EMPLOYMENT TRIBUNALS

Claimant: **Ms N Kaseruuzi**

Respondents: **(1) Glenavon Care Limited**
(2) Adam Daly
(3) Daniel Lawrence

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **10 July 2020; 1 December 2020; 9 February 2021; 16 March 2021**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person

Respondent: Ms G Crew, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The claims against the Second and Third Respondents are dismissed upon withdrawal.**

2. **The complaint of unauthorised deduction from wages by the First Respondent, contrary to Section 13 Employment Rights Act 1996, was issued outside the statutory time period for making such a complaint. Accordingly, the Tribunal has no jurisdiction to consider it on its merits.**

3. **The complaint of failure to pay holiday pay contrary to Regulation 30 of the Working Time Regulations 1998 is not well founded and is accordingly dismissed.**

REASONS

Introduction

1. This is a claim for unauthorised deduction from wages, under Section 13 Employment Rights Act 1996, and for unpaid holiday pay, under Regulation 30 Working Time Regulations 1998. At a Preliminary Hearing before Employment Judge Barrowclough on 8 January 2020, the Claimant confirmed she was withdrawing her unfair dismissal claim. The tribunal indicated that the unfair dismissal claim would be dismissed upon withdrawal.

2. The Claimant had initially named three Respondents – Glenavon Care Limited, Adam Daly and Daniel Lawrence. The Claimant accepts that she was employed by Glenavon Care Limited and that there is no basis for seeking a remedy against either Mr Daly or Mr Lawrence. Accordingly, the claims against Mr Daly and Mr Lawrence are also dismissed upon withdrawal. In these Reasons, Glenavon Care Limited is referred to as the Respondent.

3. When the case was considered by Employment Judge Barrowclough on 8 January 2020, there was a lack of clarity as to the specific complaints that the Claimant was making for unauthorised deduction of wages and for holiday pay. She was ordered to provide full particulars of both her claims, providing full details of the amounts claimed, how it was said that they arise and why those sums were owed to her.

4. As set out in the original ET1, the essence of the Claimant's claim for unauthorised deduction of wages claim was a claim she had not been paid for the 35 hours a week to which she was entitled under her employment contract. In her further particulars, she itemised the extent to which she considered there had been an underpayment, alleging that the Respondent had failed to pay her for 141 hrs 50 mins, and therefore she was entitled to payment of £1344.25.

5. In addition, she claimed that there were unexplained and unjustified deductions on her payslips in several further respects. The first was that she had been underpaid for time spent caring for Mr Walker, because the Respondent wrongly assumed that the care she was providing amounted to a sitting service. The second related to payments in relation to work carried out during the Christmas period in 2017, which the Claimant alleged did not reflect the enhanced pay she was entitled to receive for working on Bank Holidays over the Christmas period. The third basis for alleging that sums had been deducted without authorisation was in respect of entries labelled "Employer's Pension" on her payslips. The fourth was a deduction of £62 for "DBS check". The fifth was a deduction of £95 in respect of a car. The sixth was a council tax deduction of £122.66. There was also reference to other deductions which had been made for other reasons which were also challenged.

6. In her written closing submissions, the Claimant has said that she had "limited the number of issues to address under unlawful deduction section to 1) car deductions 2) DBS double charges 3) Failure to pay for bank holiday 4) Mr Rob Walker 5) 35

hours per week" (paragraph 17). Accordingly, the Tribunal does not decide the other matters apart from these that she has mentioned in her further and better particulars.

7. In its Amended Response, the Respondent provided its answer to the 35 hours point and to each of the further six matters identified above, with the exception of the DBS deduction point. This appears to have been an oversight. The Respondent argued that those matters occurring before 12 May 2019, ie more than three months before Early Conciliation was initiated, were out of time. The Respondent did not argue that the Claimant needed permission to amend to include these other particularised claims for unauthorised deductions from wages.

8. Employment Judge Barrowclough's directions allocated responsibility to the Respondent for producing a Final Hearing bundle. However, he did not specify a particular deadline for the Respondent to send this through to the Claimant. Apparently, the Respondent attempted to provide this electronically as attached to an email dated 31 March 2020. However, this email bounced back due to the size of the attachments. Due to lockdown, the bounce back was not noticed at the time. It was resent on 8 July 2020, two days before the Final Hearing. It appears that neither side picked up on this at an earlier stage.

The Final Hearing

9. The Final Hearing started over Cloud Video Platform on 10 July 2020, with a time allocation of 3 hours. Evidence was given by the Claimant herself and for the Respondent by Ms Sara Rashid, Finance Director and by Mr Adam Daly, the Respondent's owner. Each witness was cross examined on their evidence by the other party, and answered questions from the Tribunal. Both parties made reference to a bundle of documents which extended to 302 pages.

