. And overall, I always thought you've been a good employee here maybe a bit messy. Let's not deny that but, and I appreciate you try to pay off the balance of your account*…."

41. MR asked the claimant whether he wanted his P45 now or at the end of the month. The claimant said that he might need it before the end of the month. MR issued the claimant his P45 on the same day. The conversation continued for a few more minutes. The claimant asked MR about his written terms and conditions, pay slips and outstanding holidays.

42. The claimant collected some of his belongings and left the shop.

43. Later the respondent discovered that there were other items that the claimant had taken from the shop without paying for them, without recording them on his staff account, and without telling anyone. The total value of the items taken by the claimant was more than £5,000, considerably exceeding the total sum of outstanding wages due to the claimant. The respondent did not pay the claimant's wages for December 2023 and January 2024.

The Law

Dismissal vs resignation

44. An employment contract may come to an end in several ways. The two most common ways of ending an employment contract are resignation and dismissal. The former signifies when the employee terminates the contract, the latter – when the employer.

45. Typically, resignations and dismissals are effected by the terminating party notifying the other party to the contract of their decision to end the contract – "giving notice". Often termination notices are given in writing, but oral notices are equally valid. Resignation (or dismissal) may also be brought about by the party's conduct, if such conduct evinces the party's decision to terminate the contract.

46. The difficulty arises when the words spoken or the conduct in question is ambiguous and may be interpreted in different ways. In such circumstances the tribunal must examine whether ostensibly ambiguous words and/or conduct amount to a dismissal or a resignation. The test is objective and

requires the tribunal to consider all the surrounding circumstances (both preceding and following the relevant event(s)), including the workplace environment. If the ambiguity remains, the tribunal must ask itself how a reasonable employer or employee would have understood those words/conduct in light of those circumstances.

47. The so-called *contra-proferentem rule* states that any ambiguity in construction of a contract must be interpreted against the party seeking to rely on it. In *Graham Group plc v Garratt* EAT 161/97 the EAT held that this rule should also be applied to ambiguous words or acts in the context of a dismissal or resignation.

48. In *Bates v Brit European Transport Ltd* EAT 309/94, the EAT held that a mere request for P45, without more, is not the conclusive evidence of resignation. It must be considered against all the surrounding circumstances.

Unfair dismissal

49. The law relating to unfair dismissal is set out in section 98 of the Employment Rights Act 1996 ("**ERA"**).

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) The reason (or, if more than one, the principal reason) for the dismissal; and

(b) That it is either a reason falling within subsection (2) or ***some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held****. (****emphasis added****)*

50. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

51. A reason for dismissal is "*is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.*" (*Abernethy v Mott, Hay & Anderson [1974] ICR 323)*. This requires the tribunal to identify

the relevant decision maker and then consider the mental process of that person. The tribunal must consider "*only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss"* (*Orr v Milton Keynes Council 2011 ICR 704, CA).*

52. In the case of *Ely v Y.K.K. Fasteners (UK) Limited* [1993] IRLR 500, the Court of Appeal established that in a case where the employer is found to have dismissed the employee by certain conduct, in circumstances where the individual concerned did not believe themselves to be dismissing the employee, there is still a factual reason for dismissal, being the factual reason for the conduct which amounted to dismissal.

53. In *Impact Recruitment Services Ltd vMs I Korpysa* [2025 EAT22], the EAT held that a genuine but mistaken belief that the employee had resigned is capable of amounting to some other substantial reason within the meaning of section 98(1)(b) ERA, but does not necessarily mean that it will be so in every case. The EAT also observed that the threshold for a reason to amount to a substantial reason for these purposes is relatively low.

Wrongful dismissal

54. Section 86 ERA sets out the minimum periods of notice required to terminate a contract of employment. The minimum notice increases with the employee's continuous service. An employee with between one month and two years' continuous employment is entitled to one week's notice; an employee with two years' continuous employment is entitled to two weeks' notice, and so on, with the minimum notice increasing by one week for each subsequent year of service, up to the maximum of 12 weeks.

55. A longer period of notice may be agreed by the parties in the employment contract. If the contract is silent on that, the common law implies the term that a reasonable notice must be given by each party to terminate the contract. What amounts to a reasonable notice period will depend on the facts of the particular case, including the employee's length of service, his/her role in the organisation, custom and practice in that trade or profession.

