



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs B Drammeh Fatty

**Respondent:** Procure Facilities Services Limited (trading as NIC Services Group Limited)

**Tribunal:** Birmingham (determination on the papers)

**On:** 12 October 2022 (in Chambers)

**Before:** Employment Judge Kenward (sitting alone)

## JUDGMENT

1. The claimant's name in the title to the proceedings is amended to Mrs B Drammeh Fatty.
2. The complaint of unlawful deductions from wages is dismissed.
3. The complaint of a failure to give a statement of employment particulars is dismissed.
4. In respect of the complaint of a failure to provide a written pay statement containing the required particulars, a declaration is made that the pay statement dated 17 June 2019 failed to notify the claimant of a deduction which amounted to an underpayment of £73.89 in respect of nine hours' work and the pay statement dated 18 November 2019 failed to notify the claimant of a deduction which amounted to an underpayment of £184.72 in respect of 22.5 hours' work but no award is made under Employment Rights Act 1996 section 12(4) as the necessary adjustment was notified in the pay statements for 16.07.19 and 16.12.19 respectively and the underpayment made good in the following month's pay.

# REASONS

## Background and preliminary matters

1. This case was originally listed for a final hearing on 6 November 2020 before Employment Judge Hughes sitting alone. It was not possible for the hearing to proceed to a determination on that date and Employment Judge Hughes made directions, by consent, for evidence to be served by the claimant, following which, with the agreement of the parties, the Claim would be determined on the papers. There was a delay in such a determination being reached partly caused by the non-availability of Employment Judge Hughes. This resulted in Regional Employment Judge Findlay directing that the file would have to be referred to a different Judge for a determination and the case being listed before me on 12 October 2022 for a determination to be made on the papers.
2. The claimant's passport (page 58) and driving licence (page 59), which were provided to the respondent as proof of identity, give her name as Binta Drammeh Fatty (which is also the spelling of her name which appears on the ACAS Certificate and on her bank statements) so that it seems clear that her name has been misspelt on the ET1 Form of Claim where her name is given as Binta Drammaeh Fatty (which is the name in which the Tribunal proceedings have proceeded). In the circumstances the claimant's name in the title to the proceedings is amended to Mrs B Drammeh Fatty.
3. The claimant had originally notified ACAS of her prospective claim on 25 November 2019 and the ACAS certificate was issued on 10 December 2019. The ET1 Form of Claim was received by the Tribunal on 6 February 2020. The claimant had ticked the box in respect of claiming arrears of pay. The details provided were that "*I believe I have suffered from a continuous unlawful deduction of wages, specifically from the months of April - £500; June - £100; July - £500; August - £200; September - £720; October - £220 which amounts to a total of £2240*".
4. The claimant described herself as working for a company called SBFM until her employment was transferred to the respondent, pursuant to "TUPE" (the Transfer of Undertakings (Protection of Employment) Regulations 2006) on 11 November 2019, so that it followed that the alleged deductions were in relation to work which predated the transfer. The claimant also stated that the respondent had sought to avoid liability by asserting that any pay was owed by the previous company despite her rights under TUPE
5. The claimant claimed that she did not have paper evidence as to the hours worked because SBFM had not provided her with payslips. This effectively raised a complaint of a failure to provide a written pay statement or an adequate written pay statement.

