EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100041/2017

Hearing Held at Dundee on 11 and 12 April 2017

Employment Judge: Mr C Lucas (sitting alone)

Dr Gavin W Wood	**Claimant** **Present but not represented**
People's Dispensary for Sick Animals	**Respondent** **Represented by:** **Mr M O'Carroll** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is in two parts, namely,-

Firstly, that the Claimant's claim that, contrary to the provisions of Section 13 of the Employment Rights Act 1996, the Respondent made a deduction from his wages in circumstances where no such deduction was required or authorised to be made by virtue of a statutory provision or a relevant provision of his contract or in respect of which the Claimant had not previously signified, in writing, his agreement or consent to the making of the deduction has failed and is dismissed.

And, -

Secondly, that the Claimant's claim that on 20 October 2016 the Respondent breached his contract by removing his full car allowance is dismissed because it

is a claim which, in the circumstances of this case, and given the terms of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, an Employment Tribunal does not have jurisdiction to consider.

REASONS

Background

1. In a form ET1 presented to the Tribunal Office on 14 January 2017 – (hereinafter, "the ET1") – the Claimant made two discrete claims.

2. The first of the Claimant's claims was that as his employer the Respondent had made an unfair deduction from his wages, the explanation tendered in the ET1 in support of that contention being that such unfair deduction of wages had been "brought about by the reduction of my car allowance, without my agreement" in the circumstance that (such) allowance "was an express term of my employment contract and not subject to a variation clause." The ET1 referred to such alleged deduction from the Claimant's wages as having taken effect when, "on 20th October 2016 my contract was breached and my full car allowance removed".

3. The second of the Claimant's claims – (implicit within the wording of rather than specifically stated within the ET1) - related to an alleged breach of contract on 20 October 2016 when, it was alleged, the Claimant's "full car allowance" was removed after he had "repeatedly refused to accept the contract changes imposed upon me" and he was told that "if I didn't agree to the changes to my existing contract I would be dismissed without re-engagement".

4. The remedy that the Claimant sought in respect of his claims was compensation only, the Claimant setting out at Section 9.2 of the ET1 that -

> *"I have worked for my employers for fifteen years and intend to continue in my role until my retirement. Currently, my state retirement date is April 2037; however in the Autumn Statement of 5th May 2013 the Chancellor advised that the state pension age is expected to rise to 68*

by the mid-2030s. This gives me an expected retirement date of April 2038. The loss of my car allowance gives me a financial loss of £1267 per year; payable from Oct 2016 to April 2038.

ie a sum of: £27,342

The tribunal issue fee is: £160

The tribunal hearing fee is: £250

The total compensation due is therefore: £27,752".

5. Within Section 9.1 of the ET1 a box had been ticked to indicate that if the Claimant was claiming discrimination he was seeking a recommendation. But no allegation of discrimination was made elsewhere within the ET1 and when accepting the ET1 the Tribunal Office had not considered that any claim of discrimination on any ground had been implicit within, or could be inferred from, the ET1. The ET3 had not made any reference to the Claimant's ticking of the box within Section 9.1 of the ET1.

6. In a form ET3 received by the Tribunal Office on 15 February 2017 and in a paper apart annexed to and deemed by the Tribunal to form part of that form ET3 – (which documents are hereinafter, collectively, referred to as "the ET3") – the Respondent resisted the Claimant's claims in their entirety. It was stated in the ET3 that the Respondent denied that the Claimant had made any unlawful deduction from the Claimant's wages, as alleged or at all, and it was denied that the Respondent had breached the Claimant's contract of employment, as alleged or at all.

7. After some negotiation among the Claimant, the Respondent's solicitors and the Tribunal an Employment Judge directed that the Claimant's claims as set out in the ET1 should be considered at a Final Hearing on 11 and 12 April 2017 and such a hearing was scheduled by the Tribunal Office and took place as scheduled on those dates.

8. When the case called for Final Hearing at 10:00 am on 11 April the Claimant was present but not represented. The Respondent was represented by Mr O'Carroll.

9. On that first day of the Final Hearing of the Claimant's claim, at a stage prior to any evidence being led and when preliminary discussions were taking place among the Claimant, the Respondent's representative and the Employment Judge the Claimant confirmed both that he was not pursuing any claim that he had been discriminated against by the Respondent on any ground which an Employment Tribunal has jurisdiction to consider and that the only breach of contract that he was alleging was the service by the Respondent of notice of removal of the "full" car allowance that he felt that he was contractually entitled to and its replacement with effect from 20 October 2016 by a reduced-value car allowance.

10. It was also confirmed by the Claimant that his claim that the Respondent had made unauthorised deductions from his wages related to the reduction in the amount of car allowance payable to him after 19 October 2016, a reduction which took effect from and including 20 October 2016 and which was ongoing.

11. These matters having been discussed on that first day of the Final Hearing of the Claimant's claim, i.e. at a stage prior to any evidence being led, the Respondent's representative submitted that on the face of the papers before the Tribunal – [papers which included the Claimant's ET1 – (from which it was apparent that the Claimant alleged that his employment with the Respondent had begun on 7 January 2002 and was still continuing) - and the ET3 – (which referred to the Claimant's contract as having been varied so far as the amount of the car allowance payable to the Claimant was concerned)] – , and given the provisions of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 – (particularly Articles 3 and 7 of that Order) - , an Employment Tribunal did not have jurisdiction to consider the breach of contract claim made by the Claimant in the ET1.

12. In support of that submission the Respondent's representative referred the Tribunal to the guidance given by the Court of Appeal in the case of **Southern Cross Healthcare Co Limited v Perkins and Others.** In that case it had been determined that an Employment Tribunal's breach of contract jurisdiction under the

Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 – [which was the equivalent of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994] – "was confined to claims arising or outstanding on the termination of the contract and was not available during the subsistence of the contract".

13. By referring the Tribunal to that determination as made in that case of **Southern Cross Healthcare Co Limited v Perkins and Others** the Respondent's representative was relying on Article 3(c) of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 which, in itself, makes it clear that proceedings may be brought before an Employment Tribunal in respect of a claim - (other than the claim for damages or for a sum due in respect of personal injuries) - of an employee for the recovery of damages or any other sum if, amongst other criteria, "the claim arises or is outstanding on the termination of the employee's employment", but only if that criterion is satisfied.

