Appeal No. UKEAT/0252/18/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING,7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 28 May 2019
Judgment hand down 3 July 2019

Before

NAOMI ELLENBOGEN QC (DEPUTY JUDGE OF THE HIGH COURT)

(SITTING ALONE)

CORTEL TELECOM LTD APPELLANT

MR A SHAH RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR T PERRY (of Counsel) Direct Public Access
For the Respondent	MR A SHAH (Respondent in Person)

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term

CONTRACT OF EMPLOYMENT – Wrongful dismissal

In respect of the two grounds of appeal brought by the Appellant employer:

Ground 1

Appeal allowed: the Tribunal had erred in its approach to a claim for unauthorised deduction of wages arising from non-payment of a contractual car allowance. In upholding that claim, the Tribunal had failed to: (1) consider the significance of an express term requiring that the car in question be less than 3 years old; (2) address whether and, if so, by what means, that term had been varied so as to remove the relevant requirement, or it was inequitable for the Appellant to enforce it; and (3) make all prior necessary findings of fact.

Ground 2

Ground 2 comprised two parts:

(a) Appeal dismissed: the Tribunal had not erred in determining the Respondent's claim for wrongful dismissal, notwithstanding its earlier erroneous statement that his claim had been limited to one for unauthorised deduction of wages. At all material times, both parties and the Tribunal had been aware that a claim for wrongful dismissal and an award of notice moneys was being pursued by the Respondent and both parties had made submissions to the Tribunal at the full merits hearing on that basis. There being no appeal from the Tribunal's substantive findings in that claim, those findings stand.

(b) Appeal allowed: the Tribunal had erred in determining that the Appellant's employer's contract claim could not proceed on the basis that the Respondent's claim had been limited to one for unauthorised deduction of wages. First, the Claimant's claim had not in fact been so limited (see paragraph (a) above). In any event, the Appellant's entitlement to bring an employer's contract claim had arisen when the Respondent had brought proceedings in respect of a claim under Article 3 of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** and would have been unaffected by any subsequent abandonment or withdrawal of that claim by the Respondent.

Disposal

The Respondent's claim for unauthorised deduction of his car allowance, together with the Appellant's employer's contract claim, would be remitted for determination by a freshly constituted tribunal, in accordance with the EAT's judgment. If, as had been indicated to the EAT, the Appellant no longer wishes to pursue its employer's contract claim before a tribunal, it should make the appropriate application to the Tribunal. If that claim is to be pursued before the Tribunal, all necessary prior directions will need to be given, enabling clear identification of the issues to be determined at the Full Merits Hearing. The relevance to the employer's contract claim of the Tribunal's undisturbed findings in respect of the claim for wrongful dismissal will be a matter for the Tribunal (or any court) seised of the former claim to consider.

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NAOMI ELLENBOGEN QC (DEPUTY JUDGE OF THE HIGH COURT)

Introduction

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1. In this Judgment, I refer to the parties as they appeared before the Employment Tribunal. The Respondent appeals from the reserved judgment of the East London Employment Tribunal (Employment Judge Hallen, sitting alone), sent to the parties on 20 June 2018. Before me, as he had done below, the Claimant represented himself. The Respondent is now represented by Mr Tom Perry of Counsel, having been represented by its company accountant, Mr Suleman, before the Tribunal. Mr Suleman was present and able to give instructions to Mr Perry during the hearing of the appeal.

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The Factual Background

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2. Between 17 October 2016 and 2 October 2017, the Claimant was employed by the Respondent as a sales consultant, pursuant to an undated written contract of employment. That contract had followed a letter from Mr Neville Sheen, the Respondent's director, dated 28 September 2016, which was expressly intended to "*highlight the main points of* [the Respondent's] *offer"*, and stated that the formal contract would follow shortly. The letter included the following paragraphs:

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2.1 **"Salary: your basic salary will be £2,500 month…';**

2.2 **Expenses: You will get a mileage allowance of 45p per mile for the first 1000 miles per month. Plus 25p for all mileage over 1000 miles…£450 per month is the minimum payment for the allowance."** [sic]

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3. So far as material for current purposes, the contract of employment contained the following express terms:

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3.1 Clause 2.1, headed "Salary & Commissions":

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"Salary & Commission

Your basic salary, which accrues from day to day, is £30,000.00 per annum. Any changes in your salary will be notified to you in writing [on your itemised pay statement].

Your salary will be paid in equal monthly instalments in arrears on the last working day of each month directly into your bank account. Payment in respect of a period of less than a month will be apportioned in proportion to the number of days worked as a proportion of the total number of working days in that month.

