EMPLOYMENT TRIBUNALS

Claimants: **Mr L Kedzierski & Others**

Re: Lead Claimants Mr P Jasinski and Mr A Koscielny

Respondent: **Turners (Soham) Limited**

Heard at: **Bury St Edmunds Employment Tribunal**

On: **29 to 31 January 2019, 15 February 2019.**

Before: **Employment Judge M Warren**

Representation

Claimants: Mr Bourne-Arton, counsel

Respondent: Mr Bailey-Gibbs, solicitor

RESERVED JUDGMENT

1. The claims of the Lead Claimants Mr Koscielny and Mr Jasinsky for unpaid wages, for failure to pay the national minimum wage, (Mr Koscielny only) and for unpaid holiday pay shall be determined at a hearing commencing on 19 August 2019, applying the findings set out in the Reasons below.

2. There will be a telephone preliminary hearing at the Bury St Edmunds Employment Tribunal with a time estimate of 1 hour before Employment Judge Warren at 10:00 a.m. on **23 July 2019**.

REASONS

Background

1. The 38 claimants in this case are all HGV drivers. The Respondent is a haulier. The claims include complaints of unpaid or incorrectly paid holiday pay, unlawful deduction from wages, breach of contract, failure to pay national minimum wage, constructive unfair dismissal, detriment for making protected disclosures, detriment related to health and safety and detriment related to working time. Not all of these heads of claim apply to all of the 38 claimants.

2. I case managed the case at a preliminary hearing on 13 August 2018, as a result of which 2 lead claimants were identified; Mr Koscielny and Mr Jasinski. There are two different forms of contract pertaining to the contracts; Mr Koscielny worked under what is known as the PROD 2 contract and Mr Jasinski on the PROD 3 contract. The hearing of those two lead claims is what is before me. The remaining claimant's claims and those claims of these 2 lead claimants not identified in the list of issues below, were listed to be heard over 3 weeks in June 2019. The intention was that the same Employment Judge would hear the remaining claims in June. I am unavailable for the third of those 3 weeks. After discussion, we agreed that I would hear what of the remaining cases it was possible to deal with on 3 to 7 and 10 to 14 June 2019 and that we would reconvene for a third week on 19 to 23 August 2019. Unfortunately, because I have felt the need to invite further written submissions, the hearing in June has become entirely impractical and I have acceded to the parties request that the June dates be vacated altogether. I will direct that this matter be listed for a telephone case management hearing after this Judgment has been sent to the parties.

3. We agreed that with the volume of evidence to deal with, it would not be possible for me to deal with remedy in the time available to us. The representatives were hopeful that on having the benefit of my findings on the issues, it will be possible for the issue of remedy to be resolved between them without the need for a remedy hearing. If it is not, I will have to deal with remedy in August.

4. As for this hearing, we were unable to conclude the matter within the 3 days allocated and had to reconvene on 15 February 2019, when I heard from the Respondent's witness, Mr Scarlet and closing submissions.

Evidence

5. I had before me witness statements from the two lead claimants and from the Respondent's Senior Operations Manager, (who has worked for the company for 39 years) Mr Scarlett.

6. The claimant's witness statements had exhibits to them, county court style. That was not helpful. I should be grateful if the claimant's representative would please not do that again in respect of any other witness statements she prepares for this case, or indeed, any other employment tribunal case. I understand that in part, the reason was that the Respondent refused to put certain documents in the bundle. I would expect greater co-operation, in accordance with the overriding objective.

Some of the exhibits were referred to and ought to have been in the bundle, certain payslips for example. As a last resort, a claimant's bundle can always be prepared.

7. The bundle was properly indexed and in two parts; the first to page 930 and the second, page 931 to 1324. We added to the bundle at 1325 a letter of grievance dated 9 December 2016 with attached, the written grievance, which we did not paginate, (nor did we refer to it). We also added payslips at 72A and B and copy tachograph readings at 112B to E.

8. I was provided with a, "Supplemental Hearing Bundle" indexed and paginated to page 22.

9. The Representatives produced opening skeleton arguments, which were very helpful. Mr Bourne-Arton updated his for closing submissions, which was also most helpful.

10. Mr Bourne-Arton provided me with a file of authorities and copies of statutory provisions. I am grateful to him for that.

11. Having spent some considerable time unravelling this case and preparing a draft decision, I found that it was necessary to invite the parties' further submissions on certain points. A letter was written on my behalf inviting such submissions on 5 April 2019 and in response I received:

    11.1. Claimants' further written submissions dated 11 April 2019;

    11.2. Respondent's submissions dated 18 April 2019;

    11.3. Claimants' response dated 26 April 2019, and

    11.4. Respondent's reply dated 2 May 2019.

The Issues

12. The parties and I agreed the list of issues for this hearing in respect of the lead claimants in August 2018 at the preliminary hearing. I replicate that list of issues by cutting and pasting, using a reduced font size and italics, in the paragraphs below. In bold type are amendments agreed with the representatives at the outset of this hearing.

> *Unpaid Wages and Holiday Pay Issues*
>
> *12. The parties by agreement identified the issues in the unpaid wages and holiday pay claims as set out in the paragraphs below, (I have been unable to resist the temptation to change the wording in some instances).*
>
> *30 Minutes Deductions (Applies to PROD 2 and 3)*
>
> *13. Did the claimants suffer a deduction from their wages amounting to 30 minutes of time worked being unpaid?*
>
> *14. If so, on what date did such 30 minute deductions take place?*
>
> *15. What were the claimants paid on those dates?*

16. What should the claimants have been paid on those dates?

17. Was such 30 minute deduction authorised by their contract?

National Minimum Wage (Applies to claimants on PROD 2 contracts)

18. What qualifying pay did the claimants receive?

19. What qualifying hours did they work?

20. What was the average hourly rate paid over the weekly pay reference period?

21. Is there a shortfall to be paid?
22. There was disagreement between the representatives on one final point under this heading. Ms Callaghan wished to pose the question – did the contract comply with the relevant legislation? Mr Bailey-Gibbs said that he did not understand the purpose of the question; the questions above seem to deal with what the tribunal needs to decide to determine the minimum wage claim. I agree with him. Ms Callaghan insisted that she wished the question to be included in the list of issues, she said that the claimants' point is that the contract is illegal in that under its terms, they were forced to work more than contractual hours, because if they worked just the contracted hours, their rate of pay would be under minimum wage. I was unable to understand what purpose answering that question achieved in terms of outcome or remedy. However, I said that I would record this as an issue the claimants wish to argue. ***At trial, the claimant's position is clarified by Mr Bourne-Arton; they say that the productivity bonus in their contracts of employment encourages speeding and endangers road safety contrary to EU Regulation No 561/2006. The money received therefrom should not therefore be taken into account in calculating whether the claimants have been paid the national minimum wage. I was also told that it was agreed between the parties that night rates, overtime rates and weekend work should not be included in the national minimum wage calculations as they are premium rates; the calculation should be on the basis of the base rate alone.***

Holiday Pay

23. What was the rate of holiday pay paid?

24. How should the rate of holiday pay be calculated? The claimants say that it should be calculated in accordance with section 222 as their hours of work vary and the tribunal should take an average over the previous 12 weeks. The Respondent says that section 221(2) applies as their remuneration for their normal working hours does not vary. ***The Respondent now accepts that the average over the preceding 12 weeks should be taken. The claimants thought that nonetheless, the Respondent was including in its 12 week averaging calculations, pay received during periods of holiday which had itself been incorrectly calculated. The Respondent says that is not so and that its calculations were based on shifts worked only.***

25. What were the dates of each period of holiday taken by each claimant?

26. In each case:

26.1. What was date of payment for that holiday?

26.2. How much was paid?

26.3. What should have been paid?

26.4. What was the short fall, if any?

27. Were the claimants forced to take unpaid leave?

28. Were the claimants forced to take unpaid leave with their holiday entitlement reduced accordingly, when their leave entitlement was not exhausted?

29. Did the respondent withhold pay for Bank Holidays when the claimants chose to take the same as leave?

30. If so:

30.1. When did that happen?

30.2. What were they paid on such occasion?

30.3. What should they have received?

30.4. What was the shortfall, if any?

Deductions Following Grievance

31. The claimants say that additional unauthorised deductions have been made from their wages after they have raised grievances about these matters, (variously dated, Ms Callaghan was unable to specify).

32. In respect of any such deduction, on the dates on which the claimants say such deductions were made, (to be identified after disclosure):

32.1. How much should have been paid?

32.2. How much was paid?

32.3. What was the shortfall, if any?

32.4. Was any such deduction authorised by the claimants' contracts of employment
The parties agree that I am not concerned in this hearing to determine whether the deductions were made because protected disclosures had been made.

Deduction if worked more than 11 hours

33. Ms Callaghan says that in respect of claims linked to the file for 3325039/2017 Mr Bednorz, unauthorised deduction were made from their wages if they worked more than 11 hours in a day. In that respect:

33.1. On what dates of payment were such deductions alleged to have been made, (to be identified following disclosure)?

33.2. How much should have been paid on those occasions?

33.3. How much was paid on such occasions?

33.4. What was the shortfall, if any? I record here and in retrospect, that I do not understand how this differs from the issues identified above at paragraphs 14 to 18 above.

Jurisdiction

34. Having regard to the date when the alleged unauthorised deduction or non-payment took place:

34.1. Did the claimants bring their claims within 3 months of such deduction or non-payment, taking into account ACAS Early Conciliation periods?

34.2. If not, do the allegations form a series of deductions or non-payment, the last of which was within 3 months of the claim being issued, taking into account ACAS Early Conciliation?

34.3. If so, are there any gaps of more than 3 months in that series? ***The claimants say that this is no longer a concern following the European Court of Justice's decision in King v Sash Windows Workshop [2018]ICR 693. The Respondent says that case can be distinguished.***

34.4. If any of the claims are out of time, was it reasonably practical for such a claim to have been brought in time and if not, was it brought within such further period as the tribunal considers reasonable.

Addendum 1: The claimants say that it was not reasonably practicable to have brought the claims in time because of the incomprehensible nature of the respondent's pay structure, methods of payment and notification of such, made it impossible for them to understand what they were paid and why.

Addendum 2: an additional issue on jurisdiction arises; are the claims limited by the 2 year limitation in section 23(4A) of the Employment Rights Act? Only in respect of unlawful deduction of wages claims, not holiday pay claims and not breach of contract claims, say the claimants. The Respondent agrees that a breach of contract claim, which can only be brought if employment has been terminated, is not limited by the two year restriction of section 23(4A) but that such a claimant can only claim for what has accrued due to the date of termination and no further back than 18 months.

13. I will deal with each of the heads of claim in turn, making findings of fact, setting out the relevant law and my conclusions under each separate heading. But first, I propose to set the scene with a factual overview.

Factual Overview

14. The Respondent is a road haulier. It employs 180 to 200 drivers. It has about 270 employees overall.

15. Mr Koscielny's employment commenced on 4 August 2004. The first contract he signed, (on 12 April 2014) is at pages 13A to 13K. He was described as a Day Driver. As his English was not good, he relied on a Polish colleague, (appointed by the Respondent) to explain to him the provisions of the contract and the requirements of his work. He was not provided with an explanation of how the pay structure was applied in practice. It was not explained to him that deductions would be made from his time at work for breaks taken.

