



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Ms Nixon

**Respondent**  
Warstone Café Ltd

AND

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Birmingham

**ON**

20 July 2021 &  
6 August 2021  
(in chambers)

**EMPLOYMENT JUDGE** Harding

### RESERVED JUDGMENT

**Representation**

**For the Claimant:** Mr Nixon, claimant's husband

**For the Respondent:** No attendance

### JUDGMENT

**The judgment of the tribunal is that:**

1 The respondent failed to pay the claimant the national minimum wage, and has made an unlawful deduction from her wages. The respondent is ordered to pay to the claimant unpaid wages in the sum of £2,924.13 (gross figure), subject to such deductions as the respondent is entitled to make on behalf of tax and national insurance.

2 The respondent failed to pay the claimant her holiday entitlement on termination of her employment. The respondent is ordered to pay to the claimant unpaid holiday in the sum of £1,227.06.

### **Background**

1 This case had originally been listed for a three hour hearing to take place by CVP on 23 February 2021. This hearing was postponed because neither party had received the other party's documents. The hearing was re-listed for Monday 14 June 2021 but this hearing was postponed on the application of the respondent because the respondent (Mr Bains) was too ill to attend the hearing. The hearing was re-listed for a 3 hour hearing on 20 July. On Friday 17 July an email was received from Mr Bains stating that due to staff shortages the respondent would not be able to attend the hearing on Monday 20 July. Mr Bains requested that the hearing go ahead in the respondent's absence and he provided some written submissions which he asked to be considered.

2 The claimant pursues claims of an unlawful deduction from wages, which is based on an asserted underpayment of the national minimum wage, and unpaid holiday pay on termination of employment. The claimant, with the assistance of her husband, had done her best to prepare a bundle of documents. This included a calculation in respect of the asserted underpayment of wages. The claimant had carried out her calculation using an approximate figure for an average number of hours worked each week and had arrived at an asserted underpayment of £3,690.40 over the period 10 September 2018 to 30 April 2020. I explained to the claimant that this is not how a national minimum wage calculation is carried out. I explained that the information that I would need was the asserted total qualifying remuneration for each pay reference period and the asserted total number of qualifying hours worked in the pay reference period. I explained that the total pay is then divided by the total number of hours worked for each pay reference period to work out whether the hourly rate is above or below the NMW. Nowhere within the documentation was total pay and total number of qualifying hours for each pay reference period set out. The claimant told me that she would be able to provide this information in the form of a schedule and accordingly I adjourned the hearing until 12 PM in order to give the claimant an opportunity to provide this information. In fact, the claimant needed slightly longer than this and the hearing did not start until 12:50 PM.

### **Evidence and documents**

3 I had before me the bundle of documents prepared by the claimant, the schedule of total number of hours worked and total pay received for each pay reference period prepared by the claimant on the morning of the hearing and the written submissions from the respondent submitted by email on Friday 17 July 2021.

## **Findings of fact**

4 From the evidence that I heard and the documents that I was referred to I make the following findings of fact:

4.1 The claimant started working for the respondent on 10 September 2018 and her last day of employment was 30 April 2020. She worked as a Kitchen Assistant at the respondent's premises, which is a café. She was 33 when she started working for the respondent.

4.2 The café's opening hours are 7:30 AM to 3 PM Monday to Saturday and 7:30 AM to 2 PM on Sundays. Staff are generally required to arrive at work half an hour before the café is due to open – i.e. to arrive by 7.00 AM, page 88.

4.3 The claimant first learned that a Kitchen Assistant job was available at the café via word-of-mouth. She contacted Mr Bains, the owner of the café, about the job. It was agreed that she would start work with the respondent on 10 September 2018. There was some discussion about what hours she could work and the claimant told Mr Bains that she would only be available to work four days a week.

4.4 On balance I accept the claimant's evidence and find that although she did initially tell Mr Bains that she would only be available to work 7:30 AM until 1:30 PM, page 88, she in fact often worked more hours than this.