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Your salary will be reviewed with effect from [1st January] of each year, and may, at the Employer's discretion, be increased

Commission & KPIs are confirmed in Schedule 1";

3.2. Clause 16, headed "Expenses":

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"Expenses

The Employer will reimburse you in respect of all reasonable expenses wholly, exclusively and necessarily incurred by you in the performance of your job provided that, if required, you provide evidence of expenditure in respect of which you claim reimbursement. There will be an allowance for the use of your own car of 45 pence per mile for the first 1,000 miles. You must keep and maintain a car for the use in conjunction with the employer's business that is less than three years old and in good condition. The mileage allowance is averaged at 1000 miles per month at 45p. This is to cover all expenses incurred in the use of a vehicle up to 1000 miles. Above 1000 miles you can claim 25p per mile.";

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3.3 Clause 18, headed "Agreement to make Deduction/Withhold Payment or invoice lost goods":

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"Agreement to make Deduction/Withhold Payment or invoice lost goods.

At any time during your employment, or upon its termination (however arising), the Employer shall be entitled to deduct from salary or any other payments due to you in respect of your employment any monies due from you to the Employer. If at any time you are requested to return to the Employer property belonging to it and you fail to do so the Employer shall, without prejudice to any other remedy, be entitled to withhold any monies due to you from the Employer. You will also be held liable for any property requested by you for customers that is lost in transit under any circumstances and may be invoiced for them at full retail value.";

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3.4 Clause 20, headed "Termination of your employment on notice":

"Termination of your employment on notice

Should you wish to leave the Employer, you are required to give written notice of this to your supervisor. Two weeks' notice for first 12 months employment. Four weeks' notice after the first anniversary. Subject to clause 16, should it be necessary for the Employer to terminate your employment, you will receive the following minimum period of notice, or the statutory minimum requirement if such is greater:

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Two weeks' notice

The Employer may waive the requirement of notice from you."; and

3.5 Clause 33, headed "Changes in your Terms of Employment":

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"Changes in your Terms of Employment

The Employer may change any or all of the terms of your employment with your consent or by notice. The period of notice which you are entitled to receive from the Employer, should it

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> **wish to change any or all of the terms of your employment, is the period required to be given by clause 20."**

The Claimant's claims

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4. On 1 October 2017, the Claimant presented the first of two claim forms against the Respondent. By section 8.1 of that document, he indicated that he was bringing claims for unfair dismissal, a redundancy payment, notice pay, holiday pay, arrears of pay and other payments. In section 8.2, he stated (in summary) that his boss had sent him a letter stating that he would not be paid his salary for September unless he hit a specified target. The Claimant said that he had not agreed to that stipulation, or signed and returned the letter. He went on to state,

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> **"Regardless, he has not paid me anything for this month... and I cannot work without pay so am forced to resign and make a constructive dismissal claim for all my unpaid pay, plus 6 months of lost pay that would result due to unfair) constructive dismissal for non-payment of salary"** [sic].

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5. On 13 October 2017, the Claimant presented his second claim form, stating that his employment had ended on 1 October 2017. In section 8.1 of that claim form, he stated that he was owed notice pay, holiday pay, arrears of pay and other payments. Section 8.2 contained the following text:

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> **"Cortel stopped paying me my salary without agreement forcing me to leave and I am owed wages plus expenses plus payment for notice which has to be resolved.".**

The Respondent's response

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6. The Respondent lodged a single response form, responsive to both claims. The copy in the EAT bundle is undated. By section 6.1, the Respondent asserted that the Claimant had been given two verbal warnings for failing to have met his target, or KPI, every month and having made his minimum threshold only once. It further asserted that the Claimant had sent an

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offensive and critical e-mail to a colleague, which, in the opinion of Mr Sheen, had amounted to gross misconduct, justifying dismissal. Section 6.1 continued,

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> **"So, did he want to try and do business in September based on the option that he would only get his basic salary if he achieved the KPI set of £8,000 Gross Profit? He said he would do that. I confirmed the offer in writing to him. I saw him the following day and he made no comment. As far as I was concerned we had an agreement. He never sent me anything in writing which is something he would always do in the past so it seemed clear that he was confident of making the target…".**

The Respondent went on to assert that, in the event, the Claimant had not made his target, such that his basic salary for September 2017 had not fallen due. It continued,

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> **"…His expenses are from August and need to be claimed but he has not submitted a claim. If he claimed his expenses on the form provided then he will be paid them. They are expected to be £450."**

The employer's contract claim

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7. By section 7 of the response form, the Respondent pleaded an employer's contract claim. The basis of the claim was the Respondent's assertion that the Claimant had been *"contracted to sell"* but had not done so. It was said that, for eight months of his employment,

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the Claimant had not achieved his minimum KPI. The Respondent claimed £20,000, being the salary "overpaid" to the Claimant during that period. The Respondent further claimed for the value of allegedly lost business, said to have resulted from a false rumour spread by the

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Claimant, to the effect that the Respondent had not paid tax and national insurance contributions due to HMRC in respect of the Claimant's salary.

