Case Number: 3302990/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F Bulica	v	Ocado Central Services Limited

Heard at: Watford **On**: 28 February 2022

Before: Employment Judge Hyams **Members (via CVP):** Mrs M Prettyman
Mr T Poil

Representation:

For the claimant: In person
For the respondent: Ms C Step-Marsden, of counsel

JUDGMENT

1. The claimant was not disabled within the meaning of the Equality Act 2010 at any material time. His claim of disability discrimination, contrary to sections 20, 21 and 39 of that Act, is therefore dismissed.

2. The respondent wrongly deducted the sum of £22.49 from the claimant's final payment of wages and therefore owes the claimant that sum, subject to the deduction of income tax and national insurance contributions.

REASONS

Introduction; the claims

1 By a claim form presented on 1 March 2021, the claimant claimed that he had been discriminated against "on the grounds of ... disability" and that there had been unlawful deductions from his wages. The claim of disability discrimination was not in any way explained in the claim form, and there was no document accompanying the claim form which explained that claim. The claimant was as

a result informed by the tribunal in a letter dated 19 March 2021 on the direction of Employment Judge ("EJ") R Lewis that the complaint of disability discrimination had been rejected by the judge "due to lack of information".

2 The claimant then, on 16 April 2021, sent two emails to the tribunal. In the first one, received by the tribunal at 10:29, the claimant wrote (among other things) this:

> "College Student !
>
> A lot Has changed for me this year My life has completely Changed
>
> Physical Injury condition That limits a person's movements, senses, activities Swelling in the feet. Living with Physical pain that's lasted for Three Months or Longer.
> Unable to Stand on feet
>
> When I Got This Pain it felt like there was no point Living anymore it felt like my life has ended.
>
> Left Unable to Walk So I'm now finding it hard to walk and I'm in chronic pain constantly I still cant walk Properly if I wanted to and it's really getting to me. Dead Legs
>
> Nerve root irritation Bottom of my feet Bottom of my Foot Toes Are Swelling
>
> Injury's are so severe
> Pain that originates in the lower back and travels down the thighs and foot and feet.
> With sciatica playing up I cant walk without and legs and feet and back being in pain.
> Life Changing Injury's, Chronic Condition, Still struggling Suffering from the pain and injury's, Difficult mobility issues, Suffering Feet Pain, Thigh Pain, Legs, Back Mobility is Constricting me Doing Anything.
>
> Life's A lot Slower unable to go out Feel A lot of Pain Unbearably Painful
> I never thought anything like this would happen to me.
> Desperately seeking a Life without pain
> Embarrassed
>
> Mentally I'm Suffering
>
> Bullies should not be treated as reasonable human beings to be respected."

3 In the second email (received by the tribunal a minute later, at 10:30), the claimant wrote (among other things) this:

> "Please Request Re consideration of the rejection of The disability discrimination claim.
>
> Physical Injury condition That limits a person's movements, senses, activities.
>
> I Had Worked For Ocado for a period of 1 year & 4 months As A Customer Service Team Member / Delivery Driver Delivering Groceries and Goods At Ocado Park Royal.
>
> During The Period Of Employment I Picked Up A Back Injury Due to The Lot's of Heavy Lifting & Carrying that the Job Involved Day To Day.
>
> I Went To Work Now I've Got A Trapped Nerve Which is affecting my legs and movement Which Happened on site At Work Then I went To Doctor's I got A Certificate and Presented it to Manager and After Then Rang me Up Ask me To come inn To Do A couple shifts I didn't want to lose my job I was more worried about my job than my health at that point so I didn't want them to make big fuss about it So I felt Compelled to come inn."

4 The claimant's employment with the respondent was terminated by him on the giving of one week's notice on 5 January 2021, with the final day of his employment therefore being 12 January 2021.

5 On 10 July 2021, the tribunal wrote to the claimant that the claim of disability discrimination was accepted. On 23 September 2021, there was a preliminary hearing, conducted by EJ McNeill QC. In her document recording that hearing, EJ McNeill QC recorded the issues. It was not accepted by the respondent that the claimant was disabled within the meaning of the Equality Act 2010 ("EqA 2010") at any time before his employment with the respondent ended, so the first issue for determination was whether the claimant was so disabled at any relevant time. The claim of disability discrimination was recorded as a claim of discrimination within the meaning of sections 20 and 21 of that Act.