16. Mr Koscielny signed a second contract, in which he was described as an Artic Driver, on 19 July 2006, (pages 14 to 23). This is what is known to the Respondent and its employees as a PROD2 contract.

17. Since April 2016, Mr Koscielny worked 4 days a week.

18. Mr Jasinski's employment commenced on 28 July 2014. The contract which he signed, known as PROD3, is at pages 1 to 13. He worked 5 days a week.

19. Mr Jasinski's English was also poor and he also relied on someone appointed by the Respondent, known to him only as George, for an explanation of his contract. He was given no explanation about any deductions to be made for breaks either.

20. Mr Jasinski resigned from his employment on 31 March 2017.

21. On 26 September 2014, the first named claimant in these proceedings, (Mr Kedzierski) put together and sent to the Respondent, a letter on behalf of 72

drivers, (Mr Koscielny and Mr Jasinski do not appear amongst the names listed). A copy appears not in the bundle, but at exhibit AK16 to Mr Koscielny's witness statement. It reads as a letter of suggestions, rather than of complaint. It suggests holiday pay should be calculated on the basis of the average preceding 12 weeks pay. It also suggests new rates of pay and adjustments to elements of the productivity bonus, (suggesting that the productivity bonus scheme was understood).

22. By a letter dated 9 December 2016, EMB Solicitors, the same solicitors as are representing all of the claimants in these proceedings, lodged a grievance on behalf of 7 LGV Artic drivers, (not including these two lead claimants). The grievance has neither paragraph nor page numbers, but runs to 28 pages and is very detailed. The complaint is about insufficient holiday allowance and insufficient holiday pay. If there has been an outcome to this grievance, I have not been taken to it.

23. By a letter dated 2 April 2017, 20 more drivers, including Mr Koscielny and Mr Jasinski, raised a grievance through the same firm of solicitors. Their complaint runs to 23 pages and includes complaints about working hours, rates of pay, holiday entitlement, holiday pay, unlawful deductions from pay and being subjected to detriment for making complaint.

24. At a meeting with its drivers on 10 April 2017, the Respondent accepted that holiday pay should have been calculated by taking an average of the previous 12 weeks pay in accordance with section 222 of the ERA, including various allowances and overtime. It agreed to pay holiday pay on that basis with effect from 1 January 2017 and to make backdated payments for holiday taken between 1 January 2017 and 8 April 2017, (page 49). Mr Jasinsky had already left at this stage, he did not receive a back payment.

25. In that same meeting, the Respondent announced that the practice of accruing lieu days will cease. The arrangement had been that if a driver worked on a bank holiday, he would be paid at the Sunday rate of pay and in addition, would be entitled to take another day off, or he could chose to give up that day off in return for a further payment. Having discovered that this practice was contrary to the law, the Respondent ended it and provided instead that the leave would accrue and if not taken by the time employment ended, a payment in lieu would be made at that stage.

26. There are three claim forms for these consolidated claims. The claim form commencing the cases of these 2 lead claimants, (3400387 to 3400227/2017) was issued on 27 April 2017. The Early Conciliation Certificate shows that early conciliation began on 2 April and ended on 25 April 2018.

Claim for unlawful deduction from wages

Law

27. Such a claim is brought under section 13 of the Employment Rights Act 1996, (the "ERA") which reads so far as is relevant, as follows:

"13 (1) An employer 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 a statutory provision or a relevant provision of the worker's contract, or

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

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

…"

28. Wages is defined at section 27(1):

27 (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

29. There are time limits within which such a claim must be brought, set out at section 23, (so far as is relevant to this case) as follows:

"23 (1) A worker may present a complaint to an [employment tribunal]—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),…

(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made …

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments …

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received …

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

30. In summary, the fundamental and uncontroversial law is:

30.1. A deduction shall not be made from a worker's wages unless it is authorised in writing;

30.2. A complaint of an unauthorised deduction may be made to an employment tribunal;

30.3. Such a complaint may not date back to deductions made more than two years earlier;

30.4. Such a complaint must be within 3 months of the last of any series of deductions, unless

30.5. It was not reasonably practicable to have brought the claim within the 3 month time limit and it was brought within such further period as the tribunal considers reasonable.

31. Deciding the issue in this case as to whether there has been an unlawful deduction from wages will entail constructing the contract. In other words, interpreting what the terms of the contract are and what they mean, so as to determine what the wage should be. The objective is to establish the intention of the parties. That question is to be approached objectively, put this way in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896:

> *"The meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they are in at the time of contract".*

32. It is a cardinal principle of constructing a contract that the parties must have intended what they in fact said. One looks at the circumstances surrounding the contract to assist in determining how the language of the document would be understood by the reasonable person. The starting point is to attribute to the words in the contract their ordinary and natural meaning.

33. A term of a contract may be implied rather than expressed. A term may only be implied if one can presume that it would have been the intention of the parties to include it. To make such a presumption, a court must be satisfied as to one of the following:

    33.1. The term must be necessary so as to give the contract business efficacy. In other words, to make the contract workable in practicable terms, (see Reigate v Union Manufacturing Co (Ramsbottom) Litd [1918] KB 592 CA). Such a term must be necessary to make the whole agreement workable.

    33.2. It is normal custom and practice to put such a term in the particular kind of contract in question. The custom and practice must be reasonable, notorious and certain, (see Sagar v H Ridehalgh and Son Litd [1931] 1 Ch 310 CA) so it must be fair and not arbitrary, it must be generally established, well known and clear-cut.

    33.3. There was an intention to include such a term, evident from the way the contract has been performed; from the conduct of the parties.

    33.4. It is so obvious, it must have been the parties' intention to include it: if asked by the, "officious bystander" whether a particular term was included in the contract at the time it was entered into, would the parties have replied, "oh, yes of course", (see Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 CA).

Facts

34. As Mr Scarlett puts it, the Respondent's "unique" system of pay has been in place for 40 years.

35. The rates of pay differ between PROD2 and PROD3.

36. The rates of pay set out in these, "Wage Working Agreements" are reviewed every year in discussion with elected driver representatives. The first named claimant in

these proceedings, Mr Kedzierski, was the driver's representative in these discussions until recently. The driver's representative consults with the drivers, queries are taken back to the Respondent and agreement reached. This evidence of Mr Secret was not challenged.

37. Mr Koscielny's contract of employment, (PROD2) provides as to remuneration that it is to be as stated in the, "Wage Agreement LGV Drivers" the current version at that time appears on page 9 of the signed contract. The latest version to which I was referred, dated 2016, (page 45) provides as follows:

> *"**Remuneration***
>
> | | |
> |---|---|
> | *Weekdays* | *£6.325 per hour* |
> | *Saturdays before 1 pm* | *£9.489 per hour* |
> | *Saturdays after 1pm* | *£12.650 per hour* |
> | *Sundays* | *£12.650 per hour* |
> | | |
> | *Extra for working Saturday* | *£4.50* |
> | *Extra for working Sunday* | *£4.50* |
> | *Dark Money* | *£1.05 (Between 20:00 and 06:00)* |
> | *New productivity scheme* | *£3.709* |
>
> *Holiday Pay - £81.60 per day*
>
> *Bank Holiday - £71.00 per day*
>
> *Meal Allowance - £5.00 per day*
>
> *UK Nights Out(inc. incidental expenses & meals) - £25.25*
>
> *Continental Nights Out - £30.75*
>
> *(Inc. Incidental expenses & meals)*
>
> *When drivers are away from their base and unable to complete further duties (through no fault of their own), a guaranteed 11 hours will be paid (8 basic and 3 overtime)."*

38. Under a heading, "Guaranteed Hours of Work" the PROD2 2016 agreement provides:

> *"Your guaranteed hours of work are 5 days Wednesday to Sunday, with an optional Tuesday."*

39. This latest version of the agreement is signed by a Mr David Stafford on behalf of employees on 9 August 2016. Save for some inconsequential deviations and differences in rates of pay, it is in the same terms as the version of the agreement at page 9 of Mr Koscielny's signed contract.

40. Mr Jasinski's contract of employment, (PROD3) also provides as to remuneration that it is to be as stated in the, "Wage Agreement LGV Drivers" the then current version of which appears on page 11 of the signed contract, (also page 11 of the bundle). The latest 2016 version in the bundle at page 46, provides as follows:

> *"**Guaranteed Payment***
>
> *Your guaranteed minimum payment is based on 9 hours per day 5 days each week Thursday to Monday. This will attract payment of £68.31 per day (9 hours at basic Mon-Fri rate) regardless of actual days worked. This will only apply if earnings for each day are less than the stated minimum payment.*
>
> *…*
>
> ***Remuneration***

Monday to Friday	*£7.59 per hour (for first 10 hours worked)*
Overtime Monday to Friday	*£8.90 per hour*
Saturdays – midnight to 13:00	*£9.381 per hour*
Saturdays after 13:00	*£12.144 per hour*
Sundays	*£12.144 per hour*
Dark Money	*£1.05 per hour (Between 20:00 and 06:00)*
** Productivity for first 4 Units*	*£3.400 per unit*
**Productivity for Units over 4*	*£3.048 per unit*

> **Productivity Units are calculated by deducting accrued productivity Units from actual hours worked.*

Holiday Pay	*£81.60 per day*
Bank Holiday	*£71.00 per day*
Meal Allowance (no night out)	*£2.00 non taxable and £3.00 taxable per day*
Night out including Incidental Expenses & Meals	*UK – £25.25 per occasion* *Continental - £30.75 per occasion*

> *when drivers finish away from their base and unable to complete further duties (through no fault of their own), a guaranteed 11 hours will be paid (10 basic and 1 overtime).*

<u>Fuel Bonus</u> – Payable subject to meeting specific performance criteria, for more details please contact the traffic manager.

<u>Productivity</u>

A) KM BONUS – for every 48 kms travelled = 1.0 Prod.Unit

B) DAILY CIRCLE CHECK = 0.5 Prod.Unit …"

And so the agreement continues for a further page, listing matters that will attract productivity bonus units. For example, if the driver has to do a trailer change at a location other than his depot, he earns 0.5 productivity units or if he delivers and reloads at the same customer location he earns 4.0 productivity units. There is no mention of a deduction of 30 minutes time in the calculation.

41. It can be seen from the above quotations that the PROD3 wording includes an explanation that productivity units are calculated by deducting accrued units from actual hours worked. PROD2 does not contain that explanation.

42. I do not think the 2017 agreements are in the bundle, if they are, I have no record of having been taken to them and I cannot see them in the index. The annual rates are summarised in a table at page 51, the provenance of which is not known to me.

43. Attributing to the words used in these contracts their ordinary and natural meaning, my construction of the contract is that:

    43.1. PROD2 drivers do not have any guaranteed number of hours for which they will be paid; the wording under the heading, "Guaranteed Hours of Work" provides simply that they are guaranteed work on the 5 stipulated days, not how many hours they will work.

