Appeal No. UKEATS/0015/13/BI

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 17 & 18 July 2013

Before

THE HONOURABLE LADY STACEY

MR P PAGLIARI

MR P HUNTER

VISION EVENTS (UK) LTD, FORMERLY KNOWN AS SOUND & VISION AV LTD — APPELLANT

MR GREGOR RICHARD PATERSON — RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	MR RICHARD REES (Consultant) Peninsula Business Services Ltd Legal Services Department The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR GREGOR RICHARD PATERSON (The Respondent in Person)

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

Appeal

Deduction from wages. Flexi-hours scheme. The Claimant was employed by the Respondent. The Respondent operated a flexi-hours scheme whereby the Claimant was entitled to take time off in respect of extra hours already worked. The contract of employment and the employees' handbook were silent on the effect on the treatment of flexi-hours when an employee left for any reason. The Respondent made the Claimant redundant. The Respondent offered to make payment to the Claimant in respect of a restricted number of hours. The Claimant refused, arguing that he was entitled to be paid at an hourly rate for all flexi-hours. The Employment Tribunal found in favour of the Claimant, finding that the Claimant should not have to work hours for which he would not be paid. **Held**: Appeal allowed. There was no express term that payment in money would be paid for flexi hours worked. There was no need to imply such a term. The ET erred in law by doing so.

Cross Appeal

Unfair dismissal. The Claimant argued in a cross-appeal that he had been unfairly selected for redundancy. **Held**: The ET made no error in law in deciding that the employer carried out a fair procedure; that the reason for dismissal was redundancy and that selecting the Claimant was fair. Cross appeal refused.

THE HONOURABLE LADY STACEY

Preliminary

1. The employer changed its name from Sound & Vision AV Ltd to Vision Events (UK) Ltd after the hearing at the Employment Tribunal but prior to judgment being received. Before the EAT, the parties were agreed that any order made by the EAT should refer to the employer as Vision Events (UK) Ltd, formerly known as Sound & Vision AV Ltd. In this judgment we refer to the parties as Claimant and Respondent, as they were before the ET.

Introduction

2. This case has two distinct claims, firstly for the deduction of sums from wages and secondly for unfair dismissal in respect of redundancy. The ET decided that the Claimant had not been unfairly dismissed. It decided that deductions had been made from sums due to him and made an award in respect of them. The Respondent appealed in respect of the decision on deductions. The Claimant cross appealed in respect of the decision on unfair dismissal. In this judgment we set out the background; we then give our decision and our reasons in respect of the cross appeal; and then we give our decision and reason in respect of the appeal.

3. The Claimant started work as an event technician with the Respondent in September 2004. He was paid a salary and an hourly rate for overtime. In March 2008 he was promoted, becoming a multimedia producer. After the promotion his salary increased from £21,000 per annum to £28,000 per annum and his overtime pay ceased. He was however entitled to participate in a flexi-hours scheme, whereby if he worked beyond the 45 hours per week for which he had contracted he was entitled to take time off at a time to suit the Respondent. In May 2012, the Respondent made the Claimant redundant. He had worked in excess of 1000 hours of flexi-time. He sought payment in respect of those hours. The Respondent offered to pay in respect of a portion of the hours. The Claimant refused that offer

and it was withdrawn. At the Employment Tribunal, (ET) the Claimant argued that he had been unfairly dismissed and that he should be paid in respect of the hours, arguing that the failure to pay represented an unlawful deduction in terms of section 13 of the **Employment Rights Act 1996**. He did not succeed in the claim for unfair dismissal. He did succeed in his claim under the **Employment Rights Act 1996**, the ET finding that the failure to pay for 1042.84 hours was an unlawful deduction. The ET made an order that the gross sum of £12,514 be paid to him by the Respondent.

Unfair dismissal

4. The Claimant's grounds of appeal in respect of unfair dismissal are set out as extracts from the judgment of the ET with comments. It is clear from the findings in fact made by the ET that the two questions of the Claimant's redundancy and the Claimant's entitlement to payment for flexi hours were discussed at the meetings between Claimant and Respondent and that there is an element of confusion between the two in the grounds of appeal. This is inevitable and is not a criticism of the Claimant's grounds of appeal; nor is it a criticism of the way in which the Respondent conducted the meetings. The grounds of appeal end as follows: –

> **"In the case of this employee, it cannot be right that the Claimant's employment was terminated unfairly due to an unfair procedure."**

Thus the Claimant sought to argue in his presentation of his cross appeal that his redundancy was procedurally unfair.