56. When an employee is dismissed without notice, such dismissal would be considered "wrongful", meaning in breach of contract, which gives the employee the right to claim damages for breach of contract, which would be assessed on the usual basis, i.e. to put him/her in the position he/she would have been had the employer performed the contract, i.e. had the employer given due notice of termination. Accordingly, damages for wrongful dismissal are usually limited to what the employee would have earned by way of his/her net pay during the notice period.

57. However, if an employee breaches his/her employment contract in a fundamental way (often referred to as committing "gross misconduct" or "repudiation"), the employer is entitled to dismiss the employee summarily, i.e. without giving notice or paying in lieu of notice.

58. In deciding such claims, the tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation (i.e. a fundamental breach) of the employment contract by the employee. Unlike in a claim of unfair dismissal, it is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. In other words, the question of whether an employee is in repudiatory breach is a matter of fact; the employer's subjective belief is not relevant.

59. Where the employee is accused of dishonesty the key question for the Tribunal is whether the employee's dishonesty so undermined trust and confidence that the employer is no longer required to retain the employee in its employment (see *Neary and anor v Dean of Westminster* 1999 IRLR 288).

60. In civil claims (unlike in criminal law), the test of dishonesty is purely objective. The key question: Is the conduct in question dishonest by ordinary standards? It is irrelevant that the person accused of dishonesty does not view it as such (see *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* 2018 AC 391, SC).

61. All contracts of employment have an implied term of mutual trust and confidence, which requires the parties without reasonable and proper cause, not to conduct themselves in a manner '*calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties*' (*Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* 1997 ICR 606, HL).

62. Any breach of the implied term of trust and confidence will amount to a fundamental breach of contract, entitling the other party to "accept" the breach as repudiating the contract, i.e. bringing the contract to an end (*Woods v WM Car Services (Peterborough) Ltd* 1981 ICR 666, EAT).

63. There are also implied terms in all employment contracts that the employee will provide faithful service (*Sinclair v Neighbour* 1967 2 QB 279, CA), obey the employer's lawful and reasonable orders (*Luke v Stoke-on-Trent City Council* 2007 ICR 1678, CA), and exercise reasonable care and skill (*Lister v Romford Ice and Cold Storage Co Ltd* 1957 AC 555, HL). A breach of these implied terms may, depending on the seriousness of it, amount to repudiation of the contract by the employee.

64. Unlike in unfair dismissal claims, if the employer finds out after the employee has been dismissed that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal, the employer can rely on such facts to defeat a claim of wrongful dismissal (see *Boston Deep Sea Fishing and Ice Co v Ansell* 1888 39 ChD 339, CA).

65. As in the case of "constructive dismissal", the employer has the choice whether to "accept" the employee's fundamental breach as bringing the contract to an end, or waive the breach and affirm the contract, which can be

done by way of explicit words or actions, or happen through acquiescence in failing to respond to the breach.

Unauthorised deduction from wages

66. Section 13(1) ERA states that an employer must not make a deduction from the wages of a worker 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 — S.13(1)(a), or
    b. the worker has previously signified in writing agreement to the deduction — S.13(1)(b).

67. In *Potter v Hunt Contracts Ltd* 1992 ICR 337, EAT, the EAT held that to satisfy these conditions the authorisation or agreement must be in writing. It went on to say that as part of the inquiry "*it will be important to ensure that the source from which the deduction is to be made — wages — is clearly stated and secondly, that deduction is agreed to be made from that source*".

68. Section 24 ERA provides that where a tribunal finds that a complaint of unauthorised deduction from wages is well-founded, it must make a declaration to that effect and "*shall order the employer to pay to the worker the amount of any deduction made in contravention of section 13*".

69. However, in *Ridge v HM Land Registry* UKEAT/0485/12/DM, the EAT held (at [70] – [73]) that, as civil courts, employment tribunals have jurisdiction to set off any amounts awarded to the claimant against any amounts owed by the claimant to the respondent. The EAT also held that to exercise this jurisdiction there is no need for the employer to bring the employer's contract claim, and confirmed that "[i]*t has long been the law that a debt may be raised by way of set-off if it is sufficiently closely connected with the claim so that it would be unjust to require the defendant to pay the claim without deduction*".