    43.2. PROD3 drivers are guaranteed 9 hours work for 5 days at a stipulated daily rate.

    43.3. There is no explanation in the PROD2 contract of how the, "new productivity scheme" was to operate. The scheme was apparently new in 2006, (page 22) and remained, "new" 10 years later in 2016, (page 45). As noted above, Mr Scarlett told me that the scheme had been in place for 40 years. One has to assume that the scheme is the same as is applied to the PROD3 contract.

    43.4. Under both contracts, the drivers are entitled to be paid at the given hourly rates, for the time that they are work. The PROD3 contract refers to deducting productivity units from, "actual" hours worked. That might refer to hours working, when not on breaks, or it might refer to time at work, whether on a break or not.

    43.5. There is no reference in either contract to not being paid for breaks. In the world of work, time taken for breaks might be paid, or it might not. It depends on the contract of employment. When one goes to work, one expects to be paid for the time that one is at work, unless the contract makes reference to unpaid breaks. Affirmation of this can be taken from Mr Scarlett's witness statement at paragraph 68, where he confirms that drivers will often take breaks which in total exceed 30 minutes; the Respondent has not suggested

that the formula for calculating hours to be paid will depend on how much time is taken in breaks. It is no answer to the absence of reference to not being paid for breaks, to say, (as Mr Bailey-Gibbs argues) that the contracts do not say that 30 minutes should not be deducted. That is a surprising argument. A contract is constructed by what it does say, (subject to any implied term) not by what it does not say.

43.6. Drivers are entitled to be paid under either contract, for the hours that they have worked at the relevant hourly rate. Productivity units are deducted from the hours worked and the resultant sum will be multiplied by the productivity unit rate to arrive at a further amount due, in addition to the payment for hours worked.

43.7. The foregoing is subject to the guaranteed minimum of the daily rate of pay for 5 days of each week, for PROD3 drivers.

44. However, as will be seen below, this is not in fact how the pay scheme worked.

45. The Respondent acknowledges that it has not set out in writing anywhere, how the scheme works. Even the Respondent's further and better particulars, (page 418) were impenetrable to me. The penny dropped when I was provided with an A3 enlarged version of the unreadable, (due to small print size) spread sheets supplied with the further and better particulars, combined with an oral step by step explanation from Mr Bailey-Gibbs. This is my understanding, (and I wish the reader luck):

PROD2:

45.1. The first step is to calculate the actual hours worked and deduct therefrom, 30 minutes. The resultant figure is, "A".

45.2. The second step is to calculate: kilometres driven ÷ 48 + the other production units earned. The resultant figure is, "B".

45.3. Thirdly, one asks, is B greater than A? If it is:

45.3.1. One then asks if B is equal to or less than 9 hours? If it is, the driver is paid 8 hours basic and 1 hour overtime.

45.3.2. If B is not equal to or less than 9 hours, one then asks if A is less than or equal to 11?

45.3.2.1. If it is, the first 8 hours are paid at the basic hourly rate, the next 3 hours at the overtime rate and any remaining units are paid at the productivity unit rate.

45.3.2.2. If it is not, (i.e. A is more than 11 hours) then the first 8 hours are paid at basic rate, the remaining hours at the overtime rate and the difference, (B-A) is paid at the productivity rate.

45.4. If A is greater than B:

45.4.1. One then asks, is A equal to or less than 9 hours? If it is, the driver is paid 8 hours at basic rate and 1 hour at overtime rate.

45.4.2. If A is greater than 9 hours, the first 8 hours are paid at the basic rate and the remaining hours at the overtime, up to, "the legal limit".

PROD3

45.5. As with PROD2, the first step is to calculate the actual hours worked and deduct 30 minutes. The resultant figure is, "A".

45.6. The second step is to calculate: kilometres driven ÷ 48 + the other production units earned. The resultant figure is, "B".

45.7. Thirdly, one asks, is B greater than A? If it is:

45.7.1. One then asks if B is equal to or less than 9 hours? If it is, the driver is paid 9 hours basic (for PROD2 it was 8 hours basic and 1 hour overtime).

45.7.2. If B is not equal to or less than 9 hours, one then asks if A is less than or equal to 11?

45.7.2.1. If it is, the first 10 hours are paid at the basic hourly rate, the 11th hour at the overtime rate and any remaining units are paid at the productivity unit rate, (for PROD2 the first 8 hours are paid at the basic rate and the next 3 at the overtime rate).

45.7.2.2. If it is not, (i.e. A is more than 11 hours) then the first 10 hours are paid at the basic rate, the remaining hours at the overtime rate and the difference, (B-A) is paid at the productivity rate, (for PROD2 the first 8 hours were paid at the basic rate).

45.8. If A is greater than B:

45.8.1. One then asks, is A equal to or less than 9 hours? If it is, the driver is paid 9 hours at basic rate, (for PROD2 it was 8 hours at basic rate and 1 hour at the overtime rate).

45.8.2. If A is greater than 9 hours, the first 10 hours is paid at the basic rate and the remaining hours at the overtime, up to, "the legal limit", (for PROD2 it was the first 8 hours which were paid at the basic rate).

46. One cannot discern from the contract documents:

46.1. The 30 minutes deduction;

46.2. The guaranteed minimum of 9 hours in the PROD2 contracts, or

46.3. Any reference to overtime in the PROD2 contracts, which is clearly paid under the Respondent's formula, for hours in excess of 9.

47. When in cross examination, these formulae were applied to specific examples of time sheets and pay records in the bundle, they appeared to explain the final pay figures, which were otherwise incomprehensible.

48. I have worked through the 3 examples I was taken to during evidence, applying to them: (1) the formula if one applies to the contract and wage agreement there ordinary and natural meaning, (2) applying the formula the Respondent says it uses, but without deducting the 30 mins the claimants' complain about, and (3) applying the Respondent's formula. In each case I use the 2016 rates of pay set out above for PROD3:

A. Page 796 period 38 Thursday Mr Jasinski

Applying ordinary and natural meaning

Worked for 12 hours

Production Units are 526km ÷ 48 = 10.95 + tip and load 5.5 = 16.45, (say 16.5)

The wage agreement says Productivity Units are calculated by deducting accrued units from actual hours worked

So, 12 – 16.5 = minus 4.5

This makes no sense. The driver needs to work for more hours than he accumulated production units, for him to benefit from the scheme.

Either the driver therefore receives pay for his hours worked only:

10 x 7.95 (hourly rate) = £75.90

2 x 8.90 (overtime rate) = £17.80

Total £93.70

Or, one deducts minus 4.5 x 3.4 (rate per production unit) = minus £15.30 = £78.40.

Applying the Respondent's formula but without deducting 30 minutes

A is 12

B is 526km ÷ 48 = 10.95 + tip and load 5.5 = 16.45, (say 16.5)

B is greater than A

B is more than 9 hours

A is not 11 or less, therefore production units paid are 16.5 less hours 12 = 4.5

10 x 7.95 (hourly rate) = £75.90

2 x 8.90 (overtime rate) = £17.80

4 x 3.4 (first 4 Prod. Units) = £13.60

0.5 x 3.048 (Prod. Units over 4) = £1.52

Total £108.82

Apply Respondent's formula, including deduction of 30 Minutes

A is 11.5

B is 526km ÷ 48 = 10.95 + tip and load 5.5 = 16.45, (say 16.5)

B is greater than A

B is more than 9 hours

A is not 11 or less, therefore production units paid are 16.5 less hours 11.5 = 5

10 x 7.95 (hourly rate) = £75.90

1.5 x 8.90 (overtime rate) = £13.35

4 x 3.4 (first 4 Prod. Units) = £13.60

1 x 3.048 (Prod. Units over 4) = £3.048

Total £105.90

Mr Jasinski is £12.20 worse off applying the literal contract scheme rather than applying the Respondent's formula, £27.50 if one factors in the minus for productivity. He is £2.92 worse off for the 30 minutes deduction.

B. Page 798 period 39 Monday Mr Jasinski

Applying ordinary and natural meaning

Worked for 9.5 hours and worked 3 night hours

Production Units are 334km ÷ 48 = 7 (say) + tip and load 8.5 = 15.5

The wage agreement says Productivity Units are calculated by deducting accrued units from actual hours worked

9.5 – 15.5 = minus 6

As noted above, this makes no sense. The driver needs to work for more hours than he accumulated production units, for him to benefit from the scheme.

Either the driver therefore receives pay for his hours worked only:

9.5 x 7.95 (hourly rate) = £72.10

3 x 1.05 ("dark money") = £3.15

Total £75.25

Or, one deducts minus 6 x 3.4 (rate per production unit) = minus £20.40 = £54.85.

Or, does one deduct 4 x 3.4 and 2 x 3.048?

Applying the Respondent's formula but without deducting 30 minutes

A is 9.5

B is 334km ÷ 48 = 7 (say) + tip and load 8.5 = 15.5

B is greater than A

B is not 9 or less

A is less than 11

9.5 x 7.95 (hourly rate) =	£72.10
4 x 3.4 (first 4 Prod. Units) =	£13.60
11 x 3.048 (Prod. Units over 4) =	£33.52
Total	£119.22

Apply Respondent's formula, including deduction of 30 Minutes

A is 9

B is 334km ÷ 48 = 7 (say) + tip and load 8.5 = 15.5

B is greater than A

B is not 9 or less

A is less than 11

9 x 7.95 (hourly rate) =	£71.55
4 x 3.4 (first 4 Prod. Units) =	£13.60
11 x 3.048 (Prod. Units over 4) =	£33.52
Total	£118.67

Mr Jasinski is considerably better off, (£43.42) for his day's work applying the Respondent's formula than he would be under the terms of the written contract only. He is 55p worse off for the 30 minute deduction in his hours.

C. Page 798 period 39 Thursday Mr Jasinski

Applying ordinary and natural meaning

Worked for 5.5 hours

Production is 70 ÷ 48 = 1.5 (say) + tip and load 4.5 = 6

5.5 – 6 = minus 0.5

Under the terms of the PROD3 written contract, the employee is entitled to a guaranteed 9 hours pay, therefore his pay would be 9 x 7.95 = £68.31.

Query whether one should deduct minus 0.5 x 3.4 = £1.70.

If Mr Jasinski had been on a PROD2 contract, he would not have been entitled to the 9 guaranteed hours pay and would have received 5.5 x 7.95 = £41.75.

Query, whether £1.70 would have been deducted from that.

Applying the Respondent's formula but without deducting 30 minutes

A is 5.5

B is 70 ÷ 48 = 1.5 (say) + tip and load 4.5 = 6

B is less than 9

So the individual is paid the guaranteed 9 hours pay at £68.31

An employee on PROD2 would receive the same guaranteed minimum of 9 hours pay, even though it is not provided for in the written contract.

Apply Respondent's formula, including deduction of 30 Minutes

In this example, deducting 30 minutes makes no difference because the hours worked are already below the guaranteed minimum of 9 and will be made up to that. As above, that applies to PROD 2 and PROD 3 employees. Where a PROD3 driver has worked less than 9 hours, it makes no difference which method of calculation is used. For a PROD2 driver, if one applies the written contract, he is (£68.31 - £41.75) £26.56 worse off for such a day.