5. In the response in behalf of the Respondent to the cross appeal lodged prior to the hearing before us, the Respondent sought to argue that no error in law had been identified and that any attempt to revisit the facts was not permissible.

6. The ET made findings in fact from paragraph 47 onwards concerning the redundancy situation. It found that the Claimant was invited to attend a meeting on 28 March 2012 at which the company's proposals for a review of the operation in Glasgow were discussed. They found that the Claimant was advised that any suggestions he had would be given very careful consideration. At paragraph 50 the ET found that Mr Montgomery, of the Respondent, explained that although turnover in Glasgow had increased there was not enough cash coming in and so he needed to look at reducing costs. At paragraph 53 the ET found that suggestions were sought as to how the Respondent could continue to operate from Glasgow. At paragraph 54 the ET found that the Respondent told employees, including the Claimant, that the Glasgow branch would be affected by redundancies as the Respondent's view was that the administration of Glasgow-based work could be centralised into Edinburgh.

7. The Claimant was of the opinion that his salary came out of income generated in Glasgow but the profit did not go into the Glasgow accounts but was reallocated to Edinburgh. He made his views known by adding handwritten notes to a copy of notes of the meeting provided for him by the Respondent.

8. The Respondent issued a letter dated 29 March 2012 stating that the letter was a warning notice of potential redundancy for the Claimant. It stated that there would be formal consultation and that a meeting had been arranged for the 18 April 2012. The ET found, at paragraph 58, having heard lengthy evidence about what transpired at that meeting, that Mr Montgomery lost his temper. As we explain more fully in the part of this judgment concerned with the deduction from wages the reason for that loss of temper was connected to the Claimant's position concerning flexi hours. There was however some discussion about relocating the Claimant to Edinburgh. On 19 April 2012 the Respondent wrote to the Claimant

stating that a further meeting was to take place on 24 April 2012. As is found by the ET in paragraph 71 it was stated in the letter: –

> **"This letter does not constitute formal notice of redundancy, nor does it mean that we have made a final decision in relation to your continued employment. The purpose of this third meeting is to allow you the opportunity to discuss on an individual and personal basis any views and suggestions that you feel we ought to take into account which may avoid the need to make compulsory redundancies. At this meeting we will discuss any alternative employment and review the consultation process. However you do need to bear in mind that if we are unable to find any alternative to redundancy at this point then your employment may be terminated. This letter gives you due forewarning of that possibility."**

9. The ET made findings in fact from paragraph 72 onwards concerning discussions between the Respondent and Claimant about his flexi hours. They found at paragraph 95 that at a meeting on 15 May 2012 Mr Montgomery provided the Claimant with a letter dated 15 May 2012 which confirmed that he was being given formal notice of dismissal due to redundancy. The question of his flexi hours and payment for them and his period of notice were discussed and we refer to them in the part of this judgment dealing with the argument on deductions.

10. The Claimant appealed against his dismissal for a redundancy and an appeal was heard by Mr Robertson, of the Respondent, on 5 June. The ET found at paragraph 108 that the meeting was positive and that a detailed discussion took place in relation to the redundancy situation.

11. At paragraph 208 the ET found that there was a genuine redundancy situation. It found at paragraph 210 that the selection of the Claimant was not unfair. They noted that he was the only multimedia producer based in Glasgow. The ET found that there had been consultation and that the Respondent had given letters warning of redundancy and had asked for suggestions as to how compulsory redundancy might be avoided.

12. The ET dismissed the claim of unfair dismissal. The procedure followed by the Respondent was criticised to the extent that the ET found at paragraph 210 "that Mr Montgomery did not manage the individual consultation meetings in a way that would have been conducive to reaching a more satisfactory outcome for both the claimant and the respondent." Such a criticism is far from finding that the procedure was flawed. The Claimant was not able to point to any circumstance which showed that the Respondent had acted unfairly. Mr Rees for the Respondent argued that the Claimant was trying to alter factual findings. The ET had been satisfied with the consultation carried out and the alternatives discussed. Thus the tests set out in the cases of **Williams v Compair Maxam Ltd** [1982] IRLR 83 and **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 were met.

13. We are not persuaded that the ET erred in law. It directed itself appropriately and made findings in fact. We do not find that the Tribunal erred in law in relation to unfair dismissal and therefore we refuse the cross appeal.

