EMPLOYMENT TRIBUNALS

Claimant: Mr P. Armah

Respondent: Famos Support and Services Limited T/A Famos Security

Heard at: Nottingham **On:** 22 November 2019

Before: Employment Judge Rachel Broughton (Sitting alone)

Representatives

Claimant: Mr P Armah - Claimant
Respondent: Mr Kassim - Director of the Respondent

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. Famos Support and Services Limited is added as the Respondent by way of substitution under rule 34.
2. The Claimant was not an employee of the Respondent within the meaning of section 230 (1) of the Employment Rights Act 1996.
3. The Claimant was a worker with the Respondent within the meaning of section 230 (3) Employment Rights Act 1996 and regulation 2 (1) Working Time Regulations 1998.
4. The Respondent breached regulation 10 (1) and 12 (1) of the Working Time Regulations 1998 and the Clamant is entitled to compensation in the sum of £100.
5. The claim for unlawful deductions of wages under section 13 Employment Rights Act 1996 is well founded and succeeds and the Claimant is entitled to his wages in the sum of £385.87.

RESERVED REASONS

The Hearing

1. The Claimant attended the hearing unrepresented. Dr Shakiru Kehinde Kassim, company director attended on behalf of the Respondent.

2. At the outset of the hearing I sought to establish with the parties the correct entity against which the claims should be properly brought. The claim had been issued against 'Mr Carsm. Famos Security'. The Claimant explained

that he had incorrectly spelt Dr Kassim's name as Carsm. Prior to commencement of the hearing I had carried out a search at Companies' House which showed the registration of a company Famos Support and Services Limited incorporated on 26 October 2011, with its registered office at 63 Mortimor Way, Leicester East Midlands LE 31R with Dr Shakiru Kehinde Kassim listed as the only statutory director.

3. Dr Kassim confirmed that Famos Security is the trading name of Famos Support and Services Limited. Dr Kassim had attached to his witness statement (which was a document headed 'Defence' filed with the Employment Tribunal as the defence to the claim and which Dr Kassim asked to also stand as his witness statement), a document identified as S KK 4 and headed 'confirmation and cancellation of an order' which I shall refer to hereafter as the Agreement. The Claimant confirmed that he recognised the Agreement and that it was his signature on it. The Agreement set out certain agreed terms relating to the working arrangements and the parties to the Agreement were identified as the Claimant and 'Famos Support and Services Ltd t/a Famos Security'. Dr Kassim explained and it was not disputed by the Claimant, that all payments made to the Claimant for the security work/services performed had been paid from the company bank account of Famos Support and Services Ltd.

4. By the agreement of both parties Famos Support and Services Limited trading as Famos Security is added as the Respondent to this claim by way of substitution under rule 34 of The Employment Tribunals Rules of Procedure 2013.

The Issues

5. The agreed issues for the Tribunal to determine are as follows;

   5.1 Was the Claimant a worker or employee of the Respondent or an independent provider of services?

   5.2 Was there was an unlawful deduction from the Claimant's wages of £385.87 pursuant to section 13 Employment Rights Act 1996?

   5.3 Was there a breach by the Respondent of regulation 10 (daily rest) of The Working Time Regulations 1998?

   5.4 Was there a breach by the Respondent of regulation 12 (rest breaks) of The Working Time Regulations 1998?

The Hearing

6. There had been no case management orders made in this case and the Claimant and Respondent attended not having prepared any witness statements. Dr Kassim produced a copy of the defence filed to the claim which had been prepared in a witness statement format and as explained above, he asked that this document stand as his witness statement.

7. There had been no discussion between the parties with regards to the

documents. The Respondent sought to rely upon the documents that it had attached to its response form comprised of the following documents; a printout of messages from a group Whatsapp (SKK1), an invoice submitted by the claimant to Famos Security for "security service provided from 04.05.19 – 09-06-19" and another invoice from 01-06-19 to 06-19 for a total amount of £385.87" (SKK2), further set of messages from the group Whatsapp (SKK3) and a document headed "confirmation of cancellation of an order" (SKK4).

8. The Claimant brought with him a pack of documents numbered pages 1 to 11. The documents included copies of the same two invoices provided by the Respondent (document SKK2 above), a Whatsapp message dated 11 June 2019 23:07 (to the Claimant from Mr Ogienbowale (page 3), security time sheet provided by Claimant to the Respondent dated 2 July 2019 (page 4), security time sheet the Claimant provided to the Respondent dated 1 June 2019 (page 5), Whatsapp message from Claimant to Dr Kassim (message shows contact name : Dr Carsm) dated 14 June 2019 timed at 15:07 (page 6), Whatsapp messages between Claimant and Dr Kassim (pages 7 to 11).

9. The Claimant and Dr Kassim gave oral evidence and cross examined each other. No other witnesses were called. Both parties made brief submissions at the close of the hearing.

Legal Principles

Employee status

10. An employee is defined by the provisions of Section 230 (1) Employment Rights Act (ERA)1996 as

"*an individual who has entered into or works under or where the employment has ceased, worked under a contract of employment."*

11. A contract of employment is defined by section 230 (2) ERA as;

"*a contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing."*

12. The starting point in considering the question of the relationship between the parties will be the terms of any written agreement between them. Where there is a document which appears to set out the principal terms, this will be the starting point. Those terms should only be disregarded where they do not reflect the true agreement between the parties: **Autoclenz v Belcher [2011] UKSC 41).**

13. Where there is no express contract of employment, then to find an employment relationship, the Tribunal must be persuaded that there was an implied contract of employment.

14. If a Claimant submits that there was an implied contract, then the onus is upon the Claimant to establish that a contract should be implied: **Tilson v Alstom Transport [2010] EWCA Civ 1308.**

15. A contract can be implied only if it is necessary to do so: **James v London Borough of Greenwich [2008] IRLR 358).** For it to be necessary to do so, it must be needed to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which that business reality and enforceable obligations would be expected to exist.