14. After discussion among the Respondent's representative, the Claimant and the Employment Judge the Tribunal gave guidance to the Claimant that, *on the face of it*, there was substance in the submission being made by the Respondent's representative and that, *on the face of it*, the Tribunal did not have jurisdiction to consider the breach of contract claim being made by the Claimant. ***[Note:** as matters progressed at the Final Hearing of the Claimant's claim, specifically as evidence was given by the Claimant and by witnesses called to give evidence on his behalf, it became apparent that there was, at best, some confusion in the mind of the Claimant as to whether his period of employment with the Respondent had continued, unbroken, throughout the period which had begun on 7 January 2002 and which had continued to the Final Hearing of his claim or whether there had been a period of employment which had begun on 7 January 2002 and had ended on 19 October 2016 with a separate period of employment thereafter beginning on 20 October 2016 and continuing to the Final Hearing of his claim. The Findings In Fact section of this Judgment and the Discussion section of this Judgment both seek to clarify the Tribunal's findings in respect of such confused – (and at times confusing) – matter.]*

15. The Final Hearing of the Claimant's claim proceeded on the basis that the Tribunal was considering two claims made by the Claimant in the ET1, i.e., firstly, a claim that the Respondent had breached Section 13 of the Employment Rights Act 1996 by making an unauthorised deduction from his wages and, secondly, that the Respondent had breached its contract with him in circumstances which, by application of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, gave the Tribunal jurisdiction to consider such a breach of contract claim.

16. During the course of the scheduled, two days', Final Hearing of the Claimant's claim the Tribunal heard evidence from the Claimant and from two witnesses who were in attendance in compliance with Witness Orders granted by the Tribunal at the Claimant's request. No direct evidence-in-chief was given by any witness called by the Respondent to give evidence, the explanation for this being that one, perhaps both, of the witnesses attending in compliance with the Witness Orders were witnesses who the Respondent would otherwise have called to give evidence.

17. After evidence had been heard, closing submissions were made by, respectively, the Claimant and by the Respondent's representative.

18. In his closing submissions the Respondent's representative again invited the Tribunal to consider and to take into account the decision in the case of **Southern Cross Healthcare Co Limited v Perkins and Others** and made reference to the decision in the case of ***Wetherill v Birmingham City Council*** as well as to the provisions of the Employment Rights Act 1996, particularly Section 13 of that Act, and of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, particularly Article 3 of that Order.

Findings In Fact

19. Having heard evidence from and on behalf of the Claimant, and having considered documents in "Bundles" respectively provided by the Claimant and on behalf of the Respondent – (the contents of both of which Bundles were accepted as productions by the Tribunal and were referred to in evidence even although the Bundles respectively contained essentially the same documents) – the Tribunal found the following facts, all relevant to the Claimant's claims as set out in the ET1, to be admitted or proved.

20. The Respondent is a charity which, from a number of premises throughout the United Kingdom, provides veterinary services to sick and injured animals. One such premise was the Respondent's pet hospital in Dundee – (hereinafter, where the context permits, "the Dundee Pet Hospital") - where the Claimant was based.

21. The Claimant is a Veterinary Surgeon whose present hours of work at the Dundee Pet Hospital are 22.75 hours per week but who, in addition to those "core" hours provides an out-of-hours, "on call", service to the Respondent at and from the Dundee Pet Hospital, such out-of-hours cover being provided on an out-of-hours emergency-rota basis. Although working only three days per week at the Dundee Pet Hospital the Claimant undertakes a full share of out-of-hours night work during the week, out-of-hours work on Saturdays and Sundays and Bank Holidays, i.e. a "full" share of such out-of-hours work rather than a share calculated pro-rata to his three days per week work at the Dundee Pet Hospital.

22. On or about 5 December 2001 the Respondent provided the Claimant with a Statement of Terms and Conditions of Employment – (hereinafter, "the Claimant's Contract").

23. No other terms and conditions of employment or contract have/has ever been provided, whether in written or in any other readable format, by the Respondent to the Claimant, i.e. at any time since the Claimant's employment with the Respondent began on 7 January 2002.

24. The Claimant's Contract confirmed that the Claimant's employment with the Respondent began on 7 January 2002.

25. Under the heading "Hours" the Claimant's Contract stated that "You must live within 15 miles of, or 30 minutes from, the base PetAid Hospital and must be prepared to travel to any other PetAid Hospital included in the on-call rota where applicable".

26. Under the heading "Car" the Claimant's Contract stated that "A car allowance of £2,520 p.a. is payable to Veterinary Surgeons, and to part-time Veterinary Surgeons who take a full share in out of hours rotas".

27. As one of the Respondent's Veterinary Surgeons the Claimant is required to be available to make home visits and therefore needs to have a car available to him with which to make visits to patients who for any reason are unable to attend at the Dundee Pet Hospital.

28. Under the heading "Relief Cover" the Claimant's Contract stated that "In exceptional circumstances, Veterinary Surgeons may be required to work at any PetAid Hospital located within 25 miles by road of their base PetAid Hospital ….." and that "Veterinary Surgeons may also be required to provide relief cover at PetAid Hospitals beyond this distance for up to 20 working days per annum, should the need arise".

29. The Claimant's understanding of the car allowance paid to Veterinary Surgeons by the Respondent was that "it was to cover petrol, wear and tear and business-insurance cover", i.e. "general motoring costs".

30. Mr Andrew Cage is the Senior Veterinary Surgeon at the Dundee Pet Hospital, a role which means that he spends approximately half of his time doing clinical veterinary work and half of his time carrying out management duties. He has been employed by the Respondent at the Dundee Pet Hospital for some 37 years. His understanding of the car allowance payable to the Respondent's Veterinary Surgeons is that "historically, it was paid to all vets who did on call work" and was "part of the remuneration" payable to such Veterinary Surgeons.

31. Mr Terence Allan is the Respondent's Area Veterinary Manager for Scotland. He has overall responsibility for the Dundee Pet Hospital. He considers that car allowances paid to Veterinary Surgeons were "a benefit" which "was not related to out-of-hours work worked" but which was "a 'perk' of the job". He even speculated that a Veterinary Surgeon would receive a car allowance even if he or she did not have a car provided only that he or she had a driving licence.