Unauthorised deduction argument

14. At paragraph 214, the Tribunal concluded that the Claimant was correct that he was entitled to payment for accrued flexi-hours on the basis that these were hours that he had worked, but had not been allowed to take as time off, or had been unable to take as time off, and therefore had banked these flexi-hours. The Tribunal found the following in that paragraph:-

> **"On termination of employment there is no doubt that these amount to hours worked but not paid for and accordingly they amount to an unlawful deduction of wages in terms of section 23 of the Employment Rights Act 1996. The tribunal was not persuaded that the fact the employment handbook is silent as to what was to happen on termination of employment for whatever reason meant that the claimant must effectively forfeit those hours without remuneration. It was not in dispute that the claimant had worked these additional hours and they had therefore accrued to be taken as flexi hours. The tribunal was not persuaded either that the claimant's failure to self-manage those flexi hours should result in the situation where the respondent appeared to maintain that it was 'use it or loose [*sic*] it' i.e. if the flexi hours that had accrued had not been taken then they were lost. If that was indeed the respondent's**

> **position then this would have to have been spelt out to the employees. The tribunal also took the view that the claimant's failure to 'self-manage' those hours did not sit comfortably with the fact that the claimant and his colleagues (some of whom were and presumably still are) in a situation where they had accrued a considerable number of untaken flexi hours was known to the respondent since they all had to submit time sheets on a monthly basis and these were then checked by Mrs Shields and or her colleague in Edinburgh. … The tribunal did not understand the basis on which the respondent appears to have indicated that it would pay the claimant half of the accrued hours if it did genuinely consider that he had no entitlement to be paid for all of the additional hours he had worked."**

15. By that finding, the ET found that there is an implied term in the contract that payment would be made for accrued flexi-hours.

16. In a subsidiary argument, the question of the employer requiring the employee to take some of his flexi-hours during the time of his notice period was raised. On that question, the ET found in paragraph 215 the following:

> **"In relation to using some of these hours in respect of the claimant's seven weeks' notice the tribunal was not satisfied that the respondent was entitled to do this. The claimant had a statutory entitlement to seven weeks' notice and accordingly the tribunal was not satisfied that the accrued hours could be reduced in this way. Accordingly the award made in relation to accrued hours is for the full number of hours which amounted to 1042.84 and equated to £12,514."**

17. The position with regard to taking the flexi-hours is that the Respondent had in the past insisted that the flexi-hours be taken at a time which it found suitable. The Claimant had requested use of flexi-hours to go on holiday to New Zealand on an extended break in 2011. The Respondent had declined to allow any of the time to be taken as flexi-hours and the Claimant had agreed to take some unpaid leave and some annual leave. The Claimant had accepted that the Respondent could insist that flexi-hours were taken at a time to suit the business of the Respondent. There is no analysis in paragraph 215 from the ET as to why they disagreed with the proposition that the employer could insist that flexi hours were used up during a period of notice.

18. In paragraph 216, the ET found that the Claimant was not entitled to holiday pay in respect of flexi-hours. It noted that the Claimant sought holiday payment calculated on the basis that had the Respondent agreed to extend his period of notice to enable him to use up his flexi-hours, as well as having seven weeks' notice, he would have accrued holiday pay. The ET was not satisfied that the claim was sustainable and it was dismissed. It was not raised again before us. We therefore say no more about it.

The Respondent's submission

19. Mr Rees, who appeared for the Respondent argued that the ET had made an error in law in finding that there was an implied term in the contract between employer and employee to the effect that payment would be made in respect of flexi-hours when an employee left the company. He said that there was no such express term in the contract and that there was no warrant for implying it. Mr Rees argued that there is no analysis of the reason for the insertion of an implied term nor of the exact terms of the implied term itself. He made reference to paragraph 213 of the ET judgment in which it is stated:-

> **"It is not in dispute that there is no provision in terms of the respondents' handbook as to how accrued but untaken flexi-hours would be utilised on termination of employment for whatever reason."**

20. He argued that the ET had decided that if the position regarding flexi hours was that an employee had to self-manage it and that he had to "use it or loose [*sic*] it", then that should have been spelt out for the employees. He argued that was incorrect. It implied that the Respondent had originally intended to pay for flexi-hours but there is no finding in fact to support that; when the Claimant's salary was increased and his overtime payment removed there was no contractual term that he would be paid for flexi-hours. Mr Rees argued that it was necessary for before such an implied term could exist that both parties had an expectation of payment and that there was no such finding in this case. He referred to the case of **Kent Management Services**

Limited v Butterfield [1992] IRLR 294 at paragraph 16. He did however in discussion concede that that case related to a discretionary payment rather than to a contractual payment. He referred also to the case of **Morley v Heritage PLC** [1993] IRLR 400 and to the judgment of Lord Justice Rose at paragraph 24 where he stated:

> **"It seems to me, what is, or is not 'authorised' within the terms of that statute must depend upon the terms of the particular employee's contract."**

21. Mr Rees drew attention to paragraph 28 of that judgment where he argued that the test for the existence of an implied term is set out as follows:-

> **"The submission which he makes, derived from the second limb of the speech of Lord Wilberforce in *Liverpool City Council* v *Irwin* [1977] AC 239 at page 253 F-G is that business efficacy, to make the contract work, requires the implication of the suggested term; or, alternatively, which is perhaps a slightly different way of putting the same point, that the term sought to be implied is one of which the parties would have expressed themselves by the term 'of course' had they directed their minds to it."**

22. Mr Rees argued that the business efficacy of the current contract did not require any such implied term. There was no evidence, he argued, that the parties would have agreed that it should be there. He referred to the case of **Ali and others v Christian Salvesen Food Services Ltd** [1997] IRLR 17 in which the Court of Appeal overturned the EAT in considering a contract and stated:-

> **"The Industrial Tribunal had correctly held that, in the absence of an express provision for payment for hours actually worked in excess of notional weekly hours in the event of termination by the employer before the end of the pay year, a term to that effect could not be implied. The EAT had erred in allowing an appeal against that finding on the basis that such an implied term was an obvious inference from the agreement and, without it, the agreement was incomplete."**

23. Mr Rees argued that the ET had erred in law by stating that it did not understand the basis in which the Respondent indicated that they would pay the Claimant half of the accrued hours, if it genuinely considered that he had no entitlement to be paid. He argued that the evidence

made the reason obvious, that it was a gesture of good will. He argued that the ET had no basis to decline to accept that evidence.

24. His second ground of appeal related to the finding in paragraph 215 that the company could not insist on the accrued hours being taken during the notice period. He argued that the Claimant was paid in full for the period in accordance with the statutory provisions, at sections 87 and 88 of the **Employment Rights Act 1996** and that those provisions did not prevent untaken time being attributed to the notice period. He submitted that the employer had power to direct when leave was taken, and when flexi-hours were used. If the employer wished to instruct the employee to take his flexi-hours during a period of notice, then it was entitled to do so. There was a statutory requirement to pay wages during notice which the Respondent fulfilled. The employer had no requirement to provide work during that period. At one stage in his submission Mr Rees appeared to submit that the Claimant had been put on gardening leave, that is he had been told he did not require to work his notice. In discussion Mr Rees attempted to argue that gardening leave was a colloquial term and could be used when in fact it was flexi-hours that were being used up. Finally his position seemed to be that the employer had told the Claimant he was to use his flexi-time during the notice period. He submitted that while there was no evidence as to why the employer did so, the explanation "would be" that the Respondent wanted to reduce the flexi-hours in case, contrary to the Respondent's position, there was liability on it to pay for the flexi-hours.

The Claimant's submissions

25. The Claimant's position was that he had not been told when he received his promotion that the hours designated as flexi-time would be hours that he worked and did not get paid for. He explained that he did understand that he would not get overtime payments, and that he had worked for several years on that basis. Nevertheless he did not understand that he had entered

into a contract which involved working for hours which if not taken as time off, would not be paid. The Claimant did not assert any knowledge of law. Rather he submitted that the position taken by the Respondent could not be correct, as it was obvious that if he worked he would be paid; if he worked in excess of the hours for which he had contracted, then he got time off; if he had hours for which he had not had time off when he left, then he should be paid for the work he had done. He referred to the contract, which is listed in the ET judgment at paragraph 121.

26. It is convenient to set out here the terms of the correspondence and employees' handbook which were quoted in the ET judgment and which were the only terms of the employment contract and handbook brought to our attention. The letter appointing the Claimant to his promoted post is found at paragraph 13 of the judgment and is as follows:

> **"Following your recent appraisal and salary review, I am delighted to confirm your increase in salary to £28,000 per annum. Any overtime will be credited on an hour for hour basis, or double time if between 2300 hours and 0700 hours, and enable you to take flexi-time off. This is effective from 1st September 2008 and will be processed in September's pay.**
>
> **All other terms and conditions remain unaltered.**
>
> **I thank you for all your hard work, and wish you continued success in your role."**

