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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr W Shakespeare	**AND**	Community Transport

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Midlands West **ON** **28 and 29 January 2019**
9 September 2019
(In Chambers)

EMPLOYMENT JUDGE Woffenden

Representation
For the Claimant: In Person
For the Respondent: Ms H Boynes, solicitor advocate

RESERVED JUDGMENT

1 The claimant's claim for arrears of pay fails and is dismissed.
2 The claimant's claim for holiday pay fails and is dismissed.

REASONS

1 On 23 January 2018 the claimant presented a claim to the tribunal against the respondent (a charity) for holiday pay arrears of pay and 'other payments." He set out at section 8.2 the following narrative:
"my claim is underpayment of hours work. holiday pay owing. none payment of offered contract for first 3 months and contract offered a job interview and verbally by my manager not the contract i got.

claim 1 hours worked to wages received Dec 2016 till Nov 2017 are £505.40 short in pay to hours i worked

claim 2 holiday pay Dec2016 till April 2017 short by gov.uk holiday calculator of £229.24 p
claim 3 holidays April 2017 till12/112017 short by gov.uk calculator by £69.42 p after including 1 bank holiday I had added to my holidays for Aug 2017

claim 4 none payment of contract given of 22.5 hours for June July and Aug 2017 total 82.5 hours missing £660

claim 5 contract offered at job interview my job acceptance letter and verbally by my manager 2 weeks before I started permanent was was (sic) for 32 hours 4 days on 4 days off not 22.5 hours which is 3 days on 3 days off as i worked and was rostered for 4 days on and 4 off at no stage was i told that it was 22.5 hours contract till the day i left when i finally received it 5 months 12 days after i started it and worked as 32 hours like the other 3 drivers that did same job. even at the meeting held with us 4 drivers the manager and 2 woman from head office human resources dept when it was brought up did anybody tell me i was only on 22.5 hours as the meeting was to tell us we was moving location and going to a 22.5 hour contract."

The Issues

2 The claim was listed for hearing on 28 and 29 January 2019. The first day was taken up with identifying and agreeing a list of issues. The respondent conceded the claimant was an employee and that the issue of time limits did not arise. The agreed issues in dispute were as follows:

Claim 1 (hours of work and wages received for December 2016 to November 2017)

2.1 What were the terms of the contract in relation to the scale or rate of remuneration for the following periods:
a) December 2016 to June 2017
b) June 2017 to November 2017?
2.2 What were the terms and conditions relating to hours of work (including any terms and conditions relating to normal hours of work) for the following periods:
a) December 2016 to June 2017
b) June 2017 to November 2017?
2.3 What were the terms and conditions relating to entitlement to holidays, including public holidays, and holiday pay for the following periods:
a) December 2016 to June 2017
b) June 2017 to November 2017?
2.4 Did the respondent breach the contract for the following periods, if so, how and when?
a) December 2016 to June 2017
b) June 2017 to November 2017?
2.5 Were any mistakes in pay rectified at the grievance meeting?
2.6 Was there any deficiency in wages properly payable for the following periods:
a) December 2016 to June 2017

b) June 2017 to November 2017?
2.7 if there was a deficiency was it attributable to an error of computation (under section 13 (4) Employment Rights Act 1996)?

Claim 2 (holiday pay December 2016 to April 2017)

2.8 What were the terms and conditions relating to entitlement holidays, including public holidays and holiday pay for the period December 16 to April 17?
2.9 What was the scale or rate of remuneration in respect of holiday pay?
2.10 What holiday was the claimant entitled to receive (for the period December 16 to April 17).
2.11 How much was the claimant paid in respect of holiday pay for this period?
2.12 Did the respondent breach the contract?
2.13 What is the claimant entitled to, taking into account all sums paid to the claimant?

Claim 3 (holiday pay April 2017 to November 2017)

2.14 What were the terms and conditions relating to entitlement holidays, including public holidays and holiday pay for the following periods:
a) April 2017 to June 2017
b) June 2017 to November 2017
2.15 What was the scale or rate of remuneration in respect of holiday pay for the following periods:
a) April 2017 to June 2017
b) June 2017 to November 2017?
2.16 What holiday pay was the claimant entitled to receive for the following periods:
a) April 2017 to June 2017
b) June 2017 to November 2017?
2.17 How much holiday did the claimant take for the following periods; and how much pay did he receive:
a) April 2017 to June 2017
b) June 2017 to November 2017?
2 .18 Did the respondent breach the contract? If so, how and when?
2.19 What is the claimant entitled to, taking into account all sums paid to the claimant?

