



EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 13 September 2024

Claimant: Ms McIntosh-Roffey

Respondent: Belle & Wilde Limited

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Miss Martin, Counsel

RESERVED JUDGMENT

Background

1. The Claimant worked for the Respondent for the period 1 June 2021 to April 2024, on a variable hours contract.
2. The Claimant was engaged as an Apprentice Assistant Baker, but it took a few weeks for that apprenticeship to begin, on 3 September 2021. The apprenticeship involved East Sussex College (the **College**), who assessed the Claimant's progress towards achieving the goals of that programme.
3. ACAS Early Conciliation began on 10 and ended on 12 October 2023, and the Claimant presented a Claim Form to the Employment Tribunal on 14 October 2023.
4. The Claimant's Claim Form indicated that her complaints were:
 - a) That she had not been paid for accrued but untaken holiday leave;
 - b) That she was owed other payments; and
 - c) That the Respondent had failed to provide her with itemised pay statements.

5. The Claim Form stated that the Claimant was unable to calculate definitively whether she had been paid correctly during her employment with the Respondent, as the Respondent had failed to break down the payments made to her in holiday, sick pay and basic salary by reference to hours worked.
6. Two Preliminary Hearings for Case Management followed:
 - a) On 5 April 2024, before EJ O'Neill; and
 - b) On 4 June 2024, before EJ G King.
7. The Respondent was represented in both of those hearings. In the first, it was instructed to put together a draft list of issues and send it to the Claimant for her consideration, which it failed to do. In the second, which was supposed to be a Final Hearing of the matter, because the Respondent had not done as Ordered the hearing was not effective. EJ G King noted that it was open to the Tribunal to strike-out the Respondent's Response in light of its non-compliance, but the Respondent argued that a fair trial was still possible, and it was again ordered to send to the Claimant a draft list of issues and a chronology of key events by no later than 28 June 2024.
8. The Respondent drafted a list of issues at some point after the second Preliminary Hearing, and the version that appears in the Bundle is dated 5 August 2024.

The hearing

9. The Respondent was represented in the hearing by Miss Martin, Counsel. The Claimant represented herself, and was supported by her mother, Mrs McIntosh-Roffey.
10. The Claimant is a young person (20 years of age), is dyslexic, and has clearly been very distressed by her dispute with the Respondent. The one Respondent witness, Mr Harris, was cross-examined by a combination of the Claimant and Mrs McIntosh-Roffey, which neither Mr Harris nor Miss Martin objected to. As Mr Harris was a calm and frank witness, the Employment Judge assessed that he was not disadvantaged by this approach, which seemed a reasonable adjustment to make in light of the Claimant's position and vulnerability.
11. There were some technical difficulties with the CVP platform, which regrettably delayed things, but most of the delay was caused by:
 - a) The failure to have a list of complaints and an agreed list of issues; and
 - b) A failure of the parties to have settled upon the contents of the Bundle.
12. The Respondent had prepared a hearing bundle of 261 pages in length, but it disclosed two further documents the afternoon before the hearing, entitled "Belle & Wilde – Molly McIntosh-Roffey – Holiday Pay Bank Transfer – 30th April '24", and "Holiday Calculation – Molly", and the Claimant sent:

- a) five extracts of WhatsApp conversations between her and her line manager, Alexandra Whelpton:
 - (i) Beginning on 31 December 2021 at 8:55am;
 - (ii) Beginning on 11 May 2022 at 8:13am;
 - (iii) Beginning on 26 June 2022 at 2:10pm;
 - (iv) Beginning on 29 January 2023 at 6:33pm;
 - (v) Beginning on 31 March 2023 at 10:11am;
 - b) a screenshot showing a comment from Ms Whelpton on Instagram, which was apparently a comment on a story posted by the Claimant;
 - c) an email from Richard Harris, the Respondent's Managing Director, on 25 April 2024 at 13:04 entitled "Belle & Wilde Ltd – Molly McIntosh Roffey – Accrued Holiday Pay – April '24";
 - d) email correspondence between the Claimant and Mr Harris later on 25 April 2024, by way of follow up to Mr Harris' email of 13:04; and
 - e) a further email from the Claimant on 25 April 2024, at 17:02, by way of further follow up to Mr Harris' email of 13:04.
13. Neither party objected to the application of the other to admit those further documents into the Bundle, and understanding them to be relevant to the positions the parties were taking, the Employment Judge admitted them into evidence.
14. The Tribunal was presented with witness statements from:
- a) The Claimant;
 - b) A former colleague of the Claimant's at the Respondent's organisation, Sophie Stevenson, in support of the Claimant's position; and
 - c) Mr Harris, for the Respondent.
15. Ms Stevenson was not available to provide oral evidence, but in any event neither the Respondent nor the Tribunal had any questions for her. While Ms Stephenson's evidence spoke to a lack of transparency by the Respondent about pay and holiday and underpayment of her own wages, she did not comment on the Claimant's complaints. The Respondent agreed that it had not used itemised pay statements during the Claimant's employment, some of which overlapped with Ms Stevenson's, and it admitted that it still does not use itemised pay statements. That admission meant that there was no need to consider Ms Stevenson's evidence on that point, and the remainder of Ms Stevenson's evidence was about her own complaints against the Respondent, rather than the Claimant's, and so was not relevant to the issues in this case. As Ms Stevenson was not present to be cross-examined or for Tribunal questions, her remaining

evidence (other than that there were no itemised pay statements provided to her by the Respondent) was given no weight by the Tribunal.

16. Ms Whelpton did not provide witness evidence to this Tribunal, and nor did a person from the College, Katie Parris, who seemed to be involved in the set-up of the Claimant's apprenticeship with the Respondent. As regards Ms Whelpton, Mr Harris informed the Tribunal that she is on maternity leave/holiday. No application was made on behalf of the Respondent to postpone this hearing in light of Ms Whelpton's unavailability. Instead, Mr Harris' witness statement commented on matters of which he had been informed by Ms Whelpton, and in some instances what Ms Whelpton had been informed of by Ms Parris, i.e., his evidence on many of the matters with which this claim is concerned was hearsay evidence.
17. Each of the Respondent and the Claimant made submissions in support of their respective positions.
18. The case was really poorly prepared, but while the Claimant is a litigant-in-person with dyslexia, the Respondent has been legally-represented throughout. It is evident that the Respondent has not complied with the overriding objective in Rule 2 of the Employment Tribunals Rules of Procedure 2013, which expects the parties and their representatives to "*co-operate generally with each other and with the Tribunal*". Had they done so, this matter might have been in a better state by the start of its third hearing before this Tribunal. As it was, there was insufficient time for the Employment Judge to give judgment in this matter on the day, which is why this is a Reserved Judgment.

The claims

19. After discussion taking the first half of this one-day hearing, the Tribunal understood the Claimant's complaints to be as follows:
 - a) The Claimant complains that **she was not paid for holiday** (annual leave and Bank Holidays) which she accrued during her employment with the Respondent. Specifically:
 - (i) The Claimant says that she took, but *was not paid for* 18 holiday days in 2022, and that she was entitled to take 20 days' paid holiday;
 - (ii) The Claimant says that she was entitled to, but *did not take*, two holiday days in 2022;
 - (iii) The Claimant says that she took, but *was not paid for*, the ten Bank Holiday days that fell in 2022;
 - (iv) The Claimant says that she took, but *was not paid for*, 20 days' holiday in 2023; and

- (v) The Claimant says she took but *was not paid for* the Bank Holidays that fell in 2023. There were seven that occurred in the period prior to the presentation of her Claim Form,
- i.e., the Claimant seeks compensation for 57 days' leave;
- b) The Claimant says that, while she was based at the Respondent's Bakery four days a week, it was agreed that she would work from home and there undertake her **college work** on the fifth day. (The particular day of the week that that "college work" day fell changed in the course of her employment, the Claimant says.) The Claimant says that the hours involved in that work varied, but she wrote them in the Respondent's work log book, but did not retain a record of those hours herself. The Claimant says that the Respondent was obliged to pay her for that work but did not do so, and therefore that she suffered unauthorised deductions from her wages pursuant to section 13 of the Employment Rights Act 1996 (the **1996 Act**). The Respondent says that the Claimant did not work on that fifth day, and that it has paid her for the work she performed;
- c) The Claimant was paid for the hours she worked in the Bakery throughout her employment, but there is a disagreement about **the rate of pay** which the Respondent either was obliged to pay her, or did in fact pay her, for two periods:
- (i) *In respect of the period 1 June 2021 to 2 September 2021*: The Claimant says that she should have been paid at £5/hour, whereas she was paid at £4.30/hour. The Respondent maintains that it was obliged to pay her £4.30/hour for this period, which is the rate at which the parties agree it did pay her for this period; and
- (ii) *In respect of the period 3 September to 31 October 2021*: The parties agree that the agreed rate of pay for the Claimant was £5/hour. The Claimant says that she was paid £4.30/hour for this time, and the Respondent says that she was paid £5/hour,
- and therefore the Claimant avers that she suffered unauthorised deductions from her wages in respect of these periods in breach of section 13 of the 1996 Act; and
- d) Throughout her employment the Claimant was **not provided with itemised pay statements**, in breach of section 8 of the 1996 Act.