27. The terms of the employees' handbook are found at paragraph 121 as follows:

> **"Although the system is intended to be flexible and beneficial to both companies and employee, the company always retains the final say in determining the hours to be worked by all employees.**
>
> **Due to the nature of the company's business, flexi-time system, without appropriate rules would result in chaos, therefore the system is based on the principles of organised flexibility and prior notification of all variations in working hours.**
>
> **The basic rules of the flexi-time system are explained below with the timesheet example in the next section giving an idea of how it is administered in practice.**
>
> 1. **Unless otherwise stated in the employee's statement of particulars of employment, or otherwise agreed with their direct manager no later than 17:30 the previous working day, all employees are expected to start work no later than 08:30 each day. Any employee not at work by that time without prior agreement to the contrary will be considered late for work.**
>
> 2. **Employees are not allowed to let the number of flexi-hours they are carrying drop below zero at any time, without specific prior agreement from the company. Where this is agreed, the employee will be required to make up the time as soon as possible, subject to the requirements of the company.**

3. If an employee is carrying a number of flexi-hours greater than zero, then they may or may not be entitled to be paid overtime as defined employee's statement of particulars of employment [*sic*] if overtime is payable then the employee will normally be paid 50% of their outstanding flexi-hours as overtime each month. Normally this is calculated at the end of each month but the accrued position can be calculated at any interim date if necessary. If an employee is not carrying any flexi-hours at the end of the month, then they are not entitled to be paid overtime.

4. In exceptional circumstances employees may request to be paid more than the normal 50% of outstanding flexi-time. The company will not be obliged to agree or give reasons for declining the request.

5. Overtime is calculated on a monthly basis and is not determined by the length of any work period on any particular day.

6. Flexi-time will be paid as the number of hours multiplied by the employee's hourly salary rate.

7. Any flexi-hours not paid are carried forward to the next month.

8. The company reserves the right to instruct that all or part of an employee's outstanding flexi-time is taken as time off, rather than being held for payment.

9. All requests to take time off using the company flexi-time system must be approved in advance by the administration manager."

28. The points numbered above are set out in the judgment by bullet points but for ease of reference we have numbered them. The Claimant argued that these parts of the contract between himself and his employers showed that he was entitled to be paid for the hours that he had worked. He argued that while the contract was silent on what happened on termination of employment, he had never agreed to work the hours required for no payment. The Claimant accepted that in paragraph 3 in the fourth line the words "If overtime is payable" appear and he accepted that he was not a person to whom overtime was payable. He accepted that the sentence "if overtime is payable then the employee will normally be paid 50% of their outstanding flexi-hours as overtime each month." was not applicable to him. He argued that the rest of the paragraph and the other paragraphs were applicable to him. He accepted that the next sentence in paragraph 3, "Normally this is calculated at the end of each month but the accrued position can be calculated at any interim date if necessary" did as a matter of construction of language apply to the payment for overtime referred to in the preceding sentence. The Claimant argued that paragraph 4 applied to him and that redundancy was an

exceptional circumstance. He argued that paragraph 6 stated in terms that flexi-time will be paid.

29. The Claimant argued that the history of the meetings which took place between himself and the Respondent showed that the Respondent was of the view that at least 50% of hours were payable on termination. He made reference to the ET judgment at paragraph 20 onwards. He was required to submit timesheets as were all other employees and he referred to various examples produced by him of timesheets and payslips from page 94 to page 108 of the bundle. His purpose in doing so was to show that after he was promoted in 2008 he still filled in timesheets and he had flexi-time calculated on those timesheets by the employer's HR department. He explained that in September 2010 he had requested holiday leave in 2011 to enable him to go to the New Zealand Rugby World Cup. He requested that he use some of his flexi-hours to enable him to have an extended holiday. He noted, as is set out in paragraphs 25 and 26 of the ET judgment, the Respondent did not agree to that request and he took the break as a mixture of annual leave and unpaid leave. The Claimant confirmed as is noted at paragraph 35 that the question of "what would happen to his flexi-hours" was raised by him towards the end of 2011 because he understood that there was talk of possible redundancies, which had caused him to consider what would happen with his flexi-hours. He stated to us that prior to that time he had simply got on with his work and had not given much thought to the flexi-hours. The Claimant was at pains to point out to us that he regarded the company as a good company and that he enjoyed his work and that he was good at it. He confirmed that his position when discussing matters with his employer in 2011 was that he wanted to have payment in respect of his flexi-hours if his employment came to an end. He did not dispute that the ET was correct to find in paragraph 40 that Mr Montgomery, the managing director, referred back to his salary increase and reminded him that the increase was partly made in

recognition of extra hours which he had worked. As is noted by the Tribunal the discussions appeared not to come to any conclusion until as is noted in paragraph 43:

> **"Gregor [The claimant] advised Chris [Mr Montgomery] that he would be prepared to seek legal advice to get these hours paid.**
>
> **Chris advised Gregor that we would fight him all the way. He said that he had just agreed a new contract with new insurers who will not stop a Tribunal case.**
>
> **Gregor said he was told that his hours would be packaged with redundancy settlement. Chris disagreed, he said he may have said he would look at a different solution for the hours."**

30. The Claimant confirmed that the ET was accurate in noting at paragraph 45 onwards that there was correspondence between himself and the employer in or around February 2012 about his flexi-hours and he did take time off in March 2012.