Claims 4 and 5 (contract claims June 17 to November 17)

2.20 What were the terms and conditions of the contract in relation to hours of work?
2.21 What with the terms and conditions in relation to the scale or rate of remuneration?
2.22 how much was the claimant paid for this period?
2.23 Did the respondent breach the contract? If so, how and when?
2.24 Has the claimant suffered a loss?

3 I heard from the claimant who gave his evidence by witness statement supplemented with oral evidence.

4 On behalf of the respondent I heard from:

4.1 Charlotte Jolly (the respondent's HR officer); and
4.2 Tina Hemins-Fairlie (The respondent's corporate service manager). They too gave their evidence by way of witness statements supplemented with oral evidence.

5 There was also an agreed bundle of 305 pages. I have read and considered only those documents to which the parties referred in their witness statements or under cross-examination.

6 There was not sufficient time for submissions, deliberations, the giving of judgment and (if necessary) the determination of remedy within the allocated two days and the respondent had been ordered to send to the claimant some additional documentation .The final hearing was therefore postponed and was not relisted until 5 and 6 June 2019 to accommodate the claimant's scheduled operation with attendant recovery time. However, the claimant then became too unwell to attend that hearing which was postponed on 31 May 2019. The respondent then proposed that the tribunal order the parties to make their submissions in writing. Further correspondence ensued about this and the claimant's state of health and, as it remained unclear when he would be fit enough to attend, and the parties were in agreement, on 17 July 2019 I ordered the parties to provide written submissions by no later than 7 August 2019.The claimant provided his written submission on 5 August 2019 and the respondent provided its written submission on 7 August 2019. I have read both with care and thank both parties for their efforts. Unfortunately, due to listing commitments and pressure of work it was not until 9 September 2019 that I was able to read them in Chambers. Since then I have been absent for substantial periods due to pre-booked annual leave. I apologise to the parties for the delay.

7 This is a case where there have been conflicts of evidence about certain events that are alleged to have taken place. Sometimes such a conflict of evidence is due simply to a mistake, or a memory failure, by one or both parties. Sometimes it may be one witness, or another is not telling the truth. It is the parties' responsibility to obtain and put before the tribunal the material which they consider will assist the tribunal and promote their case. Tribunals do not carry out investigations. In general terms (and subject to the third general point to which I shall come), tribunals make decisions only on the material put before it by the parties. That way each party can look at, assess and criticise the other's evidence.

8 As I explained during the hearing ,in this claim it is the claimant who bears the responsibility of proving there was a contract (or contracts) between him and the respondent and the terms of those contracts as far as pay hours of work and holiday and how and when the respondent breached those terms and ,if his claim for unpaid wages and holiday pay succeeds (either as a breach of contract claim or because the respondent has made an unauthorised deduction from his wages), he must also prove the losses he has suffered as a result.

9 If the claimant satisfies me, after considering the material before me, that on the balance of probabilities a thing happened, then, for the purposes of deciding the case, it did happen. If he does not do so, then it did not happen. I must assess the credibility of the witnesses before me, and to choose between conflicting evidence, if I am able to do so. But if, after having attempted to resolve the issue, I am unable to make a positive finding on the evidence, that issue can be resolved by reference to the burden of proof: Constandas v Lysandrou [2018] EWCA Civ 613, [22]-[27].

10 The third point is that, where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so may in some circumstances entitle me to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing: see Wisniewski v Central Manchester Health Authority [1998] PIQR 324, CA; Jaffray v Society of Lloyds [2002] EWCA Civ 1101, [406]-[407]; Thames Valley Housing Association v Elegant Homes (Guernsey) Ltd [2011] EWHC 1288 (Ch), [19].

11 Added together, these points mean that my decision as to what happened is not necessarily the objective truth of the matter or matters in issue. Instead it is the most likely view of what happened, based on the assessment of the witnesses and the other evidential material that the parties have chosen to put before me, taking into account to some extent also what I consider that they should have been able to put before the court but chose not to. I cannot consider any new or more detailed information contained in the parties' submissions; it was not evidence put before me during the hearing. Submissions should not include matters which have not been given in evidence; they should review the relevant evidence which the tribunal heard.