6. The claimant also suggested that the contract given her by the respondent was erroneous insofar as it purported to include a three-month probationary period. In so far as the reference to a probationary period was erroneous, the ET1 Form of Claim also potentially raised a complaint of the claimant's employer being in breach of its duty to provide full and accurate written particulars under Employment Rights Act 1996 section 1 so that, if the complaint was well-founded, the power to award compensation under Employment Act 2002 would be engaged if the claimant succeeded with her complaint of unlawful deductions from wages.
7. The respondent duly submitted a response which attached Grounds of Resistance which explained that the legal entity employing the claimant was Procare Facilities Services Limited which was described as a franchise of NIC Services Group Limited. The Grounds of Resistance accepted that the claimant had been employed by SBFM Limited from 1 May 2019 and had transferred to the respondent pursuant to TUPE on 11 November 2019. It was accepted that any liability for wages unpaid by SBFM Limited would have passed to the respondent
8. Payslips were annexed to the Grounds of Resistance with these being dated from May 2019 to December 2019 with it being asserted that these had been emailed to the claimant.
9. In the Grounds of Resistance, it was further asserted that the claimant had been paid correctly for the hours worked at SBFM Limited which had been clocked. The sums stated as due on the payslips had been paid into the claimant's bank account (in fact, the claimant has subsequently produced her bank statements which show this happening).
10. The Grounds of Resistance were silent as to the issue of any contract of employment.
11. The directions made by Employment Judge Hughes recorded that, at the hearing on 6 November 2020, which was attended by the claimant, in person but assisted by her son (whilst the respondent was represented by Mr Lee Bronze of counsel), the Tribunal had been provided with a bundle of the respondent's documents and a witness statement from the respondent's director, Karl Hitchens (described as the sole director of the respondent company). The directions record that it was noted that the claimant had not produced a witness statement or any documentary evidence and it was explained that "*she must do so in order to prove her claim, because the burden of proof is on her*". She was ordered to serve (by email) both the Tribunal and the respondent with a witness statement commenting on the witness statement and documents provided by the respondent and explaining how much she believed that she was owed and how it was calculated. Alternatively, and by the same date, she was to write confirming that the claim was withdrawn.
12. After the hearing, on 29 November 2020, the claimant's son sent an email to the respondent's representative only (not copied to the Tribunal) with a single pdf attached running to 42 pages which consisted of a selection of the claimant's bank statements with some handwritten comments written on the first page. The respondent forwarded this to the Tribunal by email on 4 December 2020 with the respondent's comments, with this being copied to the email address from which the claimant's document had been sent.

13. In the circumstances the Tribunal has proceeded to determine the case on the basis of the documentation provided.

### **Evidence and findings of fact**

14. TUPE information dating from 3 April 2019 from Aztec Commercial Cleaners is consistent with the claimant having transferred into the employment of SBFM Limited and having continuous employment back to 11 September 2017.
15. According to the TUPE information from 3 April 2019, the claimant was an evening nursery cleaner working at Highfield Day Nursery and worked 12.5 hours per week at a basic pay rate of £8.21 and was paid fortnightly. Her annual leave year ran from 1 September 2018 to 31 August 2019 and she had taken eight days of her 28 day entitlement during that period. Her entitlement in respect of sickness absences was limited to statutory sick pay only.
16. The TUPE information which was provided by SBFM Limited prior to the transfer to the respondent is broadly similar. The claimant is described as working at Childbase Highfield as an evening nursery cleaner having started with SBFM Limited on 1 May 2019 but with continuous service back to 11 September 2017. She was working 12.5 hours a week, Monday to Friday, at £8.21 per hour. There have been no grievances in the last two years. The only difference was that her pay arrangements were described in terms of being paid on the 16<sup>th</sup> of every month. Paragraph 4 of the Grounds of Resistance states that the claimant was paid in arrears with the example being given that her paid for July 2019 was in respect of the hours worked in June 2019. This was confirmed by the statement of Karl Hitchens. In relation to the claimant's holiday entitlement, the TUPE information differed from the previous TUPE information in that it gave the annual leave year as simply 2019 and indicated that the claimant had only taken one day of her entitlement of 28 days. Potentially, this would seem to suggest that the claimant had only not worked one day (2.5 hours) by reason of being on paid holiday during the period when her employer was SBFM Limited. The TUPE information provided by SBFM Limited was further to the effect that the claimant had had eight sick days in the last 12 months. Not applicable had been entered in respect of her sick pay entitlement.
17. The evidence of Karl Hitchens was that the claimant was given a new contract of employment shortly after the transfer to the respondent which reflected 12.5 working hours per week at £8.21 per hour. No issue was taken with these terms. It is accepted that the reference to a probationary period was incorrect.
18. Once the claimant transferred to the respondent, with the contract of employment showing that this employment began on 11 November 2019, the arrangements for paying wages were described in the contract dated 11 November 2019 as being that the employee's "*salary will be paid at four weekly intervals two weeks in arrears*". The contract stated that the claimant's annual leave entitlement amounted to 28 days with details of the conditions attached to be found in the employee handbook. In relation to sick pay, the contract stated that payment for authorised periods of absence due to sickness would be made in accordance with the current statutory sick pay scheme.