4.5 Both hours of work and days of work varied week to week. The claimant had no normal working hours. She frequently worked as little as 8 hours in a week, on one occasion she only worked 5 hours in a week, and on a few weeks she did not work at all. But some weeks she did far more hours; she regularly worked as much as 32 hours a week up to a maximum of 50 hours in a week. She was paid weekly in cash. I accept the claimant's evidence and find that she was paid £6.50 for each hour worked. I do so for the following reasons. Firstly, at page 59 of the bundle there was a handwritten record of hours worked in September 2018, which had been prepared by the claimant. The claimant had handed this document in to the respondent when there were discussions about paying her for a week in hand at the end of her employment. The respondent (Mr Bains) had written on this document, bracketing together the hours worked by the claimant on Monday 10 September through to Sunday 16 September, a total of 42 hours, and against this he had written "week in hand £273". £273 for 42 hours equates to £6.50 an hour. That, therefore, corroborated the claimant's evidence. I also took into account in reaching this finding that this respondent has on a number of occasions advertised

for a kitchen assistant at the café at an hourly rate of pay well below the national minimum wage, for which see below.

4.6 The claimant was not issued with a contract of employment nor a written statement of employment particulars. She was issued with payslips at the end of each month. I accept the claimant's evidence and find that these payslips were, in fact, a fiction, issued for accounting purposes only. I reach this finding for the following reasons. Firstly, the payslips recorded that the claimant was paid monthly in cash, whereas I have accepted the claimant's evidence that she was paid weekly. Secondly, according to the payslips, the claimant worked exactly 69.333 hours each month, see for example page 61, which I considered to be inherently unlikely, particularly when there were no fixed hours or days of work. Indeed, it was notable that the respondent himself described the claimant's hours as not consistent, "working different hours per shift", page 95. The respondent did then go on to say in this document that the claimant's hours always "totalled on average 16 hours per week" due, Mr Bains asserted, to the claimant wanting to claim universal credit/childcare benefits. But the use of the words "on average" in itself suggested the figures were not precise and would vary, which again was inconsistent with the payslips. Moreover, as the requirement that a person work no more than 16 hours a week in order to be eligible to claim universal credit was removed some time ago it seemed unlikely that such an arrangement would have been made.

4.7 The claimant kept a diary of the hours that she had worked and she filled it in contemporaneously.

4.8 On balance I accept the evidence of the claimant and find that her husband would take her to work about 50% of the time and she would get a taxi to work the rest of the time. It follows from this that the record of taxi journeys in the bundle is not a complete record of the days worked by the claimant. I had some hesitation over accepting the claimant's verbal evidence, because in her written statement, paragraph 5, the claimant had stated that she "mainly" booked taxi journeys to get to work but "sometimes" her husband took her. However, before me, the claimant immediately stated that her husband took a to work about half of the time and this evidence remained consistent. Consequently I accepted this evidence.

4.9 In December 2019 the respondent placed an advertisement for a kitchen assistant to work at the café part time on an hourly rate of £6 an hour, page 36. The respondent advertised again on 27 February 2020 for a part time kitchen assistant, again at the rate of £6 an hour, page 37. A further advertisement for a kitchen assistant, this time on a full-time

basis, was placed by the respondent on 5 May 2020. Again, the rate of pay was £6 an hour. The method of pay was cash in hand, page 38.

4.10 On balance, I accept the evidence of the claimant and find that the record of total hours worked and total pay received for each pay reference period contained in her schedule is accurate. Details of the hours worked and pay received are set out in the tables below. I have accepted the claimant's evidence for the following reasons. The schedule produced by the claimant was very detailed; it contained a week by week breakdown. It was based on entries in a diary, extracts of which were before me, which I have accepted was a contemporaneous document. The respondent in its written submissions suggested that the diary was unreliable because it had been heavily amended and looked as if it had been produced specifically to support the claim. It is true that many changes had been made to the diary entries. For example for Friday 9 August the word "off" had been struck through and inserted instead was 9.30 to 3 PM, 6.5 hours, page 50. This type of change had been made frequently. But when I asked the claimant about this in her evidence she was clear that there were frequent changes to the rota and this was why there were changes to the entries in her diary. Whilst I had some hesitation about this evidence I was prepared to accept it, particularly in the absence of any further challenge from the respondent on this point. I took into account that there was a huge variation in the number of hours worked each week recorded in the claimant's schedule. The hours worked varied from zero in a week up to a maximum of 50 working hours. This level of detail, and in particular the variation in working pattern, suggested to me that the document was an accurate record. Lastly, I took into account that it was clear from the job advertisements referred to in paragraph 4.9 above that the respondent is clearly prepared to pay below the national minimum wage. This, in my view, supported the claimant's case that she was working more hours than the respondent suggested at below the national minimum wage. I did not consider that the claimant's letter of 8 May 2020, for which see more below, in which the claimant wrote that she had a claim for non-payment of holiday pay based on working 16 hours a week, undermined the claimant's evidence for the following reasons. Firstly, the claimant made clear in this letter that she was basing her calculation on the number of hours worked which had been recorded in the payslips provided to her by the respondent and secondly, and more importantly, the claimant wrote to the respondent again within a matter of weeks stating that having taken advice she now realised she had enough evidence to prove she was working more than the 16 hours a week stated on the payslips, again for which see more below.