16. When examining what happens in practice it is permissible to look at the established practice and expectations of the parties to consider whether they have hardened into legal expectations; **Addison Lee v Gascoigne UKEAT/0289/17/LA.** Where the nature of the legal relationship is not determined solely by the construction of written documentation, the determination of employment status requires the Tribunal to investigate and evaluate the factual circumstances in which the work was performed: **Clark v Oxfordshire Health Authority 1998 IRLR 125 CA.**

17. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 443 QBD**; Mr Justice MacKenna held as follows;

    "(2*) That a contract of service existed if (a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master, (b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master, and (c) the other provisions of the contract were consistent with its being a contract of service (post, p. 515C-D); but that an obligation to do work subject to the other party's control was not invariably a sufficient condition of a contract of service, and if the provisions of the contract as a whole were inconsistent with the contract being a contract of service, it was some other kind of contract and the person doing the work was not a servant (post, p. 517A); that where express provision was not made for one party to have the right of control, the question where it resided was to be answered by implication (post, p. 516A); and that since the common law test of the power of control for determining whether the relationship of master and servant existed was not restricted to the power of control over the manner of performing service but was wide enough to take account of investment and loss (post, p. 522F), in determining whether a business was carried on by a person for himself or for another it was relevant to consider who owned the assets or bore the financial risk (post, p. 520G - 521A)"*

18. The above passage was called the 'classic description of a contract of employment' by Lord Clarke in the Supreme Court case; **Autoclenz Ltd v Belcher and ors 2011 ICR 1157 SC** and Elias LJ in the Court of Appeal case of **Stringfellow Restaurants Ltd v Nadine Qashie [2012] EWCA Civ 1735** referred to the passage by Mr Justice MacKenna as the '"*test most frequently adopted, which has been approved on numerous occasions and was the focus of the Employment Tribunal's analysis in this case*."

19. The courts have established there is an '*irreducible minimum'* of; control, personal performance and mutuality of obligation; Lord Justice Stephenson in **Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612.**

20. However, a wide range of other factors outside the '*irreducible minimum'* may also be taken into account and may even give rise to a finding that there is no employment contract in place even where the 'irreducible minimum' are present.

21. It may be possible for someone who is an independent contractor providing his services as part of his own independent business to agree to terms which meet the 'irreducible minimum' on a particular project but when looked at, it is not an employment relationship.

22. In determining whether an employee has employee status it is not a mechanical exercise of running through items on a checklist, the object is to paint a picture from the accumulation of detail; **Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171.** The factors **may** include;

- Remuneration and how it is paid; regular wage or submission of invoices for defined work done
- Arrangements for payment of tax and NI
- Provision of benefits such as holiday pay, sick pay, medical expenses etc
- To what extent is the individual treated in a member of staff e.g. participation in training, staff events, nature of the ID issued and access to premises
- Provision of capital and degree of risk
- Provision of tools and equipment.
- Application of company policies including disciplinary and grievance
- Whether there is a traditional structure of employment of self-employed contractor status in the trade

23. It may be established that during periods of work an individual is an employee, that he is performing the work under a contract of employment **Plastering Contractors Stanmore v Holden [2014] UKEAT/0074/14/LA**. Where there are gaps in the work there may be a question over whether in between projects there is an overarching or umbrella contract or whether there is no contract of employment outside of individual assignments or periods of work. This is often relevant to the issue around whether the individual has the necessary continuity of service to bring a claim or not, albeit the gaps may amount to only 'temporary cessations of work' and thus continuity preserved in between any breaks.; **Cornwall CC V Prater [2006] IRLR 362.**

<u>Worker Status</u>

24. The Definition of worker is contained in section 230(3) ERA and Regulation 2 (1) (b) WTR;

"…*an individual who has entered into or works under (or, where their employment has ceased, worked under)-*

(a) a *contract of employment; or*

(b) any other contract whether express or implied (if it is express) whether oral or in writing, whereby the individual undertakes or performs personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly"

25. The 'limb b' definition of a worker consists of the following three elements as set out by Elias P in **James v Redcats (Brands Ltd) [2007] ICR 1006 EAT;**

 a) *A **contract** to perform or undertake to do work or services*

 b) *An obligation by that individual to do the work **personally***

 c) *The other party must not be a client or customer of a business run by the individual (i.e. the individual is not in business on their own account)*

26. The first requirement is that there is a contract, an intention to create a legally binding relationship. The distinction between mutuality of obligation to determine whether a given contractual agreement between parties is a contract of employment or not, requires a consideration of something more than simply whether there is a legally binding agreement (which is what we are concerned with when considering the first element of the worker test) and this was clarified by the His Honour Judge David Richardson in **Plastering Contractors Stanmore Ltd v Holden UKEAT/0074/14/LA** at paragraphs 21

 "*The first question which an Employment Tribunal must consider when it applies the statutory definition is whether there was a contract between the putative worker and employer at all."*

 And referred to the following words of Elias P in Redcats;

 "83: *Since when working she is plainly providing a service, the two potentially relevant questions are whether she is obliged to perform the service personally and whether she is doing so in the course of a business. The fact that there is no contract in place when she is not working – or that if there is, it is not one which constitutes a worker – tells us nothing about her status when she is working. At that point there is a contract in place. If the lack of any mutual obligations between engagements precluded a finding that an individual was a worker when carrying out work pursuant to an engagement, it would, severely undermine the protection which the minimum wage legislation is designed to confer".*

27. In relation to the obligation to perform work personally, it is well established now that a limited right to of the individual to provide a substitute is not inconsistent with the existence of an obligation to work personally; **Pimlico Plumbers Ltd v Smith [2018] I.C.R 1511**

28. The fact that a legal right to provide a substitute is never exercised in practice does not of itself, mean it is not a genuine right; **Express and Echo publications v Tanton [1999] IRLR 367**. Further, a right to substitute may not remove the dominant purpose of the contract being one of personal performance where this is limited to situations where the individual is unable rather than simply unwilling to work as observed by Elias P in Redacts:

    "*The critical feature here is that the substitute is to be provided when the individual is unable to provide work. That is narrower than the phrase "unable or unwilling" which was the term used in the Tanton case, as the EAT recognised in the MacFarlane case. If I need not perform the work when I am unwilling, then there is never any obligation of any kind to perform it. It is entirely my will and therefore my choice. But if I can only be relieved of the duty when I am unable, then I must do the work personally if I am able*".