19. The unchallenged evidence of Karl Hitchens was to the effect that the working arrangements in place involved the claimant attending for 2.5 hours per day with another cleaner. Karl Hitchens recognises that there may have been some occasions when the claimant attended on her own, but even on these occasions she was still only working 2.5 hours per day. If she did overtime, as seems to have been the case for a period in September 2019, then she was paid for the additional hours. However, working overtime would need to be agreed and approved. The contract dated 11 November 2019 had specifically stated that the claimant “*will be expected to work a reasonable number of additional hours to meet the requirement of the function*”.
20. The claimant’s employment eventually came to an end on 7 April 2020.
21. Various payslips have been produced by the respondent. They include a payslip dated 16 May 2019 under which no payment was made (there is a handwritten note on the payslip to the effect that “*0 hours clocked*” which is presumably intended to explain the non-payment).
22. The payslip dated 17 June 2019 shows, after deductions, a total of £236.56 net (after a deduction of £59.00 in respect of tax) was paid in respect of 34 hours’ work plus holiday pay.
23. The payslip dated 16 July 2019 shows that the claimant was paid a total of £545.97 with no deductions in respect of 50 hours worked, as well as a further 9 hours paid as “*adjustments*” and 7.5 hours paid as holiday pay. Additionally, she was reimbursed the tax deducted the previous month so that a total of £604.97 was paid to her.
24. The payslip dated 16 August 2019 shows that the claimant was paid £205.25 (with no deductions) in respect of 25 hours work (on the face of it, this would be only two weeks’ work).
25. The payslip dated 20 September 2019 shows the claimant was paid £451.55 (with no deductions) in respect of 55 hours at £8.21 per hour with this being described as “*suspension pay*”.
26. The payslip dated 16 October 2019 involved the claimant being paid £532.78 net (after a deduction of £0.87 in respect of employee’s pension contributions) in respect of 65 hours worked.
27. The payslip dated 18 November 2019 shows the claimant being paid £283.25 (with no deductions) in respect of 34.5 hours work.
28. The payslip dated 16 December 2019 shows the claimant being paid £287.36 (with no deductions) in respect of a total of 35 hours.
29. The evidence relied upon by the respondent is that the payslips had been sent by SBFM Limited to the claimant by email at [aliutour1997@gmail.com](mailto:aliutour1997@gmail.com) (this information appears in an email from Helen Nicholson, the HR Manager of SBFM Limited, to Karl Hitchens, sent on 9 March 2020 (page 49 in the bundle)). I note in passing that this email address appears very similar to the email address from

which additional evidence was served on the respondent on 29 November 2020 following the earlier hearing, but the email sent on 29 November 2020 was sent (on behalf of the sender's mother) by Aliu Touray Drammeh (who appears to be the Claimant's son) with the email address being aliutouray1997@gmail.com. From this it appears possible that the email address referred to in the e-mail of 9 March 2020 may have been written down incorrectly (although it does not necessarily follow from this that SBFM Limited had used an incorrect email address in sending out payslips since trying to send an email to an incorrectly written email address would usually result in it coming to the attention of the sender that the email has not been successfully sent).