49. What these worked examples do not pick up on, is yet another mind boggling twist to the formula. The claimants argue that they are entitled to a guaranteed daily minimum of 11 hours pay, 10 at basic rate and 1 at overtime rate. Nowhere in the written contract and wage agreement does it say that, (other than when the driver finishes away from base). Mr Bailey-Gibbs' cross examination of Mr Jasinski illustrated the confusion. Under the PROD3 formula provided by the Respondent at page 473, if B is greater than A and A (hours) is less than or equal to 11, the first 10 hours are at basic, the 11th hour at one hour's overtime and remaining hours at productivity rates. In the example used by Mr Bailey-Gibbs, the pay slip at "PJ8" to which Mr Jasinski referred in cross examination, he had production units of 12.85. He had done 8 hours 40 minutes work, from which the Respondent deducted 30 minutes to arrive at 8 hours 10 minutes, which is less than 11. So applying its formula, the Respondent paid him based upon his production units B,10 at basic rate, 1 at over time rate, 12.85 less 11 = 1.85 which was rounded down to 1.75 and he was paid 1.75 productivity units. None of this can be discerned from the written contract documentation, yet if it is not applied, the claimants will have been significantly worse off, I suspect very many times.

Conclusions

50. It is fundamental to a contract of employment that it contains a term that enables calculation of the consideration to be paid in return for labour. As my calculations demonstrate, the wording of this contract does not facilitate that. It is unintelligible.

51. Responding to my invitation for further submissions, Mr Bailey-Gibbs argues that I should imply terms into the contracts of employment, "by virtue of the conduct of the parties to the contract across several years". I take this as a submission that the parties' intentions may be surmised from the way the contract has been performed. He said the evidence was that the claimants knew and understood the scheme. I do not accept that. The claimants did not understand the scheme and that is not surprising; it is very confusing. He said that the claimants manipulated the scheme, referring to paragraph's 71 and 72 of Mr Scarlett's witness statement; those

paragraphs do not appear to set out evidence that these two claimants manipulated the scheme. He said that the claimants had completed time sheets; they had, that does not mean that they understood the scheme, they did not. He said that the claimants received payslips; they did, but the payslips did not help me and did not help the claimants, understand the scheme. He referred to a document at page 74A in which Mr Jasinski has ticked a box on a form indicate that he understood the pay structure; that is an assessment form completed after 4 weeks employment: (a) he might have thought he understood the scheme, but he didn't, and (b) he might complete that form in a positive way so as to enhance the prospects of his employment conditioning. In any event, I have no hesitation in finding as a fact that Mr Jasinski did not understand the scheme. I do not think terms could be implied on the basis of the parties intentions evidenced by the way the contract was performed.

52. As an aside and for the sake of completeness, I would further comment that I do not think terms could be said to be implied by reasons of custom and practice, just because the formula has been followed for the last 40 years. Such a term has to be reasonable, notorious and certain. Given that the method of calculating wages does not appear to have been understood by anybody other than a select few in the administration of the Respondent, (perhaps only by Mr Scarlett) certainly not by these two claimants, it could not be described as, "notorious". I do not think there could have been an intention to imply such a term, in that these two claimants did not know of the existence or the content of the Respondent's formula.

53. However, to give the contract efficacy, to make it workable, a term needs to be implied, (a term implied by reason of business efficacy). Further, if at the time the claimants were entering into their contracts of employment with the Respondent, an officious bystander had asked, will the employee be paid in accordance with the Wage Working Agreement prevailing from time to time, applying the formula for calculation that the Respondent has applied for all of its drivers for the last 30 or 40 years, both sides, acting reasonably, would have replied, "yes of course", (the official bystander test). By reasons of either or both, I find that a term is implied that the respondent's formula be adopted in the calculation of pay.

54. It is suggested that the claimants are entitled to 1.5 x the basic hourly rate for overtime and 2 x the hourly rate for working Sundays. They are not, they are entitled to what ever the Wage Working Agreement prevalent at the time stipulates, (that a 2006 pay slip, page 72A, referred to time and half and double time, does not alter that). There is no need to imply such a term in order to give the contract business efficacy, nor has such a term been adopted by the Respondent over the years.

55. Mr Bourne-Arton's further submissions at 5 d seems to suggest that there is some dispute over, "dark money" but if there is, I am not aware of that. He also suggests that the hourly rate should be no less than the national minimum wage, (which would be significant for the PROD2 contract). I do not agree. The national minimum wages regulations do not require that an hourly rate must per se be no less than the national minimum wage, but that the hourly rate when calculated in accordance

with the regulations, which may include other payments, (see below) must be no less than the rate stipulated.

56. I think that Mr Bourne-Arton may have transposed paragraphs in error at paragraphs 6 and 8 of his further submissions. The applicable guaranteed pay when a driver is unable to return to base is, for PROD2: 8 hours at the basic rate and 3 hours at the overtime rate, and for PROD3: 10 hours at the basic rate and 1 hour at the overtime rate, as set out in the Wage Working Agreement, (pages 45 and 46).

57. Mr Bailey-Gibbs has in his further submissions, referred me to a contract the Respondent has prepared as a consequence of this litigation, dated 2 December 2018, at pages 52 to 71 of the bundle. Quite rightly, this was not referred to me during evidence, because it had no bearing on the factual issues I was to determine. However, it is offered to me as a source reduced to writing, of the terms to be implied so as to give effect to the Respondent's 40 year old scheme. It appears to do just that and certainly, the flow chart at page 71 reflects my analysis of how PROD3 works, at paragraphs 45.5 to 45.8 above. Something similar would be required for PROD2. To be clear, this is not a document that assisted me in reaching the conclusion that terms had to be implied or what should be implied, but does assist me, in saving me from spelling it all out in this Judgment.

58. I return to the list of issues, to try and answer the questions posed for me there in relation to the deduction of wages claim, by reference to numbering used in the list of issues:

    13: the claimants did suffer a deduction in the calculation of their wages in some circumstances, when the application of the Respondent's formula dictated it. It was not a deduction from their wages, but a deduction in the calculation of what wages they were due.

    14, 15 & 16: do not apply as no such deduction was made.

    17: A "30 minute deduction" was authorised in their contracts, in calculating what wages they were due.

    33: the two lead claimants before me in this hearing are not part of the 3325039/2017 group of claims.

    I cannot conclusively say that the claimant's claims of unlawful deduction of wages fail, because the claimants did not understand the Respondent's formula for calculating its wages until the hearing. For all I know, when they have the time to analyse their pay by applying the formula, they may find inaccuracies.

Complaint of failure to pay the national minimum wage

59. The complaint of failure to pay the national minimum wage is only made in respect of those on the PROD2 contract. Mr Koscielny was on a PROD2 contract.

Law

60. The right to be paid a minimum wage, (NMW) is derived from section 1 of the National Minimum Wage Act 1998. Details of the scheme are set out in the National Minimum Wage Regulations 2015.

61. Section 17 provides that a worker who is not paid the NMW is entitled to claim in breach of contract, the difference between what was paid and what should have been paid applying the NMW.

62. To calculate whether a worker has received the NMW, one needs to know, (1) how many hours the individual worked during the pay reference period, and (2) the total pay received during the same period. Dividing the pay received by the number of hours worked, gives the hourly rate which can then be compared to the prescribed minimum hourly rate, (regulation 7).

Premium rates

63. Regulation 10 sets out a list of payments and benefits that should not be taken into account, including at (j):

> *(j) payments paid by the employer to the worker as respects hours of time work or output work in the pay reference period if—*
>
> *(i) there is a lower rate per hour which could be payable under the contract as respects that work (including if the work was done at a different time or in different circumstances), and*
>
> *(ii) to the extent that such payments exceed the lowest rate;*

64. The Respondent rightly accepts therefore, that certain allowances, namely the night rate, overtime and weekend rates, as premiums, should not be taken into account in calculating the pay received for the purposes of this calculation. The rationale is to ensure that the base line against which the assessment is made is at or above the national minimum wage, rather than requiring the individual to always work at an enhanced rate, (e.g. at night or always to do overtime). See Hamilton House Medical Limited v Hillier UKEAT/0246/09. However, it is the premium element that should not be taken into account, not the whole sum paid. For the purposes of the calculating whether the NMW has been paid in the reference period, one includes the basic hourly rate instead of the premium rate.

Fuel bonus

65. The claimants suggest that the fuel bonus should not be included in the calculation. The Wage Agreement simply provides as to the fuel bonus, that it is to be subject to meeting performance criteria and that details are to be obtained from the traffic manager, see above. I have been provided with no more than that. Mr Bourne-Arton says in his written closing submissions, (paragraph 26) that it is an incentive scheme to encourage fuel efficiency, including switching engines off. He says it should not be included, but does not explain why. In discussion about the issues at the outset of the case, he was unable to explain to me why the fuel bonus should not be included and said that it would depend on how the evidence came out,

accepting that there was no reference to the fuel bonus in the witness statements. No evidence, "came out".

66. I see no reason why a fuel bonus should not be included in the calculation. It does not appear to meet the definition of any of the exclusions at regulation 10. I am encouraged in this conclusion by the Department for Business, Energy & Industrial Strategy guide of December 2018, which states at page 23 that bonus payments count toward minimum wage pay.

Rest breaks

67. The claimants say that one should disregard any pay received during breaks. They suggest that every tachograph has to be gone through, the periods of rest noted and the pay received during such periods discounted from the calculation. Regulation 10, (setting out a list of payments that do not form part of remuneration for the purposes of the calculation) at (h) (i) states:

> *"payments as respects hours which are not, or not treated as—*
>
> *(i) hours of time work in accordance with regulation 35 (absences, industrial action, rest breaks),"*

And regulation 35 (3):

> *"The hours a worker spends taking a rest break are not hours of time work."*

68. This means that the time on rest breaks as well as the pay received, during those breaks, are ignored for the purposes of the calculation, (a point Mr Bourne-Arton acknowledged in submissions). It does not seem to me therefore, to be a point likely to assist the claimants greatly; the amount of the shortfall, if any, will be less because it will apply to fewer hours, but the difference is likely to represent small sums of money.

69. "Rest break" does not appear to be defined. I was not taken to any authority on the point and I am not able to find any. I think one has to take those words at what they mean, a rest break is when the worker is taking a break from work, resting.

70. I am told that this is a point that has arisen because the Respondent quite late in the proceedings, produced some tachographs for Mr Koscielny, (pages 112B to 112E) and argued that in calculating whether the NMW had been paid, the pay received during the rest break, but not the time, should be discounted. All I have from the Respondent by way of submissions responding to the claimant's argument that rest breaks ought not to be included is, "that is not the case, they still have to be paid". That seems to be wrong; on the wording of regulations 10(i) and 35(3) rest break time and pay are discounted. For the avoidance of doubt, this does not mean the worker is not entitled to the pay during the break, just that such pay and the period of time of the break, are ignored in the calculation.