Particulars of Employment

70. The legal requirement to provide workers with a written statement of their employment particulars is currently contained in Sections 1–7B of the Employment Rights Act 1996. Since 6 April 2020 the requirement has been extended to apply to all workers regardless of the size of their employer.

71. Section 38 of the Employment Act 2002 states that a tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA. A claim under s.13 ERA is one of the claims listed in Schedule 5.

72. S 38(2) states that subject to subsection (5), the tribunal must make an award of the minimum amount (equal to two weeks' pay), and may, if it considers it

just and equitable in all the circumstances, award the higher amount instead (equal to four weeks' pay).

73. Subsection (5), however, states that "*The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable*".

Analysis and Conclusions

Unfair dismissal

74. To determine this complaint, I must first decide if the claimant was dismissed or resigned. It is only if, as a matter of law, he was dismissed, the issue of whether the dismissal was fair or unfair will arise. It is not in dispute that the claimant's contract came to an end. However, what is in dispute is whether it ended by way of the claimant's resignation or dismissal.

75. For the sake of completeness I should mention that it is not a case of "constructive dismissal", i.e. the claimant does not say that he resigned in response to a fundamental breach of his employment contract by the respondent. He says he was actually dismissed by the respondent on 11 January 2024.

76. The main difficulty in this case is that neither side gave the other an unequivocal notice, either in writing or orally, that he/it was terminating the contract. The claimant did not say: "*I am resigning*", or words to that effect. The respondent did not say: "*You are dismissed*", or words to that effect. This is case falls in the category of the so-called ambiguous words/conduct resignation or dismissal.

77. The respondent says that the claimant resigned on 11 January 2024 by his conduct of deleting his login details on the work computer, collecting his personal belongings, and asking for holiday pay. These steps, the respondent argues, when viewed in light of the claimant asking MR on 9 January for his P45, (when MR confronted the claimant about him being dishonest in taking additional items not listed on his staff account he had signed on 21 December), clearly demonstrate the claimant's decision to leave the respondent's employment, i.e. his resignation.

78. The claimant argues that he was dismissed by MR on 11 January 2024 by MR saying the words: ""*I'm sorry that this has come to this stage. I'm genuinely sorry about it. But I hope you can understand where I'm coming from. I just.. whether or not it's deliberate or not or accidental I just can't have somebody here that I can't fully 100% trust of the time. And I don't want it to be a personal issue at all. And overall I always thought you've been a good employee here maybe a bit messy. Let's not deny that but, and I appreciate you try to pay off the balance of your account*….", asking him when he wanted his P45 issued, and issuing his P45 on that day.

79. The claimant denies that on 9 January 2024 he asked for his P45. He argues that wiping out his login details from the work computer was a precautionary step, because he expected that he would be dismissed on that day. The claimant also gave oral evidence that when MR said: "*So can I take that as you're leaving us then? You're wiping your login information from our laptop*", he answered "*No*". However, when it was pointed out to him that the transcript of his recording of that meeting did not show him saying "*No*", the claimant changed his evidence and said that "*he thought*" that he had answered "*No*". I find that he did not say "*No*" in response to that question by MR.

80. I accept MR's evidence that the claimant asked for his P45 on 9 January 2024. I reject the claimant's evidence that he did not ask for his P45. I also accept MR's evidence that the claimant collected some of his personal belongings on 9 January and said that he would come back to pick up the rest later, which he did on 11 January. The reasons for these factual findings are the following.

81. I prefer the respondent's witnesses' evidence to the claimant's, as I found the respondent's witnesses much more credible, straightforward and helpful, and their evidence cogent, supported by the contemporaneous documents, and logically tied to the relevant events.

82. Unfortunately, I cannot say the same with respect to the claimant's evidence, which in many respects were less than satisfactory and often illogical and contradictory.

83. For example, the claimant first gave evidence that he did not know that he had the right to receive particulars of his employment until he saw a Citizens Advice adviser on 10 January 2024. However, when it was pointed out to him that he was requesting his particulars of employment in the grievance letter, he claimed he had sent to the respondent on 8 January 2024, he tried to backtrack on his earlier evidence by introducing "friends and family" as the source of that advice, and then trying to draw a distinction between knowing from friends and family that it was "*something required in employment*" and from Citizens Advice that it was a "*statutory requirement*". I find this explanation for the inconsistency in his evidence unconvincing.