32. Both before 20 October 2016 and after 19 October 2016 the car allowance paid by the Respondent to the Claimant was subject to PAYE Tax and Employee NIC deductions.

33. On 16 February 2016 the Claimant's line manager, Mr Cage, had a meeting with the Claimant at which, acting on the instructions of the Respondent, he told the Claimant that the Respondent proposed to reduce the amount of his car allowance.

34. At that meeting Mr Cage told the Claimant that the reason for such proposed reduction was the Respondent's intention to create consistency among the Respondent's Veterinary Surgeons so far as which Veterinary Surgeons received what car allowances was concerned.

35. Mr Cage was also aware that such wish on the part of the Respondent to achieve "fairness" and "consistency" had arisen in the context of the Respondent having carried out an overall view of the expense of providing the service that it did but he does not recall whether, at the time, he shared that insight with the Claimant.

36. In the context of Veterinary Surgeons working at the Dundee Pet Hospital there were three for whom "a downward adjustment" in car allowances were to be made, one of these being the Claimant.

37. At the time of that 16 February meeting Mr Cage had not been aware that in terms of the Claimant's Contract the Claimant, as a part-time Veterinary Surgeon who

took a full share in out-of-hours rotas, was entitled to the same amount of car allowance as any full-time Veterinary Surgeon employed by the Respondent.

38. Following that meeting between him and the Claimant on 16 February Mr Cage, still acting on the instructions of the Respondent, wrote to the Claimant referring to what had been discussed at the meeting earlier in the day and setting out explanations which included, -

> *"At the meeting I explained that PDSA has been reviewing some of the allowances, bonuses and supplements that are currently being paid to employees and in particular have been focusing on situations where there appears to be an anomaly.*
>
> *I explained that although you are a part time employee you are currently in receipt of a car allowance of £3156 p.a. which is the amount paid to full time staff receiving the allowance.*
>
> *I went on to explain that allowances for part time staff are paid pro rata to their contracted hours however we acknowledge that there have been situations in the past where it may have been agreed that some part timers can retain the full allowance. However as part of the current review we are addressing all of these anomalies in order to be consistent with all colleagues who are in receipt of a car allowance.*
>
> *I explained therefore that in order to align your car allowance with that of other part time colleagues we are providing you with three months notice from today that your car allowance will be paid pro rata to your weekly hours.*
>
> *This means that from 16 May 2016 your car allowance will be reduced to £1889.45 p.a."*

39. Mr Cage wrote to the Claimant again on 24 February 2016. That, later, letter was in substantially the same terms as the 16 February letter but this time included additional wording and a signature and date template. The additional wording, inserted above the signature and date template, was, "There are two copies of this letter, please sign both copies of the letter in acceptance of the change, and return one copy to Human Resources Shared Services."

40. Following receipt by the Claimant of these 16 and 24 February letters there was a flurry of correspondence between him and Mr Cage and three "individual consultation" meetings took place. Those three individual consultation meetings involved them both and, at times, one of the Respondent's Human Resources Advisers.

41. During the course of such correspondence and meetings Mr Cage, as the Respondent's representative at such meetings and someone writing on behalf of the Respondent, consistently made it clear to the Claimant that although the meetings taking place – (or in contemplation) - were regarded by the Respondent as being part of a consultation process such process was "a consultation process", not "negotiation".

42. Notwithstanding the Respondent's expressed position that such process was a consultation process, not negotiation, during the course of the first and second individual consultation meetings the Claimant was invited to express his views as to alternative ways in which the Respondent's desire to achieve consistency and fairness might be achieved and took advantage of such opportunity by setting out alternative proposals.

43. Those alternative proposals were considered by the Respondent but rejected by it.

44. When, following individual consultation meetings on 25 March and 25 April, Mr Cage – (acting on behalf of the Respondent and following instructions from it) - wrote to the Claimant inviting him to attend the third individual consultation meeting – (a meeting proposed for 5 May 2016) - "to discuss this matter further" he stated, "At the meeting we will continue to discuss this matter and seek to find a solution", that "this will include me providing feedback regarding your concerns, challenges and questions" and that "…. if you are not prepared to accept the proposed changes to your car allowance, we may have little option but to serve you with notice to terminate your current contract (dismissal) and offer re-engagement on new terms and conditions".

45. The third individual consultation meeting took place, as scheduled, on 5 May 2016, i.e. some 11 days before the car-allowance-reduction date of 16 May which had been referred to in the Respondent's 16 February letter.

46. The notes of the 5 May third individual consultation meeting disclose that the Respondent again made it clear at such meeting that "this is a consultation process not negotiation", that "the rationale for consulting to change car allowance was to address anomalies in order to be consistent with all colleagues who are in receipt of car allowance" and – (but) - that "there is the opportunity to put forward alternative proposals which should they be accepted would be applicable to all affected individuals".

47. The notes of the third individual consultation meeting also disclose that, in response to concern being expressed by the Claimant that if he was dismissed and accepted re-engagement on a new contract he would "effectively be considered as a new employee", Mr Cage reassured him that "your service will be unaffected should you accept the changes to your terms and conditions", that "all other terms and conditions will remain the same, including your salary and your positioning within the salary banding", that "the consultation regarding your car allowance does not affect your service or pension provision", that "you will not lose any of your annual leave entitlement", that "your service would be unaffected and continuity retained, that "you won't be subject to a probation period", that "your contract would remain as is (apart from car allowance, so will continue to be permanent and you would retain your continuity of service", that "all other terms and conditions of employment would remain the same" and that "it is only the section regarding car allowance that would change".

48. Later on 5 May 2016, following on from the third consultation meeting, the Claimant submitted a "Letter of Formal Grievance". He admits that he did so "very much as a point of principle" and with the clear intention of using the grievance procedure as "a way to take it higher up the chain".

49. On 19 May 2016 the Respondent wrote to the Claimant referring to his 5 May grievance letter and inviting him to attend a grievance hearing on 1 June 2016. The 19 May letter explained that the grievance hearing would be chaired by the Respondent's Area Veterinary Manager, Mr Allan, and that the Respondent's Regional Human Resources Advisor, Mrs Bowes, would be in attendance "as procedural advisor".