10. The Claimant did not request an adjournment on the basis she had had insufficient time to check the bundle and prepare for the hearing by reference to its pages. During the Hearing, there was a dispute between the parties as to when the Claimant has first received a copy of the paginated bundle, with the Respondent contending that she had received the bundle over two months previously.

11. The Claimant wanted to rely on audio recordings which had been emailed to the Tribunal. This was opposed by the Respondent. No decision was made on the status of the audio recordings during the course of that three-hour hearing.

12. There was insufficient time at the end of the three-hour hearing for closing submissions. These were provided in writing sequentially in accordance with the Tribunal's timetable - Ms Crew, counsel for the Respondent providing her submissions first, and then the Claimant responding.

13. It was in the Respondent's written submissions that Ms Crew, very properly, accepted that she had been wrong at the Final Hearing to suggest the Claimant

had received the Final Hearing bundle several weeks earlier. She drew the Tribunal's attention to the fact that the bundle had bounced back and had only been provided two days previously.

14. In her subsequent written submissions, the Claimant said, for the first time, that she did not *"have enough time to revise the bundle prior to the hearing on 10 July 2020 to enable her to identify any missing relevant evidence that would have helped* [her] *to prove* [her] *claims with confidence"*. She asserted that the Respondent had left relevant evidence out of the bundle and sought permission to introduce further evidence, referred to as bundles 4a and 4b.

15. The Respondent contended in its email dated 21 July 2020 that the Claimant was seeking to add new claims *"such as DBS Double Charge which had not been raised prior to the hearing and at the hearing"*. It also asked the Tribunal to discard the new evidence and any new claims on the basis that this would prejudice the Respondent. There was further email correspondence from the Claimant and the Respondent on 24 July 2020 and 28 July 2020.

16. In view of the new issues and new evidence that arose after the Final Hearing had ended, I decided that the best course of action was to list a further date for the parties to attend the Tribunal. In that way, submissions could be made as to the proper scope of the issues and the evidence, and if appropriate, further oral evidence to be heard. The parties would also have an opportunity to comment on each other's written submissions before a final decision was given. This is consistent with the caution urged by the Court of Appeal in *Pimlico Plumbers v Smith* [2017] ICR 657 at paragraphs 119 and 147 – namely, that Employment Tribunals should not normally adjudicate on a dispute without providing the parties with an opportunity to make their submissions orally.

17. This hearing took place on 1 December 2020. Because the Claimant had not had a fair opportunity to review the documents in the Final Hearing bundle before that hearing took place on 10 July 2020, I decided at that hearing it was fair to allow the Claimant to put in further documents together with a short witness statement providing her commentary on those documents; and to list a further hearing to consider that evidence. In response, the Respondent relied on a supplementary statement from Ms Rashid, and a statement from Ms Amber Garrard, who had not given evidence at the initial Final Hearing. Due to technical difficulties experienced by the Claimant, the hearing listed to take place on 9 February 2021 could not proceed. As a result, the evidence in the further witness statements was tested in cross examination on 16 March 2021, before each party made brief oral closing submissions.

18. I did not consider it necessary to listen to the audio recordings provided by the Claimant. The Claimant conceded that that they were background and did not directly assist on the issues in dispute. They are not relevant to issues I need to determine on the issue of unauthorised deduction from wages or the claim for holiday pay. The wages issue turns on two features – what the Claimant was

entitled to be paid (a matter of construction of the employment contract) and what the Claimant was in fact paid (a matter of evidence, but largely recorded in the payslips).

Findings of fact

19. The Claimant was employed by the Respondent as a Carer. She provided care to residents living in the Chelmsford area, in the residents' own homes. She started work on 17 June 2017. The last date of her employment was 21 May 2019, which was the last day of her two-week notice, following her dismissal at a disciplinary hearing on 7 May 2019. The reason for her dismissal was expressed to be *"on the grounds of 'persistent lateness' and 'changing any details on rota without prior consent or swapping calls'"*.

20. The basis of the Claimant's employment was set out in a contract of employment dated 1 January 2018. This stated that her start date was 17 June 2017 and her hours would be thirty-five hours per week [86]. Her role was that of Care Assistant [87]. Her hourly rate was £9.50 an hour, including £1 per hour as a fuel element. She would be required to work "*onsite at various client locations*". Clause 11 stated that the employer would be entitled to deduct any applicable deductions and remittances as required law. Clause 18 described her normal hours of work and breaks as "*variable*", but Clause 19 added that *"the Employee will, on receiving reasonable notice from the Employer, work additional hours and/or hours outside of the Employee's Normal Hours of Work as deemed necessary by the Employer to meet the business needs of the Employer"*. The pay period was stated to be *"every four weeks"*.