84. I pause here to say that I reject the claimant's evidence that he sent a grievance letter to the respondent on 8 January 2004 and the appeal letter on 30 January 2024. I accept MR's evidence that he did not receive these two letters and only saw them as part of the disclosure exercise in these proceedings. The screen-shorts provided by the claimant, as a proof of him sending the letters, do not unequivocally show that he <u>in fact</u> had sent these two letters to MR on the dates he claims he had. Furthermore, the screen-short of the claimant's folder containing these letters, shows the timestamp of the grievance letter as 31 January 2024, when on the claimant's case he had sent it to MR on 8 January 2024.

85. Furthermore, surprisingly, the claimant's particulars of claim or his witness statement do not mention him sending these letters. On the contrary, in his witness statement he says that he came back to work in January 2024 for a few days however felt that he was targeted due to the actions of his girlfriend (CMH) and it was only after he had been asked by MR to go home on 9 January he sought advice from Citizens Advice, and was told that he was likely to be dismissed the next day he attended work. He does not give any evidence that he ever mentioned his grievance letter to MR, either at the meeting on 9 or 11 January.

86. I find that it is simply not credible that if the claimant had indeed sent a formal grievance letter on 8 January, complaining about several matters (not having particulars of employment, payslips, holiday pay, late payment of wages), he would not have mentioned that letter when he met MR on 9 and 11 January.

87. Finally, the claimant does not say that before 8 January he had ever asked MR or anyone else about any of the matters that he raised as a grievance in the 8 January letter. Yet, in his grievance letter he writes: "*It is a problem that is causing me some concern and that I have been unable to solve without bringing to your attention. I hope in doing so we can deal with the issue quickly and amicably.*" (*emphasis added*). If the claimant had not asked MR or anyone else about these matters before and no one told him that these matters would not be solved for him, it seems very strange that in his grievance letter he says that he has been unable to solve these matters and that he was hoping to have them resolved "*amicably*".

88. On balance, I find that both letters were prepared by the claimant after the relevant events to bolster his tribunal claim.

89. Another example why I found the claimant's evidence far less credible than the respondent's is his evidence as to the reason why he did not add items to his staff account, which he explained by his inability to create a spreadsheet from suppliers' invoices and then import the spreadsheet into the respondent's computer stock system. I find his explanation unpersuasive. The claimant was extremely capable and proficient with IT matters. I accept the respondent's witnesses' evidence on that. Therefore, to suggest that the claimant was incapable of creating a very simple spreadsheet of the kind we see at p.73 of the bundle and that stopped him from entering additional items onto his staff account is simply not credible. I also accept TP's evidence that he was available to help the claimant with any stock system issues, but the claimant never asked him for help.

90. Furthermore, this explanation does not answer the question why the claimant chose not to tell MR and DR at the meeting on 21 December 2023 that the staff account they asked him to check for correctness and sign was incomplete, and that in fact he owed the respondent more money than what was recoded on the account.

91. The claimant gave oral evidence that he came to the shop on 11 January expected to be dismissed. However, in his witness statement he says that he

came to work on that day "*expecting to have a normal day*" and recorded the meeting only because Citizens Advice advised him that he was likely to be dismissed. When I asked him to explain how at the same time he was expecting to be fired and have "a normal day" at work, he was unable to give me a clear answer.

92. In short, I found the claimant's evidence self-servicing and lacking credibility. Therefore, when his evidence came into conflict with the respondent's witnesses' evidence, all of whom I found to be honest and helpful witnesses, I preferred their evidence to that of the claimant.

93. Now, returning to the claimant asking for P45 on 9 January 2024, which I find as a fact he did. This, however, in my judgment, is not sufficient in and of itself to amount to resignation for the following two reasons.

94. Firstly, it was MR's evidence that at that time (i.e. on 9 January 2024) he was shocked by his discovery of the claimant's taking more stock, and when the claimant asked for P45 MR "*did not know what was happening*". In other words, MR himself at that time did not understand the claimant requesting P45 as his unambiguous notice of resignation.

95. The second reason is that there is a direct (albeit somewhat dated) EAT authority (*Bates v Brit European Transport Ltd* EAT 309/94), which holds that an employee's request for a P45 cannot, by itself, be construed as a resignation. Such a request has to be considered in light of all the surrounding circumstances (see paragraph 48 above).