50. The letter of 19 May explained to the Claimant that "You have the right to be accompanied at the meeting by a work colleague or trade union representative" and that "The purpose of the meeting is to allow you to explain your grievance and discuss with Terry how it can be resolved".

51. A grievance hearing took place, as scheduled, on 1 June 2016 – (and, where the context permits, is hereinafter referred to as "the Grievance Hearing"). The Claimant was present but chose not to be accompanied by a work colleague or trade union representative. As anticipated, the Grievance Hearing was conducted by Mr Allan. Mrs Bowes was in attendance as note taker.

52. The Grievance Hearing ended with Mr Allan confirming to the Claimant that he hoped to be able to respond to the Claimant's grievance the following week.

53. After further correspondence and attendance by the Claimant at a "Grievance Outcome" meeting, the end-result of the grievance process was that the Claimant's grievance was substantially – (although not entirely) – unsuccessful, Mr Allan advising the Claimant that "… none of your alternative suggestions met the business rationale which was to remove the anomaly which presently exists and treat all part time Veterinary Surgeons consistently in terms of the car allowance", that "I do not believe that the proposal to change your car allowance to be pro-rata based on the hours that you work when the Pet Hospital is open is unlawful", that "given there is no link between OOH/on call work and car allowance, the fair and right thing to do is to treat all part-time Veterinary Surgeons in the same way", "that the car allowance benefit is paid on a pro-rata basis" and that the Respondent hoped that the Claimant would "accept the PDSA's rationale for the change",.

54. The Claimant appealed against the Grievance Hearing outcome. An appeal hearing took place on 1 July 2016 – (and, where the context permits, is hereinafter referred to as "the Appeal Hearing").

55. The Appeal Hearing was chaired by the Respondent's Area Veterinary Manager, Mr Moody, and the Respondent's Regional HR Advisor, Ms Mannion, was in attendance "as procedural advisor".

56. When writing to the Claimant on 23 June 2016 inviting him to attend the Appeal Hearing the Respondent had made it clear that the Claimant had the right to be accompanied at the Appeal Hearing by a work colleague or trade union representative but the Claimant chose not to be accompanied at it either by a work colleague or by a trade union representative.

57. In all its aspects, the Claimant's appeal against the Grievance Hearing outcome failed.

58. Mr Moody wrote to the Claimant on 15 July 2016 explaining the outcome of the Appeal Hearing. So far as the Respondent's proposal to reduce the amount of the car allowance payable to the Claimant was concerned that letter – (hereinafter, "the Appeal Hearing Outcome Letter") - explained that Mr Moody believed that "the PDSA entered the consultation process in good faith and hoped to reach agreement without the need to dismiss and re-engage", that "there is a clear business rationale as to why" the Respondent intended to reduce the car allowance, that Mr Moody agreed that "any financial disadvantage 'must be weighed against the interests of fairness and treating everyone in the same circumstances equally'", that "PDSA believes the correct thing to do is to remove the anomaly which presently exists and treat all part time Veterinary Surgeons consistently in terms of the car allowance", that "… the upset this may cause you … must be balanced with the need to pursue the business rationale in the face of fairness and consistency", that "any reduction made to your car allowance would be done in a fair way", that "you will be given the appropriate 12 week notice for

this change to come into effect, which I believe is an appropriate adjustment time to allow you to prepare and budget for the reduction" and that "… therefore I do not uphold this point of your appeal". When closing the Appeal Outcome Letter, Mr Moody explained that "this is the final stage of the appeals process in accordance with the PDSA's Grievance Procedure and you have no further right of appeal".

59. On 21 July 2016 Mr Allan wrote to the Claimant inviting him to attend a fourth individual consultation meeting. When doing so he referred to the Grievance Hearing and its outcome, to the appeal against the Grievance Hearing's outcome and to the outcome of the Appeal Hearing itself.

60. The letter of 21 July stated that "At the meeting we will continue to discuss this matter and seek to find a solution". It advised the Claimant that Mr Allan would chair the fourth individual consultation meeting which was proposed for 27 July 2016 and that when chairing such meeting he, Mr Allan, would "be supported by Ronene Bowes, Regional Human Resources Advisor". The Claimant was told that he might be accompanied to the meeting by a workplace colleague or trade union representative if he wished.

61. That letter of 21 July, although an invitation to attend a fourth individual consultation meeting, made it clear that "… if you are not prepared to accept the proposed changes to your car allowance, we may have little option but to serve you with notice to terminate your current contract (dismissal) and offer re-engagement on new terms and conditions".

62. The fourth individual consultation meeting took place, as scheduled, on 27 July 2016.

63. After hearing the Claimant's point of view at such 27 July meeting Mr Allan adjourned the meeting briefly and once he had reconvened it he told the Claimant what the outcome of that meeting had been. The notes of that fourth individual consultation meeting narrate, -

"TA confirmed that following due consideration of the matter, and as GW was still not in agreement to the change that TA is serving notice on GW's current contract of employment and offering immediate reengagement on the new terms. The appropriate notice given GW's length of service is 12 weeks so last day on this contract will be 19 October 2016 and new contract start on 20 October 2016".

64. Mr Allan's understanding of the outcome of the 27 July meeting was that the Claimant was given notice that unless he accepted the proposed variation in car allowance before the end of the 12 weeks' notice period being given then his employment with the Respondent would terminate on 19 October 2016. He insists that his understanding on this point is to be tempered or explained by his belief that at any time prior to 20 October 2016 the Claimant could voluntarily accept a change to his car allowance payments with the consequence that any such acceptance would result in the notice of dismissal automatically being withdrawn by mutual agreement.

65. On 4 August 2016 Mr Allan wrote to the Claimant. That letter was headed "Final Consultation Meeting – Outcome Letter", referred to the meeting on 27 July 2016 as having been "your final 1:1 consultation meeting" and contained a paragraph which stated, -

"During the process we have reviewed your alternative suggestions to our proposals and responded in full to your questions, concerns and queries. However, as you have declined to agree to the changes that we have sought to make to your contract of employment, and no suitable alternatives are apparent, I gave you twelve weeks' notice that your current contract of employment is to be terminated. Your last day of employment on your current terms and conditions will therefore by Wednesday 19 October 2016."