6 As for the claim of an unlawful deduction from the claimant's wages, EJ McNeill QC wrote this (in paragraphs (6)(viii) to (x) of her case management summary, which were on page 52, i.e. page 52 of the hearing bundle):

> "*Unauthorised deductions*
>
> (viii) Following discussion with the parties, it became clear that the Claimant's claim was limited to an alleged non-payment for shifts

worked on 4 and 5 January 2021. The amount claimed was £121.05. The Respondent disputed that this sum was due.

(ix) There is a further issue as to whether the Respondent was entitled to recoup a sum of £105.34, which was in respect of days of holiday taken by the Claimant in the holiday year during which the Claimant's employment terminated, which exceeded the amount of holiday entitlement that had accrued on a pro rata basis at the date of termination of the Claimant's employment (applying the pro rata approach to payments in lieu of annual leave in the Working Time Regulations 1998). The Respondent relied on a provision in the Claimant's contract of employment or employee handbook, which the Respondent contended entitled it to make this deduction. The Tribunal questioned the legal basis for this claim.

(x) The parties were encouraged to speak to each other about the unlawful deductions claim, which was of relatively low value (although important to the Claimant), in order to see whether the issues could be resolved and a figure agreed."

The procedure which we followed and the evidence which we heard

7 At the start of the hearing, we (through EJ Hyams) informed the parties that we were of the view that we should consider as a preliminary issue the question whether the claimant was disabled within the meaning of the EqA 2010. They did not disagree with that proposal. Ms Step-Marsden had prepared a written skeleton argument, dealing in detail with that question and referring to documents which had been disclosed by the claimant concerning that issue of which there were copies in the hearing bundle, and she put that skeleton argument before us. We said that we would read the documents relating to that question and the claimant's witness statements, and asked the claimant and Ms Step-Marsden whether they would wish to add to what was already before us in the documents by way of evidence or submissions on the issue. They both said that they did not wish to do that. We therefore adjourned the hearing and read the relevant documents. Having done so, we resumed the hearing with the parties present and EJ Hyams asked both the claimant and Ms Step-Marsden whether they had decided on reflection that they wished to add anything by way of oral submissions. They both said that they did not want to do so. EJ Hyams then gave judgment with reasons orally on the question whether or not the claimant was disabled. The claimant then asked for our reasons on that issue to be given in writing.

8 We then sought to understand the respondent's position in regard to the claim of an unlawful deduction from the claimant's wages. After some discussion with Ms Step-Marsden and the claimant (principally Ms Step-Marsden), we adjourned the hearing and read through the documents relating to the issue.

We were unable to understand the position from those documents alone, and we resumed the hearing and heard oral evidence from Mr George Curtis, who was the Operations Manager at the respondent's Park Royal. We then held an extensive discussion with Ms Step-Marsden (principally) and the claimant about the documentary evidence, and during that discussion Mr Curtis gave evidence as and when it assisted our understanding of the factual situation. In addition, during the discussion, the claimant gave (via Ms Step-Marsden) EJ Hyams a large bundle of stapled copies of pay statements. EJ Hyams then scanned them and returned them to the claimant. EJ Hyams offered to send the result of the scan to Ms Step-Marsden but Ms Step-Marsden did not press him to do so and he did not do so. We then, in private, considered all of the evidence that we had heard and came to a conclusion on the claim of unpaid wages. Having resumed the hearing, we announced that decision. The claimant said that he wanted our reasons for that conclusion also to be given in writing.

9 We then ended the hearings, and the parties withdrew. The claimant then returned to the hearing room (without anyone from or on behalf of the respondent present, although there were co-incidentally in the hearing room two clerks; Mrs Prettyman and Mr Poil were still present, but only via CVP, and they could hear only what EJ Hyams said, not what the claimant said) and asserted that he had been "robbed" of his pay for his final two days' work with the respondent, which occurred on 4 and 5 January 2021. EJ Hyams said that that was not our conclusion, and that in any event the hearing had ended and that the claimant should withdraw from the hearing room. After stating his intention to appeal the decisions of the tribunal, the claimant did so withdraw.

The evidence before us concerning the claimant's claimed disability

10 The claimant put before us two witness statements: one concerning his disability which was headed "Disability Impact Statement" and the other which was called "Claimant Witness Statement". As stated in paragraph 7 above, we did not hear oral evidence from the claimant, as those statements were not challenged and the parties were content for us to decide the question whether the claimant was disabled within the meaning of the EqA 2010 on the basis of that unchallenged evidence and the documentary evidence before us alone.