96. However, that does not mean that the claimant requesting P45 is irrelevant. On the contrary, in my judgment, it is a very significant factor, as it gives a clear indication of the claimant's intention to resign.

97. P45 is a HMRC form, which is issued to an employee by her/his employer only when s/he leaves the employer's employment. It records "*Details of employee leaving work*", "*leaving date*", tell the employee to give Part 2 and 3 to their "new employer", and what to do in case of becoming unemployed, self-employed, or moving abroad. So, why would an employee ask for P45 if s/he intends on remaining in that employment?

98. Furthermore, it is equally significant that the claimant did not ask for his P45 out of the blue. He did that in the context of the conversation on 9 January, when he was confronted by MR that he was taking items belonging to the respondent without authorisation, without paying for them, and without recording them in his staff account, and when the claimant had no good explanations for that.

99. The claimant admitted on 21 December to MR (and accepted in his evidence to this Tribunal) that him doing that could be seen as stealing from the respondent. He signed the staff account, promising to repay the amount it owed, knowing that the account was incomplete and he owed more money to the respondent.

100. In other words, his request for P45 came in the circumstances when he was caught red-handed, and on any reasonable view his continuing employment with the respondent became untenable. The claimant is an intelligent person, and that would not have been lost on him.

101. On leaving the shop on 9 January he took some of his personal belongings and told MR that he would come back to collect the rest later. That too demonstrated his intention to end his employment with the respondent.

102. What happened on 11 January, in my view, eliminated any remaining ambiguity. Before any conversation about the claimant leaving the respondent started, the claimant was already wiping out his personal login details on the work computer. These details were necessary for him to perform his work duties. He asked to be paid for his accrued but not taken holidays, which is only payable to employees upon termination of their employment. He said that he was going to take home his other personal belongings and come back later with the car to take his 3D printer.

103. When MR asked him "*So can I take that as you're leaving us then?*", the claimant did not say "no", and proceeded to wipe out the work computer of his login details.

104. For completeness, I reject Ms Kesar's submission that the claimant attended the meeting on 9 January to discuss his grievance of 8 January, which she argued demonstrates his intention to stay and not to leave the respondent's employment. Firstly, it was not the evidence that the claimant gave at the hearing. It is not in his witness statement, nor did he say that in his oral evidence. Therefore, this submission is not supported by the claimant's evidential case. In any event, for the reasons explained earlier I find that the claimant did not send the grievance letter on 8 January.

105. Considering all the surrounding circumstances and the claimant's conduct on 9 and 11 January, I find that the claimant has resigned on that day by:

a. his conduct of wiping out his login details on the work computer,
b. not giving a negative response to MR's question: "S*o can I take that as you're leaving us then? You're wiping your login information from our laptop."*
c. collecting his personal belonging,
d. telling MR that he would come later to collect his 3D printer,
e. not doing any other work on that day, and
f. leaving the shop with his personal belongings.

106. He was not dismissed by the respondent.

107. This conclusion means that the claimant's complaints of unfair dismissal and wrongful dismissal fail at this hurdle and stand to be dismissed.

108. This is my primary conclusion on these two complaints. However, I went on to analyse the case on the premise that I were wrong on my primary conclusion and that conduct by the claimant in those circumstances did not amount in law to a resignation.

109. On that alternative hypothetical premise, I find that the claimant was dismissed on 11th January 2024. The dismissal was by:

a. MR telling the claimant that he could not have somebody in the shop that he could not fully trust,
b. asking the claimant when he wanted his P45 issued, and
c. issuing P45 to the claimant on that day.

(as recorded in paragraphs 40, 41 above)

110. The next question, proceeding on that alternative premise, is what was the reason (or if more than one - the principal reason) for the claimant's dismissal?

111. The respondent submits that it was the claimant's conduct, namely taking the respondent's stock without authorisation, not paying for it, and not properly recording the taken stock in his staff account.

112. Whilst I accept that it would have been a potentially fair reason to dismiss the claimant, based on the evidence I heard, I do not find that it was what operated on MR's mind when he said to the claimant on 11 January those words and issued P45.

113. I find what operated on MR's mind at that time was his belief (mistaken, if my primary conclusion is wrong) that the claimant had resigned. The two cases referred to in paragraphs 52, 53 above are to the point here.