66. Mr Allan's 4 August letter went on to state that, -

"I have enclosed an offer on the revised terms and conditions re car allowance and ask you to sign and return a copy should you wish to accept these. If you do accept this offer, during the notice period, your

continuity of employment will be unaffected and this notice of termination will be treated as withdrawn by mutual consent. However, a copy must be received by Ronene Bowes, HR Advisor, by Friday 19 August 2016.

If your signed agreement to the revised terms has not been received by Friday 19 August 2016 your employment will end upon the expiry of your notice period on Wednesday 19 October 2016".

67. Mr Allan's 4 August letter ended by stating "You have the right to appeal against this decision" and by explaining to whom, by when and in what form such an appeal must be made.

68. Under the heading "Enc:", Mr Allan's 4 August letter referred to "New employment terms and conditions re car allowance" being enclosed but there was no enclosure, as such, only a table appearing under Mr Allan's signature which stated, -

"Change of contract

Job title:	*Veterinary Surgeon*
Place of work:	*PDSA Pet Hospital, Dundee*
Effective date of change:	*Thursday 20 October 2016*
Car allowance:	*Will be paid pro rata to your weekly hours to £1889.45 p.a.*

Your employment will be counted as continuous from your initial date of joining for the purposes of calculating holiday and sick pay entitlements. All other terms and conditions remain the same."

69. In a separate letter dated 4 August 2016, Mrs Bowes, the Respondent's Regional HR Advisor, wrote to the Claimant referring to the fourth/final consultation meeting on 27 July. She referred to various documents, including Mr Allan's 4 August letter, as being "Enclosures" sent with *her* – (the Tribunal's emphasis) - letter and, referring to Mr Allan's letter, stated, -

*"**Outcome Letter** – this is the letter from Terry Allan, to confirm the outcome from your last meeting. Please sign and return a copy should you wish to accept the changes. If you do accept this offer, during the*

notice period, your continuity of employment will be unaffected and this notice of termination will be treated as withdrawn by mutual consent."

70. In the context of a request made by the Claimant at the fourth/final consultation meeting for an updated version of his then-existing contract, Mrs Bowes stated in her letter of 4 August, -

"… you requested a copy of your new contract. The original contract that you have (effective January 2002) is your contract of employment, albeit that amendments will have been made to it over the course of the years you have worked for PDSA.

As we are only proposing a change the car allowance section of your contract, if you agree to the change, you will retain your continuous employment and therefore a new contract would not be applicable. However, I have taken the opportunity to summarise some of the key terms and conditions for you as a reminder, I hope that this provides the clarity that you requested."

71. Mr Allan's understanding of the Claimant's request made at the fourth/final consultation meeting for a new contract was that the Claimant was asking for an updated version of his then-existing contract and that such request was not related in any way to the discussions about possible dismissal and re-engagement. So far as he was concerned "it was a piece of contractual housekeeping" which was "not related to dismissal and re-engagement".

72. The Claimant accepts that when he asked Mr Allan for an updated contract, a new contract, what he was asking for was an updated version of his then-existing contract and that he made such request "because my contract was 14 or 15 years old and out of date" and because "I felt it was the appropriate time to have an up to date contract". He accepts that his concern at that time and, in that context, was "to get a tidying-up exercise carried out" and nothing more than that.

73. The Claimant accepts that over the period which began when he received Mr Cage's 16 February 2016 letter and which continued until, at the earliest,

10 August 2016 the Respondent had engaged in a consultation process with him, a consultation process which had included four one-to-one consultation meetings, the Grievance Hearing and the Appeal Hearing, and that although the Respondent had, from time to time, made it clear that what it was involved in was consultation, not negotiation, ample opportunity was afforded to him to put his point of view, his alternative proposals, forward for consideration by the Respondent on the basis, as made clear by the Respondent, that any alternative proposal put forward by him and accepted by it would be applied across the board to all Veterinary Surgeons in a similar position to him.

74. Notwithstanding that he had been told in Mr Allan's 4 August letter that he had the right to appeal against the outcome of the fourth/final consultation meeting the Claimant never appealed against that decision in the way that Mr Allan's 4 August letter told him that he needed to do if he wished to appeal against that decision.

75. On 10 August 2016 the Claimant signed a copy of Mr Allan's 4 August letter and returned it to the Respondent. He did so following a telephone conversation with Mr Allan.

76. Mr Allan's recollection of his 10 August telephone conversation with the Claimant was that the Claimant had made it clear to him that although he disagreed with what the Respondent was doing so far as reduction in car allowance was concerned he would sign a copy of Mr Allan's letter to signify acceptance of the alteration to the particular term of his existing contract which related to the amount of car allowance payable.

77. When, on 10 August, the Claimant returned a copy of Mr Allan's 4 August letter to the Respondent, a copy which he had signed as if in acceptance of its terms, he annotated the signed acceptance template with the words "Accompanying letter attached". What he did, in fact, when returning the copy of the 4 August outcome letter with its signed acceptance template, was to attach a note addressed to Mr Allan which he headed "Accompanying letter for new contract acceptance" and which included the statements or explanation that, -

"At my final consultation meeting on Wednesday 27th July 2016, you gave me notice of dismissal and offered me re-engagement with the society with amended contractual terms (from 19th October 2016). At this meeting, I specifically requested that a new contract should be drawn up for me to sign – as the current one is archaic and has not been honoured by the society for this very reason. Both you and I agreed that this was the appropriate way forward. …"

And, -

"During our telephone discussion today, you agreed that this was indeed the outcome of the final consultation meeting between us and the logical way forward."

And, -

"In a letter dated 4th August … Ronene Bowes has … written … to say that a new contract is not applicable. … Furthermore, Ronene writes: if I accept a new contract from the society my notice of termination will be withdrawn by mutual consent. Again, this is not what was agreed. Both parties agreed that dismissal and re-engagement was the way forward. The fact that I have been re-engaged does not negate the fact that I have been dismissed; nor does it mean the society cannot be held responsible in a claim for unfair dismissal."