21. Clause 9 was worded as follows:

> *"The Employee agrees to abide by the Employer's rules, regulations, and practices, including those concerning work schedules, vacation and sick leave, as they may from time to time be adopted or modified."*

22. At the time, the Respondent had various rules and practices which were set out in a Staff Handbook. Unfortunately, the version of the Staff Handbook that applied until around December 2018 has not been produced in evidence. The Claimant appears to have obtained a copy of a draft handbook at some stage, which she accepts was never completed. She produced this draft handbook at the same time as sending in her written closing submissions. I find that because this handbook was never finalised, it was never understood to contain any additions or amendments to the Claimant's terms and conditions.

23. When the management of the Respondent changed in December 2018, the Staff Handbook became the version which was contained in the Final Hearing bundle at page 249.

24. It was issued to the Claimant on 21 December 2018 [245]. The Claimant had online access to the 2018 Staff Handbook at all times thereafter.

25. It would be most surprising and unlikely that a more professional version which makes references to the Management System and the App as well as to specialised policies was replaced by a less professional version that omits such references.

26. So far as is relevant, the 2018 Staff Handbook provides as follows:

> *"Your hours of* [work] *are updated every week, but can change from day to day … Should your average weekly total of hours exceed or are likely to exceed 48 hours per week over a period of 17 weeks you will be asked to sign an opting out agreement"*
>
> *"You should, under no circumstances amend, alter or rearrange any visit on the work rota without the prior consent of a manager. Should you feel that a change is preferable in the interests of the service users, you should discuss such a change with a manager so that any changes are agreed before any changes are actioned"*
>
> *"It must be clearly understood that care workers do not own service users. The service users on your rota are not your property in the sense that they cannot be allocated to other staff … You do not have the right to pick and choose which service users you will visit and those which you will not"*
>
> *"You should discuss any concerns in relation to your rota with a manager or someone nominated by them but this is not a guarantee that any changes will be made"*
>
> *"All employees will be expected to work in all areas if the need arises"*
>
> *"Employees who fall sick or are injured and unable to work should inform their Manager at once by telephone … providing that the company has been duly and correctly notified in the prescribed manner "Statutory Sick Pay" will be paid in accordance with the Social Security and Housing Benefits Act 1982"*
>
> *"Employees are not able to carry forward any unused holiday entitlement into the next holiday year. However, at the company's discretion it may choose to pay a maximum of 8 days (pro-rata) of untaken holiday entitlement early in the new holiday year"*
>
> *"All employees are subject to compulsory Disclosure & Barring Service (DBS) check which will reveal any convictions …As your employment is dependent on a satisfactory result, it follows that a result which is less than satisfactory could mean a termination of any employment within the company. The employees will bear the cost of these checks."*

"It is expected that during a period of absence due to ill-health employees will conduct themselves in a manner which is consistent with such absence and will not impede recovery"

27. There was no direct evidence given as to the extent to which these provisions replicated what was in the earlier Staff Handbook.

28. Nothing was included in the 2018 Staff Handbook, so far as any charges being levied for use of company cars. This was apparently because this was covered by the Pool Car Policy and Procedure, which was available on the intranet. The Respondent included in the supplementary bundle the current version of the Pool Car Policy. This had been last reviewed on 17 November 2020 (after the start of the Final Hearing); and last amended on 14 November 2019 (after the end of the Claimant's employment). It did not include the version of the Policy, if any, which was in force at the time of the events to which this claim relates.

Claims for unauthorised deductions from wages

29. Sections 13 and 23 of the Employment Rights Act 1996 are worded as follows:

13- Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless-
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

23 – Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal
(a) that his employer has made a deduction from his wages in contravention of section 13 …
(2) Subject to subsection (40, an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-
(a) In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made …
(3) Where a complaint is brought under this section in respect of-
(a) A series of deductions or payments …

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

30. Whether there is a 'series of deductions' is a question of fact, requiring a sufficient factual and temporal link between the underpayments – there needs to be "a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked to its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a series, a sufficient frequency of repetition" (*Bear Scotland Limited and others v Fulton* [2015] ICR 221 at para 79 per Langstaff J). If there is a gap of more than three months between deductions then those deductions cannot form part of a series of deductions (*Bear Scotland Limited v Fulton* at para 82).

31. When assessing whether it was reasonably practicable for a claimant to issue proceedings, the Tribunal will look at whether it was reasonably feasible for the claimant to do this (see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119 at paragraph 34). "The relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done" (*Asda Stores Limited v Kauser* EAT 0165/07 at paragraph 17).