11 The relevant documentary evidence concerning the claimant's back pain was in the form mostly of documents created by medical doctors. The claimant's witness statements contained nothing material which added to what was in those documents.

12 Chronologically speaking, the first of those documents was at pages 139-140. It was dated 25 October 2020. It had an addendum. The document recorded the claimant's date of birth (15 January 1993). The document was headed "MRI spinal lumbar and sacral * Final Report *". The first part was dictated and

authorised by Mr Dermot Mallan, FRCR SpR Radiologist at 15:24 on 25 October 2020, and was in these terms:

> "Clinical History
>
> fall down stairs (6 or 7) , midline tenderness L4 and LS region; presents with back pain and bilateral sciatica , ?burst fracture
>
> Report
>
> Normal lumbosacral spine alignment. No fractures. No epidural collections. No soft tissue injury identified.
>
> There are mild posterior disc bulges between the levels of L2- 3 , L3- 4 , L4-5 and L5-Sl .
>
> The LJ-4 and L4-5 intervertebral discs are minimally dehydrated. These is no significant vertebral canal or intervertebral foraminal narrowing the lumbosacral spine.
>
> Normal appearance of the conus which terminates at the level of the L1-2 disc.
>
> Opinion :
> No traumatic injury within the lumbosacral spine.
>
> Mild multilevel lumbosacral spondylosis, perhaps slightly more than would be expected in a patient of this age, but there is no evidence of any neural compression."

13 The addendum was in these terms: "I agree with the above report". That addendum was dictated and authorised by Dr Farah Alobeidi, FRCR Consultant Neuroradiologist at 20:34 on 25 October 2020.

14 There was at pages 141-143 a document in the form of a letter from Charing Cross Hospital, operated by the Imperial College Healthcare NHS Trust, to what appeared to be the claimant's GP. That document repeated the content of the report which we have set out in paragraph 12 above, but with additional text before and after setting out that content. The preceding text included this (the bold text being original):

> "**Incident occurred at**: Living room
> ...
>
> **Brief Summary:**

> **Requested Actions for GP**: reports falling down 6 or 7 steps 3 days ago sustaining lower back injury
> advises has had ongoing lumbar back pain and symptoms in keeping with bilateral sciatica
>
> normal neurological examination
>
> MRI lumbar spine performed: no acute trauma identified"

15 The text which followed the text set out in paragraph 12 above was this:

> "Patient advised analgesia and to avoid activities exacerbating back pain at present, such as heavy lifting
>
> **Diagnosis**: Backache
>
> **Investigations**:
>
> No Investigations
>
> **Outcome**: Treatment complete"

16 There was in the bundle, at pages 144-145, a further "MRI Spine lumbar and sacral * Final Report *". It was written on 16 January 2021. It was possible, for the reasons to which we refer in paragraph 27 below, to say that the report was not material to the question whether or not the claimant was disabled within the meaning of the EqA 2010 while he was employed by the respondent. However, we took its content into account since it was written only just after the claimant's employment had ended. We saw that the report said this:

> "Clinical History
>
> Had a fall last year, acute onset lower back pain since. New onset of bilateral leg paraesthesia. Numbness on both waist. [Sic] No anal tone. ?Bilateral stenosis / Cauda equina.
> from AEC
>
> Report
>
> Reviewed with MRI lumbar sacral spine dated 25th October 2020
>
> There is preserved vertebral body alignment and height. Normal marrow signal is demonstrated.
>
> The conus terminate at LI/ L2 intervertebral disc

> There are no fractures. No epidural collections. No soft tissue injury identified.
>
> There are mild posterior disc bulges between the levels of L2-3, L3-4, L4-5 and L5-S1 as described previously.
>
> There is L3-4 and L4-5 intervertebral disc dessication as before. These [Sic] is no significant vertebral canal or intervertebral foraminal stenosis.
>
> Summary
>
> There is no evidence of cord compression".