71. Does that mean one has to analyse every tachograph and discount the periods marked as rest? Well, I think it does, along with any other evidence as to when rest breaks were taken and for how long. The burden is on the respondent in NMW cases to keep records and produce the evidence necessary to show the NMW has been paid, (ss 9 and 28 of the Act and regulation 59). The tachographs will be their

primary evidence it seems, if it comes to that. From Mr Koscielny's oral evidence, I gather he and other PROD2 claimants will argue that sometimes they switched the tacho to "rest" because they ran out of lawful time. I would need some convincing that such unlawful conduct was indeed their practice and that it was necessitated by the Respondent's working practices or endorsed by the Respondent. I doubt whether it would be a proportionate and worthwhile subject matter of litigation.

Illegal productivity bonus scheme

72. The claimants say that in calculating the pay received, the Respondent's production units bonus should be ignored, because EC Regulation 561/2006, (which provides a series of regulations related to daily and fortnightly driving times and daily and weekly rest periods in road transport) prohibits a transport business from operating a pay structure that is related to distance travelled and/or the amount of goods carried, if that would endanger road safety and/or encourage infringement of those regulations. Article 10 paragraph 1 of those regulations reads:

> *"A transport undertaking shall not give drivers it employs or who are put at its disposal any payment, even in the form of a bonus or wage supplement, related to distances travelled and/or the amount of goods carried if that payment is of such a kind as to endanger road safety and/or encourages infringement of the Regulations."*

73. Before inviting further submissions, my view was as set out in this and the following paragraph. The claimants argue that the productivity bonus scheme begins with the calculation that every 48 kilometres travelled earns 1 production unit, thus encouraging drivers to cover as many kilometres as possible in a day, which encourages them to drive fast, thereby endangering road safety. It also encourages them to drive without stopping to take breaks. The Respondent says that is not so, its vehicles have speed limiters, tachographs are checked, there is a fuel bonus system which encourages sensible driving and the drivers have training on driving safely. That is all very well, but the fact of the matter is, the more miles the driver covers in the day, the more productivity bonus units he will earn; one only has to consider the three examples analysed above: example A was 526km ÷ 48 = 10.95 units, example B 334km ÷ 48 = 7 units and C 70km ÷ 48 = 1.5 units. A speed limiter will not stop a vehicle moving at 40 mph in a 30 mph speed limit. Tachographs, fuel bonus and training might encourage driving at the speed limit and taking the requisite break, but the kilometers driven calculation does the opposite.

74. It seems to me that there is more to it than the claimants argue; the quicker one gets to one's destination, the more one is likely to have the opportunity to earn some of the other production units on offer. Further, if a driver is caught in a traffic jam or in slow moving, heavy traffic, he or she is more likely to become impatient or frustrated, impairing judgment and encouraging higher speeds than might be safe. I therefore conclude that the Respondent's productivity bonus scheme is in breach of these regulations.

75. When inviting submissions, I stated that I had reached this conclusion and invited submissions on the implications, in light of Patel v Mirza [2016] UKSC 42. Mr Baily-Gibbs' first line of attack was to suggest that I should reconsider my conclusion,

setting out a number of reasons why. Mr Bourne-Arton responded that it would be inappropriate for me to do so; the decision had been reached and the Respondent's only recourse is to appeal.

76. A Judgment is not final until it has been promulgated, I could change my mind. Were that otherwise, a Judgment can be reconsidered pursuant to rule 70, either by a tribunal on its own initiative, or on application.

77. Mr Baily-Gibbs had very little to say on the question of illegality in his closing submissions. There is no reference to it in his written submissions. In his oral submissions, his points as I have noted them were:

    77.1. The Respondents' vehicles have limiters restricting their maximum speed to 56mph;

    77.2. They have tachographs to ensure there is no breach of regulations and those are subject to investigation by VOSA;

    77.3. They were inspected by HMRC in 2016, (with regard to the NMW) and were found to be compliant, and

    77.4. No examples were put to Mr Scarlet.

78. I will now consider each of Mr Bailey-Gibbs' further submissions as to why I should reconsider my decision that the Respondent's productivity scheme is illegal:

    78.1. The Claimants have not pleaded illegality. Mr Bourne-Arton does not dispute this. However, if a question of illegality arises, a court is bound to deal with it.

    78.2. There is no, "listed issue to deal with this matter". That is not correct. As I have set out at 22 in the list of issues under paragraph 12 above, the Claimant's solicitor wanted to include something about compliance with relevant legislation, which I was unable to understand and which she was unable to explain. More to the point, at the start of day two of the hearing, after a day's reading and having read both sides opening notes, I clarified as noted at 22 of the list of issues, without demur from Mr Bailey-Gibbs, the illegality issue. The point was included as an issue without objection. Rightly so, as I have already noted, if an issue as to illegality arises during a hearing, a tribunal is bound to deal with it. If the Respondent felt that it needed time to prepare evidence to deal with the question, it could have asked for an adjournment.

    78.3. Mr Bailey-Gibbs is right to say that the Claimants provided no evidence as to the endangerment of road safety in their witness statements or cross examination. He is however, wrong to say that nothing on the point was put to Mr Scarlett in cross examination: (1) he agreed that more kilometres travelled in less time improved the productivity figure; (2) he agreed that driving further in less hours would result in higher productivity units, (3) he did not agree that the scheme encouraged fast driving or long hours, because the Respondent's vehicles were fitted with speed limiters, they check the tachographs, have a fuel bonus scheme and provide training on road safety, and (4) he denied the scheme put drivers at risk of harm.

78.4. At paragraph 16 of his further submissions, Mr Bailey-Gibbs appears to misunderstand Mr Bourne-Arton's submissions at trial, representing them as focusing on the encouragement to drive more kilometres which, he says, does not mean that their hours have been infringed. Actually, Mr Bourne-Arton's argument was that the scheme encouraged faster driving as well as that it encouraged drivers not to take breaks. Mr Bailey-Gibbs suggests that the regulations are focused on the drivers' hours rather than kilometres driven, but the regulation as quoted above, refers to, "a bonus or wage supplement, related to distances travelled…".

78.5. Mr Bailey-Gibbs says that I should focus on the word, "if": "if that payment is of such a kind as to endanger road safety and/or encourages infringement of this regulation". He suggests that requires that I have evidence before me that an infringement of the regulation or a road safety incident has actually occurred. I do not accept that. Article 10 refers to encouragement of infringement, not actual infringement. It refers to endangering road safety, not requiring an incident to have occurred. If a pay scheme endangers road safety, or if it encourages infringement of the requirements as to hours of work or the taking of breaks, it is impermissible.

79. I remain of the view that the Respondent's productivity bonus scheme is in breach of these regulations: it is self evident from the construct of the scheme, that it encourages drivers to get as much work done as quickly as possible and that encourages them to drive quickly, endangering road safety, and, (perhaps surreptitiously) to avoid breaks or work longer hours, thereby endangering road safety and breaching the regulations. What are the implications of this?

80. The classic statement relating to illegality in contract law is that of Lord Mansfield in Holman v Johnson Tinsley v Milligan Court of King's Bench 1775 1 Cowp 341, *'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'.* This doctrine was adopted in the context of employment contracts in the seminal employment law case on the subject of illegality, Hall v Woolston Hall Leisure Ltd [2001] ICR 99. It is the approach adopted in all the reported cases on illegality that employment lawyers have become familiar with over the years.

81. Traditionally, what is known as a "rule based" approach has, on the authorities, been taken to cases where illegality arises: a party cannot rely upon his or her illegal act. But the strictness of that approach has now changed with the recent decision of the Supreme Court in Patel v Mirza [2016] UKSC 42. The majority decision was provided by Lord Toulson. Two policy objectives in respect of illegality were identified: (1) a person should not be allowed to profit from his or her own wrongdoing, and (2) the law should be coherent and not self-defeating nor condone illegality, (paragraph 99 of the Supreme Court's Judgment). The majority in the Supreme Court held that courts should consider the underlying purpose of the prohibition that had been transgressed and whether that purpose would be enhanced by denying the claim, any other relevant public policy that might be rendered ineffective or less effective by denying the claim and the need to apply the law with a due sense of proportionality. As Lord Toulson put it at paragraph 107, we

should, *"keep[ing] in mind the possibility of overkill unless the law is applied with a due sense of proportionality"*

82. A range of factors approach was to be adopted, in a disciplined, principled and transparent manner. Those factors were not prescribed, but it was suggested they might include the seriousness of the illegal conduct, its centrality to the contract, whether it was intentional, and whether there was marked disparity in the parties' respective culpability. Lord Toulson said [at 109] that the court*:*

> *"…must abide by the terms of any statute"*
>
> but the court in construing the statute could:
>
> *"… have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in the denial of the relief claimed."*

83. In response to my invitation for further submissions, Mr Bourne-Arton adopts his original submission; the monies paid in respect of the performance bonus should not be included in the calculation of whether PROD2 employees received the national minimum wage. He says the Respondent has acted illegally, the Claimants have not. The Claimants should not be ordered to repay productivity bonus payments received because they had no idea of the illegality, any such requirement would unjustly enrich the Respondent, the illegality did not affect the main performance of the contract and an order for repayment would not respect the integrity of the legal system as it would produce an unjust result.

84. Mr Bailey-Gibbs argues that the Claimants should not be allowed to benefit from the illegal scheme, to do so would be to endorse the illegality. Allowing them in addition, to claim an alleged underpayment would be contrary to the underlying public policy behind the regulations. He says the very essence of the Claimant's claims is the terms of payment under their contracts and so the illegality is inextricably linked with the claim. He suggests that not requiring repayment and excluding the bonus payments from the national minimum wage calculations would encourage others such as the Claimants, who are complicit in the illegality, to do the same. He submits that it would be disproportionate to discount the bonus payments because: (1) they were complicit, and (2) punishment is a matter for the criminal courts under the regulations own enforcement regime.

85. I have considered the case of R (on the application of the United Road Transport Union) v Secretary of State for Transport [2013] IRLR 890 CA to which Mr Bailey-Gibb referred me. I did not find it particularly helpful. The case concerned an application for judicial review, in which the Transport Union was seeking to persuade the Court of Appeal that the government ought to legislate to provide drivers access to the employment tribunal in respect of EU regulations relating to working time, including 561/2006 at issue here. They were unsuccessful, for reason which are not relevant to this case. It does not help me with the arguments relating to contract law and the doctrine of illegality. I know the regulations are not enforced

in the employment tribunal and I now know, courtesy of the representatives' further submissions, that the regulations have their own enforcement regime.

Conclusions

86. In this instance, we are concerned with 2 pieces of legislation. The national minimum wage legislation seeks to ensure that workers are paid as a minimum, what Parliament has decreed to be at the rate of a fair wage for a worker's basic hours of work. What matters is, the worker takes home a fair wage. The second is EC Regulation 561/2006, the purpose of which is to make our roads safer by ensuring that drivers of transport vehicles are not encouraged to drive dangerously or carry excessive weights, by a bonus or wage supplement.

87. The bonus scheme is central to the contract.

88. The bonus scheme encourages faster driving and avoiding rest breaks. It is contrary to EC regulation 516/2006. If one takes into account the bonus payments, the claimants will have received more than the national minimum wage. They have been paid the minimum amount parliament has decreed a worker should receive, why should they get more? On the other hand, the Respondent has operated a scheme that has been illegal since 2006, why should they be allowed to rely upon it? If I take the productivity payments into account, am I not endorsing, condoning, an illegal scheme that encourages faster and dangerous driving?