And, -

"Today I have agreed to sign a new contract of employment with the society under protest to ensure my continuous employment. This in no way means I agree with the unilateral imposition of changes to my existing contract which I consider to be both a professional breach of good faith and an unlawful reduction in wages."

78. On 7 September 2016 Mr Allan responded to the Claimant's 10 August covering note. When responding he made it clear that although the outcome of the 27 July meeting had been service on the Claimant of termination of "your contract, as it stands" … "with effect from 19 October 2016" the Respondent's position was that, -

"In my letter dated 4 August 2016, we again offered you the opportunity to agree to the new terms in relation your car allowance, during the notice period, which you signed on 10 August 2016.

As you have signed this document during your notice period, you have accepted the variation to your contract and therefore as detailed in my letter the notice has been withdrawn by mutual consent. Therefore, your dismissal will not come into effect."

And, -

"In summary, as you have signed to accept the changes, the notice period is withdrawn and your dismissal will not come into effect. You will retain your continuous employment in your role as Veterinary Surgeon, Dundee, with the following amendment as outlined below;

<u>Change of contract</u>

Job title:	*Veterinary Surgeon*
Place of work:	*PDSA Pet Hospital, Dundee*
Effective date of change:	*Thursday 20 October 2016*
Car allowance:	*Will be paid pro rata to your weekly hours to £1889.45 p.a.*

All other terms and conditions remain the same."

79. Further correspondence between the Claimant and Mr Allan followed. In a letter dated 29 September Mr Allan told the Claimant that, - "… in summary, your dismissal did not have the opportunity come into effect, you are still employed by PDSA and your car allowance amount will be reduced with effect from 20 October 2016. I trust that this letter responds to the points that you raise, draws a line under the matter and enables us to move forward, as this now concludes our internal processes".

80. The Claimant has continued to work for the Respondent throughout the period which included his receipt of Mr Allan's 4 August letter and his receipt of Mr Allan's 29 September letter. He has continued to work for the Respondent throughout the period which began on 20 October 2016. He has continued to work right up to the end of the Final Hearing of his claim. He has neither tendered resignation on a

basis which might have enabled him to follow such tendering of resignation with a claim of constructive unfair dismissal nor has he ever claimed actual unfair dismissal.

81. With effect from 20 October 2016, and continuing to the end of the Final Hearing of his claim, the Claimant has suffered a reduction in his overall remuneration package but at no time during the period which began with Mr Cage's letter of 16 February 2016 to him and ended on 19 October 2016 did the Claimant suffer any deduction from his wages or, more generally, any reduction in his remuneration package.

82. The Respondent's position is that the change to the Claimant's overall remuneration package which applied from and including 20 October 2016 was authorised by the Claimant on 10 August 2016 at which stage any earlier notice of termination of the Claimant's employment was withdrawn by mutual consent.

83. During the course of giving evidence to the Tribunal, specifically in response to a question put to him by the Employment Judge, the Claimant confirmed that his position is that his employment with the Respondent has comprised one continuous period which began on 7 January 2002 and has continued, without break – (specifically, without any break at or about 19 or 20 October 2016) - to the end of the Final Hearing of his claim. As the Claimant put it, "I began work in January 2002 and that same employment is in place now". When providing that confirmation to the Tribunal and to the Respondent's representative the Claimant apologised for having unintentionally given the Tribunal or the Respondent's representative any impression that his position was anything other than that.

The Issues

84. The Tribunal identified the issues which it considered to be relevant to the Claimant's complaint that the Respondent, as his employer, had made a deduction from wages payable by it to him as being, -

- Whether on any occasion during the period which had begun on 7 January 2002 and which had continued to 19 October 2016 there had been any deduction made by the Respondent from wages properly payable to him on that occasion.
- Whether on any occasion during the period which had begun on 20 October 2016 and had continued to close of the Final Hearing of the Claimant's claim there had been any deduction made by the Respondent from wages properly payable to him on that occasion.
- Whether, on any occasion during either such period, any deduction made from wages properly payable to the Claimant on that occasion was a deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract or was one to which the Claimant had previously signified, in writing, his agreement or consent.
- If there had been any deduction from wages properly payable to the Claimant on that occasion which was neither required or authorised to be made by virtue of a statutory provision or relevant provision of the Claimant's contract or a deduction to which the Claimant had not previously signified, in writing, his agreement or consent, what the date when such deduction was made had been and what the amount of such deduction had been on that occasion.
- If there had been an unauthorised deduction from the Claimant's wages what the appropriate remedy for the Tribunal to apply is.

85. The Tribunal identified the issues which it considered to be relevant to the Claimant's, *esto*, complaint that the Respondent breached his contract by removing his full car as being, -

- Whether, given the provisions of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, particularly Articles 3 and 7 of that Order, an Employment Tribunal has jurisdiction to consider any such complaint, this being a matter which will require the Tribunal to make a

determination of whether, and if so when, the employment to which such claim relates had been terminated.

- If the Tribunal has jurisdiction to consider any such claim of breach of contract what the term of the Claimant's contract that had been breached was and what the date of such breach had been.
- If the Tribunal finds that there had been such a breach of contract what the appropriate remedy for the Tribunal to apply is.

The Relevant Law

A. Legislation

- The Employment Rights Act 1996, particularly Sections 13 and 27
- The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, particularly Articles 3 and 7

B. Case Law

- Southern Cross Healthcare Co Limited v Perkins and Others, 2011 ICR 285 CA.
- Harris and Russell Limited v Slingsby, 1973 ICR 454 NIRC.
- Brock v Minerva Dental Limited, 2007 ICR 917.
- Birmingham City Council v Wetherill and Others, 2007 IRLR 781.