32. If a Claimant is ill, this is a potential reason why it might not be reasonably practicable to present a claim before the end of the relevant period. However, the Tribunal would normally expect to see medical evidence supporting the extent and duration of the Claimant's illness, where that is potentially available via a doctors' note, although this is not an absolute requirement in an appropriate case (*Norbert Dentressangle Logistics Limited v Hutton* EATS 0011/13 per Langstaff J at paragraph 35). Whilst the Tribunal will consider the entire limitation period from the date on which the cause of action accrued (and therefore the date on which time started running) to the date on which it ended, attention should be focused on the closing stages rather than the earlier ones (*Schultz v Esso Petroleum Co Limited* [1999] ICR 1202, CA). Something more than mere stress is needed to elide the statutory time limit (*Asda Stores Limited v Kauser* EAT 0165/07).

Failure to pay the Claimant for 35 hours a week work

33. It is well accepted that an employee is entitled to be paid for the hours agreed in their employment contract, unless she is not ready willing and able to work the hours offered by the employer. I find, on a true construction of the Claimant's contract, she was promised she would be offered an average of 35 hours in each four-week period. This is because the contractual documents recognise that the hours will fluctuate, and that the pay period is every four weeks. The issue here then is whether the Claimant was paid for at least an average of 35 hours work in each four-week period; and if not, was this because the Claimant was not offered an average of 35 hours per week, or because the Claimant was not ready, willing and able to work for 35 hours, and therefore not entitled to be paid the full amount.

34. If the Claimant was not offered an average of 35 hours in any four-week period, it is no answer for the Respondent to argue that it offered her more than 35 hours in

other four-week periods. Work offered and worked in other four-week periods in excess of the guaranteed average of 35 hours is overtime, and cannot be used to justify a failure to provide her with the minimum required hours in other periods. Therefore, I reject the Respondent's mathematical analysis in paragraph 28 of Ms Crew's closing submissions, in which she aggregates all periods of work over the course of her employment, in an attempt to show that overall the Claimant has been paid for more than 35 hours a week.

35. In evidence, the Claimant accepted that the Respondent's reconciliation of her pay against her timesheets was accurate, as set out on the spreadsheet at [284]. This showed that she worked in excess of 35 hours per week on average in every four-week period apart from four. These were periods in July, August, September and November 2018. The Respondent's case is that the Claimant was offered the hours but she turned them down for a variety of reasons, and as a result had no entitlement to be paid for time which was not spent working. The Claimant disputes this.

36. On weekdays, the Respondent met their clients' needs by allocating carers to clients according to an early rota or a late rota. The early rota was from 7am to 2pm and the late rota from 3.30pm to 10.30pm. These working hours also applied to the Claimant, who would also work every other weekend. The Claimant was generally rostered on the early shift, and expected to start at 7am. This is clear from the record of a meeting held on 5 March 2019, which notes as follows:

> *"Start time – when she started she was able to start at 7am, but further down the line she was then unable to start at 7am."*

37. On occasions, the Claimant was also rostered to work the late shifts. However, the Tribunal would expect to see specific evidence produced by the Respondent in respect of each of those four-week periods, explaining why the Claimant was not paid an average of 35 hours per week during those periods.

(1) Period from 14 July 2018 to 10 August 2018

38. In respect of this period the Claimant was paid 53 hours less than the hours that she should have been paid. There is no specific explanation in the Respondent's witness statements, other than a general assertion that the Claimant was frequently late in starting work. If that was the applicable explanation in relation to this period of time, I would have expected the Respondent to have produced time sheets showing that the Claimant was persistently late during this particular period, and a calculation explaining how the deductions had been computed.

39. The Respondent's first specific explanation, by reference to the documents relied upon by Ms Crew at paragraph 25 of her Closing Submissions, appears to be that the Claimant did not turn up for work on Tuesday 7 August 2018 [115]. The Claimant's contemporaneous email sent on that date, explains that there was no work for her to do because her client, Rob Walker, was in hospital [116]. This is a matter that the Claimant had raised the previous week [114]. However, it also

appears that the Claimant had been allocated different work for 7 August 2018 the previous day, in a change to the rota, and then had failed to attend the clients to whom she had been allocated on the rota because she had made other plans [116]. In these circumstances, the Respondent was entitled to deduct 7 hours pay, for her failure to work the hours allocated.

40. The second specific explanation, by reference to the same documents, is that the Claimant was absent for 14 hours on Saturday 21 July 2018 and for 14 hours on Sunday 22 July 2018. It appears from a text message on 22 July 2018 that the Claimant's son was unwell at the time, providing contemporaneous evidence that there was a potential reason for the Claimant's absence.