17 That report was dictated and authorised by a Dr Zoya Arain, FRCR SpR Radiologist at 19:30 on 16 January 2021. There was an addendum dictated by Dr Amrish Mehta, FRCR Consultant Neuroradiologist, at 20:10 on 16 January 2021, which was in these terms:

> "The provisional report is essentially correct. There are small non compressive disc bulges from L2-3 to L4-5 with mild degeneration of the intervertebral discs at L3-4 and L4-5. At L4-5 there is contact with but no compromise of the exiting L4 nerves, slightly more on the right. There is no compromise of the lumbar vertebral canal with no extrinsic compression of the cauda equina. The conus is normal."

18 At pages 147-148, there was a further communication from Charing Cross Hospital to the claimant's GP. It was written by Dr W Jansen on 26 March 2021, and recorded that the claimant had attended the Emergency Department on that day. After stating that, the communication was in these terms:

> "**Presentation**: Back Pain
>
> **Initial Assessment**: From ED. 1/7 non-traumatic low back pain radiating to both lower extremities. Denies urinary and bowel incontinence. States on amitriptytine and pregabalin for neuropathic pain. Able to WB and mobilise unaided.
>
> **Brief Summary**:
> **Requested Actions for GP**: Dear Doctor
>
> This gentleman does not have symptoms of CES and no signs of it. The most recent MRI L/S scan is reassuring and the report is copied below. [That was the report of 16 January 2021 which we have set out above.]
>
> In terms of the swelling of his feet and burning sensation: this could still be because of the pregabalin, but he is now off it for 2/52.

> I advised that the Amitriptytine dose is increased to 20 mg at night. He should also take ibuprofen 400 mg 3 times a day and continue with the co-dydramol 2 tablets 4 times a day."

19 There were in the bundle Statements of Fitness for Work dated 27 November 2020 (at page 78), 17 December 2020 (at page 80), and 6 January 2021 (at page 83). There were records of return to work interviews dated 15 December 2020 (at page 79) and 4 January 2021 (at page 81). The Statements of Fitness for Work stated as the reason for the claimant's unfitness to work respectively:

19.1 "Back pain"

19.2 "Back pain", and

19.3 "Lumbar Spondylosis".

20 Nothing by way of comment was said in the Statements of Fitness for Work dated 27 November and 17 December 2020, but there was in the Statement of Fitness for Work dated 6 January 2021 at page 83 this in the box for comments (written by a Dr Bhatt):

> "I would recommend a formal occupational health risk assessment for this patient especially due to the nature of his work. He had a flare up of pain as soon as he returned to work for two days. He has had a MRI scan already and is under the care of physio. Please arrange an Occupational health review ASAP."

21 The first return to work interview record (dated, as we say in paragraph 19 above, 15 December 2020) stated as the reason for the absence:

> "back pain, may be from repetitive lifting but no exact incident caused it".

22 The second one (dated, as we say above, 4 January 2021) stated simply this in that regard:

> "Was suffering from back pain".

The law relating to the question whether the claimant was disabled within the meaning of the EqA 2010

23 The question whether the claimant was disabled at any material time fell to be decided by reference to section 6(1) of, and Schedule 1 to, the EqA 2010, together with such assistance as might be available in the Secretary of State's guidance issued under section 6(5) of that Act and relevant case law.

24 Section 6(1) provides:

> "(1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

25 Section 6(5) provides:

> "A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1)."

26 Paragraph 2 of Schedule 1 provides:

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

27 The word "substantial" in section 6(1)(b) means, according to section 212(1) of the EqA 2010, "more than minor or trivial".

28 The question whether a person had a disability at any particular time is to be determined by reference to the evidence in existence at the time of the claimed discriminatory conduct: it is not to be determined by reference to evidence which arises later than that time: *All Answers Ltd v W* [2021] EWCA Civ 606, [2021] IRLR 612.

29 Where the question whether an impairment producing a substantial adverse effect is 'likely' to last for 12 months arises, the decision of the House of Lords in *SCA Packaging Ltd v Boyle* [2009] UKHL 37, [2009] IRLR 746, [2009] ICR 1056, is material. There, the House of Lords held that the word 'likely' means something that "could well happen". Reflecting that decision, the Secretary of State's current guidance issued under section 6(5) of the EqA 2010 (it was issued in 2011) states (in paragraph C3) that "likely should be interpreted as meaning that it could well happen".