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8. All claims were initially listed for a two-day Full Merits Hearing on 22 and 23 February 2018, though, in the event, that fixture was converted into a Preliminary Hearing, following a differently constituted Tribunal's finding that it was likely that the Claimant had not received the notice of hearing or earlier Case Management Orders.

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Case management orders made in February 2018

9. Re-listing the Full Merits Hearing for 3 and 4 May 2018, that Tribunal went on to record as follows at paragraphs 1, 2 and 5 to 8 of the Order:

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> **"1. By 8 March 2018 the claimant is to write to the tribunal with a copy to the respondent to say whether he wants to continue with his complaint of unfair dismissal. If so, he is to say on what grounds he believes the tribunal has jurisdiction to consider a complaint of unfair dismissal given that he was employed for a period of 11 months.**
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> **2. The claimant confirmed that his complaints are of unfair dismissal and unlawful deduction of wages. He confirmed that he was not making any complaint under the Equality Act 2010. His complaint of unlawful deduction of wages relates to his wage for the month of September and expenses for the month of August and/or September. His wage was £2500 per month and expenses were paid at the rate of £450 per month. The respondent confirms in its grounds of resistance that the claimant was not paid his expenses for August. The respondent also does not dispute that the claimant worked in September.**

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> **…**
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> **5. The respondent has issued a counterclaim as part of its grounds of resistance. However, it was not clear whether the contract of employment enables the respondent to claim the matters set out in the counterclaim. The counterclaim is set out differently in Mr Sheen's witness statement. Mr Sheen confirmed today that the respondent relies on the counterclaim as set out in his witness statement.**

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> **6. The respondent is to confirm in writing that the terms of the claimant's contract of employment enable it to make a counterclaim for wages and expenses paid on the basis that it is unsatisfied with the claimant's performance as that appears to be what it seeks to claim in this matter. The respondent's position is that the expenses claims submitted by the claimant related to a car allowance and that in order to receive it the claimant needed to be driving a car that is less than three years old. Mr Sheen explained today that he has subsequently found out from the Claimant's colleagues that the Claimant's car was older than three years and that it did not belong to him but to his wife and that is why he wants the expenses repaid. He also confirmed that the claimant was not asked to prove the age of his car during his employment when the expenses were paid. The respondent paid the claimant his expenses from October 2016 to July 2017.**

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> **7. Following receipt of legal advice, the respondent is to clarify the basis on which it brings a counterclaim against the claimant; the terms of the contract upon which it is based, and the elements of the counterclaim i.e. how much is claimed for each part, in writing to the claimant with a copy to the tribunal by 8 March 2018.**

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> **8. By 29 March 2018 the claimant is to respond to the counterclaim as set out by the respondent in their document served by 8 March 2018."**

Particulars of the employer's contract claim

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10. The document produced by the Respondent, on 9 March 2018, was in four sections and, in summary, asserted that:

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10.1. clause 33 of the contract of employment entitled the Respondent to change the Claimant's terms and conditions by consent, or on two weeks' notice. The Claimant had agreed to a variation of his contract whereby he would receive performance-related

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commission only, with effect from 1 September 2017. In any event, the Respondent had only been required to give two weeks' written notice of that change, limiting the Claimant's entitlement to remuneration on the basis set out in his contract to a period of 15 days;

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10.2. checks on the Claimant's registration mark, at DVLA, had indicated that the car in respect of which he had claimed expenses had been more than three years old, such that the Claimant had made a false claim for expenses. The Respondent therefore sought to reclaim £4,950, being the total sum paid to the Claimant in car allowance throughout his employment;

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10.3. clause 18 of the contract of employment entitled the Respondent to counterclaim for the falsely claimed car allowance, together with four tele-marketing leads purchased by the Respondent every month, the latter totalling £6,000. Thus, the combined asserted value of the counterclaim was £10,950; and

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10.4. the Claimant had texted "vile and insulting' comments against the Managing Director of the Respondent and the Respondent company, amounting to gross misconduct and entitling the Respondent summarily to dismiss him on 4 September 2017, under clause 19 of the contract of employment. Instead, the Claimant had been given a second chance on the basis subsequently set out in the Respondent's letter of 31 August 2017, to which he had agreed. It was inconceivable that he had not agreed to that arrangement yet had not questioned why he had received the letter.

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11. Notwithstanding paragraph 8 of the Tribunal's February 2018 case management orders, I have seen no response from the Claimant to the Respondent's document, although the Claimant's general position throughout was that the employer's claim had been invented to frustrate his own legitimate claims; a position which he had communicated to the Tribunal by e-mail dated 22 February 2018, in anticipation of the Respondent's document, summarised at paragraph 10 above.

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The Full Merits Hearing

12. The Full Merits Hearing was conducted by EJ Hallen, sitting alone, on 3 May and 14 June 2018. On the latter date, both parties made oral and written submissions. Copies of their respective written submissions were provided to me during the course of the appeal hearing, at my request, for reasons to which I shall refer below.