Facts

The Claimant started to work for the Respondent, 1 June 2021 – 2 September 2021

20. As noted in the Background section above, the Claimant started working for the Respondent on 1 June 2021.

21. The practice at that time in the Respondent's bakery was that members of staff would sign in to a log book at the start of the day, and sign out at the end of the day. That log book was used by the Claimant's line manager to notify the Respondent's Accounts team of the hours the Claimant had worked, and the Claimant was then paid via the payroll. The Claimant did not keep a note of the hours she worked, and unfortunately, that log book could not be located by the Respondent, and so is not available to the Tribunal. The payslips sent to the Claimant did not identify the number of hours she worked, or the portion of the sum paid to her that related to any working day – the Claimant's payslips simply showed a single line item, "*Salary*", before itemised deductions.
22. There is a dispute between the parties about the rate at which the Claimant should have been paid in the period 1 June to 2 September 2021, with:
 - a) The Claimant saying it was £5/hour; and
 - b) The Respondent saying it was £4.30/hour (the national minimum wage rate for apprentices from April 2021).
23. A document appears in the Bundle which is an unsigned contract of employment between the Claimant and the Respondent, dated 1 June 2021 (the **Unsigned Contract**).
 - a) The Claimant says that she was not given this document until 24 July 2023, and nor was she given any other contract of employment.
 - b) The Respondent says that it is unable to find a signed copy of the Claimant's contract, but it contends that the Claimant's actions in working and receiving remuneration in accordance with the Unsigned Contract confirms it is binding and that she has agreed to its terms. The provisions from that contract that the Respondent cites in its Grounds of Resistance are from the Unsigned Contract.
24. The Unsigned Contract contained the following:
 - a) "*Your work with Belle & Wilde Limited (Company or we) will commence on 01.06.21*";
 - b) "*Your role is as an Apprentice Assistant Baker on a casual basis*";
 - c) "*Your pay will be £5.00 an hour*";
 - d) "*... the Company operates a 'no normal hours of work policy' and you may be required to work on an 'as required' basis. Your hours may vary according to the needs of the Company and your availability to work. The Company is under no obligation to provide you with work or to provide you with a minimum number of hours work each day or week. If the Company does offer you work, you are obliged to accept it*";

- e) *“You are entitled to the equivalent of 20 days paid holiday during each holiday year (excluding all bank holiday entitlement), calculated on a pro rata basis”*; and
 - f) *“We shall not pay you in lieu of untaken holiday except on termination of your work with the Company”*;
25. In oral evidence to the Tribunal the Claimant said that, prior to being given a copy of the Unsigned Contract in July 2023 her understanding was that her initial hourly rate when she started working for the Respondent in June 2021 was £4.81/hour.
26. On 8 February 2024, Katie Parris, who worked for the College, sent an email to Ms Whelpton, apparently in the context of some prior correspondence between them which is not provided. Ms Parris’ email refers to ACAS advice if an employee thinks there is an error in their payslip, and says that the Claimant did not raise an informal grievance in relation to her pay. That email included:
- “At the time the National Minimum Apprenticeship Wage was £4.30 per hour, so I was within my rights to pay this amount. Payslips will confirm this....*
- Molly was issued a contract of employment. Despite not signing it she entered into a contract by working each month, her agreed hours...”*
- This extract is odd, because it was not Ms Parris who was paying the Claimant, but the Respondent.
27. Mr Harris said that when Ms Whelpton needed documentation that the Claimant was a member of the Respondent’s team she took the Unsigned Contract and updated it from the £4.30/hour it had included to instead reflect the Claimant’s then-rate of pay, being £5/hour. However:
- a) The Claimant says that she was not provided with a copy of the Unsigned Contract until July 2023, when the parties agree her rate of pay was £7.49/hour;
 - b) Ms Whelpton was not available for the Claimant to cross-examine or for the Tribunal to question; and
 - c) Mr Harris appears to base the Respondent’s position not on what Ms Whelpton has told him, but on what Ms Parris has said in the quoted email to Ms Whelpton. Mr Harris said, in oral evidence: *“We tried to find out if we provided you with a contract of employment prior to my joining the business. We spoke to Katie Parris, Account Manager of East Sussex College, who says one was provided. I can only take her word for it. And £4.30 was the apprentice wage at the time... Alex [Ms Whelpton] contacted Katie, and we had to take Ms Parris’ testimony in good faith”*.
28. The contentions about:
- a) A contract having been provided to the Claimant at the outset of her employment appear to be based on second-hand hearsay from Ms Parris.

Despite what Mr Harris has said, Ms Parris has not given “*testimony*”, to the Tribunal’s knowledge, but rather she has replied to an email from Ms Whelpton. Ms Parris does not appear as a Respondent witness, and neither the Claimant nor the Tribunal was able to ask questions of her at the hearing because she was not proffered as a Respondent witness; and

- b) Updating a pre-existing contract was given no weight by the Tribunal. Ms Whelpton was not present to provide evidence to that effect, and Mr Harris was not around at the time.
29. This first factual dispute between the parties, about the rate of pay that should have applied to the Claimant’s work in the period 1 June 2021 to 2 September 2021, falls to be determined by the Tribunal. In effect, that question involves determining the terms that applied to the Claimant’s employment from 1 June 2021 until at least 2 September 2021, and there are three possible answers based on the evidence before the Tribunal:
- a) That the terms of the Claimant’s employment were set out in the Unsigned Contract, and the parties operated in accordance with that document even though it was not signed (the position taken by the Respondent in the Grounds of Resistance), i.e., it was £5/hour;
 - b) That the terms of the Claimant’s employment were orally agreed and, at least as regards rate of pay, varied from the terms of the Unsigned Contract, with the agreed rate being the then-applicable minimum wage rate for apprentices, i.e., £4.30/hour; or
 - c) That the terms of the Claimant’s employment were orally agreed and at variance with the Unsigned Contract, at least as regards rate of pay, and the agreed rate was £4.81/hour.
30. The Claimant claims that she suffered unauthorised deductions from her wages in this period because she should have been paid £5/hour, and she points to the Unsigned Contract as the basis for that contention.
31. The Respondent says that she was paid at the agreed rate, being that applicable to apprenticeships at the time, i.e., £4.30/hour, and it points to the email provided by Ms Parris as supporting that position.
32. However, both parties have changed their positions on this issue in the course of the litigation. The Claimant has been clear that she did not see the Unsigned Contract until July 2023, and her oral evidence to the Tribunal was that, until that time, she believed her initial hourly rate to be £4.81/hour. In its Grounds of Resistance, the Respondent quoted clauses of the Unsigned Contract when describing the terms that governed the relationship between the parties, saying that, despite the fact it was never signed, the parties operated in accordance with that agreement. The Unsigned Contract provided for an hourly rate of £5.
33. The case of *Gestmin* cautions that human memory is inherently unreliable, and in cases of conflict where contemporaneous documentary evidence is available,

that is to be preferred. While unsigned, the Unsigned Contract is dated 1 June 2021, the date the Claimant's employment with the Respondent began. Moreover, the Respondent cited the terms of that Unsigned Contract in its initial Grounds of Resistance as terms governing the employment relationship between the parties. The Tribunal prefers that documentary evidence, and the Respondent's position in its Grounds of Resistance. The Tribunal concludes that the Claimant was initially engaged at a rate of £5/hour, and that that rate applied in the period 1 June to 2 September 2021. The Tribunal notes that, for this period, the Claimant was not in fact undertaking an apprenticeship, and if the Respondent paid her £4.30/hour it would have infringed the National Minimum Wage requirements (as the Claimant was 17 years old at the time, and so the applicable minimum wage rate was £4.62/hour). This adds to the likelihood that the agreed hourly rate exceeded, rather than was less than, the legal minimum.

