EMPLOYMENT TRIBUNALS

Claimant: **Mr J Stone**

Respondent: **Burflex (Scaffolding) Limited**

HELD AT: **Hull** **ON: 28 & 29 October 2019**

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimant: **Mr P Lassey of Counsel**
Respondent: **Miss L Howes, Solicitor**

JUDGMENT having been sent to the parties on 1 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from the transcript of the oral judgment delivered immediately upon the conclusion of the case:

REASONS

1. This is a claim by Mr John Stone against his former employer Burflex (Scaffolding) Limited.

   The complaints

2. The principal complaint is of automatically unfair dismissal the claimant asserting that he was dismissed because he had alleged that his employer had infringed a relevant statutory right. That is the right not to have unauthorised deductions made from his wages in respect of normal pay nor holiday pay. And in addition to the unfair dismissal complaint those alleged deductions are also the substance of financial claims before the Tribunal.

3. There is a stand-alone further claim of unauthorised deduction from wages in respect to the recovery of repair costs to the claimant's company vehicle, and it is in effect conceded now that part of that sum deducted was not duly authorised. That is because the claimant had signed when he started work for the company a consent to the deduction of damage caused by him or due to his neglect. When he handed over his company vehicle on the date of termination he admitted that he had caused damage to the rear light cluster. But there was other damage to the vehicle which he never accepted was his fault and where indeed on the evidence it is now clearly conceded by the respondent that it could not have been, because it occurred at a time when he was not at work and somebody else was using the vehicle. Nonetheless the respondents purported to deduct the entirety of their repair costs less VAT. But of that total figure, which was £559.62 on the documented invoice from Elite Bodywork, the only sum that is properly recoverable for repair to the rear light cluster is £240.62. That means that it is conceded that the respondent has made an unauthorised deduction from the claimant's wages in the sum of £319 and it is ordered to repay that sum.

The background

4. So far as the rest of the claim is concerned the background is that the claimant commenced work on 31 October 2017. In so far as he alleges in the claim form that the date was earlier, 16 October, I find that he is wrong. There is signed paperwork at induction dated 31 October and on the claimant's evidence that was the day he commenced work, attending the premises in Hull for an initial training session.

5. He was dismissed on 30 October the following year 2018 so he had worked just one day short of a year and nothing in fact is material dependent upon whether he started on 31 or 16 October, but as I say I find that he had in fact worked for just short of one calendar year at the date of termination.

6. When the claimant commenced work he was told that as a scaffolder's labourer he would be paid at the rate of £10 an hour. There is a document giving the written terms of conditions which includes that figure. It is not however signed personally by the claimant. It has his name written on in the signature box but it is not in his writing and it certainly is not his signature. I accept the claimant's evidence that he was not in fact given a copy of those written terms and conditions at the time. That has the consequence that because his claim in part succeeds in relation to the unauthorised deduction from wages he is entitled to a further award for the failure to provide those terms and conditions and I consider that the appropriate award is the higher level of four week's pay. That is because the failure to give a copy of those terms and conditions had had a huge impact on the further interactions between the claimant and his employer because it meant he did not have a copy of the document indicating how he was in fact to be paid. And indeed although the understanding was that he was on a contractual rate, in reality that is not what happened and the written terms that were purportedly produced at that date 31 October 2017 do not therefore properly record how the remuneration is calculated.

7. In reality the claimant was never paid at an hourly rate as his contract states. From the onset his pay slips which were produced weekly and provided to him, either at the time or shortly thereafter, consistently show that he was paid on what is termed "price work". That varied from week to week but it was never calculated by reference to the hours done nor that nominal hourly rate of £10 an hour. At least

that was the case until we get to the very last week of his employment when he was assigned to work in the yard and was told that at that stage he would only be paid his contractual basic rate. Similarly and this is a , material point in the claim for deductions, when holidays were paid they too appear to have been calculated upon that hourly rate though the position is not quite clear. Holidays were paid at £400. That would appear to be 40 hours at £10 an hour but the written terms and conditions of the contract produced by the respondent in fact refer to a minimum working week of 45 hours. So that does not correlate exactly.

8. As I have said from the moment he started work -and his first pay slip is from 10 November 2017 - the amount of price work in any given week varied. It may, in fact, on occasions have equated approximately to £10 an hour but it is not ever stated to be so calculated. Initially the claimant was working near his home with a contract at Sleights and he received varying amounts until the payslip dated 19 January 2018. At that point having been initially approached and taken on to work on the contract at Sleights the claimant was not clear whether there would in fact be a further contract offered to his team of scaffolders.