12 Finally, although employment judges must take into consideration all the evidence presented and weigh all the arguments made, we are not obliged to deal in our reasons with every single point that is argued, or every piece of evidence put in front of us. Moreover, the specific findings of fact made by an employment judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. The conclusions to which I have come below must be seen in that light.

13 I did not find the claimant a consistently credible witness. The passage of time since the events in question and his passionate belief in the rightness of his cause together with a tendency to get cross quickly (which hinders his ability to listen) have all adversely affected his recollection of events. For the most part the respondent's witnesses tried to assist me and explain their version of events but the evidence of Ms Jolly concerning events prior to 3 January 2017 was hearsay (in other words not an account of what she had witnessed but what she was told by others who I assume- in the absence of any explanation- were not asked or

were unwilling to attend tribunal) and /or surmised from her own perusal of documents . This has weakened the respondent's evidence and I have carefully considered the contents of contemporaneous documents in the event of a conflict of evidence.

The Facts

14 From the evidence I saw and heard I make the following findings of fact:

14.1 The respondent (a registered charity) operates three divisions, one of which is called CT Passenger Services. It provides accessible minibus transport to communities for people with limited mobility or disabilities including operating contracts for local authorities, the NHS and other statutory and voluntary bodies.

14.2 The claimant applied for the role of renal passenger driver within that division based at its Sandwell branch, to work 32 hours a week and after interview was offered the role in a letter from the respondent's HR administrator dated 16 September 2016 at a starting salary of £ 7.85 per hour '*basic 32 hours per week'* .The start date was to be confirmed and was subject to '*satisfactory references, medical disclosure and DBS*'. The letter said, '*I have enclosed a number of documents, and in accepting the role, I should be grateful if you would provide the following:'.* One of the documents enclosed was a DBS application form which was to be completed by the claimant. It was suggested it would be easier and safer for the claimant to call in with the documents. The claimant completed the DBS application form in manuscript and delivered it by hand to the respondent. It was dated 19 September 2016 (a Monday).

14.3 Ms Jolly's predecessor Laura Gonzales emailed Mr Fisher the respondent's Operations Supervisor on 23 September 2016.She said:
'*Hi Paul,*
Have you heard anything from Wayne Shakespeare? He was going to call you to discuss what casual hours would be available for him until the Sandwell renal contract starts.
Liz-if he doesn't call Paul, it might be an idea for you to call him and see what he is thinking. He wasn't interested in the South Staffs role when I mentioned it." She provided his telephone number and then said, "*I'm on leave next week so won't be unable to follow this up*." Mr Fisher confirmed by email he had not heard anything from the claimant. This tends partly to corroborate the account of Ms Jolly (second hand though it might be) that before the claimant had accepted the role of renal passenger driver , he was contacted on 22 September 2016 to inform him the contract which had been offered to him was no longer progressing as the proposed route/service had been cancelled but two other opportunities were available. I find however on the balance of probabilities that the offer of employment was not withdrawn as Ms Jolly asserts during that conversation but that the claimant was told that there was going to be a delay before the Sandwell renal contract started and of the availability of interim

opportunities (casual hours and the South Staffordshire role), but he was not at that time interested in the latter. The respondent did not process the claimant's DBS application form in the meantime.

14.4 On or around 26 September 2016 the claimant changed his mind about the South Staffordshire role and was interviewed for it on 14 October 2016. Ms Jolly's evidence is that he was unsuccessful (which is corroborated by an email dated 18 October 2016 from the respondent's HR team -although the recipients are not identified- and an email exchange between the HR Team and Liz Sutton on 18 and 19 October 2016). The claimant's evidence was that he withdrew during the interview because he did not consider the role suitable. I find on the balance of probabilities that the claimant was interviewed for the role but was unsuccessful. In the meantime, the respondent's offer of employment to the claimant as renal passenger driver had been withdrawn in writing on 6 October 2016 on the stated grounds the claimant had not returned the documents which had been enclosed with the offer letter and the respondent had been unable to contact the claimant about it.