29. The Court of Appeal in Pimlico Plumbers summarised the applicable principles as to the requirement for personal service and the right to substitute. In summary; an unfettered right to substitute, or a right limited only to showing that the substitute is qualified, would subject to exceptional facts, be inconsistent with personal service. A right to substitute only where the individual is unable to perform the work, or subject to the consent of someone with absolute and unqualified discretion to withhold consent would subject to exceptional facts, be consistent with personal performance.

30. Even if an individual is obliged to perform work personally he will not be a worker if the other party to the contract is a client or customer of his profession or business.

31. Subordination may assist in distinguishing a worker from someone truly self-employed however it is not a freestanding characteristic of a worker.

32. The courts must try to determine whether the essence of the relationship is that of a worker or an independent contractor who is in business on his own account, even if only in a small way: **James v Redcats.**

33. It has been held helpful to apply the integration test i.e. to consider whether the individual markets his services to the world as an independent person or whether he is recruited by the principal to work as an integral part of the principal's operation.

34. In in **Cotswold Developments Construction Ltd v Williams UKEAT/0457/05** DM paragraph 53;

    "*The paradigm case falling within the proviso to 2 (b) is that of a person working within of the established professions; solicitor and client, barrister and client; accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of a customer of a shop and the shop owner, or of the customer of*

a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such, Thus viewed it seems plan that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls "

The Working Time Regulations 1998

35. Pursuant to The Working Time regulations 1998 ***workers*** have the right to

- A daily rest period of not less than 11 consecutive hours under regulation 10 (daily rest);

  "*10(1) A worker is entitled to a rest period of not less than eleven consecutive hours in each 24 hour period during which he works for his employer*."

- A rest break with working days more than six hours long under regulation 12 (rest break);

  "12(1) *Where a worker's daily working time is more than six hours, he is entitled to a rest break.*

  (2) *The details of the rest break to which a worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.*

  (3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

36. On the issue of the 20 minute rest break the Court of Appeal in **Gallagher v Alpha catering services [2005] ICRA 684** clarified what was meant by regulation 12 rest break when Peter Gibson LJ explained at page 684 A-B that:

    "… *A period of downtime cannot retrospectively become a rest break only because it can be seen after it is over that it was an uninterrupted period of at least 20 minutes. The worker is entitled… to a rest break if his working time exceeds six hours, and he must know at the start of the break that it is such. To my mind a rest break is an imminent* ***uninterrupted period*** *of at least 20 minutes which the worker can use as he pleases."*

37. Where certain exemptions or derogations apply a worker may be required by the employer to work during the period which would otherwise be a rest

break or rest period. The employee must generally allow the worker to take an equivalent period of compensatory rest.

Security and Surveillance Exemption: Regulation 21 WTR

38. Regulation 21 WTR provides for an exclusion in relation to regulation 10 (1) and 12 (1) where pursuant to section 21 (b) the worker is engaged in security and surveillance activities requiring a *permanent presence* in order to protect property and persons, (as may be the case with security guards and caretakers where the workers are engaged in security and surveillance activities requiring a *permanent presence* in order to protect property and person). This exception however is subject to regulation 24 which provides as follows;

"*where the application of any provision of these regulations is excluded by regulation 21 … And a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break-*

(a) his employer shall wherever possible allowing to take an equivalent period of ***compensatory rest,*** *and*

(b) in ***exceptional*** *cases in which it is not possible, for any objective reasons, to grant such a period of rest, is employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety*

39. In **Corps of Commissionaires Management Ltd v Hughes 2009 ICR 345 EAT**; in this case the claimant was the security guard and it was common ground between the parties that he fell within the special case exemption set out in regulation 21 (b). The claimant was required to work during the periods that would otherwise have been his rest breaks and he was not paid for any compensatory rest. On appeal the EAT held compensatory rest means something over and above the rest to which the claimant was already entitled between shifts. Were it otherwise the claimant would not actually be compensated for the loss of his rest period. The EAT noted that the regulations do not make specific provision for payment and thus the claimant is entitlement depended upon the Tribunal making findings as to what the parties agreed in this respect.

40. In **Brown v Medway NHS Trust ET Case number 5001843/00** an Employment Tribunal rejected the argument that compensatory rest designed to make up the loss of the 11 hour daily rest period should be scheduled during working time and paid at the worker's normal rate. In this case it was agreed that the claimant, a hospital radiographer was covered by the derogations set out in regulation 21(c). The claimant worked a 24-hour shift but his working week was generally arranged in such a way as to enable him not to work for at least 11 hours immediately afterwards. Such periods fell outside scheduled shifts and the claimant was not paid for them. The Tribunal concluded that the entitlement to compensatory rest was an entitlement to take time off not be paid for that time off. The purpose of the regulations was to ensure that individuals did not work for excessive periods without rest, not to bestow salary premium.

41. **Hughes v Corpse of Commissionaire's Management Limited (No2) 2011 IRLR** the Court of Appeal; this case involved a claimant worked as a security guard. He raised a grievance where the issue was entitlement to rest breaks under regulation 12 and to compensatory rest periods. The court held that regulation 21 (b) was relevant. It was common ground between the parties that the claimant fell outside the provision of regulation 12 but that the position of the claimant was to be dealt with in accordance with regulation 24. The court considered in what circumstances and in what manner the claimant as a security guard was entitled to compensatory rest under regulation 24. It was argued on behalf of the respondent that the claimant did not fall within either part of regulation 24 because it was common ground that the claimant was engaged in security and surveillance activities requiring a permanent presence. It was further argued that because of those obligations imposed on the claimant it was not possible for him to take an equivalent period of compensatory rest under regulation 24 (a) with the consequence that the obligation was to; "*to afford [the claimant] such protection as may be appropriate in order to safeguard the [claimant] health and safety ."* The Court of Appeal did not accept this submission, it pointed out the regulation 21 (b) applies if the presence of somebody (but not necessarily the claimant) is required. In other words, it might be possible for somebody else to perform the claimant's function as a security guard when he is taking his compensatory rest and therefore even if regulation 21 (b) applies that does not mean it is impossible for the worker to take compensatory rest. The Court referred to the possibility of the respondent providing some security cover perhaps by another security officer for the claimant to take a compensatory. The case was remitted back to the employment tribunal to consider if the claimant's case was an **exceptional** case. It was also held that the term "compensatory rest "means something over and above the rest which the claimant is otherwise entitled between shifts.