9. But there clearly was other work and the claimant refers to having been contacted by his immediate manager, Mike Purvis who organised that team, in around December encouraging him to take work on a contract further afield at Chevin Park (the claimant says that was a building site near Harrogate. I am told it was in fact closer to Guiseley). The claimant's recollection is that he started that work on a new contract early in the new year. And that was on the understanding that he would receive a flat daily rate of £200 and also, because he was now working away from home, he would receive expenses which appears from the payslips to be a fixed sum of just over £252. In actual fact the payslips do not first record that payment of a flat rate of £1,000 a week, £200 for five days, until 26 January. For a period thereafter the payslips are consistent, that is until 2 March. There is then a week which is at the lower £400 and then a further week back at £1,000 and thereafter from the middle of March 2018 there again fluctuating amounts all the way through until 27 July though for the most part those are in excess of £1,000 a week. Certainly not much below it.

10. There is then a change in the wages. They go down to £750 for the price work on 3 August and £900 on 10 August and they are back up again to £1,000 on the 17th. Thereafter the claimant took holiday pay which as I have said was paid only at £400 a week and then he was injured and received only sick pay until 12 October when he received again £850 on a price work rate.

11. This is a somewhat unusual position. I heard the evidence and read at length what was said by the respondent, particularly Mr Fieldhouse, in the course of a grievance meeting held with the claimant on 30 October of last year. So far as I can understand it the concept of price work is that there is a budget for any particular job and that is allocated amongst the team provided they stay within budget. A supervisor such as Mr Purvis can then arrange to pay the scaffolders or their labourer, the claimant, whatever is appropriate given the fixed price for the job. Looking at the history over the payslips I accept that that is in effect what happened.

Deductions from what is properly payable

12. The claimant's case now is that he was, notwithstanding the written terms of the contract, operating under a verbal agreement with Mr Purvis that he would be

paid £200 a day when working away from home and therefore that is the contractual rate and any sums paid less than that are an unauthorised deduction: section 13 (3) Employment Rights Act 1996.

13. I am quite satisfied that there was no contractual agreement of that nature. Mr Purvis allocated sums on an ad hoc basis depending on the job and as I have pointed out that fluctuated. Also when I look at the account given by the claimant at the meeting on 30 October as to what Mr Purvis had said it is this:

    "Mike phoned me up and he said I've been talking to Sean. He's certain he's asked us if we will go away and work on a minimum of £200 a day and if we go any further then Chevin Park then they'll up the price".

    The way that is recounted, I am quite satisfied, does not indicate any intention to create a contractual relationship even if Mr Purvis had had the authority to determine that the claimant's contractual rate for any job would be that sum. He does not even say it will necessary be £200 on any other jobs. He indicates only that that is what will be paid at Chevin Park. That indeed was what was paid working there.

14. Similarly in the course of that same interview, when talking about events only the week before termination, the claimant recounts how Mike (that is Mr Purvis) had come and said "*right today your on £170 for Monday and Tuesday, Wednesday, Thursday and Friday your on price work"*. So it is clear that there was an understanding that Mr Purvis would identify a particular sum payable on an ad hoc basis from job to job. And also I am quite satisfied, as the respondent said in evidence, that the sums that found their way onto the claimant's payslip would have originated from the information provided by Mr Purvis. So where those sums differ it will be Mr Purvis who gave the information to payroll as to what each member of his team was due for that week. And the fact that those amounts fluctuated is wholly inconsistent with Mr Purvis having agreed a consistent flat rate of £200 a day. So that claim for unauthorised deduction from wages fails.

15. Similarly when I look at the correct sum of holiday pay that is to be calculated not on the basis of a nominal £1,000 a week contractual sum but on the basis that the average of the fluctuating price work pay received in the relevant 12 weeks prior to the period of holiday taken. That is because there was no set rate for the job and it was all done on price work. On that basis it is now somewhat belatedly admitted by the respondent that it has not paid the claimant properly in only paying him £400 a week. But the sums due have now been calculated. So on the basis of the 12 week averaging calculation that the shortfall is £1,385.92 and that sum was paid to the claimant on 19 July of this year.

16. On the face of it given that I can see no reason to dispute the respondent's calculation I simply make a declaration that there has been an unauthorised deduction from the claimant's wages in respect of the correct amount of holiday pay both for the holidays were actually taken during employment and for the accrued but untaken leave due at the date of termination. Given that that sum has been satisfied now there is no further monetary award to be made.