Our conclusion on the question whether the claimant was disabled at any material time

30 In the above circumstances, while we were able to conclude that on and before 12 January 2021 the claimant suffered from pain in his back and/or legs which constituted an impairment which had an adverse effect on his ability to carry out normal day-to-day activities which was substantial in that it was more than minor or trivial, we were unable to conclude that that pain was at any time before 13 January 2021 likely to last for at least 12 months. Rather, we concluded that the evidence before us compelled the opposite conclusion: that at that time, the pain was not likely to last for at least 12 months. On that basis, we were driven to the conclusion that the claimant was not at any material time disabled within the meaning of section 6 of, and Schedule 1 to, the EqA 2010. Accordingly, we had to, and did, dismiss his claim of a breach of sections 20, 21 and 39 of that Act.

The factual background relating to the claim of unpaid wages

31 The claimant's claim of unpaid wages related to deductions from his wages for the period from 14 December 2020 to 12 January 2021. The situation was complicated.

<u>The deductions which the claimant claimed had occurred, one of which the respondent accepted it had made</u>

32 The claimant repeatedly said that he had not authorised any deductions from his wages and impliedly asserted that he was entitled to the payment of the deducted amounts. The deductions were shown on his pay statements relating to pay days of 15 January 2021 (at page 137) and 22 January 2021 (at page 138). As shown by what we record in paragraph 6 above, there were two things about which the claimant complained:

32.1 an alleged non-payment of wages for his work done on 4 and 5 January 2021 and

32.2 an allegedly unlawful deduction of 7.7 hours' pay at the rate of £13.68 per hour for having taken more holiday than his entitlement by 12 January 2021. That was a total of £105.34.

33 The respondent accepted that it had made the latter deduction but argued that it was entitled to make the deduction. It was the respondent's case that the claimant had been paid in full for his work done on 4 and 5 January 2021.

<u>What happened during the period to which the claim of unlawful deductions relates</u>

34 During the period in question, i.e. 14 December 2020 to 12 January 2021, the claimant was on a number of days absent from work on account of sickness. The respondent had a policy of paying as a matter of discretion company sick pay of up to 4 weeks' pay at the full rate (consisting of the difference between the employee's statutory sick pay and his or her full pay). Mr Curtis told us, and we accepted, that the claimant had by 14 December 2020 exhausted his right to company sick pay and was therefore after then paid only statutory sick pay.

35 The claimant worked in the period from 14 December 2020 onwards only on 15 December 2020, and 4 and 5 January 2021.

The respondent's documents relating to holiday entitlement

36 In paragraph 7 of the document at pages 69-75, which was dated 14 December 2020 and was said to be a "Statement of Terms and Conditions of Employment" for the claimant (but which he had not signed), this was said:

> "Your holiday
>
> The standard annual holiday entitlement is 200 hours per annum. This is pro-rated if you have a contractual working week of less than 40 hours per week or if you work less than five days per week. The Ocado holiday year runs from September 1st to August 31st. Holidays will be restricted during peak times. You may be scheduled to work on any public holiday each year depending on operational and customer requirements. Additional premia payments will apply for working Christmas Day, Boxing Day and New Year's Day. If any/all of these days are not worked there will be no additional payment made over and above the appropriate weekly wage set out in these terms and conditions of employment.
>
> Please refer to the Employee Handbook regarding further details on holiday and procedures to follow in booking your time off, together with any guidelines or policies on holiday entitlement which may be issued from time to time. If you have started working with us part way through the holiday year, your entitlement for this year will be calculated on a pro rata basis."

37 That paragraph numbered 7 was on page 71. There was in the bundle a preceding statement of terms and conditions of employment for the claimant, which was dated 16 August 2019 but which the claimant had also not signed. That preceding statement had, in paragraph 8, on page 60, a clause in materially the same terms as those of paragraph 7 on page 71. Mr Curtis told us, and we accepted, that employees were automatically paid their usual holiday pay for Christmas Day, Boxing Day and New Year.

38 The respondent's holiday pay policy stated (on page 117) this about the manner in which holiday pay was calculated:

> "We base your holiday pay on your average pay over the 12 weeks immediately before you take your holiday, using an average of your previous 12 weeks' wages, including service and shift premiums, but excluding overtime or bonus payments. If you've been off work due to sickness during the 12 weeks immediately before your holiday and you were paid at the reduced Statutory Sick Pay rate, this will affect your holiday pay."