34. In July 2021, the Claimant stopped attending the bakery five days a week. The parties describe how this change came about differently.
- a) The Respondent says that, in July 2021, the Claimant's mother came in to the bakery and asked Ms Whelpton if the Claimant's hours could be reduced to four days a week. The Claimant disputes this.
 - b) The Claimant says that she was very tired at the outset of her employment (a side effect of her epilepsy and related medication), and that Ms Whelpton observed this and suggested that the Claimant work a day a week from home and complete her "off the job" learning (**OTJ**) on that fifth day from home.
 - (i) The Claimant says that when she first started her apprenticeship, there would be times when there were not so many things for her to do, as she needed to be trained to make recipes, etc. before she could be of more use. The Claimant says that in quiet periods she would switch on her laptop and do her OTJ learning in the bakery. Those OTJ tasks included writing up things she had learned and completing online e-learning modules set by her line manager.
 - (ii) As time went on, though, and the Claimant had learned more recipes and the bakery became busier, the Claimant said that it became more difficult for her to complete her OTJ hours when physically in the bakery. Her evidence was that, as part of this July conversation where Ms Whelpton observed that the Claimant was very tired, it was agreed between them that the Claimant would work from home one day a week to complete her OTJ hours.
 - (iii) The Claimant said that that OTJ time was initially performed on a Friday, and that she would generally (though not always) remember on the following Monday when "clocking in" via the Respondent's log book to also record the hours she worked at home doing OTJ time on the preceding Friday.

- (iv) At some point the day of the week when the Claimant did this OTJ learning from home changed to be a Monday, and she said again that she would record that OTJ time in the log book on her return to the bakery.
- (v) The Claimant's evidence to the Tribunal was that she worked around five or six hours doing OTJ work at home.
- (vi) The Claimant said that, in addition to the Respondent's log book, a second record of the OTJ she completed was maintained by her, in her log of her college work for her assessor from the College (Ken Ellis) to look at from time-to-time. However, the Claimant had not disclosed a complete copy of that log, though an extract from it, dated 26 April 2023 and included in the Bundle, records the Claimant's total OTJ hours to date as 632.

35. The second factual dispute between the parties is therefore whether the Claimant worked and was entitled to be paid for hours worked other than in the bakery. This is considered further below.

The Claimant commenced her apprenticeship with the Respondent, 3 September 2021

36. The Claimant's apprenticeship with the Respondent started on 3 September 2021, and she, the Respondent and the College entered into a Commitment Statement on that date, signed by each of them (the **Commitment Statement**). That Commitment Statement included the following:

- a) The apprenticeship programme was scheduled to last for 18 months (i.e., come to an end around March 2023);
- b) The Respondent was to provide the Claimant with a contract of employment which was to include the terms of an Apprenticeship Agreement template provided by the College;
- c) The Claimant was employed for a minimum of 30 hours a week;
- d) The apprenticeship was genuine, and was to involve a skills development programme, involving a mix of learning in the workplace, formal off-the-job training and the opportunity to practice new skills in a real work environment. "*The minimum requirement for off-the-job training is 20% off the planned hours. **Where off-the-job training is unable to take place, it must be re-arranged and must take place during paid hours (e.g. sick, holiday, non-attendance at college for day release)***" (the emboldened text is in the original); and
- e) The Claimant was to be paid at least the minimum wage for apprentices.

37. No separate contract of employment was provided to the Claimant. The Tribunal concludes, for the reasons set out in relation to the period 1 June 2021 to 2 September 2021, that the contractual terms governing the Claimant's

employment by the Respondent for this period were the Unsigned Contract. This is the logical conclusion of the fact that the Respondent undertook to provide the Claimant with a contract of employment and did not provide her with a contract at this time. The Tribunal finds that it did not do so because it considered the Claimant's employment to already be governed by the Unsigned Contract, albeit that that document had not been signed. This conclusion is supported by the fact that the parties agree that the Claimant was entitled to be paid £5/hour for this period, although that the Claimant says that she was in fact paid at the rate of £4.30/hour for September and October 2021 (a disputed fact which we will return to).

38. While the Respondent says that from July 2021 the Claimant started to work four days a week, and the Claimant says that this correlated with her performing OTJ hours for her college work, the Claimant's apprenticeship only started in September 2021. The Tribunal therefore concludes that it was only from 3 September 2021 that the Claimant was expected to work OTJ hours, and was entitled to be paid for the day she worked from home, which she described as OTJ hours. The Tribunal prefers the Claimant's evidence on the OTJ hours dispute, albeit from 3 September 2021, for the following reasons:

- a) While the Respondent disputes the Claimant's evidence, the Respondent's basis for doing so is apparently the position of Ms Whelpton. Mr Harris' witness statement records what Ms Whelpton has told him about these events, but Mr Harris' evidence is first degree hearsay (repeating what Ms Whelpton has told him about her interactions with the Claimant and the Claimant's mother), whereas the Claimant's evidence on this point is direct evidence. While the Tribunal has no reason to doubt the truthfulness of Mr Harris' recitation of what he has been told, the Tribunal has seen no copy of that evidence from Ms Whelpton, and the Tribunal does not understand it to have been given under oath or accompanied by a statement of truth. Ms Whelpton has not provided any kind of written statement to the Tribunal, and nor has she presented herself for cross-examination by the Claimant or for questions from the Tribunal.
- b) Moreover, her position is contradicted by contemporaneous documents, notably:
 - (i) The provision in the Commitment Statement that the minimum requirement for OTJ training was 20% of planned hours, which ties in with one day a week being worked from home; and
 - (ii) The record made by Mr Ellis of the College that, by 26 April 2023, the Claimant had worked 632 OTJ hours.

39. The Tribunal therefore concludes that, from 3 September 2021 the Claimant worked from home one day a week performing OTJ hours, and she was entitled to be paid for those hours.

40. While Miss Martin has said in submissions that if the Claimant noted the OTJ hours in the log book they would have been paid, the only person at the Respondent who could give evidence to that effect is Ms Whelpton, who has not produced a witness statement nor attended the Tribunal to answer the Claimant's and the Tribunal's questions. The evidence for the Respondent is given by Mr Harris, who says (in reliance on what he says he has been told by Ms Whelpton) that the Claimant worked a four-day week – which the Tribunal has already found is not correct. The Claimant says that she worked more hours than the Respondent paid her for, and that is the only direct evidence we have on that issue. The Tribunal therefore concludes that the Respondent did not pay the Claimant for her OTJ hours, and that by 26 April 2023, the number of accrued, unpaid OTJ hours worked from 3 September 2021 (when her apprenticeship began) until that date was 632.
41. The third factual dispute between the parties is the rate of pay which the Respondent used to calculate the sums it paid the Claimant during the first two months of the Claimant's apprenticeship. The Claimant says she was paid at the rate of £4.30/hour for these two months, whereas the Respondent says that it paid her at the rate of £5.00/hour.
42. The Respondent's position is flatly contradicted by its own Pay Schedule, which it provided to the Claimant in January 2024, and which appears in the Bundle (beginning at page 221). This makes it clear that the Claimant was paid at an hourly rate of £4.32 in September 2021, and £4.30 in October 2021. Thereafter the Pay Schedule indicates that the Claimant's rate of pay increased to £5/hour.

The Claimant's holiday position, 2022

43. The Respondent's holiday year follows the calendar year.
44. (The Claimant does not complain of any failure on the part of the Respondent to pay her in respect of annual leave and/or Bank Holidays in respect of the 2021 holiday year.)
45. The Claimant says that she was not paid for the 18 days of annual leave she took in 2022, nor for the two days' annual leave she was entitled to but did not take.
46. The Claimant says that she took the ten Bank Holiday days she was entitled to in 2022, but that she was not paid for those days.
47. The Respondent says that it paid the Claimant in respect of all annual leave and Bank Holidays she took.

Changes effected in 2023

48. At some point in the period January to July 2023 the Respondent changed its system for employees to record their working hours, retiring the physical clocking in/clocking out book and replacing it with an electronic system. There is a dispute between the parties as to when that change was made, with the Respondent saying it was made in January/February, and the Claimant around July, 2023.