31. As is found in paragraph 47, by letter dated 22 March 2012 Mr Montgomery wrote to the Claimant warning him the financial performance of the company in Glasgow had been suffering dramatically in terms of lower turnover and high costs and that it would be necessary to carry out a reorganisation which, regrettably, might result in a number of redundancies. The Claimant attended a meeting with the Respondent employer on Wednesday 28 March 2012 to discuss any proposals for reorganisation. The meeting was chaired by Mr Montgomery and Mrs Shields was present. The Claimant was of the view that his salary came out of the income generated by the Glasgow office but the profit did not go into the Glasgow office. He did not think that it was fair that the Glasgow office should be closed down.

32. Mr Montgomery wrote to the Claimant on 29 March 2012 indicating that receipt of the letter should serve as a warning notice of potential redundancy and advising that a meeting had been arranged for 18 April 2012. The ET found at paragraph 58 that Mr Montgomery lost his temper at the meeting and shouted at the Claimant. The ET found in paragraph 59 onwards that there was discussion of the Claimant's future with the company including a suggestion that

he might relocate to Edinburgh and take on the role of a technician; he might be compulsorily made redundant; and he might accept voluntary redundancy with an extra £1000. At paragraph 62 and 63 the ET found that there was discussion about flexi-hours and that that is what inflamed the situation so far as Mr Montgomery was concerned. The ET found that Mrs Shields reminded the Claimant that his contract provided that overtime hours worked were to be taken as time off in lieu. The Claimant was noted as not disagreeing with that in principle but stating that he had not been allowed to take time off. Mr Montgomery stated that the Claimant was supposed to self-manage his hours and that he had clearly not done so.

33. Mr Montgomery wrote a letter dated 19 April 2012 to the Claimant advising that a further meeting was to take place on 24 April 2012. The letter warned that redundancy was a possibility. The ET found at paragraph 73 and onwards that at the meeting of 24 April 2012 the Claimant said that he understood his options were to relocate to Edinburgh, to take voluntary redundancy, or that he would be made compulsorily redundant. There was a lengthy discussion about flexi-hours and Mr Montgomery was noted as saying:

> **"You can't say you would take voluntary redundancy then screw me for hours. You should have been self-managing your time talking [*sic*] time off. We've given you time off recently this shows that time could be taken."**

34. The Claimant confirmed the ET's finding that he thought he was being threatened at the meeting and that he found it intimidating. At paragraph 80 the ET found that Mrs Shields calculated the flexi-hours applicable to him at 26 April 2012 in a total of 1,034.92 hours.

35. Thereafter a further meeting was held on 1 May 2012. There was controversy before the ET as to the documents that were produced at that meeting. The parties were unable to agree what the evidence had been for the purposes of the EAT and the employment judge was requested to produce her notes, which she did. In the end it did not seem to us that a great deal

turned on this. It seemed not to be in dispute between the parties that the Respondent produced a letter which was given to the Claimant advising him that he was being made redundant. Attached to the letter was a financial statement in which his entitlement to a redundancy payment and notice and accrued holiday pay was set out. The last section of the financial statement referred to flexi-time hours as follows:

> **"Flexi-time hours**
>
> **Flexi-time hours accrued up to 1 May 2012 – to be confirmed**
>
> **Mutually agreed payment of half the total – amount to be confirmed**
>
> **Amount to be paid – to be confirmed."**

36. The Respondent claimed at the ET that the letter and financial statement was taken back from the Claimant on the basis that Mrs Shields intended to produce a further letter once Mr Montgomery had given her a recalculation of the actual payment to be made to the Claimant. At the meeting it appears that there was further discussion about whether or not the Respondent could continue to employ the Claimant in a role in Edinburgh. In paragraph 84 the ET found that there was discussion as to how he could continue to work for the Respondent, being based in Edinburgh but working from home and operating from venues in the west of Scotland and having an opportunity to travel elsewhere for example London or the continent. After the meeting the Claimant went back to work and continued to work for the next two weeks. He was asked to provide his comments as to what he was seeking from the employer and at paragraph 87 the ET found that he sent an e-mail in which he set out the possibility of the sum due to him in respect of flexi-hours being paid in a variety of ways. He stated that he appreciated the company's financial situation and he understood that cash flow was such that the company did not want to, or was unable, to pay the hours in one sum. He noted that another possibility would be for him to remain on the company payroll until all of his hours were exhausted. The proposed voluntary redundancy package would be, he suggested, deferred until

the end of the flexi-hour period. He stated that he would wish to be free to work for other people during the period.