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The Tribunal's reserved Judgment and Reasons

13 At paragraph 2 of the Reasons for its reserved Judgment, the Tribunal recorded the following:

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> **"The claim was listed for two days commencing 3 and 4 May 2018. At the start of the hearing, the Claimant withdrew his claim for unfair dismissal on the basis that he did not have two years' service and was not entitled to make such a claim. He confirmed his claim was limited to unlawful deduction of wages. As such, the Respondent could not make a counter claim against the Claimant as he was not making a claim for breach of contract."**

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14 The Tribunal set out its findings of fact at paragraphs 5 to 9 of its Reasons. At paragraph 7, it set out the terms of the letter, dated 31 August 2017, by which the Respondent had informed the Claimant that he would only be paid a basic salary if he had covered the basic gross profit KPI of £8,000 in the month of September, based on total contract value. That letter included the following paragraph:

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> **"You will still be paid expenses provided you have confirmed the meeting in advance with Kaf Abbas and me, with the meeting agreed by one of us."**

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The Tribunal recorded the Claimant's evidence that he had worked under protest during September 2017, as he had not accepted the Respondent's unilateral variation of his contract. It accepted that he had wished to ascertain whether the Respondent would go through with its threat to withhold his wages at the end of that month before deciding on the appropriate action to take. When, in the event, the Respondent had withheld his salary for September, the Claimant had resigned from his employment, by e-mail dated 2 October 2017, asserting that he had been constructively dismissed.

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15 At paragraph 9 of its Reasons, the Tribunal made the following findings:

> **"During the month of September, following delivery of the letter of 31 August 2017 which the Claimant received on 4 September 2017, he worked as normal from home. In addition, during the majority of his service with the Respondent the Claimant made a car allowance claim for usage of his motor car in the sum of £450. The Respondent paid this car allowance as the Claimant was using his motor vehicle as part of his job and the Respondent had already indicated that he would receive a car allowance of £450 per month as a minimum payment as set out in his letter of appointment…. The Respondent however at the hearing, sought to dispute payments of the Claimant's car allowance for the month of September on the basis that his car was over three years old. The Tribunal did not accept the Respondent's evidence. The Tribunal noted that the Claimant was paid his car allowance for the majority of his service and even though the car was over three years old, the Claimant was justified in making the car allowance claim for the month of September being half of the total amount claimed. It seemed to the Tribunal that the Respondent was aware of the age of the Claimant's car and was seeking to withhold this payment for no justifiable reason."**

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16 The Tribunal set out the law at paragraphs 10 and 11 of its Reasons. At paragraph 10, it said:

> **"10. Where an employee resigns as a consequence of the Respondent's conduct (in this case a failure to pay contractual wages) he has to prove to the Tribunal that the company was in fundamental breach of contract. A failure to pay contractual wages would be such a fundamental breach. In such circumstances the Claimant is entitled to resign with or without notice and is entitled to claim contractual notice pay as a consequence of the Respondent's fundamental breach of contract. In this case, pursuant to the Claimant's contract of employment … he was entitled to two weeks' notice or payment in lieu of notice."**

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17 Paragraph 11 of the Tribunal's Reasons recited section 13(1) of the **Employment Rights Act 1996** ("ERA"):

> **"(1) An employer shall not make a deduction from wages of a worker employed by him unless —**
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> **(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**

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(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

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18 The Tribunal's conclusions were then set out at paragraphs 12 to 16 of its Reasons. In summary, it found that:

18.1 the Claimant had been employed pursuant to the contract of employment and the offer letter of 28 September 2016 (the latter described by the Tribunal as the 'letter of appointment');

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18.2 both documents had confirmed the annual rate of pay and the notice period;

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18.3 the letter of appointment had confirmed that the Claimant was entitled to £450 per month as a minimum payment in respect of a car allowance;

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18.4 those were all contractual terms which could not be varied without the Claimant's consent;

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18.5 by its letter of 31 August 2017, the Respondent had sought to vary the Claimant's contract of employment, without his consent. Contrary to the Respondent's argument, the Claimant had not accepted this unilateral variation by working for a further month: it had been reasonable for him to have waited for the Respondent to breach his contract of employment before deciding to resign;

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18.6 the Respondent's failure to have paid the Claimant his September salary had constituted a fundamental breach of contract entitling the Claimant to resign. His resignation had been a constructive wrongful dismissal entitling him to two weeks' notice, in accordance with clause 20 of his contract of employment, in the gross sum of £1,250;

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18.7 the Respondent had paid the Claimant his car allowance for the majority of his service and so there was no good reason why it should not pay him the gross sum claimed (£225, representing 50% of the car allowance for the month of September). Even though the Claimant's car had been more than three years old, the Respondent had had ample opportunity to ascertain its age and/or question the Claimant about his car allowance claim, if it had felt that it was not in order to pay it. The Respondent had taken no such opportunity to question the Claimant in that regard, quite happily paying the allowance for the majority of his service.