114. I find that on the facts of this case, MR dismissing the claimant in the circumstances where he genuinely and reasonably (albeit, if my primary conclusion is wrong, mistakenly) believed that the claimant had resigned was some other substantial reason for the purpose of section 98(1)(b).

115. This, however, is not the end of the matter. I must now proceed to determine whether in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason to dismiss the claimant. (s.98(4) ERA), applying the so-called range of reasonable responses principle. In other words, it does not matter whether I or another employer would have dismissed the claimant in those circumstances. What matters is whether the decision to dismiss was one of possible reasonable responses open to the respondent in the circumstances of this case.

116. I find that in those circumstances the decision to dismiss was well within the range of reasonable responses. To put it simply, there were strong and ample evidence of the claimant wishing to bring his employment with the

respondent to an end (see paragraphs 96-104 above). In my judgment, it was imminently reasonable for MR to interpret the claimant's conduct on 11 January 2024, against the background of what had happened on 21 December and 9 January, as manifesting the claimant's intention to leave the respondent's employment there and then.

117. Furthermore, the claimant had a perfect opportunity to disabuse MR from his mistaken belief that he was resigning. MR asked the claimant a direct question: "*So can I take that as you're leaving us then?*". The claimant did not say: "no, I am not". Instead, he proceeded with wiping out his login details, talking about receiving his accrued holiday pay, collecting his belongings, and leaving the shop.

118. Therefore, in those circumstances, I find that MR treating his mistaken (if my primary conclusion is wrong) belief that the claimant had resigned as sufficient reason to dismiss the claimant was well within the range of reasonable responses open to a reasonable employer. Considering the size and administrative resources of the respondent's undertaking, the workplace environment, and a large degree of informality in the working arrangements and practices, it would have been highly artificial to expect that some further procedural steps needed to be taken by the respondent to ascertain the true position before dismissing the claimant for that reason, i.e. before MR saying the words and doing the things which on the alternative premise amounted to the claimant's dismissal (see paragraph 109 above).

119. Therefore, if I am wrong on my primary conclusion, and the claimant was dismissed by the respondent on 11 January 2024, I find that the dismissal was fair.

Wrongful dismissal

120. Applying the same alternative hypothetical premise that the claimant was dismissed on 11 January 2024 (see paragraph 109 above) to the claimant's wrongful dismissal (notice pay) claim, I need to consider whether in the circumstances of the case the respondent was within its rights to dismiss the claimant summarily.

121. In claims for unfair dismissal for gross misconduct the relevant question is whether the employer reasonably believed that the employee was guilty of gross misconduct or was otherwise in a fundamental breach of his/her contract of employment. This involves an inquiry into the employer's state of mind, and whether based on the facts known to the employer at that time it was reasonable for the employer to hold that view. In other words, the tribunal does not need to come to a firm conclusion whether the employee in fact did or did not do for what he was dismissed.

122. In contrast, in a claim for wrongful dismissal, the tribunal must determine for itself (applying the objective standard) whether: (1) as a matter of fact the claimant did or did not do for what he was dismissed, and (2) what the claimant did or did not do amounted in law to a fundamental breach of

contract, entitling the respondent to terminate the contract with immediate effect.

123. In other words, I need to make factual findings, on the balance of probabilities, as to what the claimant did or did not do, which respondent says amounted to gross misconduct/fundamental breach, and then assess for myself whether those actions and/or omissions by the claimant constituted a fundamental breach of contract as a matter of law.

124. The respondent says that the claimant's actions of taking stock without authorisation, without paying for it, and without recording these items in his staff account amounted to a breach of the implied term of trust and confidence, thus putting the claimant in a fundamental breach of contract.

125. The claimant's case essentially is that he has done nothing wrong and was simply doing what everybody else was doing in the shop, and also because of the lack of training he did not know better. I roundly reject the claimant's case.

126. Firstly, I reject that what claimant was doing, by taking stocks without authorisation, without paying for it, and without recording on his staff account, was something that everybody else was doing in the shop. On the contrary, the evidence before me is such that the claimant was the only person who was doing that and was doing that surreptitiously. I accept TP's evidence on that point.

127. I equally reject the claimant's evidence that he took some of the items from the shop "for testing at home". His evidence on this issue was implausible. He admitted that he did not seek permission to take these items home "for testing". His evidence as to the need for the items to be tested at his home, as opposed to in the shop, were confusing and unconvincing. I accept MR's evidence that the staff were not required or authorised to take items from the shop without permission for testing, and he was not aware of anyone doing that.