Discussion

86. The Tribunal considers that it is neither necessary to paraphrase or summarise within this Judgment all of the evidence that it heard nor appropriate to refer, in detail, to all of the documents to which the witnesses spoke when giving evidence. But lest it might be considered to have overlooked evidence on which the Claimant placed reliance it wishes to record that there were aspects of the evidence given by the Claimant and/or which he sought to obtain at examination of other witnesses that it, the Tribunal, considered it to have so little bearing on the case before it that, looked at after close of the Final Hearing, the arguments developed by the Claimant with regard to such evidence might, with the benefit of hindsight, be viewed as arguments which did no more than confuse the main issue. Those lines

of evidence included reference to what the Claimant meant when asking for a "new contract", whether he had, or had not, accepted the proposed variation to the terms of his then-existing contract on 10 August and what, if any, deduction from his wages had been made by the Respondent on any occasion. The Tribunal wishes to stress that it does not wish to infer that the Claimant was guilty of obfuscation or that he deliberately sought to mislead the Tribunal. To the contrary, the Tribunal was greatly impressed by the way in which the Claimant conducted himself throughout the Final Hearing of his claim, i.e. both when giving evidence and when, as a self-represented party, examining witnesses called by him. The fact remains, however, that in the view of the Tribunal a great deal of the evidence led was not relevant to a determination of either of the claims made by the Claimant in the ET1.

87. The Tribunal does, however, consider that it is appropriate to add some explanation to the Findings in Fact set out in detail earlier in this Judgment by making reference to some of the oral evidence, to some of the productions and to some of the closing submissions made by, respectively, the Claimant and the Respondent's representative and, by doing so, to put the findings in fact relevant to each aspect of the Claimant's claim into context when applying the relevant law to that element of the Claimant's claim.

88. Section 13 of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") – states that, -

> *"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.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting

"wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

Not the least important part of that section is the section which refers to "wages properly payable" by an employer to the worker on a particular occasion.

89. Section 27 of ERA 1996 defines "wages" as meaning, -

"(1) ….. any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,

[(ca) [statutory paternity pay] under Part 12ZA of that Act,

(cb) statutory adoption pay under Part 12ZB of that Act,]

[(cc) statutory shared parental pay under Part 12ZC of that Act,]

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc),

(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,

[(fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act,]

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act

or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker.

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

(4) In this Part "gross amount", in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.

(5) For the purposes of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is—

(a) of a fixed value expressed in monetary terms, and

(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things)."

90. Such wording of begs the question of whether, in the circumstances of the present case, the car allowance referred to in the Claimant's Contract and throughout the Final Hearing of the Claimant's claim fell within the Section 27 definition of "wages" for the purposes of application of Section 13 of ERA 1996. But that question of whether, in the circumstances of the present case, the car allowance referred to in the Claimant's contract and throughout the Final Hearing of the Claimant's claim fell within the definition of "wages" for the purposes of application of Section 13 of ERA 1996, although begging to be answered, is not one which, in the circumstances of the present case, the Tribunal has found it necessary to answer.

91. Article 3 as contained in the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 makes it clear that an Employment Tribunal only has jurisdiction to consider claims for breach of contract if certain criteria are met, the Article stating that, -

"Proceedings may be brought before an industrial tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if —

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment."

92. Article 7 as contained in the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 endorses that condition, that criterion that the claim must be

one which arises or is outstanding on the termination of the employee's employment, by making it clear that the time limits which are applicable are time limits beginning with "the effective date of termination of the contract giving rise to the claim" or "beginning with the last day upon which the employee worked in the employment which has terminated".

93. It is not for the Tribunal to pass comment on whether the reduction in car allowance was fair or whether it was a repudiatory breach of a fundamental term of the Claimant's contract entitling him to claim constructive dismissal or whether the Claimant should have treated his contract as having been brought to an end and claimed actual dismissal. The Claimant has acknowledged that although he knew that all of these were possibilities open to him he consciously chose not to go down any of those routes but chose only to claim unauthorised deduction from wages and, on an *esto* basis, breach of contract relating to the same, reduction-of-car-allowance, issue.

94. In essence, there is little dispute about what happened during the period which began early in February 2016 and continued until the date of presentation of the ET1 – (and has continued since then right up to and including close of the Final Hearing of the Claimant's claim) - , i.e. little dispute of fact. But the Claimant's discrete claims raise fundamental issues of law. During the course of the Final Hearing and as a result of submissions made it became apparent to the Tribunal that so far as the Claimant's claim that the Respondent has made unauthorised deductions from wages properly payable to him is concerned the fundamental legal issue is whether or not there was, in law, any unauthorised deduction from his wages and that so far as his claim that the Respondent breached his contract is concerned the fundamental legal issue is whether there is any basis in law which would give an Employment Tribunal jurisdiction in terms of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 to consider such a claim.

95. The Tribunal considers that it is expedient and appropriate to consider these legal matters in the reverse order, i.e. to deal with the jurisdiction issue arising from the Claimant's, *esto*, breach of contract claim first.

96. As alluded to earlier in this Discussion section of this Judgment, a great deal of time at the Final Hearing of the Claimant's claim was spent in seeking to unpick the tangled knot that was the issue of whether there had been any break in the Claimant's employment at any time during the period which had begun on 7 January 2002 and had continued until close of the Final Hearing of the Claimant's claim. If there had been no break in that employment, i.e. if the employment on which the Claimant's, *esto*, breach of contract, claim was based had not terminated, then no Employment Tribunal has jurisdiction to consider that element of the Claimant's overall claim as made in the ET1.

97. As set out in the Findings In Fact section of this Judgment the Claimant eventually confirmed that his position is that his employment with the Respondent has comprised one continuous period which began on 7 January 2002 and has continued, without break, specifically without any break at or about 19 or 20 October 2016, to the end of the Final Hearing of his claim, that "I began work in January 2002 and that same employment is in place now".

98. Mr Allan's evidence was that his understanding of the outcome of the 27 July meeting was that the Claimant was given notice that unless he accepted the proposed variation in car allowance before the end of the 12 weeks' notice period being given then his employment with the Respondent would terminate on 19 October 2016. He insists that his understanding on this point is to be tempered or explained by his belief that at any time prior to 20 October 2016 the Claimant could voluntarily accept a change to his car allowance payments with the consequence that any such acceptance would result in the notice of dismissal automatically being withdrawn by mutual agreement. And it was clear that the Respondent believed that the previously-issued notice of intention to terminate the Claimant's employment on 19 October, even the expressed service of a notice of termination of the employment on that date, had been withdrawn by mutual consent once the Claimant had signed and returned a copy of Mr Allan's 10 August letter.