30. The origin of the dispute is effectively described in the Statement of Karl Hitchens in that he makes reference to the claimant having told him, about a week after the transfer to the respondent, that she was owed a lot of money by SBFM. However, the employee liability information provided by SBFM to the respondent for TUPE purposes makes no reference to this, or any amounts being outstanding, and there had been no grievances over the period of the claimant's employment. Karl Hitchens had been unsure at the time whether any potential liability for unpaid wages would pass to the respondent, and for this reason originally told the claimant to go and see a solicitor. His statement makes clear that he accepts that if there was any liability, it would have passed to his company. Karl Hitchens seems to think that the claimant possibly believed that she could claim double hours or double pay for those periods when there was only one cleaner on duty (there would normally have been two). However, he makes the point that the applicable signing-in sheets do not show the claimant working double the amount of time. Indeed, CCTV footage had been checked, and this did not show the claimant working any significant extra hours for which she had not been paid.
31. Enquiries made of SBFM Limited by Karl Hitchens established that there was an unauthorised absence for a couple of weeks in July 2019 (which the documentation suggests amounted to two weeks and three days), the claimant was suspended on full pay for August and then had been on unpaid leave in September.
32. Karl Hitchens notes that in the months of April and July 2019 the claimant is claiming she had been underpaid by £500. Given that she would have earned approximately £100 per week for a working week of 12.5 hours, she would have had to work to an additional 62.5 hours in July 2019 to have been entitled to be paid an extra £500. Similarly, the suggestion that there was an underpayment by £720 in September 2019 appears to be fundamentally unlikely. This would have involved an additional 90 hours per month.
33. Karl Hitchens suggests that the information provided by SBFM Limited essentially shows the claimant being paid for clocked hours. Clocking records appear in the bundle for the period from May to November 2019, but the standard of these photocopied documents is poor so that it has been a struggle to be entirely sure about some of the various entries. However, a helpful commentary appears in a table within an email dated 9 March 2020 from Helen Nicholson, HR Manager of SBFM Limited to Karl Hitchens (page 49 in the bundle).
34. Karl Hitchens also refers to having had sight of the "*contractor books*" at the nursery which record the times signed in and out by the claimant. Essentially, on an

analysis of these documents for the months seen (July and September to December 2019), there is no evidence of the claimant having worked significant additional hours. The statement of Karl Hitchens had very fairly highlighted a couple of entries in the documents where, on the basis of the times that the claimant arrived or left, she may have worked for more than 2.5 hours, although equally there were occasions when less than 2.5 hours would appear to have been worked. Even allowing for the possibility of there being some occasions when the claimant worked more than 2.5 hours, there is no evidence of any additional hours having been approved on the basis that they would give rise to a contractual entitlement to overtime. In short, the available evidence does not suggest that there was any significant difference between the number of hours worked and the number of hours for which the claimant was being paid such as to generate the very significant extra payment being claimed by the claimant as part of her tribunal case.

35. Karl Hitchens also makes the point that where, for the sake of argument, an employee worked late, this would not generate an automatic right to overtime, but rather any extra hours would need to be approved and authorised by the client as the client was effectively paying the claimant's employer for any hours worked. In this regard, the email communications in the bundle are consistent with SBFM Limited having had no record or knowledge of the claimant doing additional hours (save those paid in respect of September 2019).
36. At paragraph 41 of his statement, Karl Hitchens speculates as to the position in respect of April 2019 on the basis that any hours clocked in April would have been paid with May's pay and yet May's payslip specifically records "*0 hours clocked*". Karl Hitchens suggests that the possible explanation is that the claimant would not have been paid anything by SBFM Limited for April because wages due up to that point would have been paid by the transferor.
37. The analysis in paragraphs 41 to 44 of the Statement of Karl Hitchens essentially seeks to demonstrate that the claimant was paid for the hours which she clocked. In summary, he suggests that, for the period between 1 May 2019 and the transfer to the respondent, the claimant worked 244 hours, was suspended for 55 hours and on holiday for 2.5 hours, so would have had an entitlement to be paid for 301.5 hours but the pay statements show her being paid for 310.5 hours. He suggests that the difference between the two figures is to be explained by an adjustment having been paid to the claimant in respect of nine hours, but I was unpersuaded as to this given that the adjustment is clearly described in the documentary evidence as being to make good and earlier underpayment.
38. As stated above, the agreed order of the Tribunal resulted in the claimant e-mailing further evidence on 29 November 2020. She did not produce a statement of evidence but the email effectively attached various bank statements for the period from 13 December 2018 to 12 February 2020 with there being a handwritten note on the first bank statement making the point that the statements show no pay having been received between 13 May and 17 June 2019 with payments recorded of £235.50 on 17 June 2019, £205.25 on 16 August 2019, £283.25 on 18 November 2019 and £287.36 on 16 December 2019. The various payments received are then highlighted in pink on the bank statements, so that all the payments received from December 2018 to February 2020 are shown. Clearly,