Unfair dismissal

17. That brings me to the much more central and more complicated element of this claim.

18. Because the claimant had less than two year's continuous employment it is for him to show that the reason or principal reason for the termination was that he had alleged an infringement of his statutory rights: section 104 (1) (b) Employment Rights Act 1996 Before he gets to that stage he must however, because it is an issue in this case, satisfy me that has in fact been dismissed and did not resign: section 95 (1) (a). I refused an application to amend to plead, in the alternative, constructive unfair dismissal under section 95 (1) (c) because this is neither the pleaded case, nor indeed the claimant's case on the facts as set out in his evidence.

19. On that first issue I find the claimant was dismissed. There are difficulties in the way the evidence has come to light on both sides though I now have an account given by the claimant of a conversation when he was summoned into the office of one of his managers Mr Long and told "*your service is no longer required, I have to let you go, I have to finish you. I was just told to finish you*".

20. I have generally found the claimant to come across as an honest and reliable witness attempting to assist the Tribunal and I find his account plausible. It is entirely consistent with his behaviours at the time. That is that he raised an appeal against dismissal almost immediately claiming that he had been verbally told that his employment was ended. It is also consistent with the information he conveyed to his union representative indicating immediately to him that he had been dismissed. That indeed is what prompted the appeal.

21. Contrary to that I do not find the respondent's arguments as to why I should conclude that he had in fact resigned to be compelling in the circumstances. The fact that the claimant was allowed to sit in the company vehicle awaiting collection by his wife is not inconsistent with his employment having been terminated, nor is the fact that he agreed to carry out an inspection of the vehicle to assess the damage and signed a form prepared by Mr Long. On the claimant's own account the conversation with Mr Long indicated that Mr Long was acting upon instructions, but the claimant had no particular grouse with him and nor Mr Long with the claimant. And therefore those arrangements they made to facilitate his leaving site are not inconsistent with his having been actively dismissed.

22. This necessarily means that I disbelieve the evidence now given by the respondents to the effect that Mr Long was not instructed to dismiss the claimant.

23. So having determined on the facts that the claimant was indeed dismissed rather than that he resigned, I then have to consider whether he has satisfied me that the principal reason was one that would give rise to an automatically unfair dismissal claim. And of course when I have I have held that the respondent has not told me the truth about this matter. It must raise an inference that the claimant's account is correct but it is still for him to prove it. And in this case I am not satisfied that the principal reason was indeed that the claimant had alleged an infringement of his statutory rights. Briefly the reasons for my conclusions are these.

24. The claimant was clearly unhappy with the lack of transparency as to how his pay was calculated on a weekly basis and I have every sympathy with him. As I have already pointed out the respondent is at fault and will be penalised financially for not having made clear in written terms and conditions how this arrangement of price work would operate on a week by week basis, so that an employee had an indication clearly as to what they could expect to receive and

how they will be informed as to what they receive for each job that they did for the respondent company.

25. As a result of that disquiet about that method of payment, on advice from his union representative, Mr McIntyre, he wrote a letter dated 29 October 2018. That was written on a day when the claimant was not actually in work because had to attend a funeral, but for the rest of that week from the Tuesday he was due to work in the yard at Hull and not on site. The reason for that was that in order to enable holidays to be taken and used up his colleagues on that gang who were scaffolders had taken holiday for that week. Because the claimant was not himself a qualified scaffolder himself he could do nothing unsupervised and there was no work for him to do. So he was transferred to the yard where on that occasion he would only have been paid at his basic contractual rate at £10 an hour, considerably less therefore than under a price work scheme he would have been working on site the previous week.

26. His handwritten grievance was photographed by him and included within an electronic communication sent to the company offices at around 5.30pm on that Monday. What he says in the grievance letter is "*I wish to arrange an urgent meeting between management, myself and my union representative to discuss a formal grievance regarding my wages and underpayment of holiday pay. I was verbally contracted to work away from home for £200 a day then without consultation my wage was cut to under £50 per day. Following a verbal communication with Mike Purvis regarding this matter I was put back on £200 a day then following my return to work after my accident I was again told my wages would be £170 a day only to be told on 22 October it was now price work and up to a management employee to decide what I would be paid. Trusting we can discuss this matter very soon*".

27. When the claimant went in to work the following day, having driven down from his home in Saltburn, he says he enquired of a secretary whether that email or text had been received but did not get an answer. But shortly after that he was called into a meeting by Mr Fieldhouse with Mr Kay another manager also in attendance. Mr Kay I accept unbeknown to either of the other two people present was recording that and therefore we now have a transcript of the conversation.

28. On balance I have concluded that a copy of the grievance that had been sent in the previous evening was not in fact before Mr Fieldhouse or Mr Kay on that occasion and that a copy was not in fact then given to them. Although there is some discussion about the claimant having instigated a grievance procedure on the advice of his union and having sent a letter in, there is no actual reference in anywhere in that meeting to the specific content which I have just read out in his handwritten letter. In particular there is no reference whatsoever to any alleged underpayment of holiday pay.

29. So although it must be the case, and I find that it was, that Mr Fieldhouse and Mr Kay were aware the claimant had already by the time of their meeting instigated steps to start a formal grievance, they were not in terms investigating that grievance as already been put in writing. I accept that Mr Fieldhouse would have been aware in general terms from other conversations that the claimant was unhappy about the situation regarding the way his work was allocated and paid and in particular the fact that he was having to work in Hull away from home for that week apparently on vastly reduced wages and without accommodation expenses.

30. So as to whether or not there was an allegation of an infringement of a statutory right which might have formed the principal reason for the dismissal I am looking not at the terms of the manuscript letter but only at the content of the meeting and what the claimant said. I have read that transcript carefully and it is not clear to me that the claimant was specifically alleging that he should have been paid at a higher rate. His principle concern throughout is as I stated the lack of transparency and the fluctuations in his pay. I have already pointed out those parts of the interview where it refers to what Mr Purvis had first said when talking about a £200 rate and also about the subsequent conversations about a reduced rate a price work of £170 a day. And, absent any clear verbal allegation, as there had been in the in the letter, of an unauthorised deduction from wages in respect of underpayment of holiday pay, those general concerns about lack of fairness summarised repeatedly in the claimant's assertion that he felt he'd been "victimised" were allegations that he thought he had been badly treated rather than of him necessarily having been underpaid in accordance with his actual contract. That gives great cause for doubt in my mind as to whether there was in fact an actual assertion of an infringement of his statutory right in the course of that discussion.

31. The bulk of the conversation is Mr Kay and Mr Fieldhouse seeking to explain the rationale of price work fluctuations as authorised by Mr Purvis and their constant returning to the theme that the claimant as a labourer would not ordinarily expect to receive £200 a day, that that was excessive and that no one would agree to pay that as a matter of course. Sometimes it appears to me quite clear the parties are somewhat at cross purpose. For instance I consider, reading the transcript, that Mr Fieldhouse assumed that the claimant was perhaps more upset at the lack of payment for digs whilst he was in Hull than he really was. That is because when there is discussion about that matter the claimant's concern seems to me reading the document to be that he believed that it had been said to him that he would no longer be paid for his digs if he was working generally away from home, as he had been consistently since January of that year ,whereas Mr Fieldhouse appears to take that as indication that the claimant was unhappy about not being paid for digs in Hull.

32. But most significantly in determining the context of this discussion the claimant states that he had had advice from the union and that the union had taken the initiative in stating "*well you've been on £200 for last 2 or 3 months so that's what you should be getting*". The claimant said "*well like I say I'm only telling you what I've been told because I do not know myself*". He obviously and understandably was taking a lead from his union representative but he is not positively asserting himself that he understood there had been a concluded contract with Mr Purvis to pay him £200 whenever he was working away. The fact that the claimant did not have an actual valid claim for unauthorised deductions, as I have already held, is of course not fatal to this part of the case provided he acted in good faith, but looking at the context of what he told the respondent on that occasion he is acting on the instructions of his union on a possible interpretation of the contract. And as he says on more than one occasion he is acting on the advice of Mr McIntyre in order "to get the ball rolling" and start a discussion. That falls short of a positive assertion of an infringement of his right.

33. Mr Fieldhouse is adamant throughout there has been no such infringement, and although there are concerning elements in that interview indicating an antagonism towards the involvement of the union and a reluctance to accept that an employee could raise or seek to raise a formal grievance rather than simply sort the matter out informally those are not necessarily the same thing as reacting negatively to the claimant's assertion of an infringement of his rights.

34. Underlying all of this are the particular circumstances of that week. The claimant could not continue to work on site because his colleagues were on holiday. He was not laid off or not immediately. There was an attempt to provide him with work albeit at the yard in Hull. Clearly, looking at the general tone of what he said, Mr Fieldhouse considered that the company therefore was seeking to do their best to secure continuity of employment for the claimant and that he was not properly appreciative of that fact. Also there was a general discussion about the fact that although he had been offered work in the yard it was generally anticipated to be coming up to a quiet time before Christmas. Therefore when, as I have found, a decision was taken to instruct Mr Long to finish the claimant, in that context I consider the proper interpretation is that the principle reason was that at that juncture Mr Fieldhouse was withdrawing the concession to give alternative work to the claimant. There was no actual scaffolding work to be done and he was therefore being finished.

35. That I think it entirely consistent in fact with the claimant's own account of what Mr Long said to him: "*Your service is no longer required, I will have to let you go. I have to finish you. I was just told to finish you"*. I can very readily and do read that as an indication that Mr Long had been given instructions that the provision of alternative work was now to be withdrawn.

36. That too is entirely consistent with the instructions that were given by somebody, I do not know who, to payroll when the final payslip that is dated 9 November went out. Prior to that Mr Baker the finance director, clearly acting on instructions from somebody had recorded on 6 November that the claimant was made "redundant". That is in context that there was no work to be offered to him actually on a gang constructing scaffolding. He was paid notice pay, which is also of course inconsistent with his actually having resigned without notice, and there is also a reference to his receiving a statutory guarantee pay. Whether that be for the Monday when he was off or for the final attendance on Tuesday or however otherwise calculated that can only have been a reference to a period where no work was offered to him. So again that documentation from Mr Baker is consistent with a decision having been taken that the alternative work non-scaffolding work will be withdrawn. That gives rise to a situation equivalent to redundancy or lay off. There is specific payment for guarantee which is only in the circumstances of lay off and it is treated as payment where notice is due indicating dismissal by the respondent.

37. The burden is on the claimant, notwithstanding the lack of complete transparency by the respondent in its account of what happened, to establish before me that he had indeed not only alleged an infringement but also that that is the principal reason for dismissal. On balance I find that the principal reason is rooted in the working circumstances of the respondent company at this time in the lead up to Christmas. The simple fact is that the claimant was not currently able to be given scaffolding work. Although the decision may well have been also influenced by Mr Fieldhouse's perception that the claimant was ungrateful and was "biting the

hand that feeds him" if he was seeking to challenge the respondent when they had in fact been paying him way over the normal rate for a labourer for some considerable time and by antagonism towards the involvement of a union where they were not recognised a workplace, and by disgruntlement that a formal grievance had been raised when Mr Fieldhouse thought it more appropriate to deal with it on a one to one basis informally with management, that does not mean that the principal reason was as asserted by the claimant. These are all extraneous matters but the principal underlying cause in context and given the contemporaneous document prepared by the respondents, notwithstanding their failure to acknowledge that as the true reason, is the lay off because of lack of work.

38. I cannot accept the claimant's argument that this is somehow a document constructed to disguise the real reason for dismissal. This is not something the respondent has ever asserted as the reason. It has always denied there was any termination at all. It has not sought to say "oh no, he was fairly terminated on grounds of redundancy or some other substantial reason". But in actual fact I am satisfied that is what happened and it is clear from the content of this email of Mr Baker which has properly been disclosed. Certainly the claimant has not, and the burden is on him, satisfied me that he was in fact dismissed for an automatically unfair reason.

39. So for those reasons the only claim that succeeds is for the £319 unauthorised deduction in wages but in respect of that there is in my view an unreasonable failure to comply with the ACAS Code of Practice on grievances. Although Mr Fieldhouse may not have initially understood that he was conducting the necessary grievance meeting in reality that is what became apparent. And because he was unfamiliar with the company's own grievance procedure let alone the ACAS Code he therefore failed to address that properly and allow the claimant the full opportunity to explain his potential grievances. More particularly he failed to allow him to be represented and in the circumstances where that refusal is coloured by an antagonism towards the involvement of unions in this workplace I consider the appropriate uplift on the award not the maximum but is still 20%. That means the £319 is increased by £63.80 and further as I have stated there is a failure to provide written terms and conditions setting out particular the precise arrangements as to remuneration and therefore the appropriate award is four week's pay. That is capped at the statutory maximum then in force of £508 but that therefore is a further £2,032.

Employment Judge Lancaster

Date 14th November 2019