39 The respondent's holiday pay policy also said this (also on page 117):

> "If at your date of leaving you have taken less than your accrued holiday entitlement for the holiday year, we will add the equivalent amount of pay for any holiday you have accrued up to your last working day to your final wage payment.
>
> If at your date of leaving you have taken more than your accrued holiday entitlement for the holiday year, we will deduct the equivalent amount of pay from your final wage payment. If the deduction does not cover the full amount, you will be required to reimburse us. Please note that we will pursue you for repayment."

<u>The rates of pay to which the claimant was entitled</u>

40 At page 70 there was this table setting out the rates of pay applicable to the claimant (although he did not work on Sundays):

Normal hours worked on	**Time**	**£ per hour**
Monday to Saturday (basic rate)	6 am to 6 pm	10.76
Monday to Saturday	6 pm to 12 am	11.98
Sunday	6 am to 6 pm	13.45
Sunday	6 pm to 12 am	14.98
Overtime hours worked on	**Time**	
Monday to Sunday	6 am to 6 pm	16.14
Monday to Sunday	6 pm to 12 am	17.97

The respondent's stated general right to deduct overpayments from wages

41 In the paragraph above that table, on the same page, this was said:

> "We reserve the right to make deductions from your wages in respect of any overpayments made to you by us and any monies payable to us as set out in the Handbook or in guidance or policies issues by us from time to time."

Payment during the "festive period" for 2020-2021

42 On page 102, there was a document entitled "2020-2021 Christmas working" for employees doing work of the sort which the claimant did, namely for "Weekly paid non-LGV Service Delivery Employees". It started in this way:

> "**What will I be working**?
> As usual, we'll be operating average rostering during the three week festive period. Average rostering means that you may be rostered to work additional shifts in any one week, and will receive additional rest days to balance this in one of the quieter weeks.
>
> You will be paid for your contractual normal hours, less any absences during the festive period.
>
> **Why will my festive period pay be different?**
> Due to bank closures during the festive period, it is not possible to process your exact pay in the normal way. This means that it is necessary for your work time to be estimated in advance to ensure that payment is received in your bank account on, or prior to, your usual pay date.
>
> **What will I be paid?**
> The hourly rate used to calculate your pay during the festive period will be an average of the following:
>
> Basic Pay + Sick Pay + Holiday Pay + Any Premiums over the preceding 12 weeks."

The claimant's pay during "the festive period"

43 The "three week festive period" was not specifically defined in the document at page 102. The pay statement at page 137, namely for 15 January 2021, showed that the claimant's pay was calculated for what we assumed was the "festive period" as being

43.1 for 9.75 hours at the basic rate per hour of £10.76 for "Wk 1", namely £104.91 gross; plus

43.2 18 hours of holiday (namely 75% of 8 hours for each of Christmas Day, Boxing Day and New Year's day), namely £248.76 gross; plus

43.3 statutory sick pay of £215.63 gross; plus

43.4 13.68 hours' pay for "Wk 4" at the rate of £10.76 per hour, which was £147.20 gross; minus

43.5 £768.47 gross, which was stated to be a "Basic Adjust".

44 The latter figure was the total of the payments received by the claimant as shown in the pay statements dated

44.1 25 December 2020 (at page 134; the figure there was £476.43 gross and was simply called "Basic Adjust"),

44.2 1 January 2021 (at page 135; there was there the figure of £178.72 which was described as another "Basic Adjust"; there was also a figure of -£2.35, which was stated to be for "Pens Sal Sac", i.e. pensions salary sacrifice) and

44.3 8 January 2021 (at page 136, where there was another "Basic Adjust" sum shown, which was £113.32 gross).

45 We did not know how the pension salary sacrifice operated, but if the pension salary sacrifice of £2.35 was ignored, then the total amount paid to the claimant during the three-week festive period was £768.47. As a result, we could see from pages 134-137 that the claimant had been paid £104.91 for his work on 15 December 2020 and £147.20 for his work done on 4 and 5 January 2021.

46 We did not have before us on 28 February 2022 evidence of the claimant's pay during the period of 52 weeks before 12 January 2021. Ms Step-Marsden commendably pointed out during the hearing the requirement as far as the Working Time Regulations 1998, SI 1998/1833, were concerned for holiday pay under those regulations to be determined by reference to the preceding 52 weeks of employment (and we return to this issue in paragraph 58 below). As a result, we said that we could either decide the matter on the evidence which we had before us at that time and conclude the hearing on that day, or resume the hearing on the second of the two days allotted for the case (namely 1 March 2022) in order to allow the respondent to put before us further evidence. However, Ms Step-Marsden, after taking careful instructions, said that the respondent preferred the hearing to conclude on 28 February 2022.