there are some months when she was paid less and other months when she was paid more.

39. Effectively, the bank statements show that the claimant was receiving payments on a fortnightly basis from Aztec Commercial Cleaners with these payments being in the region of £100 per week. It is to be noted that the bank statements show a payment of £195.75 on the 22 March 2019. There was then a payment of £343.20 on 5 April 2019 and £205.25 on 18 April 2019. There was then a payment of £143.68 on 3 May 2019. The next payment is 17 June 2019 when she received £236.56 from SBFM Limited. On 16 July 2019 she received £604.97 from SBFM Limited. On 16 August 2019 it was £205.25. On 20 September 2019 it was £451.55. On 16 October 2019 it was £532.78. She was paid £283.25 on 18 November 2019 and £287.36 on 16 December 2019, with these payments being from SBFM Limited and then a payment of £334.91 on 27 December 2019 which appears to be a payment from the respondent. There was also a payment of £328.51 from the respondent on 24 January 2020.
40. It can be seen that the bank statements show regular payments being made, but there was some variation in the amounts of the payments. Additionally, there was a gap between the beginning of May and the middle of June which was potentially explicable by the transfer of employment giving rise to different arrangements for payment.

### **Relevant law**

41. Section 13(1) of the Employment Rights Act 1996 (“ERA 1996”) provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to ERA 1996 section 23. The definition of “wages” in ERA 1996 section 27 includes holiday pay.
42. Under ERA 1996 section 8(1), an employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement. Such a pay statement is required to set out any deductions from pay.
43. An employee who has not been provided with an itemised pay statement has the right, pursuant to ERA 1996 section 11(1), to refer the matter to an Employment Tribunal. If the Tribunal finds that an employee or worker has not received a pay statement, or that the employee or worker has received one but it does not contain the required particulars, the Tribunal must, pursuant to ERA 1996 section 12(3), make a declaration to that effect. Where the Tribunal finds that any unnotified deductions have been made during the 13 weeks immediately preceding the Tribunal application, it may also make a monetary award to the employee. The maximum award is the aggregate of unnotified deductions made during those 13 weeks. If the employer's infringement is purely a technical slip, Tribunals may make no award, or only a token award, particularly if the worker has suffered no real loss.



44. Under ERA 1996 section 1, an employer is under a statutory obligation to provide workers with a full and accurate written statement of the particulars of their main terms and conditions of employment. Since 6 April 2020, the particulars required include particulars of any probationary period, but this was not a requirement before that date. Under ERA 1996 section 4, an employer must also notify workers in writing of any subsequent changes to those particulars.
45. The remedy for a breach of the statutory rules regarding written statements is by means of a reference to the Employment Tribunal under ERA 1996 section 11 which gives Tribunals the power to determine what particulars ought to have been included in order to comply with ERA 1996 section 1. Following the case of *Railcare Ltd v Cook* [1999] UKEAT/1052/98, Tribunals are limited to deciding the particulars that were applicable at the date of the originating application.
46. Tribunals also have the power to award compensation under section 38 of Employment Act 2002 (“EA 2002”) where, upon a successful complaint being made under any of the jurisdictions listed in Schedule 5 of EA 2002 (which includes a complaint of unlawful deductions from wages) it becomes evident that, at the time the proceedings were begun, the employer was in breach of its duty to provide full and accurate written particulars under ERA 1996 section 1. In such circumstances, the Tribunal must award the “*minimum amount*” of two weeks’ pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and may, if it considers it just and equitable in the circumstances, award the “*higher amount*” of four weeks’ pay.