37. Mr Montgomery wrote to the Claimant on 3 May telling him that another meeting had been arranged for 15 May. The ET found that Mr Montgomery wrote on 10 May 2012 in the following terms:

> **"You have done this [taking time off on flexi-hours] in the past, yet you have built up a significant amount of time which you have not taken.**
>
> **During the redundancy consultation process, you requested payment for these hours which you claim are owed. The company was more than willing to compromise with you on this, and as a gesture of goodwill was willing to reimburse you 50% of the amount owed after you had taken your notice period as flexi-time. However it was pointed out to you that this payment would have to go through the company payroll for which tax and NI would be deducted.**
>
> **You have rejected this offer, and requested payment after tax and NI which would almost entirely amount to the full payment.**
>
> **Therefore you have left the company no option but to withdraw this offer.**
>
> **I have arranged a further and final redundancy consultation meeting with you on Tuesday 15th May 2012 and we can further discuss this after the meeting."**

38. The Claimant sent an e-mail dated 15 May to Mrs Shields in which the ET found at paragraph 93 in which he stated as follows:

> **"From my understanding the reason for the further meeting is to present me with the amended financial redundancy package, and if necessary this will be discussed. This is following my rejection of the company's offer to pay only 50% of the outstanding overtime due – which was included on the same form as the statutory redundancy package pay details. I was issued with a formal notice of redundancy on 1st May. I have since been legally advised that this cannot be retracted unless all parties agree."**

39. The ET found at paragraph 95 that on 15 May Mr Montgomery provided the Claimant with a letter dated 15 May 2012 confirming that he was being given formal notice of dismissal due to redundancy and that his entitlement was to seven weeks' notice commencing 15 May 2012. He was advised that he was not required to work his notice and his last date of employment would be 3 July 2012. He was being placed on gardening leave. The ET found at paragraph 98 the Claimant was advised that he would have the right to look for alternative

employment and to attend job interviews during his notice period but that he would remain an employee until 3 July 2012 and should not take up other paid employment or self-employment during that period. The letter given to him made no reference to any payment in respect of the flexi-hours.

40. The Claimant appealed against the decision to dismiss him and in his letter of appeal stated as follows:

> **"Unfortunately given my redundancy, I have still not been given details of a full financial settlement for the overtime hours that are outstanding and due following my dismissal. Instead it appears that the company has decided to use 7 weeks of these outstanding hours in order to cover the notice period up until 3rd July 2012."**

41. An appeal was heard by Mr Robertson on 5 June 2012. He refused the appeal. In his letter doing so he indicated that it might be possible to use the Claimant's skills on a freelance basis and asked if he wanted to discuss that further. The Claimant acknowledged that by a letter dated 19 June in which he indicated that he did not want to have a further meeting. He did however ask in that letter about his financial settlement and he received a reply dated 4 July 2012 from Mr Montgomery. In that letter Mr Montgomery stated as follows:

> **"Due to the amount of flexi-hours outstanding we arranged for you to take your 7 weeks notice pay as flexi-time off to recover some of the time accrued and give you opportunity to line up other employment or to start freelance or inform potential contractors."**

42. The Claimant referred to the terms of paragraph 13 of the ET3. On behalf of the employer is stated:

> **"At a third consultation meeting on 1st May 2012 the respondent proposed a voluntary redundancy package which, in accordance with the claimant's terms and conditions of employment, included payment of 50% of the claimant's accrued flexi-time hours. The claimant refused this offer and the respondent requested that the claimant provide written confirmation of his claim for overtime payment in order for a further investigation to take place."**