4.11 No holiday year was specified for the claimant and accordingly her holiday year began on the 10 September of each year and ended on the 9

September the following year. The claimant on a number of occasions requested to take paid holiday but the respondent refused to allow this. The claimant was also aware of three other colleagues all of whom had had their requests for paid holiday refused. She reached the point where she thought there was no point in requesting paid leave because she knew it would not be allowed. She took no paid holiday during her employment.

4.12 The claimant worked 16 hours the week of 16 – 22 March 2020, which was in fact the last time that she worked at the cafe. She did not work at all from Monday 23 March - Tuesday 31 March and on 1 April 2020 she was placed on furlough. She remained on furlough until 30 April 2020. The circumstances in which the claimant's employment came to an end were not explained to me but it was not disputed between the parties that the claimant left with immediate effect on 30 April. The claimant was paid £455.38p for the month of April.

4.13 On 8 May 2020 the claimant wrote to the respondent stating that on the payslips the respondent had provided her with she worked 69.333 hours a month, equivalent to 16 hours a week, which equated to 149.34 hours of holiday pay that she had not been paid, page 73. The claimant wrote again to the respondent on 4 June 2020 stating that she had now taken employment advice and that she realised she had enough evidence to prove that she had worked more than the 16 hours a week stated on the payslips and had a claim for non-payment of the national minimum wage, page 75.

## **The Law**

### **National Minimum Wage**

5 The right to the NMW derives from the National Minimum Wage Act 1998, section 1(1) of which provides:

“A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.”

6 Section 2 of the Act provides that regulations may make provision with respect to the circumstances and times at which a person is to be treated as or as not working. Thus what is work for the purposes of the Act is determined by the Regulations. These are the National Minimum Wage Regulations 2015.

7 NMW Regulation 7 deals with the method of determining if the national minimum wage has been paid. Regulation 7 states that it is necessary to work out the total remuneration paid in the pay reference period in accordance with Part 4 and the hours of work over the same period in accordance with Part 5. In

summary it is necessary to work out; firstly what the total qualifying remuneration was that a worker received in a pay reference period and once this has been calculated to work out the total number of qualifying hours worked in the pay reference period. This has two elements to it; firstly what type of work was the worker carrying out and secondly what hours worked count towards the calculation, using the rules set down for each category of work. Then the total pay is divided by the total number of hours worked for each pay reference period to work out whether the hourly rate was above or below the NMW.

8 The pay reference period is defined in Regulation 6. It is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

9 Regulation 17 sets out that there are 4 different types of work; salaried hours work, time work, output work and unmeasured work. Determining what *type* of work the worker is carrying out is not dependent on the duties carried out by the worker rather it depends on the way in which the worker's pay is calculated, paragraph 10, **Focus Care Agency v Roberts UKEAT/0143/16**. The starting point is to ask whether the work is salaried hours work within chapter 2 Regulation 21. Work done under a worker's contract will be salaried hours work if four specified conditions are met. The first of those conditions is that the worker is entitled under their contract to be paid an annual salary (or an annual salary and/or a performance bonus and salary premium), Regulation 21(2).

10 If the work is not salaried hours work the next question is whether it is time work. Time work is defined by regulation 30. It is work that is paid for under a worker's contract by reference to set or varying hours or periods of time but which is not salaried:

Regulation 30

"Time work is work, other than salaried hours work, in respect of which a worker is entitled under the contract to be paid-

(a) by reference to the time worked by that worker."

11 The 1998 Act does not itself provide a mechanism for enforcement of the right conferred by section 1(1), but section 17 (1) provides:

"If a worker who qualifies for the National Minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of –

(a) the amount described in subsection (2) below, and

(b) the amount described in subsection (4) below.

(2) the amount referred to in subsection (1)(a) above is the difference between—

- (a) the relevant remuneration received by the worker for the pay reference period; and
- (b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.

(3) In subsection (2) above, “relevant remuneration” means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.