89. I have no information on whether the Respondent has deliberately flouted EC Regulation 516 or not. The claimants could not be said to be culpable in the illegality in any way; that the bonus scheme was illegal is something that has occurred to the claimants' lawyers in the course of this litigation.

90. I do not think the Respondent could be said to have profited from its illegal scheme. It has adopted a method of paying its employees sums of money which by and large, ensure that they are paid at least the national minimum wage. If the scheme were not adopted, it would have had to come up with some other means of determining how much to pay its employees at least as much as the national minimum wage, which was compliant.

91. In my view, to order the Claimant's to repay the bonus payments received would be pointless, because the Respondent would immediately have to repay the same money by way of arears of pay so as to ensure the Claimant's received the national minimum wage, (a point touched on Mr Baily-Gibbs somewhat obliquely, at paragraph 37 of his further submissions).

92. The regulations have their own enforcement regime. Contravention is investigated by the police or the DVSA. An offender is liable to on summary conviction to a fine up to level 4. If I were to discount the bonus payments and order the Respondent to pay further sums to take the Claimants to the national minimum wage, it will have been punished significantly by me for wrong doing for which it will also be liable in the criminal courts. That seems to me disproportionate. The Claimants will have doubled their money, that also seems to me to be disproportionate, "overkill" to use the words of Lord Toulson. I do not think respect for the integrity of the justice system would be enhanced by such a result.

93. My conclusion is that the payments received under the bonus scheme should not be discounted in calculating the whether the Claimants have received the national minimum wage. The result might be different in the future, were the Respondent to continue to operate the scheme, for the Respondent's culpability would be greater and a future tribunal might be seen then to endorse the illegal scheme if it continued to allow the Respondent to rely on it.

94. Whether or not Mr Koscielny has been paid the national minimum wage will have to be assessed in light of my above findings.

Claim for holiday pay

Law

95. The Working Time Regulations 1998, (WTR) include provision for workers statutory entitlement to minimum periods of paid holiday: under regulation 13, pursuant to EU Directive 2003/88 article 7, four weeks, (20 days for a full time worker) and under regulation 13A, an additional 1.6 weeks, (8 days for a full time worker, equivalent to the 8 public holidays of England and Wales) which is not derived from European law.

96. The purpose behind the minimum paid holiday legislation is the health and safety benefits of taking holiday. Regulations 13(9)(b) and 13A(6) therefore prohibit such holiday being replaced by payment in lieu.

97. Regulation 13(9)(a) provides that the 20 days leave must be taken in the leave year in which it accrues due. That does not apply to the additional 8 days under regulation 13A(6); an agreement may provide for the additional 8 days leave to be carried over, (regulation 13A(7)). The rationale of requiring leave to be taken in the year that it is due, is to encourage leave to be taken because of its health and safety benefits.

98. European case law has evolved to recognise that when a worker is unable to take leave during the leave year in question, it may be carried forward, for a limited period, so as to preserve the health and safety benefits, see Stringer & Others v Revenue and Customs Commissioners [2009] ICR 932 and Pereda v Madrid Movilidad SA [2009] ICR959. As a consequence, a purposive approach has been adopted in the UK to interpreting regulation 13(9)(a) in cases where a worker has been unable to take holiday due to long term sickness absence, see NHS Leeds v Larner [2012] ICR 1389 CA. In King v The Sash Windows Workshop Limited & Another [2018] ICR 693 ECJ, the employer wrongly thought that Mr King was self employed and so not entitled to paid holiday. Mr King therefore took limited unpaid holiday. He was subsequently found as a matter of law, to have been employed and he therefore claimed his accrued due but untaken holiday pay. The European Court found that because he had been unable to take his leave, (he was prevented from taking it because he thought he would not be paid for it) he was permitted to carry it over, for an unlimited period.

99. In Plumb v Duncan Print Group Ltd [2016] ICR 125, a case where the claimant had been on long term sick, the EAT, following the earlier of the above cited European

authorities, allowed that one should read into regulation 13(9) that the period over which leave could be carried over was up to 18 months.

100. This European case law does not apply to the additional 1.6 weeks leave. Such leave, untaken, is not carried over unless provision for such is made in the workers contract.

101. The WTR do not provide that the entitlement to paid leave accrues through the year. The worker becomes entitled to his or her 5.6 weeks leave from the beginning of the leave year. That is why regulation 15A is necessary, which provides for leave during the first year of employment to accrue at the rate of one-twelfth per month.

102. Regulation 15 sets out minimum notice provisions by which workers are to book their holidays, (other contractual booking arrangements are permissible, regulation 15(4)). Employers are permitted to require workers to take holiday on particular days provided they give appropriate notice, (regulations 15(2) and (3)).

103. The amount of holiday pay per regulation 16, is to be calculated by reference to a week's pay as defined in sections 221 to 224 of the ERA 1996. Following British Airways PLC v Williams [2012] ICR 847 CJEU and Bear Scotland and Others v Fulton and Others [2015] ICR 221, in order to comply with the Directive, holiday pay should be equivalent to normal remuneration and reflect payments beyond basic pay if they are, "intrinsically linked" to the performance of contractual duties. In Bear Scotland that included supplements, allowances and overtime.

104. A complaint of failure to pay holiday pay under the WTR is brought under regulation 30. Similar limitation provisions apply as to unlawful deduction and breach of contract claims. Regulation 30(2) reads:

> *(2) [Subject to [regulations 30A and 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented—*
>
> *(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six 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, as the case may be, the payment should have been made;*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months*.

105. The right to holiday pay conferred by the WTR does not confer a contractual right, (regulation 16(4)) and so a claim for holiday pay under the WTR cannot be brought as a claim in breach of contract on termination of employment. That does not prevent such a claim being brought if the contract provides for holiday pay and the employer is in breach of that contractual provision on termination.

Facts

106. Mr Koscielny's contract, (PROD 2) provides as follows in respect of holiday entitlement:

> *"a) For the purpose for holiday calculation of the Company's holiday year runs from the 1st January to 31st December.*
>
> *b) Your holiday entitlement for the first year of service will be 15 days. Holiday entitlement thereafter will be 20 days per year…*
>
> *d) You may not take any more than:-*
>
> *Quarter of your entitlement before the end of March.*
>
> *Half of your entitlement before the end of June.*
>
> *Three quarters of your entitlement before the end of September.*
>
> *Full entitlement by the end of November.*
>
> *e) You may not carry over any more than 10 days into the following holiday year.*
>
> *f) You will not be entitled to receive pay in lieu of holiday that is not taken except in accordance with subclause (j) below.*
>
> *g) entitlement as in subclause (b) have rounded down in your favour*
>
> *h) Holidays of more than two weeks or unpaid extra leave only to be taken with prior management approval.*
>
> *i) Holidays may only be taken with prior agreement with the management. The Company reserves the right to refuse holiday requests if it is considered to be at a time which may adversely affect the Company's ability to meet customer requirements. All holiday requests must be put in writing using the Holiday Request Form and send to the Operations Manager for approval.*
>
> *j) If you start or leave your employment during a holiday year your basic Company holiday entitlement in respect of the Company holiday year will be calculated at the rate of 1.25 or 1.66 days (dependent on your entitlement in accordance with subclause (b)) for each complete calendar month of service during that year, rounded up to the nearest whole day in your favour.*
>
> *k) Upon termination of your employment you will be entitled to pay in lieu of any basic Company holiday entitlement which has accrued but not been taken, but you will be required to repay to the Company any pay received for holiday taken in excess of the basic holiday entitlement accrued up to the date of termination. Any sums so due may be deducted from any money due to you on the termination of your employment.*
>
> *l) For the purpose of calculating any holiday pay one day's pay shall be normal holiday days pay as stated in the wage working agreement.*
>
> *…"*

107. Mr Koscielny's PROD 2 contract provides as to holiday pay as follows:

> *"**Holiday Pay***
>
> *Payment for holidays is as stated in the current "Wage Agreement LGV Drivers" on page 9 of this contract.*
>
> ***Bank Holidays – Non-working Payment***
>
> *Payment for Bank Holidays not worked will be a days holiday pay. However if a Bank Holiday falls on your normal rostered shift you will be required to work. Bank Holidays recognised by the company are* [the usual eight bank are holidays listed]
>
> ***Bank Holidays – Working Payment***
>
> *Payment for Bank holidays worked will be your normal Sunday rate plus one days holiday pay or a day in lieu added to your holiday entitlement."*

108. The holiday pay rate of pay is referred to above, (£66.65 per day).

109. Upon leaving, Mr Koscielny received a payment in lieu of accrued holiday pay. Part of his claim is that the amount paid was incorrect. During cross examination and as a result of the Respondent having earlier confirmed that it calculated the holiday pay using Mr Koscielny's last 12 weeks pay based on shifts worked, (so not including for example, pay on days on which leave had been taken) it was conceded that he had been paid correctly, save that he thought that the fuel bonus had been left out occasionally. The parties agreed that would be a question for remedy and not something for me to resolve in this decision.

110. As to the other aspect of Mr Koscielny's holiday pay claim, at page 493 of the bundle is a table he produced setting out what he says he is owed in holiday pay. He was cross examined on entries for 17 and 24 March 2017. He was taken to time sheets which appeared to show he was paid correctly, or in the second case, that an error was made but corrected by later payments. Mr Koscielny's only answer was that this had been put together by his solicitor and he could not explain the apparent error.

111. At page 78 is a table prepared by the Respondent setting out its summary of Mr Koscielny's holiday records. As he worked a 4 day week, it correctly shows his annual entitlement at 22.5 days, (that is 16 days per regulation 13 and 6.4 days per regulation 13A, rounded up to 6.5). The Respondent's record for 2016 shows Mr Koscielny as having taken 18 days paid holiday and 7 days unpaid, suggesting that Mr Koscielny is owed 4.5 days holiday for 2016.

112. Mr Jasinski's contract provides as to his holiday entitlement, (insofar as this differs from the PROD2 contract of Mr Koscielny), as follows:

> *"b) Your holiday entitlement 20 days per entitlement year, plus 8 bank holidays.*
>
> *…*

e) Depending on circumstances you may be permitted to take more holiday than you are currently entitled to. In this situation you will be allowed the time off but may not receive the holiday money until such point as this holiday is added to your entitlement. For example, if you took 10 – days holiday in June, you would receive 5 – days pay at the time of your holiday and a further 5 – days pay in July.

…

f) The company reserves the right to request you to take up to 3 days holiday at a time specified by management. This will be subject to the company giving you statutory notice.

…

h)You may not carry over any more than 10 days into the following holiday year these must be used by the end of February of the following holiday year and are subject to management approval

…

j) Holiday limits are set for certain times of the year. From July through to October, you may take a maximum of 12 days holiday plus rest days. Holidays will be restricted in the 2 – weeks either side of Easter and over the Christmas and New Year period. There will be no holiday permitted in the run-up to Christmas. Exact dates will be confirmed at the appropriate time.

k) Holiday requests must be submitted on the approved Company holiday request form and be submitted at least 2 – weeks prior to the holiday commencing.