14.5 An email from the respondent's HR team to Liz Sutton on 18 October 2016 stated the claimant had contacted the respondent's HR Team because he did not understand why he had been rejected from the South Staffordshire role and was confused whether he had been rejected from the renal passenger driver role. He was referred to Liz Sutton. The claimant's witness evidence did not address whether he received the respondent's letter of 6 October 2016 though he strenuously denied receipt of other documents nor did he challenge Ms Jolly about it under cross examination .He denied receipt in his subsequent written submissions but I find on the balance of probabilities that the confusion he expressed to the HR team emanated from the contents of that letter.

14.6 It is common ground between the parties nonetheless that the claimant agreed to work for the respondent on a casual basis. The parties do not agree about how and when and in what circumstances the agreement was reached. The respondent's email dated 19 October 2016 which Liz Sutton sent to its HR team said '*We agreed that we are going to take Wayne on in the Black Country on a zero hour contract,pending any renal work starting, on the understanding that there are no guaranteed hours per week, and that there are some internal candidates to be placed on renal before he will be*. Liz Sutton also subsequently sent an email to the respondent's HR Team on 9 May 2017 which corroborated the existence of and the terms of the agreement (see paragraph 14.8 below) .It was the claimant's evidence that following a conversation in the second week of November 2016 he was told that the renal passenger driver job was not available at the moment but when it was it was his and in the interim the casual work was available. I find that on the balance of probabilities that on 18 or 19 October 2016 the respondent (in the absence of any renal driving work) offered and the claimant accepted work on a casual basis, and the respondent agreed it would offer him any available renal driving work which was not taken up by internal

candidates. The DBS application form which the claimant had completed on 19 September 2016 had a manuscript note on it saying '*Processed 19/10/16*' and the DBS certificate was issued to him on 20 October 2016.

14.7 On 26 October 2016 the claimant brought in to the respondent's office the other documents which the respondent required and a contract of employment was created (headed '*variable hours'*) .It was said to be a zero hours contract with a start date of 28 October 2016.The job title was '*Casual Driver*' and the rate of pay was £7.39 per hour. The rate of pay for a renal driver was £ 7.85 at the time. It said the holiday year began on 1 April each year and the paid holiday entitlement was set out as follows '*You are entitled to the pro-rated equivalent of 25 days per annum plus bank/public holidays (usually 8 but may vary depending on when Easter occurs). Your pro rata entitlement to holidays will be calculated based on the hours you have worke*d.' It had a caption for signature and dating by the employee but is not signed or dated. There is no documentary evidence to support Ms Jolly's assertion it was created and issued to the claimant the same day. The claimant denies receipt of such a contract and says the agreement reached about casual work was by telephone with Mr Fisher. I find on the balance of probabilities that the respondent did not send to the claimant the contract of employment headed '*variable hours'*.

14.8 Mr Fisher contacted the claimant on 28 November 2016 and asked him to attend for work on Wednesday 30 November 2016 and said on the following Monday he would be working with a renal passenger driver in order to be trained as cover for illness and holidays.

14.9 The claimant had to complete and submit time sheets on a weekly basis. On occasion time sheets were not submitted or were submitted late. If the time sheet was submitted late the hours on the time sheet were paid the following month and were identified on the relevant wage slips as arrears. Payment periods were from 1st to the end of each month for permanent salaried employees while extra hours and hours worked by casual employees were paid from mid-month to mid-month. Wage slips were issued to employees each month.

14.10 The claimant's first wage slip was dated 28 December 2016 and the claimant was paid for 48 hours at £7.39 per hour with holiday added at 10 % of that rate of pay. The claimant's wage slip dated 28 March 2017 shows he was paid basic pay for 14.50 hours at the rate of £7.39 per hour and for 56.75 'extra hours' at the rate of £7.85 with 10 % holiday pay added to each rate. The hourly rate of pay for non-renal drivers remained the same until 1 April 2017 when it increased to £7.54 with holiday added at 10 % of that rate of pay. The claimant's wage slip dated 28 April 2017 showed the claimant was paid for 32.5 hours at £ 7.54 an hour with holiday pay added at 10% of that rate and for extra hours (100.50) at the rate of £ 7. 39 with holiday added at 10 % of that rate of pay. The hourly rate for renal drivers was increased in 1 April 2017 to £8.00 per hour.

14.11 Ms Jolly commenced employment on 3 January 2017.The respondent's Operations Director wanted to introduce a 22-hour 30-minute contract on a 3 on 3 off shift pattern instead of a 32-hour contract on a 4 on 4 off shift pattern. New starters were to be recruited based on the new contract from February 2017.There was to be consultation with existing employees about changes to their terms and conditions of employment about location and hours of work.