41. The third specific explanation is to suggest that the Claimant did not attend for work on 2 and 3 August 2018. However, no written record explains the reason why the Claimant did not attend work on this date, nor is there any specific written communication with the Claimant about her absences.

42. The other matter relied upon by the Respondent is a memo written by Charlotte Little on 19 February 2020 in which she claimed to remember the Claimant being off work in July/August 2018 due to her son being unwell, and as a result the Claimant "handed back a fair amount of her work". However, this evidence is vague in that Ms Little records that she had little communication with the Claimant as this was handled by "our previous manager". Ms Little has not been called to give evidence before the Tribunal; and her document at [209] is not referred to by either of the Respondent's witnesses. Accordingly, I reject that evidence.

43. I find that the Claimant failed to work two 14 hour shifts (21 and 22 July 2018) and one 7 hour shift (on 7 August 2018), a total of 35 hours during this four-week period. I do not find that the Respondent has sufficiently established that the Claimant was absent on 2 and 3 August 2018. The Respondent was therefore only entitled to make a deduction equivalent to 35 hours. In respect of the remainder of the 53 hours deducted, the Respondent has failed to sufficiently explain and prove why it has deducted a further 18 hours in relation to this four-week period. There has therefore been an unauthorised deduction of wages for the pay equivalent to 18 hours work. This is in the sum of £18 x £9.50 = £171 gross. However, the Tribunal only has jurisdiction to award that sum if the complaint has been made to the Tribunal within the time period required by statute.

(2) Period from 11 August 2018 to 7 September 2018

44. During this period, the Claimant was paid 29.5 hours less than she should have been paid based on an average of 35 hours per week. Again, this period is not specifically addressed in the Respondent's witness evidence. Ms Crew refers to pages 117, 118 and 286. These indicate that the Claimant requested and was granted holiday on Thursday 6 and Friday 7 September 2018. As a result, these dates ought to have been regarded as paid holiday and no deduction should have been made. It appears that the Claimant was only allocated a 2 hour shift the

following Friday (presumably 14 September 2018), which she regarded as unfair. However, the record on [286] notes 8.5 hours of missed calls during this 4 week period. I accept this record, and that the Respondent is therefore able to justify a deduction of 8.5 hours pay.

45. No justification has been provided for any of the additional 21 hours deducted during this period – other than the general reliance on a document drafted by Ms Little at [209] which is not sufficiently specific. Therefore, there has been an unauthorised deduction equivalent to the required hourly rate for 21 hours work. This is in the sum of 21 x £9.50 = £199.50. Again, this is subject to the Tribunal having the jurisdiction to award the Claimant this sum, given the operation of statutory time limits.

(3) Period from 8 September 2018 to 5 October 2018

46. During this period, the Claimant was paid 67 hours less than she should have been paid under her employment contract. This appears to be explained by the absences recorded on a Post It Note at [213] in the bundle. This indicates that the Claimant was absent for 8 days, including two days when she was expected to work a double shift. The date on which the Post It Note was prepared and the source of the information on the note is unclear. If true, this would suggest that the Claimant should have had 70 hours deducted. That said, I find it implausible that the Claimant was expected to work for 70 hours working each day over an eight-day period without a day off.

47. There is some supporting evidence in the screenshot at [214] suggesting that the Claimant was absent for some days during week commencing 10 September 2018 due to car issues. Doing the best I can, but recognising that the burden is on the Respondent to justify the deduction, I accept that the Respondent was entitled to deduct 14 hours but has not adequately explained the deduction for a further 53 hours pay. A sum equivalent to the agreed rate of pay for 53 hours is an unauthorised deduction. This is in the sum of 53 x £9.50 = £503.50.

(4) Period from 3 November 2018 to 30 November 2018

48. During this period, the Claimant was paid 12 hours less than she should have been paid under her employment contract. The Respondent's justification, according to [215], is that the Claimant was absent on 12 November 2018, and potentially also on 21 November 2018 [218]. Accordingly, I accept that the deduction of 12 hours pay was a deduction that the Respondent was entitled to make under the employment contract, on the basis that the Claimant had not worked the hours she had been offered.

Deductions in relation to the use of the company car

49. It is agreed between the parties that the Claimant was charged £95 for the use of the Respondent's vehicle, in order to travel to the clients for whom she was

providing care. The Claimant accepts that she had problems with her own car, such that on occasions she needed an alternative form of transport to visit clients. The issue here is whether the Respondent had agreed in advance that there would be a charge for providing the Claimant with a vehicle, and whether the charge that was made was consistent with the agreed charge. There is also an issue as to when this deduction was made and, if it was made outside the statutory time period for bringing claims, whether it forms part of a series of deductions which ends within that period.