(4) The amount referred to in subsection (1)(b) above is the amount determined by the formula—

$$(A/R1) \times R2$$

where—

A is the amount described in subsection (2) above,

R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and

R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.”

12 It is to be noted therefore that the worker is entitled to *the higher* of:

- (i) the shortfall between the amount paid and the amount that should have been paid under the national minimum wage applicable at the time of the underpayment, or
- (ii) the sum payable if the rate of the national minimum wage applying *at the time of the arrears being determined* had been applicable throughout the relevant period.

13 This provision means that effectively compensation is calculated *at current* national minimum wage rates, so that if rates have gone up since the time of the underpayment the worker will be due more arrears than they were originally underpaid.

14 The effect of section 17 is to provide the worker with a contractual entitlement to be paid at the specified rate. It follows that any underpayment can be recovered by bringing a claim for an unlawful deduction from wages contrary to sections 13 and 23 of the ERA (or indeed pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 in the event that the claim arises or is outstanding on the termination of the employment).



Holiday Pay

15 Regulations 13 and 13A of the Working Time Regulations 1998 set out an employee's or a worker's annual leave entitlement. The current entitlement for any leave year beginning on or after 1 April 2009 is a maximum of 28 days, Regulation 13A (2) (e) and 13A (3).

16 Regulation 14 states as follows:

“(1) This Regulation applies where –

(a) A worker's employment was terminated during the course of his leave year; and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under Regulation 13 and Regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be –

(a) Such sum as may be provided for, for the purposes of this Regulation in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply, the sum equal to the amount that would be due to the worker under Regulation 16 in respect of a period of leave determined according to the formula –

$(A \times B) - C$

Where

A is the period of leave to which the worker is entitled under Regulation 13 and Regulation 13A.

B is the proportion of the worker's leave year which expired before the termination date; and

C is the period of leave taken by the worker between the start of the leave year and the termination date.”

17 The Working Time Regulations do not permit carry over of leave. However, it is well established that when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of any relevant EU Directive in order to achieve the result sought by the

Directive, **Marleasing**. In short, in order to achieve compatibility with the Working Time Directive, words have been read into the Working Time Regulations by both the Employment Appeal Tribunal and the Court of Appeal so as to permit carry over of leave in certain circumstances.

18 **NHS Leeds v Larner Court of Appeal [2012] EWCA Civ 1034** is authority for the proposition that if an employee is unable or unwilling to take paid annual leave because of sickness then such an employee is entitled to receive payment on termination of their employment for the paid annual leave which the employee had, for that reason, been prevented from taking even if this falls in a leave year prior to that in which the employee's employment terminated. In **The Sash Window Workshop Ltd v Dollar UKEAT/0057/15** the EAT gave guidance that sick leave may not be the only circumstance that would act as an impediment to taking annual leave. It was suggested that the tribunal in this case should have considered whether the claimant was unable or unwilling because of reasons beyond his control to take annual leave and as a consequence did not exercise his right to annual leave. The EAT in **Shannon v Rampersad & Anor (t/a Clifton House Residential Home) UKEAT/0050/15** put it thus paragraph 32: The question for the tribunal was whether the claimant was unable or unwilling to take annual leave as it fell due for reasons beyond his control, for example due to sick leave or maternity or paternity leave or because the employer would not allow him to do so. **Larner** is an example of where holiday pay may accrue, paragraph 35.

19 In **Sood Enterprises v Healy UKEAT/0015/12** the EAT confirmed that the right of a worker to carry over annual leave when they have been unable to take their leave only applies to the entitlement under Regulation 13 to 20 days leave. The entitlement to 1.6 weeks (8 days) additional annual leave under Regulation 13A does not carry over (unless there is a relevant agreement between the parties as set out in regulation 13A(7)).

20 Pursuant to Regulation 16(2) of the Working Time Regulations, sections 221-224 of the Employment Rights Act 1996 are to be used as the method for calculating "a week's pay" for the purposes of the WTR. Where a worker has normal working hours *and* is on a fixed salary the calculation is straightforward because under 221(2) of the ERA, that weekly pay will form the basis of the assessment.

21 Section 224 of the ERA states that, where there are no normal working hours, the amount of the week's pay is the amount of the employee's average weekly remuneration in the period of 12 weeks ending-

- (a) where the calculation date is the last day of the week, with that week, and,
- (b) otherwise, with the last complete week before the calculation date.