…

m) Unpaid leave will only be permitted in exceptional circumstances and must be approved by the Administration Manager. A holiday loss calculation will be applied in any situations where unpaid leave is granted.

…

o) For the purpose of calculating any holiday pay one days pay shall be normal holiday days pay as stated in the wage working agreement.

…

q) Holiday entitlement is not accrued during absence from work due to unpaid leave. Loss of entitlement will be calculated according to the number of weeks absence pro rata your entitlement as in sub clause (b) above."

113. The provision for bank holidays is the same as for the PROD2 contract, with an additional sentence:

"you will only receive a lieu day if you specifically request one. This must be agreed in advance of the relevant Bank Holiday with the Administration Manager."

114. As noted above, the Respondent now acknowledges that permitting drivers to, "cash in" their bank holiday days in lieu, (i.e. to take the money and surrender the holiday entitlement) is contrary to the law and it has ceased this impermissible practice.

115. The Respondent's busy periods are in the lead up to Christmas and Easter. Its particularly quiet period is between January and March. It therefore seeks to carefully control the amount of leave taken during the busy periods and encourages leave to be taken during the quiet period. It is perfectly entitled to do this and it is not suggested that it is not. Because so many of its drivers are from Eastern Europe and wish to return there for extended holidays, many take additional unpaid leave during those three quiet months.

116. The Respondent acknowledges that upon scrutinising leave taken by its drivers as a consequence of these proceedings, it has identified that a number of drivers have not taken their full leave entitlement each leave year. They have confirmed to those drivers that their leave has not been lost; it has been carried forward and the entitlement will be met by a payment in lieu on their leaving employment.

117. The Respondent explains its provision for holiday to accrue due incrementally each quarter, as a provision to counter the problem of people leaving its employment having taken more holiday than had accrued due as at the date of termination of employment and the consequent, "overpayment" of holiday pay not being recoverable, (an inconvenience and potential cost all employers in the UK have to put up with as the law stands). The Respondent says that drivers are not prevented from taking more holiday than has accrued due, they are just not paid for it. Later in the year, when those unaccrued days taken do in fact accrue, they are paid. This is not permissible, holiday entitlement does not accrue during the course of the year, the worker is entitled to his or her annual allowance from the beginning of the leave year.

118. Where drivers take long periods of unpaid leave, (as occurs sometimes for example, when a non-UK national returns to their country of origin for an extended holiday) the Respondent reduces their annual holiday entitlement on a pro rata basis, by 1 day's paid leave for every 8.3 unpaid day's leave taken. This is permissible; it is in accordance with the purpose of the WTR that if a worker is not working, is not ill but is taking time off, the worker is resting and the health and safety purpose of the requirement to permit leave is met, (see Hein v Albert Holzkamm GmbH and Co KG. ECJ, 13.12.18 (C-385/17) referred to below).

119. Mr Koscielny said in cross examination that he could not bring a claim in respect of holiday pay sooner because he had been deceived for many years as to his holiday entitlement and he did not understand what his holiday entitlement was. He agreed he was a member of a trade union, but he did not know he could seek legal advice. He agreed he had access to the internet. He denied that his colleagues who had raised the December 2016 grievance had informed him of the potential issues in relation to holiday pay, (this latter point I find improbable).

120. From looking at the leave request forms in the bundle, (75A to 75AV) and hearing Mr Koscielny's evidence, I am satisfied he knew how the leave system worked and what he was entitled to, (under the Respondent's scheme).

121. Mr Jasinsky said that he was not aware of discrepancies in relation to his annual leave until this was pointed out to him by his solicitor. He denies that colleagues who earlier raised a grievance, referred to above, did not discuss with him that there were issues relating to holiday pay. As with Mr Koscielny, I find that unlikely.

122. I am satisfied though, that there was confusion over what and when the claimants could take leave as paid or unpaid, because of their impermissible scheme of not allowing paid leave, but allowing unpaid leave, at certain times of the year. If leave was taken, it should be paid, until the individual has exhausted his annual paid leave entitlement. It must be possible to calculate from the records, the total leave taken each year and ensure that the individuals were paid their statutory and contractual entitlement in that year and to the extent that they are not, they are entitled to Judgment for the balance, subject to limitation points.

Conclusions

123. I set out my conclusions by reference to the list of issues.

124. The questions posed at 23 and 24 were what was the rate of holiday pay and how should it be calculated? This issue has been resolved between the parties, in that the Respondent now recognises that holiday pay should be calculated using the previous 12 weeks' pay and should take into account overtime and the productivity bonus. There remained a question mark over fuel bonus. The fuel bonus was a reward for driving efficiently. That is intrinsically linked to performing the contractual duty of a driver. Normal pay is that which is normally received, (Langstaff P in Bear Scotland at paragraph 44); the fuel bonus was pay normally received. If it has not been included in the calculation of holiday pay, it should have been.

125. Questions 25 and 26 are a matter for remedy, which I am not dealing with.

126. Question 27 asks whether the claimants were forced to take unpaid leave and was their holiday entitlement reduced accordingly, at a time when their leave entitlement was not exhausted? The Respondent is perfectly entitled to require the claimants to take their leave at certain times of the year. It is not entitled to refuse to pay holiday pay until it has, "accrued", (it does not really accrue, because the claimants – other than in their first year - are entitled to their leave immediately, at the commencement of the new holiday year). It is an odd apparent contradiction, that whilst the Respondent stipulates that a certain amount of leave may taken during specified periods of the year, under the PROD3 contract more leave may be taken during those specified periods, provided that it is taken as unpaid leave. Mr Koscielny was entitled to, (4/5 x 20) 16 days holiday a year plus, (8 x 4/5) 6.5 further days on bank holidays. Mr Jasinski was entitled to 20 days plus 8 days on bank holidays. For their first 16 or 20 days holiday each year, they should have been paid holiday pay, calculated by the method the Respondent now accepts is

correct, including fuel bonus in that calculation. The claimant's holiday and pay records will need to be analysed in light of these findings.

127. The provisions in the contracts for carry-over leave to be limited to 10 days untaken leave is permissible, provided that it relates to the 8, (or 6.5) bank holidays, or the reason that the leave has not been taken is that the employee is on long term sick leave, or the employee has otherwise been prevented from taking leave by the Respondent, (in which case there would be no limit in the number of days carried over). Neither lead claimant were on long term sick leave or prevented from taking leave. In reality, the maximum carry over is 8, (or 6.5) being the holiday pursuant to UK law which is in excess of that required by article 7 of the EU Directive. For the avoidance of doubt, the carry over is not cumulative; it is not a case of carrying over 8 days from one year, not using them and then carrying over those 8 days into the following year together with 8 further days from the current year, so as to carry over a total of 16. 8 days only, (or 6.5) in total, may be carried over, from one year into the next.

128. Questions 29 and 30 are about bank holidays. Was pay for bank holiday withheld when taken as holiday? Both contracts recognise bank holidays separately from the 20 days that may be taken at other times. Holiday pay for bank holidays, where they represent the additional 1.6 weeks, (8 days) provided for by Regulation 13A, is not subject to the ECJ rulings that require amendment to the week's pay calculations in sections 221 to 224 of the ERA, which means overtime, supplements and allowances may be left out if to do so would be in accordance with those sections of the ERA as drafted and the contract.

129. The PROD2 provision as to holiday pay is quoted above. It provides that if required to work on a bank holiday, the individual will be paid at the Sunday rate plus a day's holiday pay, **or** a day in lieu added to holiday entitlement. In other words, an extra days pay may be taken to give up the holiday. That is not permissible, (regulation 13A(6)). The PROD3 contract in relation to bank holidays, as noted above, is even more explicitly contrary to the law; it provides that the individual can only have a day off in lieu if expressly asked for, otherwise he or she will receive payment instead.

130. Payments in lieu of either type of holiday are not permitted, except on termination of employment, (regulations 13(9)(b) and 13A(6)). Any payments in lieu of holiday, other than those made in the final year on termination of employment, must therefore be discounted. To do otherwise would be to endorse the Respondent's illegal practice of buying holiday off its workers, who for health and safety reasons, should have taken their holiday. Is this unjust enrichment or double recovery? No, the claimant's received what was in effect an exgratia illegal payment for agreeing not to take holiday they were entitled to. Not to discount the payment would be to unjustly enrich the Respondent by providing it with extra days of labour which in accordance with the law, it ought not to have had and which its competitors, complying with the law, would not have had.

131. The lead claimants are no longer employed. For those who are still employed, my provisional view is that for those whose untaken holiday in previous leave years is being withheld on the promise of a payment in lieu on termination, that is not permissible. They were entitled to paid leave during the leave year in question and if they were not paid it then, they are entitled to payment now as a consequence of this litigation, not when they leave. If the Respondent thinks I am wrong in that, it can make submissions at another hearing concerning such a claimant and I will make a definitive ruling on the point.

132. The WTR contain provision at Regulation 30 for enforcement of the entitlement to holiday pay. However, such a claim must be brought within 3 months of the date on which it is alleged that the right to holiday should have been permitted, or the date on which holiday taken should have been paid for, (unless it was not reasonably practicable to have done so). This means that under the WTR, a claim has to be submitted within 3 months, every time holiday has been denied or not paid for. As a consequence, utilising a practice endorsed by the House of Lords in Revenue and Customs Commissioners v Stringer 2009 ICR 985 HL, a claim for holiday pay may alternatively be made under section 13 of the ERA as an unauthorised deduction from wages, the enforcement and limitation provisions of which at section 23, enables a claim to be brought within 3 months of the last of a series of deductions.

133. As a consequence of the above mentioned ECJ rulings that holiday pay should include bonuses, supplements and overtime, in order to minimise the potential cost to employers who for years had paid holiday pay at the basic rate, the ERA was amended, (section 23(4A)) limiting claims under section 13 to deductions made within 2 years of the date of the issue of proceedings.

134. The claimants submit that in any event, the new 2 year limitation in wages claims under section 23(4A) is not compatible with article 7 of directive 2003/88. I am referred to article 17, (which states that member states may not derogate from article 7) to King v Sash Windows, (supra) and to a German case, Hein v Albert Holzkamm GmbH and Co KG. ECJ, 13.12.18 (C-385/17).

135. As I have explained above, Sash Windows is about a claimant who was prevented from taking his holiday.

136. Hein is about a worker who pursuant to a collective agreement, had a 26 week period when he remained employed but was not provided with work and his holiday entitlement was reduced accordingly. The ECJ noted that the purpose of paid holiday is to enable rest and relaxation and was based on the premise that the worker had worked during the reference period. Annual leave in accordance with the directive should be calculated by reference to periods of actual work. The reduction in the workers annual leave entitlement was not contrary to article 7.

137. Neither case was about national law limitation periods.

138. Article 17 has always been there, it has not suddenly come into play because it has been referred to in a case. It is not really explained to me why either Sash Windows or Hein should be authority for the proposition that either the two year limitation of section 23(4A) or indeed the proposition that a break of more than three months breaks the chain of a series of deductions as held by Langstaff P in Bear Scotland, (supra), are contrary to the directive. The passages quoted in Mr Bourne-Arton's written submission do not really assist me; yes, they repeat that per article 17, article 7 cannot be derogated from, but that does not mean that national law imposing limitation periods amounts to derogation.