50. The Respondent's case is that the Claimant was charged £5 for each shift for which it provided the Claimant with a car. This was apparently an agreement reached between the Claimant and the Claimant's line manager, although it is not recorded in writing. The Claimant's position is that there was no such agreement.

51. Not only is there no written evidence to support such an agreement, there is no reference to such an agreement in the Respondent's witness statements. Nor is there any record of the dates on which the Respondent supplied a car to the Claimant, or any reconciliation with deductions recorded on payslips. Apart from the April 2019 payslip (Claimant's bundle page 25), there does not seem to be any other deductions on the payslips specifically stated to be for the use of company car.

52. The £95 deducted for "Car" would suggest that the Claimant used a company car on 19 occasions during the previous four weeks – or that, for whatever reason, a lump sum deduction was made in the April 2019 payslip for the use of a company car over several previous four-week periods. Neither proposition is specifically supported in the evidence.

53. The onus is on the Respondent to show that it is entitled to make a deduction from the Claimant's wages. The Respondent has not discharged that onus here. As a result, the Respondent has made an unauthorised deduction in the sum of £95 in respect of the charge of £95.

54. This deduction was noted in the 26 April 2019 payslip (SB/25). However, the Claimant needs to show that the claim was brought within the statutory time period. The Claimant contacted ACAS to request Early Conciliation on 13 August 2019 and an Early Conciliation Certificate was issued on 16 August 2019. These proceedings were issued on 21 August 2019. As a result, events that occurred on or before 12 May 2019 occurred outside the primary limitation period. The deduction of £95 was therefore made outside the relevant time period for bringing proceedings. As a result, the claim is out of time unless it is part of a series of deductions or it was not reasonably practicable to issue proceedings within time. I deal with that issue below.

Deductions for DBS payment

55. The Respondent argues that this is a new claim raised for the first time in the Claimant's closing submissions. That is not the case. It is raised in the Claimant's Further and Better Particulars provided on 3 February 2020 at page 45 of the Final Hearing bundle. Therefore, it is a matter which ought to have been addressed in the Amended Response and in the Respondent's witness evidence. It appears to have been overlooked during the initial evidence and was not addressed by Ms Crew in her written closing submissions. It was addressed by Ms Rashid in her supplementary witness statement, and referenced in the supplementary bundle at page 55. The unusual feature of this DBS check is that the Claimant's DBS Certificate was still current and not about to expire. I find that this was an unauthorised deduction in circumstances where it has not been established that the deduction was made before the 2018 Staff Handbook was received by the Claimant (21 December 2018) [245]; in any event, the provision is not included in the employment contract nor does it obviously have contractual status; and its wording does not specifically cover a second check where the current certificate is not about to expire.

56. However, the Claimant needs to show that her claim has been brought in time, or that it was not reasonably practicable to bring the claim within the relevant statutory time limit. Here the deduction appears to have been made in December 2018 as recorded in payslip dated 7 December 2018 [296]. As a result, the Claimant's claim was issued outside the statutory time limit for complaining about this deduction – unless it was part of a series of deductions, or it was not reasonably practicable to issue proceedings within time.

Payment in respect of working Christmas Day 2017

57. There is potentially some confusion as to the Claimant's claim for underpayment of wages in relation to Bank Holidays worked over the Christmas period 2017. However, it is clear from the further and better particulars [44-45] that the Claimant relates to Christmas 2017, not to Christmas 2018. The Claimant states she was only paid the standard rate for working Christmas Day 2017. She says she should have been paid double time, and therefore is owed a further £95. This is confirmed in her Schedule of Loss [287]. Ms Rashid refers to the position from December 2018 onwards in her witness statement, and Ms Crew in her written closing submissions cross-refers to documents in relation to the same period of time. There is no claim in relation to December 2018. The claim relates to December 2017.

58. The Respondent's position (as set out in Sara Rashid's witness statement at paragraph 26) is that before Christmas 2018, Bank Holidays were paid at standard rate, but that staff were entitled to time off in lieu. From Christmas 2018 onwards bank holidays were paid at time and a half (with the exception of Christmas Day, which was to be paid at double rate). This was more generous than the previous position in which Bank Holiday work was apparently compensated by time off in lieu. Ms Rashid states that *"all employees were made aware of the change and the*

policy was implemented immediately". It appears that this was done by text message, as shown on pages 127 and 128 of the bundle.

59. Because that text message also refers to the previous position of time off in lieu, I accept the Respondent's position that the standard hourly rate of £9.50 per hour applied in 2017 to work on Bank Holidays. The draft staff handbook in the Claimant's bundle of documents was never implemented. Insofar as it purports to indicate that an hourly rate of £19 applied to bank holiday work, it is therefore not effective. There has therefore been no unauthorised deduction of wages.