128. I equally reject the claimant's evidence and Ms Kesar's submissions that the claimant's conduct arose from the lack of training and him being "*new to the company*". Firstly, the claimant was not new to the company. By the time these matters came to light he had been with the company for over two years. Since the beginning of 2023 he assumed TP's responsibilities and was working as the shop manager. Secondly, I accept TP's evidence that the claimant was given all appropriate training on the job, that he was a quick learner and knew exactly how the systems operated, what needed to be done to book the stock, and what needed to be done when he wanted to purchase the respondent's stock for personal use.

129. Thirdly, and fundamentally, you do need much training (if any), or knowledge of the computer systems or operational processes to appreciate that taking something that does not belong to you without paying for it, and

not telling the owner that you have taken their property without paying, is wrong and dishonest.

130. It is trite law, that every contract of employment contains an implied term of trust and confidence, which says that without reasonable and proper course each party must not conduct themselves in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employee and the employer. A breach of this implied term is a fundamental breach of contract. There are other implied terms which employees must observe too (see paragraph 63 above).

131. On any sensible view what the claimant has done breached the implied term of trust and confidence. He misused his position of the shop manager by ordering items for personal use, taking the respondent's stock without paying for it, not accurately recording the taken items on his staff account. Furthermore, when he was asked by MR and DR on 21 December 2023 to verify that his staff account was complete and accurate, he confirmed that knowing that it was not true, and that he had taken more of the respondent's stock and owed more money to the respondent, than what his staff account showed.

132. The respondent is a small niche business that sells expensive equipment to customers interested in airsoft. MR had a very much "hands off" approach to the day-to-day running of the shop, relying on his sale staff being trustworthy and transparent. The claimant abused that trust. As MR said to him on 11 January: "*I just can't have somebody here that I can't fully 100% trust of the time*". I agree.

133. By his actions (see paragraphs 17, 19- 43 above) the claimant also breached the implied terms of fidelity, obeying lawful and reasonable orders of his employer, and using reasonable care and skill in performing his work duties. The claimant's breaches of these implied terms were, in my view, fundamental, because his actions were premediated and surreptitious. Objectively viewed his conduct was dishonest. He engaged in that conduct over a considerable period of time. His conduct caused a substantial financial loss to the respondent, over £5,000.

134. I, therefore, find that the respondent was within its rights to dismiss the claimant summarily. In other words, had the claimant not resigned on 11 January 2024, the respondent would have been entitled to dismiss him summarily on that day.

135. This issue of affirmation does not arise (and it was not argued by the claimant that the respondent affirmed his contract), because the claimant was dismissed shortly after the respondent had discovered his fundamental breach.

136. For all these reasons, even if I am wrong on my primary conclusion that the claimant has resigned, the claimant's claims for unfair and wrongful dismissal must still fail.

Unauthorised deduction from wages

137. It is not in dispute that the respondent has made a deduction from the claimant's wages by failing to pay the claimant his final salary for December 2023 and January 2024.

138. The respondent however contends that the deduction was not unauthorised, because on 21 December 2023 the claimant has signed a document (see paragraph 30 above) effectively confirming that he owed money to respondent in the amount stated there, which amount was greater than the deduction made by the respondent. The respondent also relies on the claimant telling MR and DR on that day that the debt would be paid off over a period of time, including from his salary. The respondent contends that all this amounted to the claimant signifying in writing his agreement to the making of the deduction, within the meaning of section13(1)(b) ERA.

139. I disagree. Firstly, on a fair reading of the claimant's writing on that document (see paragraph 30 above), the claimant simply accepts that he owes this amount to the respondent and will pay it off over a period of time. There is nothing in that wording to suggest that he gives his agreement for this or another sum to be deducted from his salary.

140. By analogy, in the case of *Potter v Hunt Contracts Ltd* 1992 ICR 337, EAT (see paragraph 67 above), the EAT found that the agreement to repay a loan upon departure from the company was insufficient as an agreement for deductions to be made from the employee's salary.