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The Respondent's Notice and Grounds of Appeal

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19 By its Notice of Appeal, settled by Mr Perry, the Respondent raised two grounds of appeal:

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19.1 that the Tribunal's decision to award the Claimant his car allowance was a decision without evidence and/or which was perverse. Specifically, it was said that there was no evidence to support the conclusion, at paragraph 9 of the Tribunal's Reasons, that the Respondent had been aware of the age of the Claimant's car. Moreover, clause 16 of the contract of employment was clear that the Claimant would only receive his car allowance if his car was less than three years old (which was agreed not to have been the case); and

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19.2 in awarding the Claimant compensation for notice pay for the period after employment in respect of a claim under section 23 of the ERA, the Tribunal had erred in law. At paragraph 2 of its Reasons, the Tribunal had confirmed that the Claimant was not making a claim for breach of contract, on which basis it refused to hear the Respondent's counterclaim. In awarding the Claimant damages for unpaid notice pay in respect of a claim expressly stated to have been advanced solely under sections 13 and 23 of the ERA, the

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Tribunal had erred in law, contrary to the principle in **Delaney v Staples** [1992] IRLR 1919, HL. Nonetheless, if the matter had ever been pursued as a breach of contract claim, the Respondent had been entitled to have its employer contract claim considered:

> **"Given the claimant resigned with immediate effect and indicated in his ET1 claim form that he was pursuing a claim for notice pay, it is submitted that there must initially have been a claim for breach of contract (albeit that the claim was expressly not pursued at the final hearing). Accordingly, the ET should have considered the respondent's employer contract claim and in not doing so the ET erred in law."**

20 At the sift, His Honour Judge Richardson ordered that the appeal proceed to a Full Hearing. In his Reasons, he stated that ground 2 was reasonably arguable:

> **"Reasons:**
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> **Ground 2 is reasonably arguable in the light of Delaney v Staples [1992] ICR 483. If the Claimant was not claiming for breach of contract then an award for wrongful dismissal could not be made. If the Claimant was claiming for breach of contract then in principle the Respondent was entitled to counterclaim".**

Regarding ground 1, he observed:

> **"Ground 1 is a short perversity point. I cannot easily tell from the papers whether it is sound. It would be surprising if the Claimant had not given the registration number of his car when making expenses claims, and if so the Respondent would surely have known the age of the car; but I cannot resolve the point on paper and so it should go to a Full Hearing with Ground 2.**
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> **The Claimant should set out in his Answer what the evidence was before the ET that the Respondent knew of the age of his car…"**

The Respondent's Answer

21 In his Respondent's Answer, the Claimant noted that he had presented multiple claim forms for expenses and receipts to the Tribunal (which he attached), in which his car registration mark had been in full view. All of them had been paid. He further stated that, within the final correspondence from the Respondent, it had been clearly stated that his expenses would be paid. Regarding the award of notice moneys, the Tribunal had been correct to find that non-payment of wages, coupled with an indication that they would not be paid, amounted to a constructive dismissal.

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Ground 1

The Respondent's Submissions

22 In his skeleton argument for the Full Hearing of the appeal, Mr Perry indicated that, having reviewed the evidence, the Respondent no longer wished to advance the contention that there had been no evidence to support the Tribunal's conclusion that the Respondent had been aware of the age of the Claimant's car:

> **"The Respondent accepts that there were two expense forms before Judge Hallen which justified a finding by the ET that the Respondent was aware of the age of the Claimant's car (albeit the Respondent maintains that it did not check the age of the car)".**

Thus, before me, ground 1 was confined to a contention that the Tribunal's conclusion was perverse in light of the terms of clause 16 of the Claimant's contract of employment. In short, Mr Perry contended that no term can be implied into a contract which is inconsistent with an express term, unless an intention to vary the relevant contractual term is established. He further contended that, whilst concerned with entitlement to an enhanced redundancy payment, the guidance given by Underhill LJ in **Park Cakes Ltd v Shumba** [2013] IRLR 800, CA was

> **"…helpful in identifying the potentially relevant considerations to the determination of a contractual benefit more generally, which will typically include: (a) the number of occasions, and over how long, the benefits in question had been paid, (b) whether the benefits were always the same, (c) the extent to which those benefits have generally been publicised, (d) how the terms are described, (e) what is said in the express contract, and (f) equivocalness, such that an employee will be unable to discharge the burden of proof if the employer's practice is – viewed objectively – equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation."**

23 In Mr Perry's submission, whilst the Tribunal was not to be criticised for not having gone through every factor, monthly payment of the car allowance, without more, would not suffice to establish contractual obligation, as distinct from the exercise of a discretionary policy. Only if the Tribunal had concluded that there had been an implied variation removing the requirement that the car be less than three years old would an award have been justified. At no point in its judgment and reasons had the Tribunal made clear the legal test that it had been applying, or made the relevant findings of fact that would have warranted such a conclusion.