42. A worker may present a complaint an employment tribunal that an employee has *"refused*" to permit him to exercise his right under regulation 10 and 12 pursuant to regulation 30. An employer shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or the payment should be made: regulation 30 (2) WTR.

43. There is been some uncertainty as to whether an employer can be said to have refused to allow worker to take rest**. In Grange v Abellio London Ltd 2017 ICR 287 EAT**, The EAT held that the entitlement to a rest break for workers under regulation 12 (1) required employers not merely to permit the taking of rest breaks but to proactively ensure that working arrangements allowed for them to take those breaks. The approach in **Miles v Linkage Community Trust Ltd [2008] IRLR 602** that there first had to be a request by the employee to exercise the right to a break was incorrect. The employee in this case had initially been employed as a bus driver and subsequent is a relief roadside controller. The bus drivers rest

breaks were scheduled at fixed times each day. In his new role his working day lasted eight and a half. In practice it was difficult to take the lunch break. Subsequently the worker was informed his working day was changed to eight hours so that he would work without a break but finish half an hour earlier. The tribunal held that the employer's expectation that the employee would work eight hours without a break did not amount to a refusal of a request. The Court of Appeal emphasised however the underlying health and safety purpose of the protection afforded by the entitlement to adequate rest and referred to the authority of the court in **Scottish Ambulance Service v Truslove [2010] 1 WLUK 129** where the court rejected any suggestion that the employee had been required to expressly request daily rest. Employees were not merely required to permit the taken rest breaks but they are to proactively ensure that working arrangements allowed for workers to take those breaks. Adopting an approach that allowed both for common sense construction of regulation 30 (1) and met the purpose of the Directive, the employee had an obligation to afford the work of the entitlement to take a rest break and that entitlement would be *refused* by an employer if they put into place working arrangements that failed to allow the taking of a rest break.

44. Regulation 30 (3) WTR provides that where a tribunal finds a complaint is well founded, the tribunal shall make a declaration to that effect and may make an order for compensation to be paid by the employer to the worker. Regulation 30 (4) provides that the amount of the compensation shall be such as the tribunal considers ***just and equitable*** in all the circumstances having regard to;

    (a)the employer's default in refusing to permit the worker to exercise the right, and

    (b) any loss sustained by the worker which is attributable to the matters complained of

45. **Miles v Linkage Community Trust Limited 2008 IRLR**: The EAT in this case gave guidance around the factors a Tribunal should consider when awarding compensation under regulation 30 (4) which it observed were as follows;

- *The period of time during which the employee was in default*
- *The degree of fault*
- *The amount of the default in terms of the number of hours the employee was required to work on the number of hours he or she was given as rest periods.*

<u>Unlawful Deduction : section 13 Employment Rights Act 1996</u>

46. Under section 13 Employment Rights Act 1996 an employee shall not make a deduction from wages of a worker employed by him unless;

    a. The deduction is required or authorised to be made by virtue of the statutory provision or a relevant provision of the workers contract or

b. The workers previously signified in writing his agreement or consent to the making of the deduction.

47. A clause simply providing that the employee will be liable for losses incurred by the employer is unlikely to be sufficient: **Potter v Hunt Contracts Ltd 1992 ICR 337 VAT**.

48. **Mitchell Fire Security Installations Ltd ET Case no. 2408510/09:** the tribunal in this case held that just because a clause gives the employee the right to charge the employee did not mean the employee had the right to *deduct* those payments from the employee's wages.

Relevant Findings of Fact

49. The Tribunal does not have jurisdiction to hear any of the claims brought by the Claimant unless he has the status of an employee or worker of the Respondent. It makes no difference to the claims and the remedies which may be available to the Claimant whether he is found to be a worker or an employee however the first consideration for the Tribunal is what his status was at the material times.

50. The Respondent is a company which provides security and surveillance services, it also provides training courses and, though not directly relevant to this case, coaching/tutors for children. It is common ground between the parties that the Respondent has a Whatsapp group (the user name for which is boladapo 25) and invites trained security guards to join the group, I shall refer to the members who elect to join henceforth as the Members. The Respondent informs the Members of work which is available, this may be for example work providing security for a concert, sports events and nightclubs. The Respondent have a number of clients who require ad hoc security guards. Copies of some Whatsaoo group messages appear in document SKK1 of the Respondent's bundle. Members are told via the Whatsapp of the venue, the timings of the shifts and those who are interested are asked to contact the Respondent for further details.

51. It is not in dispute that the Claimant first had contact with the Respondent in around 2015 or 2016. The exact timing is not material. The Claimant wanted to take a course in security work to obtain a security 'badge' which would enable him to find work in this field. The Claimant was introduced to the Respondent and carried out the required training with them (which he paid for) and then obtained his security 'badge '.

52. On completion of the training the Respondent offered him an assignment. The Claimant carried out assignments for the Respondent during this period on a couple of occasions and was then invited to join the Whatsapp group.

53. The Claimant carried out assignments for the Respondent on only a couple of further occasions during the period 2017 to 2018, he brings no complaints in relation to that period. There was then a gap until the Claimant accepted

assignments for the Respondent again on 4 May 2019. The Claimant explained that the reason he did not carry out security assignments for the Respondent during this period was because he was ‘not in the Country’ and ‘was busy.’

54. The Claimant produced what are headed as invoices, these are simple documents which he produced which confirm the days when he worked, the total amount payable by the Respondent and the Claimant’s bank account details. The bank account details are not for a business but for Claimant’s personal bank account.

55. It is accepted between the parties that when the Claimant accepted an assignment he would be given a short period of training, around 30 minutes to familiarise him with the building and the fire exits et cetera. That training would be provided by the Respondent. This training was compulsory but was unpaid. The Claimant was free to work for someone else, he would inform the Respondent in advance of dates he would be available.

56. Payments were made by the Respondent on the 9th day of every month in arrears. The Claimant was required to complete timesheets produced by the Respondent which set out the date he had worked, start and end time of each shift, the site where he had worked and the total number of hours worked. None of this is disputed.