## Conclusions

47. A potential problem with the way in which the Claim has been put forward by the claimant is that the amounts being claimed are all round figures. Whilst it is true that, had she worked all of her shifts during a working week, the claimant would normally be receiving approximately £100 per week, any entitlement to pay was not a round figure but would have been a precise figure based on multiplying £8.21 by the number of hours concerned. Thus, where the full 12.5 hours was worked in a week, the claimant’s pay would have been £102.62. One assumes from this that the amounts being claimed are estimates. This brings one to the next problem, which is that there is no explanation as to how these amounts, whether estimates or otherwise, have been calculated.
48. However, the most fundamental problem with the claimant’s case, as identified by Karl Hitchens, is that whereas it is possible to undertake an exercise in reconstructing the hours worked by the claimant and then to cross-reference this with the hours for which she seems to have been paid, which raises possible queries as to whether the amounts paid have given rise to a small underpayment (or a small overpayment), nowhere does one find any evidence which begins to explain the basis upon which the claimant was seeking to contend that there were monthly underpayments which ran into hundreds of pounds. For example, where she claims £500 in respect of July 2019, given that her rate of pay was £8.21 per hour and her normal hours were 2.5 hours an evening (so that £500 represents approximately 60 hours work at the normal rate), there is nothing in the evidence which has been provided which points in the direction of an entitlement to a sum of such size having been generated and not paid.

49. I turn to look at the specific months in issue. In respect of April 2019, the claimant has claimed £500. In fact, her bank statements show the following payments in April 2019: 05.04.19, £343.24; 18.04.19, £205.25; 03.05.19 £143.68. Presumably the above payments were for work done in April 2019, in that, prior to the transfer to SBFM Limited, the claimant was being paid fortnightly, which I assume was the fortnight just worked, but this is not entirely clear from documentation. There is no evidence to suggest that these payments were for the wrong amount. Based on an hourly rate of £8.21 per hour, the payment of £205.25 on 18 April 2019 was the claimant's normal pay for two weeks (25 x £8.21). Clearly the payment on 5 April 2019 involved a significant payment in excess of the Claimant's normal fortnightly payment. Given that the period for which the claimant was paid every fortnight is not entirely clear from the documentation, I cannot rule out the possibility that some of the additional payment on 5 April 2019 related to extra work done in April 2019. Conversely the payment on 3 May 2019 was for less than the normal amount for two weeks. In fact, the figure of £143.68 would amount to pay for 17.5 hours at £8.21 per hour. Effectively the claimant's pay for this period suggested that she had not been paid for three of her normal shifts. If the transfer took place on 1 May 2019, the previous employer would presumably have not been paying the claimant for any shift worked on Wednesday 1 May to Friday 3 May 2019 (if these were shifts for which the claimant would otherwise have normally been paid on 3 May 2019, which is not entirely clear).
50. By reference to May 2019, the claimant has not claimed that any sum is due. In fact, her bank statements show the payment received on 03.05.19 in the sum of £143.68. This was paid by Aztec Commercial Cleaners and was presumably for work done in April 2019. The payslip from SBFM Limited which is dated 16 May 2019 and recorded a nil payment had a handwritten note on the payslip to the effect that "*0 hours clocked*" which was presumably intended to explain the non-payment. Given that SBFM Limited was paying wages in arrears and any payment on 16 May 2019 was for April, the more likely explanation is probably that the claimant had not clocked any hours for SBFM Limited, but had been paid for the hours worked for Aztec Commercial Cleaners in that month.
51. In respect of June 2019, the claimant has claimed £100. In fact, her bank statements show she received £236.56 on 17.06.19. This was presumably her wages for work undertaken in May. From the payslip, the claimant was being paid for having worked 34 hours and was being paid for two hours' holiday (so 36 hours in total). In fact, the HR analysis in the e-mail of 9 March 2020 (page 49) is that the clocking records for May show that the claimant worked 42.5 hours, had three days off sick and took 2.5 hours as holiday, so would be entitled to normal pay for 45 hours. Hence, there appears to have been an underpayment of nine hours. However, the underpayment seems to have been made good following month. £59 was deducted for tax which was also later repaid.
52. In respect of July 2019, the claimant has claimed £500. In fact, her bank statements show she received £604.97 on 16.07.19. This would appear to be the claimant's wages for work done in June. The payslip is paying her for a total of 66.5 hours representing 50 hours work which would amount to four weeks (plus holiday pay for 7.5 hours and the adjustment in respect of nine hours). This is consistent with the HR analysis (page 49) of the clocking records (page 43) which show that she