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Crucially, Mr Perry submitted, it had not made any finding as to when the Respondent had become aware of the age of the Claimant's car. The Claimant's expense forms suggested that this might not have been until July 2017 (the earliest dated form before the Tribunal on which the registration mark had appeared). In those circumstances, the claim should be remitted to enable proper consideration of all relevant factors, by a freshly constituted tribunal.

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The Claimant's submissions

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24 The Claimant's position as to ground 1 was that, throughout his employment with the Respondent, there had never been any doubt that his car allowance had been payable and would be paid. There had been clear evidence before the Tribunal of his agreement with the Respondent entitling him to that allowance. He referred me to sections 5.4 and 6.1 of the response form; to the Respondent's letter of 31 August 2017, cited at paragraph 7 of the Tribunal's judgment, including a statement, even at that stage, that he would be paid his expenses (see paragraph 14 above); to the expense claim forms which had been before the Tribunal and which had recorded his registration mark from 13 July 2017 onwards; and to a reference written by his employer on 14 July 2017, which had referred to his entitlement to a car allowance. He said that he had told the Tribunal that Mr Sheen had asked him, and been told, the age of his car at the beginning of his employment. The allowance had always been paid. There had been no e-mails questioning his entitlement to it. The Claimant submitted that it was as important to note the absence of evidence supportive of the Respondent's position as it was to consider the evidence supportive of his own. The first occasion on which his entitlement to a car allowance had been brought into question had been half-way through a Tribunal hearing in February 2018, long after his employment had terminated. In all such circumstances, the Claimant contended, the findings of fact made at paragraph 9 of the Tribunal's judgment were entirely justified.

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Discussion of Ground 1

25 The Claimant's claim to a car allowance is advanced as an unauthorised deduction of the wages properly payable to him, contrary to section 13 of the ERA. The Tribunal appears to have taken the view (see paragraph 12 of its Reasons) that the 'letter of appointment' and the contract of employment jointly recorded the contractual terms upon which the Claimant had been employed by the Respondent and that such terms could not be varied without his consent. In fact, as is clear on its face, the former document was designed to highlight the main points of the Respondent's offer and the formal contract was to follow separately. Clause 16 of that contract set out the parties' respective obligations in respect of the car allowance. It included a requirement that the Claimant *"keep and maintain a car for use in conjunction with the employer's business that is less than three years old and in good condition"*, amounting to a condition precedent to payment.

26 There is no dispute that, from the outset, the Claimant's car was more than three years old. It follows that, if clause 16 accurately records the agreement between the parties at the material time, the Claimant would not have been entitled to a car allowance. The Claimant relies on the Respondent's custom and practice in contending that a term must be implied to the effect that there was no requirement that his car be less than three years old, but any such term would be inconsistent with the express wording of clause 16 and, for that reason, cannot be implied. (See, for example, **Park Cakes**, at paragraph 36(e), per Underhill LJ.)

27 The questions that ought to have been addressed, in my judgment, are whether:

27.1 clause 16 of the contract had been varied so as to remove the requirement that the Claimant's car be of the stipulated age (perhaps, but not necessarily, in accordance with clause 33 of the contract); alternatively

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27.2 expressly, or by its conduct over the course of the Claimant's employment, the Respondent had represented that compliance with that requirement was not required and, if so, whether the Claimant had relied on that representation so as to render it inequitable for the Respondent to enforce the requirement.

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28 The answers to those questions would depend upon certain prior findings of fact, in particular and at least as to:

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28.1 what, if anything, had been said on behalf of the Respondent to the Claimant and his colleagues regarding the significance of the age of any vehicle in respect of which car allowance was being, or would be, claimed;

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28.2 what had been known by the Respondent about the age of the Claimant's vehicle (and the age of the vehicles belonging to his colleagues in respect of which car allowance had been claimed and paid);

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28.3 the date from which the Respondent had, or ought to have, been aware of the age of the Claimant's vehicle;

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28.4 whether the age requirement had been consistently ignored, in relation to the Claimant and his colleagues, and, if not, on how many occasions and in which circumstances it had been ignored;

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28.5 whether the payment by the Respondent, on any given occasion, of a car allowance in respect of a vehicle which was over three years old had been, expressly or by implication, a matter of discretion; and

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28.6 what the Claimant had done in reliance upon any express statement or conduct by the Respondent which is said to have operated to remove the age requirement.