57. The payment was calculated on an hourly rate without any deduction of tax. The Claimant in his evidence stated that he was unsure of what his tax position was and whether he had to personally account to HMRC. The Claimant initially in his evidence maintained that he was only ever paid the national minimum wage by the Respondent however, within his own documents at page 10 is a copy of a text message exchange between the Claimant and Dr Kassim regarding the hourly rate he would be paid for an assignment and it is clear that the rate varied depending on the type of assignment. If the work was at a nightclub (considered to be more high risk), the rate paid was £8.50 per hour.

58. On accepting an assignment, the Claimant would to be told the location where he would be working and the times he needed to be present. He would be paid for the whole time he was on site, there was no breaks factored in to the times that he worked or the payment he would receive. The Claimant was required to make a call every hour from the site telephone. The undisputed evidence of the Claimant was that the purpose of the call was twofold; to check on his welfare but also to make sure that he was on site. The Claimant also described occasions when Mr Ogeinebowale, a manager employed by the Respondent would physically attend site to check he was present. These facts are not in dispute.

59. The Claimant would drive his own vehicle from one site to another if he was required to work at another location.

60. The Claimant was required to dress in a certain way, for example black trousers and shirt. The Respondent did not provide any uniform. The

Claimant wore his own high visibility vest and provided his own security badge. The Claimant was not provided with any tools not even a torch, he described how if he needed a flashlight he would use an application on his mobile telephone. The only thing the claim he was provided with was in his words; "a chair to sit on."

61. It is common ground between the parties that the Claimant was required to sign Agreement. The Agreement is signed by Mr Ogeinebowale on behalf of the Respondent. The Agreement is undated and the Claimant's evidence is that it was signed on the 3 May. Dr Kassim could not dispute the date the Agreement was signed because he had delegated the task of getting the Agreement signed to Mr Ogeinebowale. The Agreement in its preamble provides as follows;

"*any cancellation can affect our relations with our client because we may lose the contract if we fail in our obligation. Therefore, this must be respected. It is not our wish to pass any fine to you, please make sure you can cover the shift before you confirm."*

62. The Agreement goes on to provide for the Claimant to give a specific period of notice if he is unable to work a shift either at the site at Liberty House or another location, the requirement to give notice were more onerous in terms of shifts at Liberty House and provides as follows;

1. If I Patrick Armah confirms [confirm] to cover shift at Liberty House site with FS, I must cover it, otherwise I authorised [authorise] SS to charge me for FS 8 shifts. Unless the cancellation is done in accordance to clause 3

2. If you confirm a short-term shift even if it is one shift at any other site apart from the one mentioned in clause 1 above, then I [if I] cancel I authorised [authorise] FS to charge me for 2 shifts. Unless the cancellation is done in accordance to clause 4.

3. For any shift mentioned in clause 1, I have given month notice before the start of the shift

4. For any shift described in clause 2 you have to give notice 72 hrs before the shift starts"

63. The Agreement goes on to provide at paragraph 5 for a uniform which is black suit, white shirt, black leather tie "*or has dictated by the nature of the assignment."*

64. The reference to Liberty House is to student accommodation in Leicester. The Respondent had secured this as a permanent contract. This was an important contract for the Respondent hence requiring the Claimant to sign the Agreement to ensure them of his commitment to work the agreed shifts.

65. The Claimant asserts that he was told to sign this form on 3 May and that he was informed by Mr Ogeinebowale that he would be an employee from the date of signing the Agreement. Dr Kassim denies this however Mr Ogeinebowale although present in the Tribunal did not give evidence and

therefore we only have the Claimant's evidence regarding what he was told by Mr Ogeinebowale. I find on a balance of probabilities that the Claimant was told by Mr Ogeinebowale that he would be taken on as an employee if he entered into this Agreement. However, I also accept the evidence of Dr Kassim that he was not aware that the Claimant had been told this and that as far as he was concerned the Claimant was not an employee of the Respondent. It is clear from the documents produced by the Claimant that in practice the Claimant continued to complete the same time sheets and submit invoices for payment (document 2), and that the arrangement between the parties remained the same in all other respects apart than the requirement to give notice under the Agreement.

66. Dr Kassim explained that the Agreement was 'unique', in that it was the first time the Respondent had required anyone to enter into this type of agreement however they were keen not to lose the contract with Liberty House.

67. Dr Kassim stated that he had reservations about the Claimant working at the Liberty House site because he had let the Respondent down on previous occasions. Dr Kassim alleged that the Claimant had said, when asking to be given work on the new Liberty contract; "if I disappoint don't pay me." The Claimant denies that this was said and there are no documents evidencing this comment was made. Some such assurance may have been given by the Claimant however it is not material because Dr Kassim does not rely upon that comment as giving him the contractual right not to pay the Claimant for the shifts that he carried out in June which relate to the unlawful deduction claim, his pleaded case is that he relies upon the Agreement signed by the Claimant as his contractual authority for not making the payments.

68. With regards to the 'charge' of 8 shifts if notice was not given; Dr Kassim, was asked by the Tribunal to explain how the Respondent had arrived at that level of charge. Dr Kassim explained that eight was the total number of shifts the Claimant had agreed to carry out on the Liberty House site in one month. In terms of the financial consequences for the Respondent of the Claimant not providing the required notice when he failed to work the agreed shifts in June, Dr Kassim's evidence was that the Respondent had managed to find someone else to cover the shifts at short notice, that Mr Ogeinebowale had to carry out some additional administrative work to arrange the cover which required Dr Kassim to cover Mr Ogeinebowale's tutoring commitments. Dr Kassim's hourly charge out rate was £25, he tutored for two hours and therefore estimated that the Respondent incurred an additional cost of £50 plus Mr Ogeinebowale's time which he estimated to be another £50. Taking those costs at face value that would equate to £100. It is agreed between the parties that the payment withheld by the Respondent for the for the shifts worked by the Claimant in June was an aggregate sum of **£385.87.**

5 and 6 May shifts – Daily Break and Rest Break

69. The Claimant accepted an assignment on 4 and 5 May 2019.

70. It is not disputed that the Claimant started work at 7am on 5 May 2019 at a site at Oxford Court in Leicester. The Claimant's undisputed evidence was that on evening of the 5th May he was telephoned by Mr Ogeinebowale and told not to leave the site until he arrived. The Claimant was due to finish his shift at 7pm but waited for Mr Ogeinebowale to arrive which he did at 8pm. The Claimant was asked to drive immediately to Nottingham to work at another site, to start a shift at 9pm that same evening. The Claimant complains that he was told that the Respondent would lose the contract at the site in Nottingham if he did not agree to cover this shift for them. He therefore, after working 13 hours, drove to Nottingham to cover a shift from 9pm which finished the next morning, on 6th May at 7:30am. The timings for the shifts are confirmed in a Whatsapp message dated 5 May and copies of the time sheets which are contained in the bundle. He then drove immediately back to Leicester on 6th May to start his next shift at 8.30 am which finished at 3pm. It is agreed between the parties that the time he worked in total was therefore 7 am on 5 May to 3pm on the 6 May, a total of 30 hours excluding the two hours driving between sites.