224(3): "in arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to 12 the number of weeks of which account is taken". This section was amended

by The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 with effect from 6 April 2020 to specify a 52 week average:

10.—(1) Regulation 16 of the Working Time Regulations 1998 is amended as follows.

(2) At the end of paragraph (2) insert “and the exception in paragraph (3A)”.

(3) In paragraph (3)—

(a) in sub-paragraph (c) omit “and”;

(b) after sub-paragraph (d) insert—

“(e)subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—

(i)in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii)in any other case, 52; and

(f)in any case where section 223(2) or 224(3) applies as if—

(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—

(aa) where the calculation date is the last day of a week, with that week, and

(bb) otherwise, with the last complete week before the calculation date; and

(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.”.

## **Submissions**

22 Mr Nixon, for the claimant, confirmed that there was nothing that he wanted to add in addition to what I had already been told save that he clarified that it was the claimant’s case that the unlawful deduction from wages had continued through the month that the claimant was on furlough and up to her last day of employment.

23 Mr Bains, for the respondent, submitted in his email dated 17 July that when the claimant had originally contacted him about the alleged underpayment she had asserted she worked 16 hours a week and yet now was asserting she worked 27.5 hours a week. He submitted that the taxi logs provided by the claimant did not support her claim and he submitted that the claimant’s diary had been heavily amended and looked like it was produced specifically to support the claim. Mr Bains accepted that holiday pay was due to the claimant. He calculated the amount due as being £1, 144.97.

## **Conclusions**

### **Unlawful deduction from wages claim**

24 The claimant was paid weekly, paragraph 4.5, above. Accordingly, her pay reference period is a week. The first question for me to decide was what was the total qualifying amount of pay that the claimant was paid for each pay reference period. There was no suggestion on the evidence before me from either the respondent or the claimant that any of the payments received by the claimant did not form part of her remuneration for national minimum wage purposes. Accordingly, the claimant's total pay for each pay reference period was the gross amount of pay that she received for that period.

25 As set out above the claimant provided detailed evidence of the amount of pay received for each pay reference period which I accepted. I find and conclude therefore that the pay received is as set out in the tables below.

26 Next I was required to consider the total number of qualifying hours worked in the pay reference period. That had two elements to it; firstly what type of work was the claimant carrying out and secondly what hours worked counted towards the calculation, using the rules set down for each category of work. I concluded that the claimant was carrying out time work. I did so because the work was not salaried hours work, as the claimant was not entitled under her contract to be paid an annual salary, but she was paid by reference to the time she worked – i.e. she received an hourly rate of pay. Whilst there was no written contract of employment the agreement that existed between the respondent and the claimant was that the claimant would be paid £6.50 for each hour she worked, paragraph 4.5 above.

27 As to the hours worked that counted towards the calculation, this was straightforward as the claimant was not someone who was spending periods of time on call or travelling. Accordingly, all the hours that she worked counted towards the calculation.

28 Once again the claimant provided detailed evidence of the number of hours worked for each pay reference period, which I accepted, for the reasons I have set out above. I find and conclude therefore that the hours worked are as set out in the tables below.

29 As set out above, in accordance with Regulation 7 of the National Minimum Wage Regulations 2015 the total pay received in each pay reference period is to be divided by the total hours worked in each pay reference period in order to determine the hourly rate of pay and to decide whether the claimant has been paid at or below the National Minimum Wage. That calculation has been

carried out for each pay reference period in the “total pay divided by total hours” column set out in the tables below.

30 The amount of the deduction per pay reference period has then been worked out by multiplying the deduction per hour by the total number of hours worked in that pay reference period.