worked 50 hours in June. Further credit was being made in respect of an adjustment for nine hours work at £8.21 per hour. This was clearly making good the underpayment in respect of work done in May 2019.

53. In respect of August 2019, the claimant has claimed £200. In fact, her bank statements show she received £205.25 on 16.08.19. This would appear to be the claimant's wages for work done in July. The amount paid was the 25 hours' work (or two weeks). The explanation put forward by Karl Hitchens is that he was informed by SBFM Limited that the claimant was on unauthorised absence for a couple of weeks in July 2019. In fact, the documentation in the bundle in the form of the clocking records (page 44) shows an unauthorised absence recorded on 13 working days between 15.07.19 and 31.07.19.

54. In respect of September 2019, the claimant has claimed £720. In fact, her bank statements show she received £451.55 on 20.09.19. This would appear to be the claimant's wages for work done in August. The payslip actually describes this as suspension pay with the amount being paid representing pay for 55 hours which would be 22 days.

55. In respect of October 2019, the claimant has claimed £220. In fact, her bank statements show she received £532.78 on 16.10.19. The payslip for 16.10.19 shows the claimant being paid for 65 hours as her basic pay. This is consistent with the HR analysis (page 49) of the clocking records for September 2019 (page 46) which show that she had five days (12.5 hours) of unauthorised absence, but still worked a total of 65 hours with this including several shifts of five hours including at weekends.

56. The claimant's bank statements then show that she received £283.25 on 18.11.19. In so far as the amount being claimed in respect of October 2019 relates to work done in October 2019, the payslip for 18.11.19 shows the claimant being paid for 34.5 hours. However, as there were 23 working days in October, one might have expected the pay to be for 57.5 hours (at 2.5 hours per day). Thus, on the face of it, there was an underpayment in respect of 23 hours. The explanation is to be found in the e-mail of 2 July 2020 from Helen Nicholson, the HR manager of SBFM Limited. The claimant was paid for 34.5 hours which effectively amounted to 14 days with one of the shifts, on 1 October 2019, only being clocked for two hours rather than 2.5 hours (as shown on the clocking documentation at page 47). The other 22.5 hours (effectively nine days) were not paid as they were not clocked. Thus, there was potentially an underpayment of 22.5 hours. It was later proven that these days had been worked by the claimant and so the underpayment was made good in the following month's pay. Thus, the statement of Karl Hitchens states that this was rectified the following month when the final payslip generated by SBFM Limited, which is dated 16.12.19 and would have been for work done in November 2020 until the date of transfer, shows that the claimant was paid for 12.5 hours which is the number of hours that the clocking records show she worked up until the point of transfer, but was also paid for an additional 22.5 hours at "*basic rate 2*" which "*is understood to be a rectification of the hours from the month before*".

57. In the circumstances, my conclusions, on the balance of probabilities, and on the basis of the analysis set out above, are that I have not been provided with any

evidence from which I could conclude that there were underpayments in respect of the period for which the claimant was claiming, such as to give rise to unlawful deductions from wages. It was made clear to the claimant at the previous hearing that she would need to provide evidence which satisfied the Tribunal, on the balance of probabilities, that such unlawful deductions had occurred. She has not satisfied this burden of proof. In any event, on the evidence before me, and on the basis of the analysis undertaken above in relation to each month in issue, I am satisfied that the claimant has ultimately been paid the correct sums to which she was contractually entitled and on the two occasions when she was paid less than was ultimately due to her, the additional amount which was due to her was subsequently established and the outstanding amount paid in the following month.