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29 The Tribunal made no findings in respect of the first, second, third, fifth, or sixth matters described above. In respect of the fourth matter, the Tribunal found:

29.1 (at paragraph 9 of its Reasons) that,

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> **"…the Claimant was paid his car allowance for the majority of his service and even though the car was over three years old…It seemed to the Tribunal that the Respondent was aware of the age of the Claimant's car and was seeking to withhold this payment for no justifiable reason.";**

and

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29.2 (at paragraph 16 of its Reasons) that,

> **"Even though the Claimant's car was more than 3 years old, the Respondent had ample opportunity to ascertain the age of the car and/or question the Claimant about his claim for a car allowance if it felt that it was not in order to pay it. The Respondent took no such opportunity to question the Claimant in this regard, quite happily paying the car allowance for the majority of his service."**

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In the absence of the other findings of fact identified above, however, such findings did not justify the conclusions drawn. Whilst the evidence on which the Claimant relies before me and which, he tells me, was before the Tribunal may well have informed the Tribunal's conclusions,

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there is no indication to that effect in its Judgment and, in any event, it had not asked itself the correct questions. In such circumstances, this ground of appeal is allowed and I address the appropriate disposal below, having first considered ground 2.

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Ground 2

The Respondent's submissions

30 Mr Perry's submissions as to ground 2 essentially repeated the relevant ground of

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appeal (set out at paragraph 19.2 above). He told me that the Respondent did not now wish to

A pursue its employer's contract claim before the Tribunal, but might wish to pursue it in a different forum in due course.

B *The Claimant's submissions*

31 The Claimant told me that he recalled having been asked by Employment Judge Hallen, on multiple occasions, what he was claiming for and in what sums. He had told the Tribunal

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D had not been based on a protected characteristic. He submitted that there had been sufficient evidence before the Tribunal that a wrongful dismissal had taken place to justify its finding to that effect and related award.

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Discussion of Ground 2

(a) The claim for notice moneys

32 Mr Perry is correct in his contention that a claim for notice moneys payable on the

F termination of employment cannot be advanced as a claim for unauthorised deduction of wages under the ERA. Per Lord Browne-Wilkinson in **Delaney**, at paragraph 29, when considering predecessor provisions under the **Wages Act 1986**:

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> **"In my judgment one is thrown back to the basic concept of wages as being payments in respect of the rendering of services during the employment, so as to exclude all payments in respect of the termination of the contract, save to the extent that such latter payments are expressly included in the definition in s7(1)."**

H 33 However, in my judgment, that principle is not dispositive of ground 2 in this appeal. Both claim forms had made clear that the Claimant was advancing a claim for notice

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moneys. At the February 2018 Preliminary Hearing, however, the Tribunal then considering the matter recorded that the Claimant had confirmed that his complaints were of unfair dismissal and unlawful deduction of wages. It further recorded that the latter claim related to his wage for the month of September and expenses for the months of August and September 2017. Nonetheless, it went on to give directions requiring the Respondent to particularise its counterclaim, which, in accordance with Article 4 of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**, the Tribunal would only have had jurisdiction to consider if the Claimant had himself brought a claim in accordance with Article 3 of that Order. It was not suggested that the Claimant had withdrawn his claim for notice moneys.

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34 At paragraph 2 of the June 2018 Judgment and Reasons from which the Respondent now appeals, the Tribunal recorded the Claimant's confirmation that his claim was limited to one for unauthorised deduction of wages, although the nature of the sums to which that claim was said to relate was not specified. The Claimant's position before me was that he did not understand how that statement had come to be recorded: he had been clear throughout that he was pursuing a claim for his notice moneys. I note that that position is consistent with both parties' written closing submissions to the Tribunal (which, in the Respondent's case, had been drafted with the benefit of legal assistance). Copies of those submissions were provided to me in the course of the appeal hearing, at my request, in light of the Claimant's stated position.

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35 The Claimant's written closing submissions to the Tribunal began as follows, *"....I have a rightful claim for non-payment of wages according to my employment contract for the month of September, and my notice period mid-October.*" Later in the same document, he submitted,

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"...I believe I have demonstrated legally that the laws in relation to termination of my contract were broken and I am owed money.". Paragraph 2 of the Respondent's written closing submissions read, *"The Claimant brings claims of: (a) unlawful deduction from wages; (b) wrongful dismissal."* Under the latter heading, the Respondent made submissions at paragraphs 10 to 13, contending, in summary, that:

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35.1 it had not acted in breach of the Claimant's contract of employment because the Claimant had orally accepted the variation to his pay, with effect from 4 September 2017, which had been offered as an alternative to his dismissal for gross misconduct and against the background of his failure to have hit his sales targets; alternatively,

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35.2 the Claimant had claimed sums for car allowance to which he had not been entitled under clause 16 of his contract because his car had been over three years old. Had that been discovered prior to the Claimant's resignation, it would (as an act of dishonesty) have entitled the Respondent to dismiss the Claimant without notice, in accordance with the principles in **Boston Deep Sea Fishing & Ice Company Ltd v Ansell** (1888) 39 ChD 339, CA; alternatively,

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35.3 there should be a set-off of the overpaid car allowance (said to amount to £4,500) against any liability for notice pay and basic pay; in any event,

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35.4 there should be no liability for car allowance during the notice period.