The claimant's evidence about his hours worked on 4 and 5 January 2021

47 In paragraph 14 of his witness statement, the claimant said this about his work done on 4 and 5 January 2021:

> "I was back on duty on the 4th January 2021 & 5th January 2021 and Prior to commencing my shift I also asked the Duty Manager to make a specific adjustment which was for Only Carrying out light duties. lighter Duties or for a lighter route or any other adjustments. However, these adjustments were not provided by my manager. I therefore carried out my shift on 4th January I was Still Given the Same duties I Had Complained about on Both 15 December 2020 and on 4th January 2021. When I went home That Evening My Back was aching and I had Pain in my Upper Thighs and found it hard in my back being overloaded with work. However, on the following day No Adjustments had been made again I Was still Given the Same Duties. I Returned from My Route Early on 5th January, having complained of Fatigue and was then signed off sick again and suffered from Further Back Pain Following my return to work and a flare up of my pain."

48 The claimant did not complain about the number of hours stated to have been paid for in respect of his work done on 4 and 5 January 2021, i.e. (see paragraph 43.4 above) 13.68.

The claimant's holiday entitlement: how much he had taken by 12 January 2021 and the amount to which he was entitled under his contract of employment

49 As shown by the documents referred to in paragraphs 36 and 37 above, and as confirmed by Mr Curtis, the claimant's holiday year ran from 1 September to 31 August.

50 At page 109 there was a print-out of two screenshots taken from the respondent's computer records, showing that the claimant had taken holidays with pay on the following days from 1 September 2020 to 12 January 2021 inclusive:

50.1 2 September 2020

50.2 9 September 2020

50.3 16 September 2020

50.4 22 September 2020

50.5 2 October 2020

50.6 3 October 2020

50.7 23 October 2020

50.8 6 November 2020; and

50.9 13 November 2020.

51 The document at page 109 also showed that the claimant had carried over from the previous holiday year 3.07 hours of holiday entitlement. In addition, Christmas Day, Boxing Day and New Year's Day were recorded in the document as having been taken as unpaid holiday, but they were, as can be seen from what we say in paragraph 43.2 above, in fact paid holidays.

52 The claimant's hours in the period from 1-20 September 2020 inclusive were 37.5 per week. After then, they were reduced (at the claimant's request) to 30 hours per week. As a result, before 21 September 2020 the claimant had an annual entitlement to holiday (in addition to the Christmas and New Year bank holidays) of 200 hours (i.e. 5 working weeks) x 37.5/40, which was an entitlement to 187.50 hours per year. After 20 September 2020, the claimant had an entitlement to holiday at the rate of 150 hours per year plus the Christmas and New Year bank holidays.

53 Ms Step-Marsden calculated the claimant's entitlement to holiday for the period from 1 September 2020 to 12 January 2021 in the following manner, with which we agreed.

53.1 For the period from 1-20 September 2020, the claimant had a right to his annual entitlement of 187.5 hours per year (which was 11,250 minutes per year), divided by 365 and multiplied by 20. That was a total of 616.438 minutes.

53.2 For the period from 21 September 2020 to 12 January 2021, the claimant had a right to an annual entitlement of 150 hours per year (9,000 minutes), divided by 113 (the number of days in that period). That was 24.66 minutes times 113, which was 2,786.30 minutes.

53.3 The total of those two figures was 3,402.74 minutes. That was 56.71 hours.

53.4 The claimant had carried over 3.07 hours so his total entitlement during that period was to 59.8 hours.

54 The claimant had, however, as shown by the document at page 109 and what we say in paragraph 50 above, between 1 September 2020 and 12 January

2021 inclusive taken a total of 9 x 7.5 hours of holiday, which was 67.5 hours. That meant, it was the respondent's case (and this was the basis of the deduction of pay for 7.7 hours at the rate of £13.68 per hour to which we refer in paragraphs 32.2 and 33 above), that the claimant had taken 7.7 more hours of holiday than his entitlement at the end of his employment.

55 The claimant did not contest the accuracy of the document at page 109, but in order to ensure that it was accurate, we checked it against the pay statements that the claimant had given to us as described in paragraph 8 above. Those pay statements confirmed that the days stated to have taken as paid holidays had indeed been so taken.