60. In any event, the Claimant's claim in respect of an alleged failure to pay the correct sums through the payroll system in early 2018 in respect of Christmas 2017 is substantially out of time. It relates to a one-off failure which occurred over 18 months before proceedings were issued. It is therefore very substantially outside the primary limitation period. For that additional reason this claim is dismissed.

Payment in respect of care for Mr Robert Walker

61. According to the Claimant's further and better particulars, the Claimant was only paid £8 per hour rather than £9.50 per hour for time spent caring for Mr Robert Walker between December 2017 and February 2018 [44-45]. As a result, she alleges that there has been an unauthorised deduction of £105. However, no payslips were included within the bundle dealing with this period of time; and no reference is made to the Claimant's care of Mr Walker in her witness statement. In cross examination, she accepted that she did not complain about underpayment for time spent caring for Mr Walker at the time.

62. In an attempt to address the complete dearth of evidence on this point, the Claimant applied to introduce further documents, namely payslips on 5 December 2017, 5 January 2018 and 5 February 2018 and 5 March 2018 which appear to show a lower hourly rate was paid in these months. That evidence was admitted. In addition, the Claimant has given further witness evidence attempting to explain in detail not included in her witness statement the particular care she had provided to Mr Walker.

63. The simple answer to the claim in relation to care provided to Mr Walker is this – under the Claimant's contract of employment, she was entitled to receive £9.50 per hour for each hour worked. Her contract does not distinguish between hours of personal care and hours regarded as providing a sitting service. Therefore I accept that there has been an unauthorised deduction of wages in relation to the care provided to Mr Walker during the period from December 2017 to February 2018.

64. However, the series of alleged deductions in relation to Mr Walker ended in about February 2018, about 18 months before proceedings were issued. The Claimant is therefore substantially out of time to bring an unauthorised deduction of wages claim in respect of these payments, unless they can be regarded as part of a wider series of deductions when considered together with other underpayments.

Deductions in relation to employer's pension payments; Deductions for council tax payments

65. As these claims are no longer pursued, it is not necessary for me to address them in these Reasons. Had I been required to do so, I would have found that the council tax payments were an authorised deduction as a result of an Attachment of Earnings Order, and that no deduction had been made in fact for employer's pension payments.

Summary of position in relation to deductions

66. I have found that there have been unauthorised deductions as follows:

    a. Between December 2017 and February 2018, in relation to care provided to Mr Walker, in the sum of £105 gross.
    b. On 10 August 2018, in the sum of £171 gross.
    c. On 7 September 2018, in the sum of £199.50 gross.
    d. On 5 October 2018, in the sum of £503.50 gross.
    e. On 7 December 2018, in the sum of £62 (for DBS fee).
    f. On 26 April 2019, in the sum of £95 (for car hire).

67. However, it is necessary to go on to consider whether the Tribunal has the jurisdiction to award a Judgment in the Claimant's favour in these sums, given the applicable time limits for bringing employment tribunal proceedings.

Series of deductions

68. The deductions made to the Claimant's basic pay in the period between 14 July 2018 and 5 October 2018 were a series of deductions. The relate to the same factual subject matter, namely the hours that the Claimant had been offered in each four-week period. They were made in successive four-week periods and therefore there is a degree of regularity to the deductions.

69. However, they are not part of a series of deductions that includes the underpayments in relation to care for Mr Walker, the £62 deducted for the DBS fee on 7 December 2018, or the £95 deduction made for the use of the car on 26 April 2019. This is for two reasons. Firstly, they are not sufficiently similar as a matter of fact. Secondly, there is a gap between the deduction in relation to Mr Walker's care in February 2018 and the deduction on 10 August 2018 of more than three months. The same is the case between the deduction of £62 for the DBS fee on 7 December 2018 and the deduction of £95 for the car hire on 26 April 2019.

70. Therefore, the relevant limitation period in relation to the series of deductions in relation to Mr Walker's care starts in February 2018 and expires in May 2018. The relevant limitation period in relation to the series of deductions in relation to Claimant's reduced four weekly pay starts on 5 October 2018 and expires on 4 January 2019. As a result, all these claims are outside the three-month primary

time limit for bringing an employment tribunal claim. It is then necessary to consider whether it was reasonably practicable for the Clamant to have issued proceedings within that time limit.

Reasonable practicability

71. In relation to the series of deductions from the Claimant's four weekly pay that ended on 5 October 2018, it was reasonably practicable for the Claimant to have asked ACAS to initiate Early Conciliation on or before the end of the three-month time limit, namely before 4 January 2019. During this period, she was continuing to work for the Respondent. There is no evidence that she was ill at that point. The same is true in relation to the failure to pay her £9.50 per hour, where the limitation period ended at a substantially earlier point in time. Therefore, both these claims are out of time and the Tribunal has no jurisdiction to make an award of unauthorised deduction of wages to the Claimant in these respects.