The Tribunal does not need to determine this dispute in order to determine the Claimant's complaints.

49. The Claimant's rate of pay increased in April 2023 to £7/hour, and then again to £7.49/hour from 11 May 2023 (when the Claimant turned 19 years old). Although there was an initial error in amending the pay rate for the Claimant following her birthday, that was corrected in August 2023, and there is no complaint from the Claimant about underpayment for on-the-job hours in this period.

The Claimant requests a copy of her contract of employment, July 2023

50. The Claimant's evidence is that she did not see the Unsigned Contract until 24 July 2023, which accords with what she said to Ms Whelpton in a WhatsApp message on that date. On 24 July 2023, Ms Whelpton sent that contract to the Claimant with an accompanying email which read: "*Here you go, this was when you were on £5 and hasn't been changed so we need to do that.*"
51. The Claimant commenced a period of sickness absence on 28 July 2023, and has never returned to work at the Respondent's organisation.

The end of the Claimant's apprenticeship

52. While the Claimant's apprenticeship was anticipated to last for 18 months, which would have come to an end in March 2023, it is clear from Mr Harris' evidence that it continued after that time. His witness statement refers to:
- a) The Respondent creating a mock examination paper for the Claimant on 25 July 2023, which resulted in the Respondent requesting additional tuition and support for the Claimant from the College;
 - b) Mr Ellis attending the Respondent's premises to assess the Claimant on 1 August 2023; and
 - c) The College contacting Ms Whelpton on 4 September 2023 to inform her that, in its view, the Claimant had "*checked out*" of the apprenticeship programme.
53. This evidence supports a finding that the apprenticeship continued until at least 4 September 2023. This means that the Claimant worked OTJ hours until at least this time.

The Claimant corresponds with the Respondent's Accounts department, September 2023

54. On 21 September 2023 the Claimant wrote to a member of the Respondent's staff who works in the Accounts team and requested copies of:
- a) All timesheets for her work from June 2021 to September 2023; and
 - b) All payslips for that same period.
55. The colleague in the Accounts team replied on the same day (21 September 2023):

- a) Apparently attaching a sheet of hours that were provided by Ms Whelpton to the Accounts team for each payroll, and the subsequent payslips, but noting that only hours from February 2022 were available;
- b) Saying that the Claimant should contact Ms Whelpton for earlier hours;
- c) Acknowledging that hours are not displayed on payslips;
- d) Noting that holiday prior to October 2022 was never taken; and
- e) Observing that the Claimant carried over five days' holiday, that she had taken 10 days' holiday in 2022, leaving her with 15 days to the end of the calendar year.

The Claimant complains about not being paid correctly, October 2023

56. On 10 October 2023 the Claimant raised a formal grievance to Ms Whelpton, which included:

"I have a complaint that I have not received the correct pay since the 1st June, 2021.

I have raised this issue with you informally a number of times without success.

Please could you respond to my claim so we can rectify this and I can be paid the money I am owed.

I would be grateful if you could let me know by the end of the working week when I can meet you to talk about my grievance."

57. On the same day she contacted ACAS, and a period of Early Conciliation began, which ended on 12 October 2023.

58. The Claimant presented her Claim Form to the Tribunal on 14 October 2023.

The Claimant's holiday position, 2023

59. The Claimant says that she took, but was not paid for, her 20 days of annual leave in the 2023 holiday year, all of which was taken in the period January to June.

60. The Claimant also says that she took, but was not paid for, the Bank Holidays that fell in 2023. Seven of the nine Bank Holiday days for 2023 fell in the period prior to the presentation of the Claimant's Claim Form, and so are potentially within the scope of this claim.

61. However, in cross-examination the Claimant accepted that she had in fact been paid for holiday in:

- a) February 2023;
- b) August 2023; and
- c) May 2024,

but she maintains the calculation of those sums was done incorrectly.

The Claimant's employment with the Respondent ended, 4 March 2024

62. The Claimant's employment with the Respondent ended on 4 March 2024.

Correspondence between the College and the Claimant, April 2024

63. In April 2024 Ken Ellis of the College sent an email to the Claimant in response to a question from her which stated:

"You were on the full time, work based, apprenticeship programme, and only invited into college to cover commodities that could have risked contamination in your gluten free working environment. You... were not expected to attend [college] weekly." (The Respondent organisation is a gluten-free baker.)

Law

Contemporaneous documentary evidence versus human memory

64. Leggatt J (as he then was) made some observations on the reliability of evidence based on recollection in the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd and another* [2013] EWHC 3560 (Comm). He noted that:

- a) human memory is subjected to powerful biases, and "*such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth*";
- b) "*The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces*";
- c) "*Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go*

through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events"; and

- d) *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".*

Determining the weight to be given to hearsay evidence

65. Evidence given by a witness that is not about what happened to, or was observed by, the witness themselves is 'hearsay' evidence.
66. There are different degrees of hearsay – for example, a witness's evidence about what a claimant said to a third person, A, is first degree hearsay if A relayed that conversation to the witness. If instead it was B, who overheard the conversation between A and the claimant, and B who told the witness what was said, the witness's evidence of that conversation is second degree hearsay.
67. In determining the weight to be given to hearsay evidence the tribunal should consider:
- a) Why the person who directly participated in the event or conversation is not available to the tribunal;
 - b) The extent to which the evidence is credible (for example, whether it was made contemporaneously with the act in question, whether it is corroborated by the evidence of witnesses present at the hearing or by determinative documentary evidence);
 - c) The reliability of that evidence, for example:
 - (i) what is the degree of hearsay?

- (ii) is a statement given under oath?
- (iii) to what extent does other evidence suggest that it accurately and authentically reports what happened?
- (iv) is it a complete record of what the statement maker said on the subject, or has it been edited?
- (v) does the person in question have or did they have any motive to conceal or misrepresent matters?
- (vi) how soon after the event in question did the source inform the witness of what happened?

Entitlement to annual leave

68. Regulations 13 and 13A set out the entitlement of a worker covered by the WT Regulations to leave.

69. Regulation 13 of the WT Regulations provides that:

“... a worker is entitled to four weeks' annual leave in each leave year.”

70. Regulation 13A supplements that as follows:

“Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

...

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or
(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.”

Compensation related to entitlement to leave

71. Regulation 14 of the WT Regulations applies where:

“(a) a worker’s employment is terminated during the course of his leave year, and
(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.”

72. In other words, Regulation 14 applies where the worker’s employment has terminated in the relevant leave year, and the worker has taken more or less annual leave than their *pro rata* entitlement for the portion of the leave year they have worked.

Remedy for failure to permit leave to be taken, or to compensate for leave not taken

73. Regulation 30 of the WT Regulations describes the remedies available for breach of those regulations.

74. A worker may present a complaint to an employment tribunal that their employer:

- a) refused to permit them to take leave provided for by Regulations 13 and/or 13A; and/or
- b) failed to pay them the whole or any part of any amount due under Regulation 14.

75. Regulation 30(3) of the WT Regulations provides that where a complaint under Regulation 13 or 13A is well-founded the Tribunal *shall* make a declaration to that effect, and *may* make an award of compensation to be paid by the employer to the worker.

Unauthorised deductions from wages

76. Section 13 of the 1996 Act provides:

“(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...

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

77. Section 27 of the 1996 Act defines wages as “any sums payable to the worker in connection with his employment”, and that includes, in subsection (a), “any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.
78. The words “properly payable” in section 13(3) mean there must be some legal entitlement to the sum in question (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27).
79. A claim of unauthorised deductions is not the same as a claim for breach of contract or for misrepresentation (where damages may be awarded if the claim is successful) - rather it is a statutory claim based on an entitlement to payment which has not been made (or not made in full). This will involve a factual determination of whether the claimant had a legal entitlement to the payment in question (*Steel v Haringey LBC* EAT 0394/11).

A week's pay

80. Chapter II of Part XIV of the 1996 Act stipulates how a week's pay is to be calculated for the purposes of (among other matters) the unauthorised deduction from wages provisions.
81. Where the employee in question had no normal working hours section 224 provides:
- “(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending-*
- (a) where the calculation date is the last day of a week, with that week, and*
- (b) otherwise, with the last complete week before the calculation date.*
- (3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks if which account is taken.”*

Time limits – unauthorised deductions from wages under section 13 of the 1996 Act

82. Section 23 of the 1996 Act governs the bringing of complaints under section 13 for unauthorised deductions from wages, and that section stipulates:

“(2) Subject to the following provisions of this section, 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 reference 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.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(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.”