99. During the course of the Final Hearing there was a lot of confusion about the basis on which the Claimant had signed and returned the copy of that letter. But clarification was eventually obtained as to what the Claimant meant when he referred to being issued with a new contract. The Tribunal has borne it in mind that the Claimant has referred to the "new" or "up-dated version" contract issue as "… a piece of contractual housekeeping" which was "not related to dismissal and re-engagement" and was satisfied that what the Claimant meant and what the Respondent understood was that the Claimant was asking for was an updated version of his then-existing contract and that such request was not related in any way to the discussions about possible dismissal and re-engagement.

100. But it is for the Tribunal to determine whether, in law, there had been a termination of one period of employment on 19 October 2016 and the commencement on 20 October 2016 of a separate period of employment on terms, other than those relating to the car allowance, which were identical to those applying during any such earlier period of employment.

101. The Tribunal has borne it in mind that situations can arise where an employer is faced with a recalcitrant employee who refuses to agree to a change in contract terms and that in such a circumstance the employer may choose to terminate the old contract with due notice and offer the employee new terms and conditions. The Tribunal has borne in mind, too, that in such a circumstance there will be no breach of contract but that there will be a dismissal which can give rise to an unfair dismissal claim even if the employee accepts the new job.

102. The Tribunal has sought to remain alert to the need for a notice of dismissal to be clearly that, i.e. clearly a notice of dismissal, and that a notice of variation should not be construed as being, in effect, a termination and re-engagement under a new contract. It has borne it in mind that once notice to terminate employment has been given it cannot be unilaterally withdrawn, that the party on whom notice has been served must consent to it being withdrawn before withdrawal is effective. This is a principle established very many years ago in the case of **Harris and Russell Limited v Slingsby** but that principle is as valid now as it was then.

103. The Tribunal has applied the principle that if there is an attempt by an employer to withdraw notice and there is a question of whether or not an employee has consented to the notice being withdrawn it, an Employment Tribunal should first look for an unequivocal statement from the employee that he or she agrees to the withdrawal of the dismissal notice but that if an unequivocal statement cannot be found it is appropriate to infer agreement of withdrawal from the employee's conduct. Guidance in this respect was given by the Employment Appeal Tribunal in the case of **Brock v Minerva Dental Limited**.

104. Having considered all of the evidence before it the Tribunal was satisfied that the previously-issued notice that the Claimant's employment would end on 19 October 2016 had been withdrawn by mutual consent and that there had been no break in the Claimant's employment at any time during the period which had begun on 7 January 2002 and had continued to close of the Final Hearing of the Claimant's claim.

105. That being the case, the Tribunal has determined that the employment on which the Claimant's, *esto*, breach of contract, claim is based had not – (and has not) - terminated and that, in terms of the provisions of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, the Tribunal does not have jurisdiction to consider that element of the Claimant's overall claim as made in the ET1.

106. So far as the Claimant's claim that the Claimant has made unauthorised deductions, indeed a series of unauthorised deductions, from wages properly payable to him on various occasions is concerned the Tribunal has determined that at no time during the period which began on 7 January 2002 and which has continued to close of the Final Hearing of the Claimant's claim has the Respondent made any deduction from the Claimant's wages of any sum "properly payable" by it to the Claimant.

107. Whether or not it was reasonable for it to do so, and whatever the reason why it chose to do so, what happened in this case is that the Respondent decided, on a national-policy basis, to bring car allowances paid to part-time Veterinary Surgeons employed by it into "consistency". It chose to do so by reducing any car allowances which it had been paying to part-time Veterinary Surgeons at "full" rate to a rate calculated pro-rata to (core) hours worked. As part of the process of implementing that decision, that policy decision, the Respondent entered into what turned out to be a very lengthy consultation process with the Claimant. As it was put by the Respondent's representative in his closing submissions, after four separate consultations, with a Grievance Hearing and an Appeal Hearing having been interposed between the third and fourth one to one consultation meetings, the Respondent felt that "the end of the line was reached" so far as consultation with the Claimant was concerned. That consultation process reached its end at the fourth/final consultation meeting on 27 July when the Claimant was told that he was being given 12 weeks' notice of termination of his employment, a period of notice which, as the Respondent's representative has correctly stated in his closing submissions, "would have" ended on 19 October had the Claimant not, within that notice period, acceded to the Respondent's desired variation of one particular contract term – (the term that related to the amount of car allowance payable) - by signing an acknowledgement of the variation, as he did, on 10 August, thereby ensuring that the notice previously given was withdrawn by mutual consent and so preserving his continuous and unbroken period of employment with the Respondent.

108. The Respondent's representative has argued that when embarking on the consultation process and seeking to implement its policy decision the Respondent was acting reasonably and in accordance with the guidance given in the case of **Wetherill v Birmingham City Council** to which he referred in his closing submissions. But the Tribunal's view on this, a view previously stated, is that it is not for the Tribunal, in the context of consideration of the claims made by the Claimant, to pass comment on whether the reduction in car allowance was fair or even whether the change was sought by the Respondent for sound business reasons. The Tribunal was, however, satisfied that there had been a meaningful

and genuine consultation which had lasted many months and that at the end of that consultation process the Claimant did agree to the contractual change which permitted the new car allowance rate to be applied with effect from and including 20 October 2016.

109. The Tribunal has determined that at no time prior to 20 October 2016 had there been any unauthorised deduction from the Claimant's wages as envisaged by Section 13 of ERA 1996, that with effect from 20 October 2016 the Claimant had authorised a reduction in his car allowance as envisaged by Section 13 of ERA 1996 and that at no time after 19 October 2016 had the Respondent made any unauthorised deduction from his wages.

110. The Tribunal has determined that the Claimant's claim that the Respondent made unauthorised deductions from wages properly payable to him on any occasion has failed and that there is no need for the Tribunal to expand this discussion further by exploring the difficult issue of whether, in the circumstances of the present case, the car allowance payable to the Claimant was a sum payable to him in connection with his employment, i.e. was a payment falling within the definition of "wages" as set out within Section 27 of ERA 1996.

Employment Judge: Chris Lucas
Date of Judgment: 24 April 2017
Entered in register: 25 April 2017
and copied to parties