A discussion; relevant law

56 The respondent conferred on the claimant a right to take as paid holiday Christmas Day, Boxing Day and New Year's Day, and conferred on the claimant a right to an additional 5 weeks' holiday. By doing so, the respondent conferred on the claimant a right which was potentially more generous than those which arose under the Working Time Regulations 1998. That was because the respondent would not after New Year's day count as part of the claimant's holiday entitlement under those regulations those three paid holidays but would instead assess his entitlement to holiday only by reference to his contractual right to 5 weeks' holiday. As a result, if the claimant left his employment at any time after New Year's Day, then he might gain a slight pecuniary advantage as compared with the rights conferred by the Working Time Regulations.

57 We regarded regulation 16 of the Working Time Regulations 1998 as conferring on the claimant a right to be paid here in accordance with the provisions of that regulation if and in so far as regulation 16 conferred on the claimant a better right than his contract of employment gave him.

58 The passage set out in paragraph 38 above, taken from page 117, was inconsistent with the Working Time Regulations 1998 as they stood at the time of the claimant's employment with the respondent (and as at the date of the hearing), since (1) the payment of statutory sick pay could in our view not properly be taken into account when determining an employee's remuneration when calculating an employee's holiday pay entitlement under regulation 16 of those regulations and (2) the reference period under that regulation is 52 weeks (or, if less, the whole of the employee's employment with the respondent) rather than, as stated on page 117, 12 weeks.

59 While section 13(1) of the Employment Rights Act 1996 ("ERA 1996") protects against unauthorised deductions from wages, section 14(1) provides this:

> "Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of— (a) an overpayment of wages".

60 The claimant did not agree with the respondent the amounts that he should have been paid by way of statutory sick pay. As a result, the following passage in *Harvey on Industrial Relations and Employment Law* (paragraph BI[367]) was relevant:

> "Statutory sick pay is included in the definition of wages set out in ERA 1996 s 27(1) (see para [338] ff). As a result, it might be expected that disputes about whether an employee has received the correct amount of statutory sick pay from his employer could be determined by means of a deduction from wages claim and it is not uncommon to see such claims included on employment tribunal claim forms. In fact, the tribunal only has jurisdiction if the amount of the employee's entitlement is uncontested: see *Taylor Gordon & Co Ltd v Timmons* [2004] IRLR 180. In that case the EAT held that because the statutes and regulations dealing with statutory sick pay (as to which, see para [63]) set out a comprehensive and exhaustive body of rules and procedures by which the amount of statutory sick pay should be determined, the employment tribunal has no jurisdiction to determine disputes as to the amount of SSP owed. Instead, such disputes can only be determined by the Inland Revenue (now HMRC). It follows from this that if the employer and employee are in agreement as to the amount of statutory sick pay that is due, the tribunal would have jurisdiction to entertain the claim if the sum is not paid. If, on the other hand, there is a dispute between the employer and employee as to the amount, the tribunal will lack jurisdiction".

61 The case to which reference was made there bore out the proposition that we were precluded from deciding whether or not the claimant had been paid the correct amount of statutory sick pay.

Our findings of fact relating to the claim of unpaid wages

62 In the above circumstances we concluded that

62.1 the claimant had (see paragraphs 43.4 and 48 above) been paid his full entitlement to pay for working on 4 and 5 January 2021, so that that part of his claim for unpaid wages had to be dismissed; and

62.2 while the respondent had been entitled to deduct from the claimant's wages 7.7 hours' pay, the respondent had not been able to satisfy us on the balance of probabilities in the absence of evidence of the claimant's hourly pay during the 52 weeks up to 12 January 2021 that the rate of

pay to be deducted was £13.68. As a result, we concluded (given that the burden of proving that the deduction made was lawful was on the respondent) that the respondent had satisfied us only that it was entitled to deduct 7.7 hours of pay at the minimum applicable rate of pay, namely £10.76 per hour, which was £82.85. The respondent had instead (see paragraph 32.2 above) deducted £105.34. That was an over-deduction of £22.49, and the claimant was entitled to the payment of that sum accordingly, subject to the deduction of income tax and national insurance contributions.

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Employment Judge Hyams

Date: 3 March 2022

SENT TO THE PARTIES ON

13.3.2022
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THY
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FOR THE TRIBUNAL OFFICE