43. The Claimant referred to this in his argument, noting that the employer had asserted that the 50% was in accordance with his terms and conditions. He therefore relied on that as a basis for arguing that at least some payment was due contractually. Mr Rees stated that he had not noticed this prior to the argument before us but on its being drawn to attention he said that it was a mistake. He made reference to paragraph 15 of the same document which refers to the payment being made as a goodwill offer and he referred to the whole terms of the ET3 including paragraphs 20, 21 and 22 in which the employer plainly argued that there was no contractual right, either express or implied, to payment. He was not able to explain why such an important mistake had been made. He stated that the ET3 had not been completed by the client company but by Peninsula on its behalf. We invited Mr Rees to take the opportunity to the adjournment of the Tribunal to the second day to seek instructions on this matter. He stated that he had done so, by speaking to the department of Peninsula Business Services Ltd which had drawn up the ET3. The person to whom he spoke said that it was a mistake, but could not explain how it had happened. Mr Rees stated that the normal procedure is that forms ET3 are shown by Peninsula to their client before being lodged, although he could not confirm that had happened in this case. Thus we were left with no explanation of how a mistake on the matter which goes to the heart of the dispute had happened.

Discussion and decision

44. We have come to the view that the contract between the employer and employee, while poorly drafted and not very clear, does not include any clause which shows that it was the intention of the parties that a person not entitled to overtime would be paid for his flexi-hours on leaving. The ET found this at paragraph 213. The ET then purported to consider whether such a term required to be implied into the contract. They found that such a term should be implied. We have considered it and the majority have come to the view that there is no requirement to imply such a term. It is not necessary for business efficacy and it is clearly not a

term which both parties believed should be implied. The majority accepted Mr Rees' submissions that the law is clear; a term may be implied in a contract if it is necessary to do so to make the contract work; or if both parties would have said that such a term was agreed between them. The majority found that the ET erred in law as it decided that a term should be implied in order to make the contract fair. That is not the correct test.

45. The majority did not find it impossible to understand that the employer was prepared to make "a goodwill offer" to the employee of payment of part of those hours. Any employer is entitled to make such a payment if he so wishes without it being concession that there is a legal requirement for him to pay. Thus the majority did not agree with the ET that the offer made by the Respondent indicated that such a term was to be implied in the contract.

46. It appeared to the majority that the ET3 indicated either muddled thinking on behalf of the Respondent, or mistake for an unknown reason by Peninsula. While the situation is unsatisfactory, we did not find the existence of the reference to terms and conditions to be decisive. We accept Mr Rees' argument that the document is not in itself conclusive and in any event it is self-contradictory. While such a mistake has certainly not assisted the passage of this case through the litigation we cannot hold from it that the term in question ought to be implied.

47. We therefore hold, by a majority, that the ET erred in law in finding that a term should by implied into the contract between employee and employer to the effect that any flexi hours accrued at the date of termination of the contract will be paid in money.

48. The minority decided that there was an implied term in the contract that the Claimant would be paid something in respect of flexi hours worked. The Claimant's position was that he did not agree to work for no pay. The minority view was that such a stance was an obvious part

of any contract of employment. The Respondent must have been well aware that the Claimant, like any employee, expected to be paid for work done. The contract in this case provided that time would be offered in respect of flexi hours. On termination of employment, time was no longer available for the Respondent to offer to the Claimant. The contract is not clear, and any ambiguity in it must be construed against the Respondent. Thus it must have been an implied term of the contract that if the work done could not be "paid by offering time" then it must be paid in money. The minority took the view that the admission made by the Respondent in the form ET 3 was a clear indication of the Respondent's state of mind. This is seen at paragraph 13 of the ET 3 where the Respondent stated as follows: –

> **"at a 3rd consultation meeting on 1st May 2012 the respondent proposed a voluntary redundancy package which, in accordance with the Claimant's terms and conditions of employment, included payment of 50% of the Claimant's accrued flexi time hours. The claimant refused this offer and the Respondent requested that the claimant provide written confirmation of his claim for overtime payment in order for further investigation to take place."**

The minority held that it should be inferred from that evidence that the contract provided that 50% of unused flexi hours should be paid for at termination of employment.

49. We agree with Mr Rees that the employer was entitled to require the flexi hours to be used during the period of notice. It is clear that the employer was entitled to direct the time at which hours should be used. It is not however clear from the findings of the ET that the Respondent did so instruct. It appears that at various stages the employer said that the time was to be taken as "gardening leave" and at other times that it was to be flexi-hours. We are of the view that such a lack of clarity is not impressive in an employer and we are bound to say that we were not impressed by the lack of clarity exhibited by Mr Rees in submission. Nevertheless as a matter of law we agree with Mr Rees that the employer's obligation is to pay wages in respect of the period of notice and that was done. We find that the ET erred in law in finding

that the employer was not entitled to require the employee to take flexi time hours during the period of notice.

50. The majority having decided that the ET erred by holding that there was an implied term in the contract, the appeal is granted.

51. We apologise for the delay in issuing this judgment.