141. Insofar as the respondent reliance on the oral conversation, in which, the respondent says, the claimant indicated that he would pay this sum to the respondent from his wages; that, in my view, still falls far short of a proper authorisation/agreement to make deductions from the claimant's wages. Firstly, a confirmation by an employee that s/he will repay a debt owed to the employer using their salary is not the same as authorising the employer to deduct the amount of the debt owed from the employee's wages. Secondly, section 13(1)(b) requires such agreement to be in writing. An oral agreement or authorisation is not sufficient.

142. For these reasons, I find that the respondent has made an unauthorised deduction from the claimant's wages by failing to pay to the claimant his final salary for December 2023 and January 2024. Accordingly, I make a declaration to that effect.

143. Under section 24 ERA I must order the respondent to pay to the claimant and amount of any deduction made in contravention of section 13 ERA.

144. However, it was held in *Ridge v HM Land Registry* UKEAT/0485/12/DM that employment tribunals have the power to set off any amounts awarded to

the claimant against any amounts owed by the claimant to the respondent (see paragraph 69 above).

145. It is trite law that a set off of this kind is only possible if the sums are liquidated - that is to say, ascertainable with certainty. In other words, a debt can be set off against another debt, but a debt cannot be set off against a mere claim for damages.

146. The second legal requirement for a valid set off is that a debt may be raised by way of set-off if it is sufficiently closely connected with the claim, so that it would be unjust to require the respondent to pay the claim without a deduction for the debt owed by the claimant.

147. In this case, the claimant accepts (and he confirmed that again in his oral evidence) that he owes a debt to the respondent in the sum exceeding the amount that the respondent has deducted from his wages. Therefore, there is no issue of the claimant's debt to the respondent being ascertainable with certainty.

148. It is also unquestionable that the debt the claimant owes to the respondent is closely connected to the claimant's successful claim for unauthorised deductions of wages. The claimant's debt to the respondent arose from the claimant's employment with the respondent. The claimant verbally agreed to repay the debt from his wages payable to him by the respondent.

149. Considering the circumstances of this case, in particular:

a. my findings that the claimant surreptitiously and dishonestly misappropriated the property belonging to the respondent, thus putting himself in fundamental breach of his employment duties (see paragraphs 126 - 134 above), and
b. the fact that on 21 December 2023 and again on 11 January 2024 the claimant expressly agreed to repay the debt he owes to the respondent from his wages,

in my judgment, it will be unjust to order the respondent to pay the claimant's successful claim without making a deduction for the claimant's debt.

150. For these reasons, I decline to make an order for the respondent to pay any money to the claimant for the wages deducted. Instead, the respondent must treat the deducted sums as setting off (in part) the debt the claimant owes to it.

s.1 ERA claim

151. There is no dispute that the claimant did not receive his particulars of employment.

152. As the claimant succeeded on his s.13 ERA unauthorised deductions claim, under section 38 of the Employment Act 2002

the tribunal must, subject to subsection (5), make an award of the minimum amount (2 weeks wages) to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount (4 weeks) instead.

153. Subsection 5 states that "*The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.*"

154. I find that this case falls into this category of "exceptional circumstances". Firstly, I accept MR's evidence that the respondent, being a very small employer, was simply unaware of the changes in law in 2020, making it mandatory to issue particulars of employment to all workers, regardless of the size and composition of the workforce. Whilst it does not excuse the respondent's non-compliance with its s.1 ERA duties, it is still a relevant factor that the respondent's breach was not deliberate or designed to avoid any responsibilities to its employees.

155. Secondly, until 9 January 2024, the claimant never asked to be provided with particulars of his employment. The first time he asked for the particulars was at the same time as him asking for his P45. He resigned the next day he attended work, on 11 January 2024. On 9 January, MR did not tell the claimant that he would not be provided with particulars of employment. However, given the circumstances, the respondent did not have the opportunity to investigate the matter further and remedy its non-compliance before the claimant's departure.

156. Thirdly, and most importantly, I find that the wrong committed by the claimant against the respondent is of such magnitude that it would be unjust and inequitable for him to receive any compensation from the respondent for the respondent's breach of its s.1 ERA obligations, when the claimant still owes a considerable debt to the respondent, which he accumulated through his dishonest conduct, and so far took no steps to repay.

157. For these reasons, I make the declaration that the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars but decline to make any compensation award to the claimant under s.38 EA.

Employment Judge Klimov

3 June 2025

Sent to the parties on:

11 June 2025

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For the Tribunals Office