Calculation by pay reference period

10/9/18 – 31/3/19

NMW: £7.83 an hour

Amount of deduction per hour £1.33

<b>Pay reference period</b>	<b>Total hours of work</b>	<b>Total pay received</b>	<b>Total pay divide by total hours</b>	<b>Amount of deduction</b>
10/9/18 -16/9/18	42	£273	£6.50 per hour	<b>£55.86</b>
17/9/18-23/9/18	50.5	£328.25	£6.50 per hour	<b>£67.18</b>
24/9/18-30/9/18	24	£156	£6.50 per hour	<b>£31.92</b>
1/10/18- 7/10/18	24	£156	£6.50 per hour	<b>£31.92</b>
8/10/18-4/10/18	16	£104	£6.50 per hour	<b>£21.28</b>
15/10/19 - 21/10/18	24	£156	£6.50 per hour	<b>£31.92</b>
22/10/18 - 28/10/18	16	£104	£6.50 per hour	<b>£21.28</b>
29/10/18- 4/11/18	16	£104	£6.50 per hour	<b>£21.28</b>
5/11/18 – 11/11/18	24	£156	£6.50 per hour	<b>£31.92</b>
12/11/18 – 18/11/18	8	£52	£6.50 per hour	<b>£10.64</b>
19/11/18 – 25/11/18	24	£156	£6.50 per hour	<b>£31.92</b>
26/11/18 – 2/12/18	24	£156	£6.50 per hour	<b>£31.92</b>
3/12/18 – 9/12/18	24	£156	£6.50 per hour	<b>£31.92</b>
10/12/18 – 16/12/18	16	£104	£6.50 per hour	<b>£21.28</b>
17/12/18 – 23/12/18	24	£156	£6.50 per hour	<b>£31.92</b>

24/12/18 – 30/12/18	24	£156	£6.50 per hour	<b>£31.92</b>
31/12/18 – 6/1/19	20.5	£133.25	£6.50 per hour	<b>£27.26</b>
7/1/19 – 13/1/19	22	£143	£6.50 per hour	<b>£29.26</b>
14/1/19 – 20/1/19	23	£149.50	£6.50 per hour	<b>£30.59</b>
21/1/19 – 27/1/19	22	£143	£6.50 per hour	<b>£29.26</b>
28/1/19 – 3/2/19	22.5	£146.25	£6.50 per hour	<b>£29.92</b>
4/2/19 – 10/2/19	22.5	£146.25	£6.50 per hour	<b>£29.92</b>
11/2/19 – 17/2/19	22.5	£146.25	£6.50 per hour	<b>£29.92</b>
18/2/19 – 24/2/19	29	£188.50	£6.50 per hour	<b>£38.57</b>
25/2/19 – 3/3/19	8	£52	£6.50 per hour	<b>£10.64</b>
4/3/19 – 10/3/19	8	£52	£6.50 per hour	<b>£10.64</b>
11/3/19 – 17/3/19	0			
18/3/19 – 24/3/19	6.5	£42.25	£6.50 per hour	<b>£8.64</b>
25/3/19 – 31/3/19	8	£52	£6.50 per hour	<b>£10.64</b>
<b>TOTAL</b>				<b>£791.34</b>

1/4/19 – 31/3/20

NMW £8.21 an hour

Amount of deduction per hour £1.71

Note; for the purposes of calculating both furlough pay and holiday pay account has to be taken of the legal obligation to pay the NMW and accordingly the figure in the column “total amount of wages for the pay reference period if the NMW had been paid” is calculated by adding total pay and amount of deduction together.

<b>Pay reference period</b>	<b>Total hours of</b>	<b>Total pay received</b>	<b>Total pay divide</b>	<b>Amount of deduction</b>	<b>Total amount of wages for</b>
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	work		by total hours		the reference period if NMW had been paid
1/4/19 – 7/4/19	8	£52	£6.50 per hour	<b>£13.68</b>	£65.68
8/4/19 – 14/4/19	8	£52	£6.50 per hour	<b>£13.68</b>	£65.68
15/4/19 – 21/4/19	8	£52	£6.50 per hour	<b>£13.68</b>	£65.68
22/4/19 – 28/4/19	0		£6.50 per hour		
29/4/19 – 5/5/19	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
6/5/19 – 12/5/19	8	£52	£6.50 per hour	<b>£13.68</b>	£65.68
13/5/19 – 19/5/19	0				
20/5/19 – 26/5/19	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
27/5/19- 2/6/19	23	£149.50	£6.50 per hour	<b>£39.33</b>	£188.83
3/6/19 – 9/6/19	31	£201.50	£6.50 per hour	<b>£53.01</b>	£254.51
10/6/19 – 16/6/19	23	£149.50	£6.50 per hour	<b>£39.33</b>	£188.83
17/6/19 – 23/6/19	14	£91	£6.50 per hour	<b>£23.94</b>	£114.94
24/6/19 – 30/6/19	28.5	£182.25	£6.50 per hour	<b>£48.73</b>	£230.98
1/7/19 – 7/7/19	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
8/7/19 – 14/7/19	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
15/7/19 – 21/7/19	23	£149.50	£6.50 per hour	<b>£39.33</b>	£188.83
22/7/19 – 28/7/19	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
29/7/19 – 4/8/19	23	£149.50	£6.50 per hour	<b>£39.33</b>	£188.83
5/8/19 – 11/8/19	21.5	£139.75	£6.50 per hour	<b>£36.76</b>	£172.26
12/8/19 – 18/8/19	23	£149.50	£6.50 per hour	<b>£39.33</b>	£188.83
19/8/19 –	5	£32.50	£6.50	<b>£8.55</b>	£41.05