139. I find that both the 2 year limitation and the principle that a break of 3 months ends a series of deductions, apply to the claimants unlawful deduction from wages claim for holiday pay in this case.

140. These 2 particular lead claimants seek to avoid these limitation provisions by bringing breach of contract claims in respect of their holiday pay, as provided for in their contracts of employment. This is only possible for those claimants whose employment has ended. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 enables employment tribunals to consider claims in breach of contract by employees to a maximum value of £25,000, provided that such breach was outstanding or arose on termination of employment. Such claims must be brought within 3 months of the last day of employment or, if it was not reasonably practicable to do so, within such further period as the tribunal considers reasonable. However, as to how far back one can go with such a claim, breach of contract claims generally, have a limitation period of 6 years in accordance with the Limitation Act 1980. A M Coletta v Bath Hill Court (Bournemouth) Property Management Ltd UKEAT/0200/17/RN has been suggested to me as authority for the proposition that the 6 year limitation applies to breach of contract claims in the employment tribunal. In fact in that case, HHJ Eady expressly left that point undecided, pointing out that there were good conflicting arguments either way and she did not need to decide the point, (paragraph 51). She did decide that there was no 6 year limitation to wages claims, (which is what the case was about). The debate was over whether the provision in section 39 of the Limitation Act 1980 that its periods of limitation shall not apply in relation to a cause of action covered by a limitation period prescribed in other legislation. The ERA contains its own limitation provisions. In my Judgment, the key here lies in the provision of article 3 to the 1994 Extension of Jurisdiction Order, which extends the jurisdiction of the employment tribunal to consider a claim which a court would have jurisdiction to hear. A court would only have jurisdiction to hear a claim in breach of contract that went back no further than 6 years. Accordingly, I find that the breach of contract claim is limited to a period of 6 years from the date of issue, because that is all that could be claimed in a court.

141. The issues as identified by the parties to me at the preliminary hearing on 13 August 2018 did not identify a breach of contract claim in respect of holiday pay and that did not change with my review of the issues with the representatives at the start of this hearing. After my inviting further submissions, Mr Bourne-Arton has

referred me to the claimants' ET1 at section 8.1 where they write that they bring a claim in breach of contract; in the particulars of claim at paragraph 14 they refer to breach of contract for non-payment of proper wages, at paragraph 15 to breach of contract with regard to holiday leave and in the prayer at (b), breach of contract including failure to pay the claimants' correct holiday pay. There is clearly a pleaded breach of contract claim for holiday pay.

142. Mr Bailey-Gibbs responds that the Respondent was entitled to understand the case being brought, that it is not unusual for claims to be clarified at preliminary hearings and for not all of a pleaded case to survive to a final hearing. He points out that the list of issues as agreed at the preliminary hearing and as clarified at the outset of this hearing, makes no reference to a breach of contract claim for holiday pay.

143. It is regrettable that the claimants' breach of contract claim was not identified in the agreed list of issues at the preliminary hearing nor during my review of the issues at the outset of the case. Responsibility for this lies with the claimants' representatives. However, the appeal courts have pointed out to us on a number of occasions that a list of issues is a useful case management tool, not a substitute for the claimant's pleaded case, see Parekh v London Borough of Brent [2012] EWCA 1630, Chandhok v Turkey UKEAT/0190/14, Millin v Capstick & Others UKEAT/0013/14 and Saha v Capita Plc UKEAT/0080/18. These two lead claimant's, having brought their claims after the termination of their employment, are entitled to rely upon breach of contract as a head of claim in respect of their holiday pay claims. Their claims are not therefore limited by the 2 year limitation imposed by the ERA section 23(4A), which applies to wages claims under section 13 only.

144. Mr Koscielny received a backdated holiday pay payment on 5 May 2017, covering the underpayments of holiday pay received during the period 1 January to 30 April 2017. He received a further payment for accrued but untaken holiday on termination of his employment, on 26 May 2017. Mr Jasinski did not receive any such payments as he had already left the Respondent's employment, on 31 March 2017, before these arrangements were made.

145. From the foregoing, I find that one should approach the assessment of whether the claimants are entitled to holiday pay arears as unlawful deductions from wages, or in breach of contract if their employment had ceased by the time the claims were issued, with the following in mind:

    145.1. The contract allows for up to 10 days untaken leave to be carried forward, which is permissible, in so far as it relates to untaken bank holidays, periods of illness or other reason which prevented holiday being taken.

    145.2. Untaken leave in any leave year, is otherwise lost.

145.3. The lead claimants are entitled to payment in respect of any unpaid leave, so as to take their annual totals for paid leave, (excluding bank holidays) to 20 and 16 days respectively, for a period of 6 years prior to the issue of the claim, i.e. to 28 April 2011.

145.4. Payments in lieu of bank holidays should be discounted.

145.5. The entitlement should be calculated on the basis that untaken bank holidays are carried forward as an entitlement to a day off in lieu at the bank holiday rate.

Mr Koscielny

146. Mr Koscielny accepts that it would be sensible to await the outcome of this decision, until he knows how far back he will be able to claim for unpaid holiday, before quantifying his claim. He had not received the benefit of the back payment. As Mr Koscielny left the Respondent's employment in May 2017 and these proceedings were issued in April 2017, his employment had not been terminated at the time these proceedings were issued and therefore the tribunal does not have jurisdiction to consider a claim in breach of contract. His claim is limited by the 2 year rule and by any gap of more than 3 months between the dates of non-payment.

Mr Jasinski

147. In closing submissions, Mr Bourne-Arton asks for a finding on quantum in respect of Mr Jasinski's holiday pay claim. He had received the benefit of the back payment. He had left the Respondent's employment before these proceedings were issued and therefore the tribunal has jurisdiction to consider the pleaded breach of contract claim, dating back to the commencement of his employment in 2014. This relates to holiday entitlement in accordance with his contract, not the WTR.

148. A table by Mr Jasinski setting out the holiday he says he has taken and what he is due is at page 507. A table by the Respondent setting out its view of the holiday Mr Jasinski has taken is at page 75. I do not have sufficient understanding of the content of these documents to provide a determinative assessment of what is due to Mr Jasinski, but I make the following findings arising out of the tables and the evidence I heard in relation to them:

148.1. I accept the evidence of Mr Jasinski that at the beginning of 2016, he took pay for days in lieu of bank holidays because he was told that he had to. His entitlement to those bank holidays as paid leave survives and the final calculation should be carried out on that basis.

148.2. In respect of 4 days unpaid leave claimed for on 21 October 2016, the Respondent says that was for sick leave which was unpaid. I was taken to

no evidence of that and find that it was not, but that Mr Jasinski took 4 days unpaid leave that week.

148.3. The Respondent also suggests that the 4 days unpaid holiday claimed for 30 December 2016 was also unpaid sick leave. This time, the Respondent points to a subsequent pay slip at page 691, which shows him receiving statutory sick pay, (SSP). It is suggested that for the week in question, (period 38 pay date 23/12/16) Mr Jasinski worked one day and was off sick the remaining 3, which were the 3 day's absence through ill health one has to undergo before becoming entitled to SSP. However, the week of SSP is period 40, pay date 6 January 2017. There is a week in between, (pages 689 and 690) during which no pay is received. I find that Mr Jasinski did have 4 days unpaid leave at the end December 2016.

149. The parties should re-visit the detail of the holiday pay claims in light of these findings and if they are unable to reach agreement, present their evidence and submissions at the reconvened hearing. I would suggest a table similar to page 507 with a witness statement narrative explanation that also contains cross references to relevant documentary evidence in the bundle. A witness statement narrative explanation of what is disputed in such a table from the Respondent would be helpful. It follows that the Claimants table and narrative should be prepared first. I will time table that as a case management order at the telephone preliminary hearing if the parties cannot agree this between themselves.

Jurisdiction

150. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the Tribunal. The onus is on the Claimant to show that it was not reasonably practicable, (Porter v Bandridge Ltd [1978] ICR 943 CA).

151. The expression, "reasonably practicable" has been held to mean, "reasonably feasible", (see Palmer v Southend Borough Council 1984 IRLR 119 CA).

152. In Marks and Spencer v Williams-Ryan 2005 IRLR 565 the Court of Appeal held that regard should be had to what, if anything, the employee knew about the right to complain and of the time limit. Ignorance of either does not necessarily render it not, "reasonably practicable" to issue a claim in time. One should also ask what the claimant ought to have known if he or she had acted reasonably in the circumstances.

153. Ignorance of the law is of itself, no excuse for failure to comply with the time limit. The question is whether the ignorance was reasonable? A claimant should make reasonable enquiries about his or her rights.

154. If a claimant is using a professional advisor, then generally speaking, the claim should be brought in time. The primary authority for that is Dedman v British

Building and Engineering Appliances Limited [1974] ICR 53. What Lord Denning said in that case, is:

> *"If a man engages skilled advisors to act for him and they mistake the time limit and present it too late, he is out. His remedy is against them."*

155. In the case of Northamptonshire County Council v Mr Entwhistle UKEAT 0540/09/ZT, the then President of the EAT, Mr Justice Underhill, reviewed the case of Dedman and some subsequent authorities which may have been thought to bring its ratio into question. He confirmed that the principle of Dedman is still very much good law, but with the caveat that one must bear in mind the question is, was it reasonably practicable to bring the claim in time? We are reminded that it is possible to conceive of circumstances where a skilled advisor may have given incorrect advice, but nevertheless it was not reasonably practicable for the claim to have been brought in time. That said, in general terms, the principle remains that if a claim is late because of a solicitor's negligence, that will not render it not reasonably practicable for the claim to have been brought in time.

156. I think I should refrain from giving a decision on whether either of the holiday pay claims are out of time unless and until I have before me in an understandable format, the detail of what is claimed, in light of my findings above. I will say that I would find that it was reasonably practicable for the claim to have been issued in time, if they are in fact out of time, for the following reasons:

156.1. These two claimants understood how the holiday system worked;

156.2. Mr Koscielny was a member of a trade union;

156.3. The above mentioned grievances show that the drivers collectively, had been tackling the issue of holidays for some time;

156.4. The involvement of the claimants' solicitor, and

156.5. I do not find it credible that in respect of these two particular claimants, they were not mutually aware from each other and the other drivers, what was going on in terms of challenging the Respondent and potentially making a legal claim.

157. I can not make a blanket finding to that effect in respect of all claimants; there may be particular circumstances relating to individual claimants, or individuals may wish to persuade me that they were unaware what was going on and that they were entitled to take legal action, until very late in the day. I think each individual case would have to be considered on its merits.

158. As a post script, I observe that as at the time I sign of this Judgment for promulgation, the Court of Appeal of Northern Ireland has found that contrary to

Bear Scotland, a gap of more than 3 months does not break a series of deductions, see The Chief Constable of Northern Ireland & an Other v Agnew [2019] NICA 32. As things stand, I remain bound by Bear Scotland.

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Employment Judge M Warren

Date: 26 June 2019

JUDGMENT SENT TO THE PARTIES ON

.....3 July 2019.....

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FOR THE TRIBUNAL OFFICE

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