83. As subsection (2) clearly shows, time limits are not a mere formality – the tribunal does not have jurisdiction to hear a complaint unless the condition(s) in either subsection (2)(a) or (4) is (are) satisfied.

84. As noted in subsection (3A), section 207B of the 1996 Act extends the limitation period for bringing an unauthorised deduction from wages claim so as to facilitate conciliation between the parties before institution of proceedings on the following terms:

“(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

... ..

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

- (4) *If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*
- (5) *Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”*

85. In other words, where the limitation period for bringing an unauthorised deduction from wages claim would otherwise expire *during* a period of ACAS early conciliation, the limitation period shall be extended as prescribed by subsection (3) and/or subsection (4) where that applies.

Series of deductions

86. Whether there has been a “series” of deductions for the purpose of section 23(3) is a question of fact, requiring a sufficient factual and temporal link between the underpayments (*Bear Scotland Ltd v Fulton* [2015] ICR 221; *Chief Constable of the Police Service of Northern Ireland v Agnew* [2023] UKSC 33). The word “series” is an ordinary English word, and in the context of section 23(3) it means “a number of things of a kind which follow each other in time” (*Agnew*).
87. The case law indicates that the following factors may be relevant to whether deductions are part of a “series”:
- a) The deductions’ similarities and differences;
 - b) Their frequency, size and impact;
 - c) How they came to be made and applied; and
 - d) What links them together.

Presentation within a longer period

88. Where the three month time limit (as extended by early conciliation if appropriate) has expired, in order for the Tribunal to hear the complaint it must be satisfied both that:
- a) it was not reasonably practicable for the Claimant to bring their claim within the time limit; and
 - b) it was presented within such further period as the tribunal considers reasonable.
89. The starting assumption is that, in passing the 1996 Act in the terms it did, Parliament has set an expectation that the primary time limit is the period within which, in the ordinary course of events, it *is* reasonably practicable for would-be litigants to meet. There is also a strong public interest in claims being brought promptly.

90. The burden of proof is on the claimant to show the reason or reasons which rendered it not reasonably practicable to meet the limitation period (*Porter v Bandridge Ltd* [1978] IRLR 271).

Ignorance of fact

91. Where a claimant says that they were ignorant of a crucial fact and this made it not reasonably practicable for their claim to be presented in time, the core principles that apply to whether this rendered it not reasonably practicable to present the claim are as follows:

- a) The fact about which the claimant was ignorant must be a crucial or fundamental fact, meaning that when the claimant does learn of it, their state of mind genuinely and reasonably changes from one where they do not believe they have grounds for the claim to be one where they believe the claim is viable;
- b) The ignorance and continued ignorance must be reasonable, and the change of belief in light of that new knowledge must also be reasonable; and
- c) Whether the newly-acquired knowledge is true or not does not matter. What matters is whether it genuinely and reasonably produced the change of belief on the part of the claimant

(as per the decision of the EAT in *Cambridge and Peterborough NHS Foundation Trust v Crouchman* [2009] ICR 1306), although this is not a substitute for applying the language of the statutory test (*Post Office v Sanhotra* [2000] ICR 866).

92. When the claimant gains the requisite knowledge will be relevant to both limbs of the test in section 23(4) (*James W Cook and Co (Wivenhoe) Ltd (in liquidation) v Tipper* [1990] ICR 716).
93. Moreover, the ignorance of the fact must be the cause of the delay (*Birmingham Optical Group plc v Johnson* [1995] ICR 459).

Role of respondent in contributing to the delay

94. If the respondent caused or contributed to the delay on the part of the claimant, that will be a relevant consideration as to both *whether* it was reasonably practicable for the claimant to present their claim in time and *the duration* of the further period it was reasonable for the claimant to present that claim (*Fisons plc v Jeffries* EAT 524/97; *Andrews v Kings College Hospital NHS Foundation Trust* EAT 0614/11).

Presentation within reasonable further period

95. The second condition, that the tribunal be satisfied that the claim was “*presented within such further period as the tribunal considers reasonable*”, does not require the tribunal to be satisfied that it was presented as soon as reasonably practicable

after the expiry of the time limit (*University Hospitals Bristol NHS Foundation Trust v Williams* EAT 0291/12).

96. What amounts to the “*further period as the tribunal considers reasonable*” is a question of fact on the circumstances of the case, and involves consideration of both:
- a) the factors causing the delay; and
 - b) the period that should reasonably be allowed in those circumstances,
- in the context of the primary time limit set by Parliament and the strong public interest of claims being brought promptly (*Cullinane v Balfour Beatty Engineering Services Ltd* EAT 0537/10).

Failure to provide itemised pay statements

97. Section 8 of the 1996 Act provides that:

“(1) A worker 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.

(2) The statement shall contain particulars of:

- (a) the gross amount of the wages or salary,*
- (b) the amounts of any variable and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,*
- (c) the net amount of wages or salary payable,*
- (d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment, and*
- (e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as-*
 - (i) a single aggregate figure, or*
 - (ii) separate figures for different types of work or different rates of pay.”*

98. The remedy for a failure to provide one or more itemised pay statements is a declaration from the Tribunal to that effect (section 12(3) of the 1996 Act). Where the Tribunal finds that any unnotified deductions have been made in the 13 weeks immediately preceding the presentation of the Claim Form, it may also make a monetary award in respect of those, which is not to exceed the aggregate of those deductions (section 12(4)).

Adjustment to awards of compensation for unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures

99. Pursuant to s207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**), awards in respect of complaints of (among other things):

- a) unauthorised deductions from wages;
- b) a failure to pay a statutory redundancy payment;
- c) unfair dismissal – just the compensatory award; and
- d) breach of the WT Regulations,

may be increased or decreased by an amount which the tribunal considers “*just and equitable in all the circumstances*”, up to a maximum uplift or reduction of 25% if the tribunal considers that there has been an unreasonable failure on the part of the employer (prompting an increase) or employee (prompting a decrease) to comply with the ACAS Code of Practice on disciplinary and grievance procedures (the **ACAS Code**).

Application to the claims here

Unauthorised deductions in respect of annual leave not taken by the Claimant in 2022

100. Part of the holiday pay claimed by the Claimant relates to two days she says she did not seek to take in 2022. The Tribunal has no jurisdiction to determine a complaint in respect of those days, because both the Claimant’s contract and Regulation 14 of the WT Regulations only entitle the Claimant to compensation in respect of that leave when her employment terminates. The termination of the Claimant’s employment post-dated this claim.

101. The Claimant presented her claim on 14 October 2023. This preceded the termination of her employment, and so the Tribunal has no jurisdiction in this claim to consider her complaints that she accrued, but did not take and was not paid in lieu of holiday in 2022. Regulation 14 of the WT Regulations only applies where a worker’s employment has terminated, and at the time of the presentation of the Claim Form the Claimant’s employment had not terminated. She has not since made an application to amend to include those complaints.

Unauthorised deductions in respect of annual leave and Bank Holidays taken by the Claimant in 2022 and 2023

102. The burden of proving that unauthorised deductions were made from the Claimant’s wages in the months when took annual leave and when bank Holidays fell in 2022 and 2023 lies with the Claimant. Her position was made difficult by the opacity of the Respondent’s payslips. The Respondent’s position is that the simple line item “salary” in the months when annual leave and/or Bank Holidays were taken included payments for those days.

103. However, the Tribunal was taken to a payslip for August 2023 by Miss Martin's cross-examination of the Claimant. That payslip shows a line item for "holiday pay", which, as the Claimant agreed, related to some of the holiday the Claimant took, and all of the holiday the Claimant told Ms Whelpton about in a WhatsApp message in August 2023. The fact that no other payslip for 2022 or 2023 contains any line item for holiday pay supports the Claimant's contention that she was otherwise not paid holiday pay in 2022 or 2023, either in respect of her annual leave or Bank Holidays.

- 2022

104. Mr Harris is not able to provide direct evidence on this question, as Ms Whelpton was the Claimant's line manager, and so Ms Whelpton was responsible for managing her holiday leave. Mr Harris says Ms Whelpton informed him that no holiday was taken by the Claimant in the period June 2021 to December 2022. This is highly unlikely as a factual matter, and in any event is contradicted by direct evidence from the Claimant that she did take that leave. The Tribunal prefers the Claimant's direct evidence on this point, and finds that she did take the leave she says she took.

105. In light of the dearth of documentary evidence on this point, the strongest evidence is the absence of "holiday pay" line items from all payslips save for August 2023 (which shows that the Respondent did delineate holiday pay in payslips), and so the Tribunal finds that the Claimant was not paid at the time for annual leave or Bank Holidays she took in 2022, i.e., for 18 days' annual leave and for ten days of Bank Holidays.

106. The Tribunal notes Mr Harris' evidence that, given the Respondent's belief that the Claimant took no annual leave in 2022 and the provision in the Unsigned Contract that employees could only roll-over a maximum of five days' annual leave, that the Respondent paid the Claimant for five days' annual leave rolled over from 2022 on 4 March 2024. The Tribunal has seen the evidence to support Mr Harris' position on this, and concludes that the Claimant was paid for five days' holiday on the presumption that a day's holiday should be calculated by reference to six hours' work, and at an hourly rate of £7.49, when the Claimant's hourly rate for 2022 was £5/hour. The unauthorised deductions from the Claimant's wages in respect of the annual leave and Bank Holidays she took in 2022 needs therefore to be reduced by the sum of £224.70 that was paid to her by the Respondent in April 2024 in respect of annual leave for 2022.

107. As for what sums should have been paid to the Claimant, because the Claimant had variable earnings, section 224(2) of the 1996 Act indicates that the appropriate rate of pay for a day's pay for the Claimant should have been arrived at by looking at her earnings in the 12 week period preceding the annual leave dates. The information available is not sufficiently precise (because hours worked are given on a monthly, not weekly, basis), but the value of the underpayments can be calculated by looking at the number of working weeks in the relevant

month and pro-rating the hours to four complete weeks. The OTJ hours also need to be added to the Respondent's figures.

108. The unauthorised deductions for 2022 annual leave and Bank Holidays may be calculated as shown below:

Month annual leave / Bank Holiday taken	Preceding 3 months' hours	Preceding 3 months' hours adjusted for OTJ hours	Preceding 3 months' hours with OTJ hours, pro-rated where more than 4 working weeks in month	Average weekly hours over that 12 week period	Average daily hours (5 day working week)	Daily rate of holiday/Bank Holiday Pay	Number of days' leave taken in month by Claimant	Value of leave
January 2022	140.25, 140.25, 116.75	172.25, 172.25, 148.75	172.25, 153.11, 148.75	39.51	7.90	7.90 x £5 = £39.51	14	£553.13
April 2022	127.15, 123.25, 83.20	159.15, 157.25, 115.20	141.47, 157.25, 115.20	34.49	6.90	6.90 x £5 = £34.49	2	£68.99
May 2022	150.25, 127.15, 123.25	182.25, 159.15, 155.25	182.25, 141.47, 155.25	39.91	7.98	7.98 x £5 = £39.91	2	£79.83
June 2022	90.85, 150.25, 127.15	122.85, 182.25, 159.15	122.85, 182.25, 141.47	37.21	7.44	7.44 x £5 - £37.21	3	£111.64

Month annual leave / Bank Holiday taken	Preceding 3 months' hours	Preceding 3 months' hours adjusted for OTJ hours	Preceding 3 months' hours with OTJ hours, pro-rated where more than 4 working weeks in month	Average weekly hours over that 12 week period	Average daily hours (5 day working week)	Daily rate of holiday/Bank Holiday Pay	Number of days' leave taken in month by Claimant	Value of leave
September 2022	110.25, 67.95, 82.25	142.25, 99.95, 114.25	126.44, 99.95, 101.56	37.33	5.47	5.47 x £5 = £37.33	1	£37.33
October 2022	137.00, 110.25, 67.95	169.00, 142.25, 99.95	150.22, 126.44, 99.95	31.38	6.28	6.28 x £5 = £31.38	6	£188.31
December 2022	129.25, 91.25, 137.00	161.25, 123.25, 169.00	143.33, 123.25, 150.22	34.73	6.95	6.95 x £5 = £34.73	2	£69.47
TOTAL								£1,108.70
Less sum paid								£884.00

- 2023

109. As above, save for the holiday pay paid to the Claimant in August 2023, the Tribunal finds that the Respondent failed to pay the Claimant for annual leave and Bank Holidays in 2023.
110. The Respondent paid the Claimant £486.85 gross for holiday pay in August 2023, which the Claimant accepted in cross-examination correlated to the annual leave days she informed Ms Whelpton she took in May and June 2023. However, the Claimant says that this did not take account of the Bank Holidays that fell in that period, or indeed in any of 2023, and that she miscalculated the days she told Ms Whelpton about. The Claimant also says that she took annual leave and leave on Bank Holiday dates outside of those two months.
111. While the Claimant should have told Ms Whelpton the correct number of annual leave days she took in May and June 2023, the Respondent should not be able to avoid responsibility for paying her appropriately for annual leave by the Claimant's miscalculation, not least because the Claimant is dyslexic, and the Tribunal has observed her difficulty with reading and understanding numbers in this hearing.
112. The Tribunal finds that the Respondent did not pay the Claimant for:
 - a) Any of the nine Bank Holidays that fell in 2023; or
 - b) Ten days of annual leave.
113. Again, the evidence from Mr Harris that the Respondent paid the Claimant in April 2024 in respect of 18 days' annual leave from 2023 is accepted, so credit needs to be given for the sum of £808.92 paid in respect of this.
114. As for 2022, the sums that should have been paid to the Claimant depends on the Claimant's weekly wage in the 12 week period preceding the annual leave dates. As for the 2022 calculations, the information available for 2023 hours worked is not sufficiently precise (because hours worked are given on a monthly, not weekly, basis), but the value of the underpayments can be calculated by looking at the number of working weeks in the relevant month and pro-rating the hours to four complete weeks. The OTJ hours also need to be added to the Respondent's figures.
115. The unauthorised deductions for 2022 annual leave and Bank Holidays may be calculated as shown below:

Month annual leave / Bank Holiday taken	Preceding 3 months' hours	Preceding 3 months' hours adjusted for OTJ hours	Preceding 3 months' hours with OTJ hours, pro-rated where more than 4 working weeks in month	Average weekly hours over that 12 week period	Average daily hours (5 day working week)	Daily rate of holiday/Bank Holiday Pay	Number of days' leave taken in month by Claimant	Value of leave
January 2023	157.00, 129.25, 91.25	189.00, 161.25, 123.25	189.00, 143.33, 123.25	37.97	7.59	7.59 x £5 = £37.97	7	£265.76
February 2023	72.00, 157.00, 129.25	104.00, 189.00, 161.25	104.00, 189.00, 143.33	36.36	7.27	7.27 x £5 = £36.36	4	£145.44
April 2023	114.50, 123.00, 72.00	146.50, 155.00, 104.00	130.22, 155.00, 104.00	32.44	6.49	6.49 x £7 = £45.41	2	£90.82
May 2023	81.00, 114.50, 123.00	113.00, 146.50, 155.00	113.00, 130.22, 155.00	33.19	6.63	6.63 x £7.49 = £49.66	2 not paid	£99.32

Month annual leave / Bank Holiday taken	Preceding 3 months' hours	Preceding 3 months' hours adjusted for OTJ hours	Preceding 3 months' hours with OTJ hours, pro-rated where more than 4 working weeks in month	Average weekly hours over that 12 week period	Average daily hours (5 day working week)	Daily rate of holiday/Bank Holiday Pay	Number of days' leave taken in month by Claimant	Value of leave
June 2023	89.75, 81.00, 114.50	121.75, 113.00, 146.50	121.75, 113.00, 130.22	30.41	6.08	6.08 x £7.49 = £45.54	3 not paid	£136.62
September 2023	39.58, 139.75, 78.00	71.58, 171.75, 110.00	63.63, 171.75, 97.78	27.76	5.55	5.55 x £7.49 = £41.57	1	£41.57
TOTAL								£779.53
Less sum paid								- £29.39