58. On the face of it, written itemised pay statements were being generated which explained the way in which the amounts being paid had been calculated and any deductions which had been made (save in relation to the two underpayments which were subsequently made good. Whilst, some uncertainty remains as to whether the correct email address was used, as a result of an incorrect email address having been transcribed into the email of 9 March 2020, (and then repeated in the statement of Karl Hitchens), I am satisfied that it is more likely than not that pay statements were being emailed to a correct email address as it seems very unlikely that the use of an incorrect email address would not have come to the respondent's attention over the period of time concerned. Moreover, this evidence appeared in the statement of Karl Hitchens and the claimant was provided with an opportunity, following the previous hearing, to take issue with such evidence, but has not done so.
59. The pay statement dated 17.06.19 confirmed that the claimant was being paid an amount which involved her being underpaid in respect of nine hours (£73.89). Whilst particulars as to this deduction were not provided in that pay statement, the amount of the underpayment was made good the following month with the particulars in respect of that adjustment appearing in the payslip dated 16.07.19.
60. Similarly, the pay statement dated 18.11.19 confirmed that the claimant was being paid an amount which involved her being underpaid in respect of 22.5 hours (£184.72). Whilst particulars as to this deduction were not provided in that pay statement, the amount of the underpayment was made good the following month with the particulars in respect of that adjustment appearing in the payslip dated 16.12.19.
61. The effect of ERA 1996 section 12(3) is that I am required to make a declaration that the pay statements of 17.06.19 and 18.11.19 failed to contain the required particulars in that there was no notification of these deductions. Where the Tribunal finds that any unnotified deductions have been made during the 13 weeks immediately preceding the Tribunal application, it may also make a monetary award to the employee. The maximum award is the aggregate of unnotified deductions made during those 13 weeks. Obviously, this only applies to the unnotified deduction of £184.72 which was not notified in the pay statement of 18.11.19. The earlier deduction from 17.06.19 falls outside this 13-week period. The statutory provisions do not provide any guidance on the exercise of the Tribunal's discretion to make a financial award, but relevant factors have been suggested by earlier case law to include whether the breach was due to a genuine

oversight in respect of a particular deduction or whether there has been a wholesale disregard of the employer's obligations, as well as whether there is an explanation for the failure and whether the failure has caused any loss. In this case, the explanation is that the 22.5 hours (effectively nine days) were not paid as they were not clocked but when it was later proven that these days had been worked by the claimant the underpayment was made good in the following month's pay. Having regard to these circumstances, no award is made under ERA 1996 section 12(4).

62. At the date proceedings were issued, which was 6 February 2020, the respondent had complied with the statutory obligation to provide the claimant with a written statement of the particulars of her main terms and conditions of employment. The statement was inaccurate in that it made reference to a probationary period, but as at that date there was no requirement to include particulars of any probationary period. In the circumstances, the right to a declaration under ERA 1996 section 11 and / or a remedy under section 38 of Employment Act 2002 does not arise. In any event, the right to a remedy under section 38 of Employment Act 2002 does not arise as the claimant has not succeeded with a complaint of unlawful deductions from wages.

63. It follows that the complaints of the claimant are dismissed save that a declaration is made to the effect that the pay statement 17.06.19 failed to notify the claimant of a deduction which amounted to an underpayment of £73.89 in respect of nine hours' work and the pay statement dated 18.11.19 failed to notify the claimant of a deduction which amounted to an underpayment of £184.72 in respect of 22.5 hours' work but no award is made in respect of either deduction or under Employment Rights Act 1996 section 12(4) as the necessary adjustment was notified in the pay statements for 16.07.19 and 16.12.19 respectively and the underpayment made good in the following month's pay.

**Employment Judge Kenward**  
8<sup>th</sup> December 2022