71. The Claimant is not alleging that he was not paid for these shifts, he is not making any claim for payment for the time spent driving, he complains that he was required to work 30 hours (excluding the driving time), without having a rest break or daily rest period.

72. It was common ground that there was no set time for the Claimant to take a break when he was working. The Claimant accepts that when he worked at the venue in Leicester, on previous occasions he could and would ask a colleague from another site to cover for him so that he could take a lunch break. The Respondent's case is that it did not prevent the Claimant from taking a rest break during the shifts on the 5th and 6th May 2019 and that he could have arranged for someone to cover for him to allow him to have a break. The Claimant complains that while he was working at the site in Nottingham he was required to watch CCTV, he was working on his own and there was no opportunity for him to take a break. Further he states that during the shifts in Leicester he was busy, students were being collected by their parents and he simply did not have the opportunity to take a break. He complains that he also worked the 30 hours without an 11-hour daily rest period.

73. Dr Kassim accepted that the Claimant had worked 30 hours on the 5th and 6th of May plus driving between sites and that he had not had an 11-hour daily rest period after working 24 hours. Dr Kassim's response to this was that the Claimant did not have to accept the shift in Nottingham, he could have rejected it. I asked Dr Kassim about arrangements for compensatory rest, Dr Kassim's evidence was that when people work these sorts of hours they are given days to rest and that the Claimant's time sheet showed that he did not work for the Respondent again until 10 May. It was clear however from Dr Kassim's evidence that he had not been aware at the time that the Claimant was working those shifts, had not made any arrangements for compensatory rest and as Dr Kassim conceded, he did not know whether or not the Claimant was working immediately after finishing the shift on 6 May for someone else and whether or not he would therefore have had a chance to rest. In response to a question about what processes or procedures Dr

Kassim had in place to manage shifts to ensure that individuals had rest and daily breaks, his answer was; "*it is up to them, their choice to do a shift".* When asked whether he organises shifts to enable individuals to take breaks at set times or leaves it up to the individual to decide whether or not they take breaks his response was; "*it's up to them*." Dr Kassim did not plead that the exception under Regulation 21 WTR applied nor did he allege at any point that a permanent presence was required or that it would not have been possible for the Claimant to take a daily break or rest period during those shifts. Dr Kassim's evidence was that the Claimant could have taken a break but chose not to, not that it was not possible because a permanent presence was required.

Right of substitution

74. The Claimant' s evidence was that he was not permitted to send a substitute in his place if he was unwilling or unable to carry out a shift. Dr Kassim's evidence was that he was, however the only illustration he gave of this was an occasion (which is evidenced in a Whatsapp message exchange), when the Claimant had rejected an assignment in Portsmouth. Dr Kassim did not appear to appreciate what was meant by a right of substitution because in this instance it was clear from the messages that the Claimant had not accepted the shift and in response to a general request by Dr Kassim to the group whether they knew of anyone who may be interested, the Claimant had provided a name. It was not for the Claimant to make the arrangements and the individual was not going to work the shift on behalf of or in place of the Claimant. Dr Kassim states in the messages as follows;

   *"If you know anyone that is available for the trip, **kindly ask such person to contact me on [number].** Thank you"*

75. This is not evidence that the Claimant had the right to send a substitute to carry out the work on his behalf. Certainly, in relation to the Agreement about work at Liberty House, Dr Kassim explained that anyone who worked on this contract would need training by the Respondent, he did not suggest that the Claimant could have sent a substitute to carry out work for this client.

76. I find that the Claimant did not send substitutes and that he had no right to do so, this was not the arrangement in practice and nor was there any agreement providing for such a right.

Control

77. It is not in dispute that the Claimant was told where to work, what times to work and generally what work was required. The Respondent carried out random checks.

78. I find that the Claimant was in practice, subject to a degree of control however the nature of the work itself did not require close supervision.

79. The Claimant was not subject to any disciplinary policy. He was not provided with any company policies that he was subject to and he was not paid holiday or sick pay.

80. The Claimant did not continue to work the shifts he had agreed to work at Liberty House in June because he complains that the Respondent was late paying him in June for the work he did in May. Although Dr Kassim initially denied this he later conceded that there may have been a delay, and indeed the document at page 3 of the Claimant's bundle which is a message between the Claimant and Mr Ogeinebowale would support the Claimant's evidence;

"Hi Patrick, I trust you are aright at work. I am so surprise you can refuse to pick up my calls despite pleading to you that delay in payment you you dues was partly my fault. As mature men I believe that talking things over is the best was to resolve complain[t]s not by keeping to yourself.

81. I find therefore that the Respondent was late in making payment to the Claimant for the shifts worked in May 2019.

82. The Claimant's position therefore is that the Respondent had breached the terms of his arrangement with them which had been payment by the 9th of each month and this therefore entitled him to treat the Agreement as at an end, with no requirement therefore for him to give the notice set out in the Agreement.

Unlawful deduction of Wages

83. It is common ground between the parties that the work that the Claimant carried out in June should have been paid on 9 July 2019 but for the Respondent's reliance upon the terms of the Agreement. The parties agree the Claimant was due an aggregate gross payment of **£385.87** but that this sum was not paid to him because the Respondent contends that it had the right to withhold payment under the terms of the Agreement.