25/8/19			per hour		
26/8/19 – 1/9/19	25	£162.50	£6.50 per hour	<b>£42.75</b>	£205.25
2/9/19 – 8/9/19	26	£169	£6.50 per hour	<b>£44.46</b>	£213.46
9/9/19 – 15/9/19	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
16/9/19 – 22/9/19	22	£143	£6.50 per hour	<b>£37.62</b>	£180.62
23/9/19 – 29/9/19	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
30/9/19 – 6/10/19	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
7/10/19 – 13/10/19	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
14/10/19 – 20/10/19	8	£52	£6.50 per hour	<b>£13.68</b>	£65.68
21/10/19 – 27/10/19	0				
28/10/19 – 3/11/19	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
4/11/19 – 10/11/19	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
11/11/19 – 17/11/19	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
18/11/19 – 24/11/19	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
25/11/19 – 1/12/19	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
2/12/19 – 8/12/19	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
9/12/19 – 15/12/19	8	£52	£6.50 per hour	<b>£13.68</b>	£65.68
16/12/19 – 22/12/19	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
23/12/19 – 29/12/19	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
30/12/19 – 5/1/20	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
6/1/20 – 12/1/20	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
13/1/20 – 19/1/20	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
20/1/20 – 26/1/20	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
27/1/20 – 2/2/20	24	£156	£6.50	<b>£41.04</b>	£197.04



			per hour		
3/2/20 – 9/2/20	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
10/2/20 – 16/2/20	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
17/2/20 – 23/2/20	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
24/2/20 – 1/3/20	24	£156	£6.50 per hour	<b>£41.04</b>	£197.04
2/3/20 – 8/3/20	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
9/3/20 – 15/3/20	32	£208	£6.50 per hour	<b>£54.72</b>	£262.72
16/3/20 – 22/3/20	16	£104	£6.50 per hour	<b>£27.36</b>	£131.36
23/3/20 – 29/3/20	0				
30 - 31/3/20	0				
<b>TOTAL</b>				<b>£1,764.71</b>	£8, 465.46

### Furlough

The claimant was furloughed between 1/4/20 - 30/4/20, paragraph 4.12 above. The total pay she received for this period was £455.38.

Furlough pay is 80% of the *higher* of wages earned in the corresponding calendar period in the previous year, or average wages paid in the 2019 – 2020 tax year.

Note: calculations take account of the legal obligation to pay the NMW and are based on the figure in the far right column of the above table.

The reference date for the calculation is 19/3/20.

### Calendar look back method for variable rate employees

Lookback period for April 2020 is April 2019

It is not known if the claimant worked on 29 and 30 April 2019 and therefore calculation is based on earnings between 1 – 28 April = £197.04

### Average wages in 2019 – 2020 tax year

Tax year 6/4/19 – 31/3/20 (day before first furloughed)

Note: it is not known what, if anything the claimant earned on 7 April 2019 and therefore the calculation runs from 8/4/19.

Total wages: £8,399.78

Divide by total number of days in this period: £8,399.78/359

Multiply by number of days in furlough period (30) and multiply by 80%  
£8, 399.78/359 x 30/100 x 80 = £561.54

This is the figure to be used as it is higher than the look back figure.

The claimant was actually paid £455.38.

Therefore there is a deduction of £106.16 for this period.

**TOTAL UNAUTHORISED DEDUCTION = £2, 662.21**

(Figures in bold in tables above between 10/9/18 and 31/3/20 PLUS £106.16 furlough pay)

31 As set out above, the effect of section 17 of the NMWA 1998 is that if a worker is paid at a rate which is less than the national minimum wage, the worker shall be entitled under his contract to be paid, as additional remuneration in respect of the relevant period, the greater of –

(i) the shortfall between the amount paid and the amount that should have been paid under the national minimum wage applicable at the time of the underpayment; and

(b) the sum payable if the rates of the national minimum wage applying at the time of the arrears being determined had been applicable throughout the relevant period.

32 This second limb of section 17 means that compensation is calculated at *current* national minimum wage rates meaning, in terms, that if the rates have gone up since the time of the underpayment the claimant will be due more arrears than she was originally underpaid. This means that a further calculation has to be carried out using the formula set out in section 17(4) as follows:

Amount of original underpayment when NMW @ £7.83 an hour: £791.34

£791.34/ £7.83 x £8.91 (current NMW) = £900.49

Amount of original underpayment when NMW @ £8.21 an hour: £1, 741.41

£1, 764.71/£8.21 x £8.91 = £1,915.17

Amount of original underpayment when NMW @ £8.72 an hour: £106.16

£106.16/£8.72 x £8.91	=	<b><u>£108.47</u></b>
<b><u>TOTAL UNAUTHORISED DEDUCTION</u></b>		<b><u>£2,924.13</u></b>

Holiday Pay

Note: calculations take account of the legal obligation to pay the NMW

33 The claimant's holiday year began on the 10 September of each year and ended on the 9 September the following year, paragraph 4.11. The claimant took no holiday during her employment. As set out above if an employee is unable to take their leave because their employer will not allow them to do so then there is a right to carry over this leave and be paid for it on termination of employment; the Working Time Regulations must be read compatibly with the Directive in this regard.

34 On my findings the claimant was unable to take her paid leave because the respondent refused to allow her to take it. She made a number of requests which were all refused, and she knew also of three other colleagues who had likewise had requests refused. She reached the point where she thought there was no point in requesting paid leave because she knew it would not be allowed, paragraph 4.11 above. It follows from this that I conclude that the claimant is entitled to carry over leave from the 2018 – 2019 leave year.

35 The claimant had no contract of employment and accordingly this claim is concerned with statutory holiday only. The statutory entitlement for a full time employee is 5.6 weeks per year, of which 4 weeks (20 days) can be carried over in these circumstances, see **Sood** above. The claimant loses her entitlement to the 1.6 weeks.

36 The added difficulty with this case is that the claimant worked variable part time hours with no fixed hours. This raises an issue when applying the formula under Regulation 14 to calculate the amount of holiday pay due on termination of employment. The ACAS guide originally suggested that a figure of 12.07% of time worked was used. This was on the basis that 5.6 weeks per year is equivalent to 12.07% of time worked.  $52 - 5.6 = 46.4$ .  $5.6 / 46.4 = 0.12068$ . Round up  $0.1207 = 12.07\%$ . But in the case of **Harpur Trust v Brazel [2019] EWCA Civ 1042** the Court of Appeal confirmed that holiday pay should **not** be calculated on the basis of 12.07% of hours worked but instead should be based on an average of earnings in the 12 weeks before leave is taken, at least in respect of term time contracts.

37 I considered it most accurate to take the following approach. Calculate a week's pay for the claimant using the (now) 52 week average set out under section 224 ERA and Regulation 16 of the WTR. Then multiply this by 5.6 weeks = a full years *pay* entitlement for the claimant's holiday (or multiply by 4 weeks for

the 2018 – 2019 leave year). Multiply this by the proportion of the leave year that has expired and deduct any holiday pay received. This will give a pay figure that is consistent with the Regulation 14 formula. That is because the pro rating is implicit within the section 224 calculation. I did not include in the calculation the month that the claimant was on furlough, and therefore only in receipt of 80% of her normal pay, because it is settled EU and UK law that holiday pay must correspond to normal pay based on periods of actual work, see for example, **Flowers v East of England Ambulance Trust UKEAT/0235/17**.

Section 224 ERA

Week's pay = average weekly remuneration over 52 weeks

Pay is calculated by a week ending on a Sunday, therefore a week starts on a Saturday and ends on a Sunday

Exclude weeks in which no remuneration was paid – section 224(3).

Therefore 25/3/19 – 22/3/20

Total pay in this period = £8, 476.10

£8, 476.10/52 = £163 average per week

Year 1 10 September 2018 – 9 September 2019

Week's pay: £163 x 4 weeks (no right to carry over the extra 1.6 weeks under Reg 13A) = **£652**

Year 2: 10 September 2019 – 30 April 2020

0.63 of the leave year expired  
(365 days/232 days)

£163 x 5.6 weeks = £912.80

£912.80 x 0.63 = **£575.06**

**TOTAL HOLIDAY PAY** = **£1, 227.06**

Employment Judge Harding  
6 August 2021