116. The Claimant also says that the holiday pay she did receive in August 2023 pertaining to some annual leave taken in May and June 2023 was too low an amount.
117. At the time, the applicable hourly rate of pay for the Claimant was £7.49/hour, so the paid sum of £486.85 equates to 65 hours, so the Respondent assumed the appropriate number of hours to pay the Claimant for in respect of each day's annual leave was 6.5.
118. Section 224(2) of the 1996 Act indicates that the appropriate rate of pay for a day's pay for the Claimant should have been arrived at by looking at her earnings in the 12 week period preceding the annual leave dates. The information available is not sufficiently precise, but:
- a) The hours the Respondent says the Claimant worked in the three month period preceding May 2023 were 123.25 (February 2023), 114.50 (March 2023) and 81.00 (April 2023);
 - b) Those calculations neglect the OTJ hours the Claimant worked, found by the Tribunal to be 32 a month, so that increases the monthly hours to 155.25 (February 2023), 146.50 (March 2023) and 113 (April 2023);
 - c) While February 2023 was a four-week month, March 2023 was a 4.5 working week month, so pro-rating that for a 4-week period comes to 130.22 (being $(146.50/4.5) \times 4$), and April 2023 was a four working week month; and
 - d) Taking those together, that would result in weekly hours over those three months of 33.21, equating to daily hours worked of 6.5.
119. The Tribunal therefore finds that the Claimant should have been paid for her **May 2023** annual leave on the basis of a 6.5-hour working day, which is how the Respondent paid her. There was no underpayment in respect of those hours.
120. Using a similar process for the Claimant's June 2023 leave:
- a) The Respondent's records indicate the Claimant worked 114.50 hours in March 2023, 81.00 hours in April 2023 and 89.75 hours in May 2023;
 - b) These numbers neglect the OTJ hours which need to be added in, so March 2023 hours go to 146.5, April 2023 hours go to 113, and May 2023 hours go to 121.75;
 - c) Because March 2023 was a 4.5 working week month, the hours for those assumed four weeks need to be pro-rated, which adjustment takes March 2023's hours to 130.22. April 2023 was a four-working-week month, and May 2023, while a 4.5 week month, had three Bank Holidays in 2023, so an adjustment is not required to that month's hours for them to represent four working weeks' hours; and

- d) Taking those together, that would result in weekly hours over those three months of 33.21, equating to daily hours worked of 6.5.
121. The Tribunal therefore finds that the Claimant should have been paid for her **June 2023** annual leave on the basis of a 6.5-hour working day, which is how the Respondent paid her. There was no underpayment in respect of those hours.
122. The Tribunal has therefore found that in 2022 and 2023 the Respondent made unauthorised deductions from the Claimant's pay in respect of annual leave and Bank Holidays the Claimant took to the aggregate sum of **£854.61 gross**.
123. The Respondent contends that the Claimant's complaints of these unauthorised deductions was presented out of time, and this is considered below.

Unauthorised deduction from wages for OTJ hours

124. As noted in the Facts section above, the Tribunal finds that the Respondent did not pay the Claimant in respect of OTJ hours, when those hours were worked and it was obliged to do so.
125. Given the Respondent's loss of the log book, the only evidence as to the number of hours the Claimant worked by way of OTJ hours comes from the Claimant in oral evidence, and from the extract of the Claimant's log book from 23 April 2023, which recorded the number of OTJ hours to that point as 632 hours.
126. The Respondent should not avoid having to compensate the Claimant for hours she worked because the Respondent has lost the relevant records, so taking the 632 hours to roughly the end of April 2023 as a guide, that would amount to around 32 OTJ hours a month (the apprenticeship having commenced at the beginning of September 2021). The Claimant worked a further three months before commencing a period of sick leave on 28 July 2023, so if it is assumed that she continued to work OTJ hours at a similar rate, that would amount to a further 96 OTJ hours, bringing the total OTJ hours for which she was not paid to 728.
127. In this period, the parties agree that the Claimant was entitled to be paid at the following hourly rates:
- a) September 2021 to March 2023: £5/hour;
 - b) April 2023: £7/hour; and
 - c) May 2023 to July 2023: £7.49/hour.
128. The 632 OTJ hours the Claimant had accrued to 23 April 2023 would, in the main, have been payable at £5/hour, save for those worked in the month of April 2023. We do not have records of the number of OTJ hours worked in each month, but if it is assumed that 32 OTJ hours were worked in a month, as the Claimant had worked three out of four of the weeks that fell in April 2023 at the time of her meeting with Mr Ellis, so $\frac{3}{4} \times 32$ is 24. The Tribunal therefore considers it

reasonable to calculate the value of the sums due in respect of those unpaid OTJ hours as follows:

- a) 632 minus 24 would provide the OTJ hours worked in the period 3 September 2021 to the end of March 2023. Those 608 OTJ hours were payable at £5/hour, so £3,040 gross;
 - b) The OTJ hours for April 2023 were payable at £7/hour, so 32 hours at £7/hour comes to £224; and
 - c) The OTJ hours for May to July 2023 were payable at £7.49/hour, so £719.04.
129. The value of the unauthorised deduction from wages complaint in respect of the OTJ hours is therefore **£3,983.04 gross** in aggregate.
130. The Respondent contends that the Claimant's complaints regarding these unauthorised deductions are out of time. This is considered further below.

Unauthorised deduction from wages for incorrect rates of pay

131. As noted in the Facts section above, the Tribunal has found that while the Claimant was paid at the rate of £4.30/hour for the period 1 June to 2 September 2021, she was in fact entitled to be paid at the rate of £5/hour.
132. While the parties agree that from September 2021 onwards the Claimant was entitled to be paid £5/hour until her rate increased in April 2023, the Tribunal has also found that the Claimant was paid at the rate of £4.32/hour for the hours the Respondent considers she worked in September 2021, and £4.30/hour for the hours it says she worked in October 2021.
133. The Pay Schedule document in the Bundle shows that the Claimant:
- a) Worked 97 hours in June 2021, and was paid at the rate of £4.30/hour;
 - b) Worked 159 hours in July 2021, and was paid at the rate of £4.30/hour; and
 - c) Worked 112.25 hours in August 2021, and was paid at the rate of £4.32/hour.
134. For these months, therefore, the Claimant was underpaid by:
- a) £67.90 for June 2021;
 - b) £111.30 for July 2021; and
 - c) £76.33 for August 2021,
- each on a gross basis.
135. September 2021's hours are not broken down by day, but in any event, this spreadsheet indicates that all of September 2021's 162.25 hours were paid at the rate of £4.32, when the Respondent confirmed to the Tribunal in this hearing that

the Claimant was entitled to be paid at £5/hour. Therefore the Claimant was underpaid for those hours by £110.33 on a gross basis.

136. Similarly, this spreadsheet says that October 2021's 116.75 hours were also underpaid, at a rate of £4.30/hour rather than the £5/hour the Respondent agrees the Claimant was entitled to. This represents an underpayment of £81.73.
137. In aggregate, this amounts to an underpayment of **£447.59 gross** for the period June to October 2021.

Failure to provide itemised pay statements

138. As the Respondent accepts, the Tribunal finds that the Respondent failed to give the Claimant pay statements in accordance with section 8 of the 1996 Act throughout her employment. In particular, the Respondent failed to comply with the obligation in section 8(2)(e) of the 1996 Act to set out the number of hours the Claimant worked. In light of the evidence available, the Tribunal finds that the hours the Claimant worked in the bakery were as set out in the Pay Schedule included in the Bundle, both hours worked also included the OTJ hours that the Claimant worked and was entitled to be paid in the period 3 September 2021 to 28 July 2023. The true number of hours that should have been recorded on itemised pay statements in that period should have included those OTJ hours.
139. Section 12(4) of the 1996 Act provides that, where the Tribunal finds that there were unnotified deductions from the Claimant's pay in the 13-week period preceding the presentation of the Claimant's Claim Form, the Tribunal may make an award in respect of those unnotified deductions. The 13-week period prior to the date the Claimant presented her Claim Form on 14 October 2023 looks back to 15 July 2023. The Claimant does not complain to this Tribunal of any deductions from her pay to 27 July 2023, and thereafter she was paid Statutory Sick Pay. The Tribunal does not understand the Claimant to have complained to this Tribunal of any unnotified deductions in this 13-week period.
140. The declaration set out above is therefore the Claimant's only remedy in respect of this breach, but the Tribunal observes that had the Respondent complied with this obligation then the numerous errors which riddled the Respondent's approach to the payment of the Claimant could have been caught and corrected, and this litigation, and the consequent significant distress this has caused the Claimant, could have been avoided. The Tribunal notes with dismay Mr Harris' evidence that the Respondent has not yet corrected this inadequacy and illegality in its practice - it should take steps to do so forthwith.