14.12 A renal passenger driver who was working on a 32-hour contract resigned on 9 May 2017 and on that day Liz Sutton sent an email to the HR team on attaching the resignation letter and saying:' *On this basis, Wayne Shakespeare should automatically be offered a post, as he was offered employment before in written form, but by which time the offer of work had been withdrawn by WMAS, so Wayne agreed to go on a casual contract until such time as a suitable position arose.*
If he accepts, we then have NO cover in Sandwell for renal annual leave or sickness, so I would like to recruit a post." I find the claimant had been undertaking renal passenger driving work to cover sickness and holidays.

14.13 Liz Sutton met with the claimant later in May 2017 and in his witness statement the claimant said that she told him she would like to offer him the job he had applied for and take over the other driver's job permanently from June 2017 and he accepted that offer. The other driver in question was on a 32-hour contract on a 4 day on 4 day off shift pattern. Under cross-examination the claimant said she had asked him if he would like to take over the job of the driver who was on 4 days on and 4 days off. Later in cross examination he said he had known the rota of the previous driver and assumed he (too) had a 32-hour contract because (until his employment ended) he had worked a 32-hour contract and the other 3 drivers were all on a 32-hour contract. I found his evidence about this particularly vague and inconsistent.

14.14 An existing employee change form was completed for the claimant to show his job title would change to Renal Driver from Casual Driver with effect from 5 June 2017 and that his revised hours would be '*variable*'. This was sent to HR team on 22 May 2017.Liz Sutton must have had it in mind that she needed to fill the hours vacated by the driver who had resigned but also that new starters were being put on 22 .5 hour not 32-hour contracts. If she had reached an agreement with the claimant that he was on a 32 hour contract she would have completed the change form stating his hours would be 32 hours per week and if she had reached the agreement with the claimant for which the respondent contends she would have inserted 22.5 hours a week. Ms Jolly's evidence was that a contract of employment was issued which said the claimant's normal hours of work were '*22.5 per week over six days*' with an hourly rate of pay of £8.00 an hour and which was sent to the claimant's home address. However, although the contract disclosed has a caption for signature and dating by the employee and employer it is not signed or dated by either. There is no documentary evidence to support Ms Jolly's evidence. There is an email from Ms Jolly to Liz Sutton dated

22 May 2017 saying they were unable to implement a variable hours contract but the claimant would be put on the 22.5 hour a week contract and she would proceed to process this '*as we have agreed this verbally*' unless she heard from Liz Sutton to the contrary . Her evidence to me was she had not wanted the contract to be a contract with variable hours but a contract with 22.5 hours. However, I find that her email to Liz Sutton of 22 May 2017 post-dated the oral agreement which Liz Sutton had already reached with the claimant (see paragraph 14.16 below).

14.15 A letter from Ms Jolly to the claimant dated 13 October 2017 which purported to enclose a copy of the claimant's contract of employment for 22 .5 hours said to have been issued to him in August 2017(though in what circumstances is not explained) and a copy of such a contract signed by her on behalf of the respondent on 3 November 2017 have been disclosed by the respondent. Ms Jolly's evidence under cross examination was vague and uncertain about how and when the claimant was sent the contract of employment for signature and why no effort was made to obtain a signed copy from the claimant or the circumstances in which she had signed such a document on 3 November 2017. I did not find her evidence credible. The claimant denies having received such a contract until the week he left the respondent's employment**.** His evidence was that he had chased Ms Jolly for a copy in particular at one of the individual consultation meetings held with him on 31 October 2017 (see paragraph 14.15 below). I find on the balance of probabilities no such contract of employment was sent to the claimant by Ms Jolly prior to the last week of the claimant's employment.