72. In relation to the deduction of £62 for the DBS check, which was made on 7 December 2018, ACAS ought to have been contacted to initiate Early Conciliation by 6 April 2019. In relation to the deduction of £95 for the car hire payment, which was made on 26 April 2019, ACAS ought to have been contacted to initiate Early Conciliation by 25 July 2019.

73. In fact, ACAS was not contacted until 13 August 2019, almost three weeks later than the second of these dates. The Claimant's explanation is given in paragraphs 35 to paragraphs 46 of her witness statement. Essentially, she suffered an anxiety attack as she was driving to a client's house on 18 April 2019, and was signed off work for 2 weeks. Her health deteriorated further when she was dismissed on 8 May 2019, at a point when she was still on sick leave. She obtained a further sick note and thereafter went into a deep depression. She sought and obtained legal advice, and then decided to issue these proceedings. She accepts that she realised that there had been some unauthorised deductions in about February 2019 (witness statement paragraph 30). She says that around this time her family noticed that her mental health was deteriorating, although she was able to continue working.

74. The only medical evidence in the bundle is a sick note on 18 April 2019 signing her off for two weeks with anxiety, and then a further sick note on 7 May 2019 for a further two weeks with stress and anxiety. There is no medical evidence as to the Claimant's state of health after 21 May 2019.

75. The onus is on the Claimant to show it was not reasonably practicable to contact ACAS by 6 April 2019 (in relation to the DBS fee claim); and by 25 July 2019 (in relation to her car hire deduction claim). Notwithstanding the Claimant's evidence in her witness statement, I find she has failed to discharge that burden in either respect. She has not provided any medical evidence as to her state of health before 18 April 2019 or after 21 May 2019, nor has she explained why this has not been possible. Accordingly, I find that it was reasonably feasible for her to have

initiated Early Conciliation in relation to both the deduction of £62 for the DBS check and the deduction of £95 for use of the company car within the three months.

76. Therefore, the Tribunal does not have jurisdiction to consider any of the Claimant's unauthorised deduction claims.

Unauthorised deductions – conclusion

77. As a result, the unauthorised deductions claim fails.

Holiday pay claim

78. There are two issues in relation to the claim for holiday pay. The first is whether the Claimant was entitled to carry over nine days of unused accrued holiday entitlement from 2018, totalling 63 hours. The second is whether the Claimant was paid for all of her 2019 accrued holiday entitlement when her employment ended.

79. The Respondent's holiday year for calculating holiday entitlement runs from 1 January to 31 December, as is made clear by Clause 20 of the Claimant's employment contract. The contract itself does not specify the amount of holiday entitlement, or whether any untaken holiday can be carried forward to the next holiday year. The parties agreed that the Claimant's holiday entitlement was the minimum statutory entitlement provided under UK law, namely 5.6 weeks (or 28 days) including Bank Holidays. I find that the Respondent's 2018 Staff Handbook, sent to the Claimant in December 2018, confirms the pre-existing position, which was that employees are not entitled to carry forward any unused holiday entitlement into the next holiday year. This is consistent with what the Claimant was told by Jennifer Edwards on 30 January 2019: "no holiday can be carried over from the previous year and you will only have accumulated 2 days holiday by the 27th February" [145].

80. There was no written agreement entitling the Claimant to carry over unused holiday from 2018. Email correspondence between the Claimant and Ms Sue Hales, care manager in June 2018 warned the Claimant that unless holiday was taken in 2018 she would be disadvantaged: *"I do not want you to lose out"*. The Claimant's argument appears to be she had a verbal agreement with Sue Hales in June 2018 to be paid for untaken holiday, because as the Claimant herself acknowledge in her written closing submissions *"as I won't be able to carry them over"* (paragraph 62). If so, then this is more properly a breach of contract claim, rather than a claim for accrued but untaken holiday. There is no such claim before the Tribunal. Had there been, then it would have been substantially out of time, with any payment due in the middle of 2018, or at the latest at the end of 2018.

81. In relation to holiday entitlement in the calendar year, the Claimant was paid £520.13 by way of accrued but untaken holiday in her final payslip [301]. When the Claimant challenged the amount, the Respondent recalculated the amount due, and paid a further 74p, acknowledging that there was an underpayment to this

extent. In her closing submissions, the Claimant does not contend that there has been any shortfall in the holiday pay for holiday accrued during 2019.

82. As a result, the complaint that the Claimant did not receive her full accrued holiday entitlement is not well founded.

Employment Judge Gardiner
Date: 17 March 2021