Time limits

141. The Tribunal does not have jurisdiction to consider the Claimant's complaints for unauthorised deductions from her wages unless, as required by section 23 of the 1996 Act, either:

- a) they were presented within three months of the deduction complained of (section 23(2)) or, in the case of a series of deductions, within three months of the last in that series (section 23(3)), as amended by the Early Conciliation process; or
 - b) the Tribunal finds both that:
 - (i) it was not reasonably practicable for those complaints to be brought within that timeframe; and
 - (ii) the Claimant presented her Claim within a further reasonable period.
142. The Respondent contends that the Claimant has not satisfied either of those options, and therefore that the Tribunal does not have jurisdiction to consider her complaints. The Claimant says that she struggled to get the underlying information from the Respondent – in effect, that she was ignorant of the fact they had made the unauthorised deductions because she did not receive itemised payslips.

Unauthorised deductions in respect of annual leave and Bank Holidays taken by the Claimant in 2022 and 2023

143. These were a series of deductions (being attributable to the same failure by the Respondent to recognise that the Claimant should be paid for her annual leave and Bank Holidays). Although the Respondent did recognise its obligation to pay the Claimant for annual leave in July 2023, making a payment in August 2023, that did not sever the connection between the failure to pay the Claimant for annual leave and Bank Holidays that preceded and post-dated that August 2023 payment.
144. The last failure in this series occurred in September 2023, so by virtue of section 23(3) of the 1996 Act, these complaints were brought within the time period required by section 23.

Unauthorised deductions in respect of OTJ hours

145. Again, these were a series of deductions, as they occurred month-on-month from the start of the Claimant's apprenticeship to its conclusion, which were attributable to the same failure by the Respondent to recognise that the Claimant should be paid for the OTJ hours she worked.
146. As found in the Facts section above, the Claimant's apprenticeship did not conclude until at least 4 September 2023. Her claim form was presented just over a month later, and so within the time period required by section 23.

Unauthorised deductions in respect of incorrect rates of pay

147. 1 June to 2 September 2021: These deductions were a "series" for the purpose of section 23(3), but they risk falling foul of section 23(4A) of the 1996 Act, because they occurred more than two years before the date the Claimant

- presented her Claim Form, unless they form a series with the deduction made in respect of the Claimant's October 2021.
148. 3 September to 31 October 2021: These deductions were erroneous, due to a failure of the Respondent to update the rate that, in the course of these proceedings, it agrees applied to the Claimant's pay from the date she commenced her apprenticeship. However, the Tribunal has found that the £5/hour rate applied from the commencement of the Claimant's employment, and there was no change that was effected at the start of her apprenticeship. The Tribunal therefore concludes that the deductions that were made 1 June to 31 October 2021 were part of the same "series", being attributable to the same error by the Respondent. Consequently, the last deduction in the series occurred within two years of the presentation of the Claim Form, and therefore section 23(4A) does not apply.
149. The last in this series was more than three months before the presentation of the Claim Form (as adjusted for ACAS Early Conciliation). The last in the series was just under two years before the Claim Form was presented, which leaves the question of whether these series of deductions satisfies section 23(2):
- a) Was it reasonably practicable for the Claimant to present her claim for these deductions in time?
 - b) If not, did she present her claim within such further period as was reasonable?
150. The Tribunal concludes that it was not reasonably practicable for the Claimant to present her claim for these deductions in time. She did not have itemised payslips, and nor was she told of the hours that the Respondent used to calculate the payments made to her until January 2024 (which would have enabled her to recognise the erroneous hourly rate used) – quite a considerable time after the payments were made.
151. Moreover, the Claimant's ignorance of the essential fact of her pay rate was reasonable:
- a) She was working on the understanding that the Respondent would honour the terms agreed between them;
 - b) The Respondent had failed to provide the Claimant with a statement of written particulars until it produced those in July 2023, and even then that was only 'half the picture', as the Claimant did not have itemised pay statements to calculate the rate of pay the Respondent had used when paying her;
 - c) She had taken no copy of the entries she made in the Respondent's log book, and nor was it required by the Respondent that she do so, and nor would it be reasonable to assume that she did. The fact that the Respondent used a paper-based log book inherently recognised that there

was a single record of the hours worked, and that was kept in the possession of the Respondent;

- d) The Claimant is dyslexic, and this was her first employment. It is perfectly reasonable that she should not notice subtle (though important) errors in her pay;
 - e) When the Claimant began to suspect that she had been underpaid, she asked for the requisite records, but as the Respondent had not produced itemised pay statements it gave her insufficient information to understand what had happened; and
 - f) When she raised a grievance about this in October 2023, the Respondent did not act on it.
152. As to whether the Claimant presented her claim within such further period as was reasonable, the Tribunal finds that she did. The evidence of Mr Harris was that the Pay Schedule which has been used by the Tribunal to understand the rates of pay and the hours of work used by the Respondent when paying the Claimant was only provided to the Claimant in January 2024. Prior to that the Claimant had payslips which, throughout her employment, did not identify the number of hours she was understood by the Respondent to have worked. The Claimant began to become suspicious about whether she had been under-paid in September 2023, when she began to correspond with the Respondent's Accounts department. She did not receive satisfactory replies to her queries, and presented her Claim Form the month following that. The Tribunal finds that she did present her Claim Form within such further period as was reasonable, as from September 2023 she became aware that her enquiries of the Respondent were not adequately answered.
153. Consequently, the Tribunal finds it does have jurisdiction to consider the Claimant's complaints for unauthorised deductions from her wages in respect of the wage rate errors from 1 June to 31 October 2021.

Adjustment to awards of compensation for unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures

154. Complaints for unauthorised deductions from wages are within the scope of section 207A and Schedule A2 of TULRCA, and so can be increased by up to 25% if the Tribunal considers there has been an unreasonable failure on the part of the employer to comply with the ACAS Code, or decreased by up to 25% if the Tribunal considers there has been an unreasonable failure on the part of the employee to comply with that Code.
155. Here, it is evident that the Claimant raised a grievance on 10 October 2023, and the Tribunal has seen no evidence that the Respondent even acknowledged that grievance or did anything to act upon it. The Respondent's failure to comply with the ACAS Code was not reasonable.

156. The Respondent has said that the Claimant raised this grievance at the same time as she contacted ACAS to commence Early Conciliation, but that did not relieve the Respondent of the responsibility to respond to that grievance. If it had done so, it is possible that this litigation could have been avoided.
157. The Tribunal finds it has the power to uplift the award to the Claimant, and that it is appropriate to do so in the circumstances. In light of the Respondent's failure to provide itemised pay statements and her commencement of ACAS Early Conciliation, it was more important that it respond to the Claimant's grievance. At that point the Claimant was still employed by it, and there was the prospect of salvaging their relationship. The Respondent failed to take it.
158. When considering the appropriate size of the uplift, the Tribunal has considered the size of the overall award to the Claimant (just over £5,000 before the uplift), and the relatively small size of the Respondent's business. The Tribunal also considers the fact that the Respondent has continued to fail to rectify its non-compliance with section 8 of the 1996 Act a relevant factor. This means that its other employees who are subject to variable pay arrangements also will not be able to understand how their pay has been calculated, or identify any errors made by the Respondent.
159. In those circumstances, the Tribunal has concluded that a 15% uplift is appropriate.

Conclusions

160. The Respondent owes the Claimant the following sums:
- a) £854.61 gross in respect of annual leave and Bank Holidays taken but not paid;
 - b) £3,983.04 gross in respect of unauthorised deductions from the Claimant's wages in respect of OTJ hours; and
 - c) £447.59 gross in respect of unauthorised deductions from the Claimant's wages for incorrect hourly rates of pay,
- which comes to £5,285.24 gross in aggregate, and this sum is increased by 15% to reflect the Respondent's failure to comply with the ACAS Code in respect of the Claimant's October 2023 grievance.
161. The Respondent must therefore pay the Claimant the aggregate sum of **£6,078.03 gross**.

Employment Judge Ramsden

Date 29 October 2024

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