Submissions

84. The submissions of Dr Kassim were simply that the Claimant was not an employee or worker but that he was a self-employed contractor, that the failure by the Claimant to give notice that he did not want to work the shifts at the Liberty House site meant that the Respondent had been entitled to withhold payment for the shifts undertaken in June. That the Claimant could have taken breaks during this shifts on the 5th and 6th of May but chose not to do so. With respect to the claim in relation to not having had an 11-hour daily break, the Respondent submits that this was his choice, he did not have to accept the second shift.

85. The Claimant in summary argues that he was not a self-employed contractor, that he was an employee or worker and that he was entitled to the payment for the June shifts which had been unlawfully deducted. He further argues that he had been unable to take breaks during the shift on 5th and 6th May 2019 because he had been too busy, it was end of term and the students were being collected by their parents and there was no time to take a break even though he accepted that he would probably been able to

ask another guard to cover for him had he asked. Further, that although he had a choice whether to take the extra shift in Nottingham, he was put under pressure by Mr Ogienbowale to do so having been told that a failure to do so meant the Respondent would be put at risk of losing the contract

86. The Respondent and Claimant were invited to make submissions regarding remedy should the Claimant succeed in his claim for unlawful deduction of wages and/or breach of The Working Time Regulations, after having given the parties guidance in terms of the factors the Tribunal are to consider. The parties were advised that as an alternative, the Tribunal was prepared if there is a finding in the Claimant's favour, to hold a separate hearing to deal with remedy which would give both parties the opportunity to take advice and make further submissions. Both parties expressed a preference not to have to attend a further hearing and to make their representations today.

87. The Claimant invited the Tribunal to consider when determining what compensation may be awarded, if it finds that there has been a breach of the WTR, that working without an 11-hour break was a very serious matter for him and had consequences in terms of the impact on his time with his wife and children. The Claimant did not allege that he had suffered any personal injury or financial loss.

88. Dr Kassim also made brief representations and invited the Tribunal to make a nominal award if any award were to be made, on the basis that the Claimant had the choice of whether to take breaks or to accept the shift.

Conclusions

89. The Claimant was generally free to either accept work which the Respondent had 'advertised' on the WhatsApp group or not. The Claimant was under no compulsion to accept the work. The Claimant was one of many security workers who formed what may be described as a pool. The Claimant was not restricted in terms of his ability to accept work elsewhere and he did so and that did not change. The Claimant was not obliged to make the Respondent aware of his availability. There is no suggestion that the Respondent has a dominant market position. The Respondent could not compel the Claimant to accept work, and indeed he did not accept it if it did not suit him, if he had other work elsewhere or if he was not prepared to travel the required distance (as with the assignment in Portsmouth).

90. The Claimant entered into the Agreement from 3 May 2019, an agreement which was only offered to one other person who was an employee. The key purpose of introducing the Agreement was to ensure that the Respondent had sufficient notice if shifts were cancelled to enable them to arrange cover and not place at risk the Liberty House contract which was important to them.

91. The Respondent hoped that the Liberty House contract would be a long-term contract and the Claimant was induced to sign the Agreement with an assurance by Mr Ogeinebowale, a manager of the Respondent, that he would become an employee of the Respondent if he signed it. Dr Kassim however was not aware that the Claimant had been told this. The Agreement

required the Claimant to give notice of at least one month before the start of a shift at Liberty House. The Agreement also referred to work at other sites and included a requirement to give notice in respect of those sites but this was for a lesser period. If the required notice was not given in respect of a shift at Liberty House, then the Agreement provided that the Claimant would be charged for 8 shifts, which equates to about 1 month's remuneration. The Respondent explained how this arrangement was "unique", it was not the Respondent's standard practice. The Claimant received training to undertake the work at Liberty House. He continued to submit invoices and record his time in the usual way. He was not provided with a contract of employment or any documents recording that he was an employee. The Claimant continued to be available to carry out work for others and was free to do so when not working for the Respondent. He continued to be remunerated in the same way. There were no further measures taken to integrate him into the business, he was not subject him to any disciplinary policy or any more control over his activities when performing the work.

92. Although the terms of the Agreement meant that there was more commitment from the Claimant regarding the shifts he agreed to work at Liberty House and other sites, in respect of the requirement to give notice if he did not want to or could not work a shift, I do not find that there was sufficient mutuality of obligation to find that the Claimant was an employee, The commitment was only to the shifts he had agreed to work which he could cancel if he gave the required notice and then continue to pick and choose the assignments he was prepared to accept. Regardless of what was said about him being an employee on signing the Agreement, he was not in practice treated as an employee. No steps were taken to integrate him further into the business, he was not required to work exclusively for the Respondent but remained free to work elsewhere and market himself to the world at large, there was no more control over his activities, he continued to pick and choose other shifts he wanted to do, he submitted time sheets and invoices for the work he did and was paid without deduction of tax.

93. I therefore find that the relationship lacked the essential core characteristic of employment. There was insufficient mutuality of obligation which is fatal to a finding that the Claimant was an employee.

94. I turn now however to the question of whether the Claimant was a worker. The Respondent offered work on the group WhatsApp, if the work was accepted the hourly rate was agreed verbally or via text message. There was an intention to create a legally binding contractual relationship.

95. The work was of variable duration. The Claimant was not involved in the discussions as between the Respondent and the end user regarding the hours of work, the requirements of the role or the price for the work. The Claimant was offered an hourly rate by the Respondent and he could accept or reject it.

96. I do not consider that there was any right of substitution. What the Respondent described as a right by the Claimant to arrange a substitute was

in the one example given, a request made by the Respondent for the name of anyone who may be prepared to carry out the work to be provided to the Respondent for the Respondent to contact them. This is not a right of the Claimant to have a substitute. There a degree of control over the Claimant in the sense that he was required to attend site during certain prescribed hours, he was required to attend on site for the purposes of a short training session and spot checks on whether he was on site during the required hours were carried out from time to time. The Claimant was not provided with any tools or uniform but the role did not require it, he was told what the required dress code was and he was required to comply with it.

97. The Claimant from the point he accepted the work was I find under an obligation to perform the work on the terms agreed and to do so personally.