36 In the face of both parties' closing submissions to the effect summarised above, it is difficult to see how it can fairly be said that a claim for wrongful dismissal had not been before the Tribunal. Indeed, the Claimant's position is consistent with the fact that the Tribunal made

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findings in relation to his constructive wrongful dismissal, leading to the award of notice moneys now challenged by the Respondent.

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37 Mr Perry acknowledged that the Respondent had always understood the Claimant to have been maintaining his claim to notice moneys, but contended that, as he could not do so, as a matter of law, under sections 13 and 23 of the **ERA** and as there was, formally, no breach of contract claim being pursued, the Tribunal had been wrong to make an award, nonetheless.

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38 In the circumstances of this case and in particular given that the Claimant has been acting in person throughout, that is an unattractive and, in my judgment, inappropriate position

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for the Respondent to adopt on appeal. The nature and substance of the Claimant's claim was at all times clear to the Respondent and to the Tribunal and this ground of appeal therefore proceeds on the simple basis that the Claimant, or the Tribunal(s) on his behalf, had earlier

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applied the wrong label to it. The inconsistencies in approach adopted, respectively, at the Preliminary Hearing and at the Full Merits Hearing, indicate that each tribunal had overlooked the fact that a claim for notice moneys cannot be advanced as a claim for unauthorised

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deduction from wages. Matters were not assisted by the seeming absence of a list of issues arising for determination, and the problem was compounded by the second Tribunal's erroneous statement, at paragraph 2 of its Reasons, that "[the Claimant] *confirmed his claim was limited to unlawful deduction of wages. As such the Respondent could not make a*

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counterclaim against the Claimant as he was not making a claim for breach of contract." In fact (see above), the Claimant had made clear, and the Respondent and the Tribunal had understood, that the Claimant was pursuing a claim for notice moneys arising from his

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allegedly constructive wrongful dismissal and, in any event, the Respondent's entitlement to bring an employer's contract claim had arisen once the Claimant had brought proceedings in

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respect of a claim under Article 3 of the 1994 Order and would have been unaffected by any subsequent abandonment or withdrawal of that claim by the Claimant. As a result of its erroneous conclusion on that issue, the Tribunal did not consider the counterclaim, the particulars of which (served by the Respondent in accordance with the February 2018 Orders) had included contentions, respectively, that clause 33 of the contract of employment had entitled the Respondent to change the basis of the Claimant's remuneration on two weeks' notice, without the need for his consent, and that clause 18 of the contract had entitled the Respondent to deduct from the Claimant's salary, or any other payments due to him in respect of his employment, any moneys due from him to his employer. It was further contended that clause 18 entitled the Respondent to recover "falsely claimed" car allowance payments and the cost of purchasing tele-marketing leads.

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39 The above said, in the event, the Tribunal rightly went on to consider the Claimant's claim for wrongful dismissal, having received submissions from both parties relating to that claim. It did so at paragraphs 10 and 13 of its Reasons, reflected in paragraphs 4 and 5 of its Judgment: *"In addition, the Claimant was wrongfully dismissed and is owed two weeks' notice pay in the sum of £1250 gross….less the appropriate amount in tax"*. No separate challenge has been raised by the Respondent to the Tribunal's analysis of that claim.

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(b) The employer's contract claim

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40 The Respondent's particulars of the employer's contract claim included matters which would have been of relevance to the claim for wrongful dismissal and any related award. However, as noted above, there is no further ground of appeal by the Respondent asserting that, in any event, the Tribunal's approach to the claim of wrongful dismissal was wrong in law. On that basis, its findings in respect of that claim stand.

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41 Nonetheless, for the reasons explained above, the Respondent was wrongly deprived of the opportunity to advance its employer's contract claim and, to that extent, ground 2 of its appeal is allowed. The relevance to that claim of the findings already made in the wrongful dismissal claim will be for the tribunal (or court – see below) seised of the former claim to consider.

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Disposal

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42 It follows that the Claimant's claim for unauthorised deduction of the car allowance for September 2017 and the employer's contract claim should be remitted for consideration, in accordance with this Judgment. Given the nature and extent of the flaws in the Tribunal's approach, I agree with Mr Perry that it is appropriate that a differently constituted tribunal determine those claims, so far as they are to be pursued.

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43 If, as indicated to me, the Respondent no longer wishes to pursue the employer's contract claim before a tribunal, it should make the appropriate application to the Tribunal. In that event, the only claim remaining for determination would be the claim for unpaid car allowance, having a value of £225, and I encourage both parties to give very careful thought to whether continued proceedings over that sum are necessary and proportionate.

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44 If the employer's contract claim is to be pursued before the Tribunal, directions will need to be given enabling the Claimant to respond to that claim, as previously particularised by the Respondent, so that all issues arising for determination can be identified clearly, in advance of the full merits hearing.

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