14.16 By September 2017 the respondent began a process of consultation with employees about the proposed changes to the terms and conditions of employment. The claimant was invited to and attended a consultation meeting on 15 September 2017. The proposal included changing existing work patterns from a 4 day on 4 day off to a 3 day on 3 day off shift pattern and potentially changing the depot from Sandwell (where the claimant worked) to Birmingham. During the consultation meeting notes were taken by an HR administrator and Ms Jolly made a presentation. The notes record the claimant as having said "*Don't even know why I'm here, my contract is 22.5 anyway, but I always work over so don't understand why you want to reduce it to a zero hour one, makes no sense*". Ms Jolly is noted as having explained that everyone was included as although his contractual hours might not be changing the potential change in location still did. She is noted as having later put to him that in regards to his contract nothing was changing but he was included in the meetings as the shift pattern and location were also up for discussion, but he was already on the 22.5 hour contract and so the only time his contract would change would be if the routes were relocated to Birmingham. The claimant responded that he just wanted a contract that said hours or days so "*you have to pay that*." His evidence under cross-examination was that the notes were wrong, and he vehemently denied saying his contract was 22.5 hours at that meeting inviting me to prefer his evidence about the

agreement he had reached with Liz Sutton who had not attended as a witness. However, he did not challenge Ms Jolly in cross-examination about the accuracy of the notes of the consultation meeting on 15 September 2017 or ask her anything about what happened at the consultation meeting. I find the notes of the meeting are an accurate (if not verbatim) account of what was said by the claimant and Ms Jolly during that meeting.

14.17 I found the claimant's comment at the consultation meeting compelling evidence because he volunteered the information about the hours of his contract. If he had understood his was a 32 hour contract he would have been vocal on his own account about such an adverse proposed contractual change at that meeting. I also accept Ms Hemmins-Fairlie's evidence that the claimant worked an average of 32 .55 hours per week in the period June to November 2017. I find on the balance of probabilities that sometime after 9 May 2017 and before 22 May 2017 the claimant had agreed orally with Liz Sutton that from 5 June 2017 he would work a minimum of 22 .5 hours per week and any additional hours he was willing to work thus providing Liz Sutton with a means to achieve the hours she needed to fill as a result of the resignation of the renal passenger driver without breaching the respondent's new starter contract rules while the claimant with a combination of 22.5 hours per week and additional hours would achieve the hours he had originally been offered for the renal passenger driver role before it was withdrawn. That was the context in which Liz Sutton had described the claimant's revised hours in the employee change form as '*variable*'.

14.18 The claimant's wage slip dated 28 June 2017 showed an hourly rate of £8.00.

14.19 The claimant subsequently attended individual consultation meetings but resigned at the consultation meeting on 31 October 2017. His employment ended on 12 November 2017, but he raised a grievance in writing on 10 November 2017.An investigation meeting was held with Ms Hemmins-Fairlie on 7 December 2017.Typed notes were made of that meeting. Ms Hemmins-Fairlie had prepared a spreadsheet on her computer containing the hours submitted by the claimant on his time sheets and for which he had been paid and read to the claimant what was on the spreadsheet in relation to each pay period. If the wrong rate was included it was changed. If the claimant said he had worked without payment due to a late submission of time sheets she identified the hours were paid the following month and shown on wage slips as 'Arrears'. If no time sheet had been submitted, she made checks to see if those days had in fact been worked by him. It was the claimant's evidence (which I accept) that she asked him if he was happy it had all been covered and he said yes, he was happy every hour had been covered at the correct rate of pay. However, the meeting (which took several hours) ended acrimoniously when (having formed the view that the respondent was not going to pay him what he had estimated during the hearing he was entitled to) the claimant walked out. His grievance was not upheld. Ms Hemmins-Fairlie wrote to the claimant confirming this on 14 December 2017.On

28 December 2017 the claimant was paid £443.27, the sum which the respondent accepted was owed to him.

The Law

15 Offers of employment can be made subject to a condition or conditions and the contract does not take effect until it is, or they are satisfied.

16 An offer of employment can be withdrawn any time before acceptance. An employee can either accept or reject an offer of employment. Acceptance can be express (in writing or oral) or implied by conduct. For an example if an employee does not formally reply to an offer of employment but turns up for work, then he or she will be taken to have accepted employment on the terms offered.

17 Contracts of employment do not have to be agreed in writing (though important contractual terms usually are); oral agreements are still binding. Sometimes terms and conditions are implied into contracts (rather than expressly agreed). One of the ways in which terms and conditions become implied into contracts of employment is by the conduct of the parties (what the parties do or don't do) so a tribunal will examine how the contract operated in practice, considering all the surrounding circumstances. The date on which a contract of employment is made between the parties is not necessarily the same date on which the employee begins working for the employer.

18 Contractual terms must be sufficiently clear and certain for a tribunal to give them a meaning. In looking for the true meaning of contractual terms the tribunal often looks at all the circumstances surrounding the making of the contract as an aid to construction to clarify any ambiguities.

19 Claims for breach of contract can be presented to an employment tribunal by an employee under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. That Order only applies to breaches of contract outstanding on the termination of employment. The responsibility of proving as the term of the contract relied on, the breach of that term by the respondent and the damages that flow from that breach falls on the claimant.

20 Under section 13 (1) Employment Rights Act 1996 ('ERA') a worker has the right not to suffer unauthorised "*deductions*". Section 13 (3) ERA provides "*Where the total amount of wages paid on any occasion by an employer to work employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages on that occasion'*. The determination of what is "*properly payable*" on any given occasion requires a tribunal to resolve what the worker is contractually entitled to receive by way of wages. It may be necessary for a

tribunal to construe a contract in order to decide whether a particular sum is "*properly payable*".

21 Under section 27 (1) ERA "*wages*" means *'any sums payable to the worker in connection with his employment, including any fee, bonus, commission, holiday pay or other emolument preferable to his employment, whether payable under his contract or otherwise*. "Section 13 (3) directs a tribunal to consider what was properly payable "*on any occasion*" and in so doing focuses on the individual payment period. Under section 13 (4) ERA there is no deduction where "*an error of computation*" is the reason for the deficiency. This means that an underpayment arising from a mathematical error is not an unauthorised deduction though it would be a breach of contract.

22 Full-time workers are entitled to 5.6 weeks leave under Working Time Regulations 1998 ('WTR'). A part-time worker's entitlement is measured as a pro rata proportion. A worker's leave year begins on the date on which the worker's employment began and each subsequent anniversary of that date where there are no provisions of a relevant agreement that apply. A relevant agreement means a workforce agreement which applies to the worker any provision of a collective agreement which forms part of a contract between him and his employer or any other agreement in writing which is legally enforceable as between the worker and his employer (regulation 2 WTR).

23 Under regulations 13 and 13A WTR a worker is entitled to be paid a weeks' pay for each week of annual leave. A weeks' pay is to be calculated by reference to the provisions in sections 221 224 ERA but without applying a cap on a weeks' pay.

24 Claims for statutory holiday pay under WTR are made as unauthorised deduction from wages claims where it relates to the failure to pay the holiday for actually taken or in lieu of accrued holiday upon termination. Holiday pay is "*wages*" under section 27 ERA so failure to pay in the ordinary course of a worker's contract is not only a breach of regulations 16 and 30 WTR but also an unauthorised deduction from wages. A worker has no statutory right to carry forward holiday from one holiday year to the next in most ordinary circumstances nor is she or he entitled to a payment in lieu of untaken holiday. Such a right can exist for example where a worker has been deterred or prevented from taking statutory holiday. The burden falls on the employer to ensure that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so (**King v Sash Window Workshop Limited [2018] IRLR 677, HL Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Shimizu C-684/16, [2019] 1 CMLR 1233***.)* Paying an hourly supplement as holiday pay ('rolled up' holiday pay) is precluded by WTR but contractual remuneration paid to a worker in respect of leave goes to discharge any liability under WTR.

25 In **Chandhok v Tirkey UKEAT/0190/14/KN** the then President of the Employment Tribunal said that the claim as set out in the claim form is not '*just something to set the ball rolling*' but '*sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made -meaning under the Rules of Procedure 2913, the claim as set out in the ET1*.'

Conclusions

26 The claimant was made an offer of employment for the renal passenger driver role on 16 September 2018 which (on acceptance by him) was to be accompanied by the provision of a number of documents (of which the DBS application form was only one) .The start date of the contract of employment was (even if the offer was accepted) made subject to the condition of the provision of satisfactory references medical disclosure and a criminal records check (the condition precedent).

27 In my judgment the mere provision of the completed DBS application form is not sufficient in and of itself to imply by conduct the claimant had accepted the offer of employment. I conclude that offer was withdrawn by the respondent on 6 October 2016 before acceptance by the claimant and on 19 October 2016 the claimant was offered and orally accepted the respondent's offer of work on a casual basis (with no guaranteed contractual hours) pending any new offer of renal driving work if it became available.

28 If I am wrong about the withdrawal of the offer of employment and it had been accepted by the claimant , in my judgment the start date of the contract of employment was nonetheless subject to the condition precedent above which had not been satisfied when the claimant was offered and on 19 October 2016 orally accepted the respondent's offer of work on a casual basis (with no guaranteed contractual hours) pending any new offer of renal driving work if it became available.

29 Although the claimant did no work under that contract until a later date, the oral contract agreed between the claimant and the respondent on 19 October 2016 remained in force until June 2017. I reject the claimant's contention that the casual work was an interim arrangement pending the start of the contract for the renal passenger driver role and I reject the respondent's contention the terms and conditions of the contract of employment for casual work were put in writing and sent to the claimant.

30 I conclude that the terms implied by the parties' conduct into that oral contract as to the rate of remuneration were that the claimant was paid £ 7.39 per hour until 1 April 2017 when the rate increased to £7.54 per hour save for renal passenger driving for which he was paid £7.85 per hour until 1 April 2017 when the rate increased to £ 8.00 per hour. The claimant was paid and accepted

wages calculated on that basis as set out in his wage slips and there is no evidence he queried them at the time.

31 That oral contract was then replaced by the oral contract the claimant made with Liz Sutton sometime in May 2017 under which from 5 June 2017 he was employed as a renal passenger driver. There was no evidence before me that the hourly rate of pay for renal driving changed.

32 There were no terms and conditions agreed relating to set hours of work (including any terms and conditions relating to normal hours of work) for the period December 2016 to June 2017. The claimant worked a varying number of hours.

33 From 5 June 2017 to November 2017 the terms and conditions in relation to hours of work agreed were as set out in paragraph 14.17 above.

34 There were no terms and conditions agreed between the claimant and the respondent relating to entitlement to holidays, including public holidays, and holiday pay for the period from December 2016 to June 2017 save that (implied by conduct) the claimant was paid an additional 10% of the applicable hourly rate for the work done as payment for holidays ,instead of taking annual leave. The claimant was paid and accepted wages with such payments calculated on that basis as set out in his wage slips and there is no evidence that he queried this at the time. The claimant's entitlement to annual leave and holiday pay was therefore subject to the WTR but the respondent is entitled to credit for the additional 10% payments made to him for the period 16 October 2017 to 5 June 2017 to discharge any liability under WTR.

35 From June 2017 to November 2017 no terms and conditions were agreed or implied as far as the claimant's entitlement to holidays, including public holidays, and holiday pay was concerned and the claimant's entitlement to annual leave and holiday pay was therefore subject to the WTR.

36 I was not required to consider whether the claimant had the right to carry forward holiday from one leave year to the next or that he is entitled to a payment in lieu of all untaken holiday up to the termination of his employment because it was not the claimant's case (nor did he provide any evidence) that he was in any way deterred or prevented from taking leave because he knew or feared the respondent would not pay him for it or would underpay him for any leave .

37 Having reached those primary conclusions it is not necessary for me to determine the remainder of the issues in dispute because for the claimant's claims for unpaid wages and holiday pay to succeed (whether they are brought as unauthorised deduction from wages claims of for breach of contract) he had to prove his case as pleaded. His claims were based on the existence of a contract of employment on the terms set out in the respondent's letter to him dated 16

September 2016 and/or a contract of employment as a renal driver for 32 hours a day on a 4 day on 4 day off shift pattern at £8.00 an hour. I have set out in paragraphs 27 29 30 31 32 33 34 and 35 above the conclusions which I have reached about the contractual arrangements between the parties. He has failed to prove his case as pleaded.

38 Furthermore, in successful claims for unpaid wages and holiday pay a tribunal orders the difference between what should have been paid and what was actually paid. It cannot make a financial award based on an estimate of what it thinks is due to the claimant. It must set out in the judgment precisely how such an award has been calculated. The claimant could not tell me what financial award I should make, nor could he explain what losses he had suffered and how they were calculated under cross-examination. He had prepared two schedules of loss and a witness statement. All had different calculations and were not consistent with each other or the claimant's pleaded case. He did not explain why he thinks the sum of £443.27 which the respondent paid to him on 28 December 2017did not rectify any errors in pay. The claimant has failed to prove any loss.

39 The claimant's claims therefore fail and are dismissed. The parties have 28 days from the date this judgment is sent to them to confirm they intend to pursue their respective applications for costs against the other.

Employment Judge Woffenden
Dated: 01/11/2019