Worker – in business on his own account

98. I find that during the period when the Claimant was carrying out an assignment, he was not his own boss. He could not leave the site where he was working during the periods he had agreed to work. He was working exclusively for the Respondent during the assignments albeit often they were only single shifts. The Claimant could only be properly regarded as performing services for and under the direction of the Respondent during the work he had agreed to perform, in return for which he received remuneration.

99. The Claimant was not an independent provider of services, he submitted invoices however he did not have anything which can be construed as a business. He does not have an accountant to provide him with advice and receives an hourly rate based on or slightly more than the national minimum wage. He was not involved in negotiating the remuneration, he was told what the hourly rate was and it was up to him if to accept it.

100. When he accepted a shift, or was given training on site by the Respondent, he was told what to wear although he supplied his own clothing. There was an element of control in that there was a degree of monitoring to ensure he was on site.

101. I do not find that the Claimant was in business on his own account. He was told where to go, the hours to work and what he was paid was set by the Respondent.

102. The Respondent was not his client or customer of the Claimant and I find that when he accepted an assignment he was a worker during the period of that assignment or shifts. In respect of the 5th and 6th May, I find that he was a worker throughout that 30-hour period when he worked three shifts in succession.

<u>Working Time Regulations</u>

103. The Claimant complains of how he was treated on the 5th May and 6th

May 2019 when it is accepted that he worked for 30 hours (plus driving to the sites). The Respondent attempted to challenge the Claimant's account that he had not been able to take a rest break during those shifts however Dr Kassim was not able to produce any evidence that the Respondent had taken any steps to facilitate a rest break or evidence that the Claimant was able to do so on this occasion, other than seek to rely on the Claimant's own evidence that he had made arrangements with another security guard on previous occasions. To work such long hours and then travel on public roads to different sites in between shifts creates an obvious health and safety risk, not only to the Claimant but other road users. I find that when he carried out these three shifts in succession he was a worker and thus entitled to a daily rest period of 11 hours and a rest period of 20 minutes after 6 hours work.

104. Dr Kassim was unaware that the Claimant had worked these three shifts without a break. Although there is an exemption for security work, Dr Kassim did not plead this exemption, he did not make any attempt to argue that it was necessary for the Claimant to work those three shifts without a break in between. Indeed, Dr Kassim's defence was not that a permanent presence on the sites was required or that it was not possible (whether because of cost or otherwise) to arrange for someone to cover for the Claimant to enable him to take a daily and/or rest break, his position was that the Claimant had a choice, that it was possible for him to take a rest break as far as he was aware, and that he could have declined the second shift.

105. Dr Kassim's case is therefore not that a permanent presence was required or that there were exceptional circumstances which meant compensatory rest could not be provided. Regardless of the Claimant's evidence that he was told that the Respondent risked losing the Nottingham contract if he did not agree to work the shift, Dr Kassim did not plead that this was the case or that there were any exceptional circumstances that applied.

106. The Respondent had clearly not applied its mind to the question of breaks or rest periods in this case because it did not consider the Claimant to be a worker or employee. The Claimant does not allege that he requested a break which was refused however, I find that the Respondent was under an obligation to make arrangements which enabled him to take the required breaks however they failed to comply with that obligation.

107. My findings are therefore that the Claimant was a worker when carrying out this work on 5th and 6th May and that the Respondent was in breach of regulation 10 and 12 of WTR.

108. The Employment Tribunal is to award what sums it considers just and equable. I take into account that the default was over a short period of time and the Claimant suffered no financial loss or harm however, there was a clear risk to the health and safety of the Claimant. The WTR are complex however the Respondent did not assert that it had taken any legal advice in order to understand its legal obligations. The Claimant was usually paid the national minimum wage for the hours he worked, he was deprived of the right to an 11-hour daily rest period and rest breaks and although there is no right to payment if these had been taken, I have taken into account that the

equivalent payment for an 11- hour shift would be £90.31 based on a national minimum wage rate. I consider that it would be just and equitable in the circumstances to award the Claimant the sum of £100.00 for breach of regulation 10 and 12 WTR.

Unlawful Deductions from Wages

109. Under section 13 ERA a worker has the right not to suffer unauthorised *'deductions'.* A deduction is defined in the following terms: '*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages on that occasio*n': section 13 (3) ERA.

110. It is accepted that the Claimant worked 4 shifts in June 2019 for which he was not paid. The Claimant was not prepared to work again to cover shifts on the 15 and 16th June 2019. The Claimant it is accepted did not give 1 months' notice as required under Agreement. The Respondent therefore did not pay him for those shifts.

111. The Agreement does not permit the Respondent to make a deduction from the Claimant's wages. It merely provides that the Respondent may *'charge'* the Claimant for 8 shifts.

112. The Respondent does not argue that the sums are not properly payable.

113. The contractual authority must be to make a deduction from wages to satisfy section 13 (1). The Agreement did not provide for this, the clause provides that the Claimant will be liable for a sum and I find that although the Agreement may have given the Respondent the right to ***charge*** the Claimant a certain amount, it does not give the Respondent the right to make a ***deduction*** from his wages.

114. Further, even if the Agreement did provide for the sum to be recovered by way of deduction from wages, the Respondent was unable to explain how any potential losses it may occur equate to the remuneration the Claimant would receive from 8 shifts. The Respondent was asked to explain how it had arrived at this figure. The evidence of Dr Kassim was not persuasive and nor did he arrive at a figure for estimated damages which equated to the sum to be deducted. I find that the charge under the Agreement was not liquidated damages, there was not a reasonable relationship between the amount that could be recovered in a common law action for damages and the amount of the charge. The contractual term must be enforceable at common law if it is to authorise a deduction under section 13. I find that the clause which set out the charge to be paid was a 'penalty clause'. Penalty clauses are prohibited at common law. I therefore find that the deduction was unlawful because the contractual term relied upon did not authorise the charge as a deduction from wages and/or that it amounted to a penalty clause which cannot be a 'lawful' deduction.

Remedy

- The Claimant is to entitle to the payment of £385.87 pursuant to section 13 Employment Rights Act 1996. The Claimant is to be responsible for payment of tax and national insurance on this sum.
- The Claimant is entitled to £100 compensation for a breach of section 10 and 12 of The Working Time Regulations 1998.

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Employment Judge Rachel Broughton

Date: 29th December 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE