EMPLOYMENT TRIBUNALS

Claimant: Mr Gian Singh

Respondent: Hindu Cultural Society of Bradford

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley
On: 2 March 2020

Representation
Claimant: Ms N Williams (with Mr P Singh interpreting)
Respondent: Mr K Sharma (respondent's Chair), accompanied by Mr S Balakrishnan (respondent's Managing Director)

RESERVED JUDGMENT

1. The claimant's claims for notice pay (wrongful dismissal) fails and is dismissed.
2. The claimant's claim for the balance of his statutory redundancy pay under s135 of the Employment Rights Act 1996 fails and is dismissed.
3. The claimant's claims for unauthorised deductions from wages (holiday pay) under s13 of the Employment Rights Act 1996 succeeds. The Tribunal declares that the claimant suffered a gross deduction of £553.48. The respondent shall pay to the claimant the sum of £553.48 (without any deductions).

REASONS

INTRODUCTION

4. The respondent is a voluntary organisation, run by a committee of volunteers each of whom give up their free time to assist the respondent. The respondent previously operated a Day Centre attended by local residents, which was mainly funded by a grant from Bradford Council. Bradford Council informed the respondent that its funding would cease with effect from 31 December 2018. The respondent employed around six employees (including the claimant) when the Day Centre was in operation. Those employees were responsible for running the day to day functions of the Day Centre and reported into Mr Shyam Shukla, who managed the Day Centre.

5. The claimant was employed by the respondent as a part-time driver from 2 September 2013 until he was dismissed due to redundancy with effect from late November 2018. The exact date on which the claimant's employment ended remained in dispute as at the date of this hearing and is recorded in the findings of fact set out below.

Tribunal proceedings

6. This claim was the subject of two Preliminary Hearings on 7 June 2019 (which the respondent did not attend) and on 13 January 2020 (which both parties attended). The claimant withdrew his claims for unfair dismissal and age discrimination at the second Preliminary Hearing.
7. The parties provided a joint file of documents which I considered during their evidence together with a supplemental bundle of documents provided by the respondent.
8. I noted that the respondent alleged illegality as part of its response to these claims. It was common ground that the claimant's driving licence did not entitle him to drive minibuses after the age of 70, but that he continued to drive the respondent's minibus after he reached that age. I informed the parties before hearing witness evidence that any findings of fact that I made during the hearing could give rise to questions of criminal or civil liability for both the claimant and the respondent. I adjourned the hearing for a short period to enable the parties to consider this issue. However, both parties confirmed that they were willing to continue with the hearing and that they did not wish to amend their cases.
9. I heard oral witness evidence from the claimant and from Mr Kamal Sharma (respondent's Chair). The respondent also submitted two witness statements for Mr Samykkurukkal Balakrishnan (respondent's Managing Director), together with single witness statements for each of Mr Shyam Shukla (respondent's Day Centre manager) and Mr Seema Rani Buttoo. Mr Shukla and Mr Buttoo did not attend the hearing today and were unable to provide oral evidence. Mr Sharma stated that Mr Shukla was in India and could not attend the hearing today.
10. Mr Balakrishnan did attend the hearing today, but Mr Sharma stated that he did not intend to call Mr Balakrishnan to provide witness evidence. I explained that I could not give the same weight to Mr Balakrishnan's witness that I could give to the evidence of the claimant and Mr Sharma statement, if Mr Balakrishnan did not give oral evidence. I explained that this was because Ms Williams would not have the opportunity to cross-examine Mr Balakrishnan on his evidence. However, Mr Sharma confirmed that Mr Balakrishnan would not give oral evidence.
11. I considered the outline written submissions provided by the claimant and the respondent's skeleton argument (prepared by Mr Balakrishnan) together with the respondent's document headed 'Summary of the findings by the respondent for the defence' which attached a case summary. I also heard oral submissions from Mr Sharma and from Ms Williams.

CLAIMS

12. The claimant brought claims for:

    12.1 notice pay (wrongful dismissal);

    12.2 the balance of his statutory redundancy pay; and

12.3 holiday pay (unauthorised deductions from wages).

ISSUES

13. The issues to be decided were set out in Employment Judge Jones' case management order of 13 January 2020 (with the amendments underlined below which agreed with the parties at the hearing). Ms Williams confirmed at the beginning of the hearing that the claimant no longer wished to claim holiday pay in respect of the respondent's holiday year ending 31 March 2018 and the part of the issues relating to that part of the claimant's holiday pay claim have been removed from the list of issues below.

14. The issues that I considered are as follows:

Notice Pay

14.1 Was the claimant entitled to five weeks' notice pay pursuant to sections 86 and 88 of the Employment Rights Act 1996 ("**ERA**")?

14.2 If so, is the respondent entitled to refuse to pay such notice pay because of a fundamental breach of contract which would have entitled the respondent to dismiss the claimant for gross misconduct as a result of the following:

14.2.1 Was the claimant requested by the respondent to provide his licence from the age of 70 years and did he fail to do so?

14.2.2 Did the claimant receive notification from the DVLA that he was required to renew his licence at the age of 70 years and not do so?

14.2.3 Did the claimant continue to work as a driver in breach of the express clause within his contract of employment to be the holder of a valid driving licence?

14.2.4 Did the claimant breach the implied duty of good faith in failing to provide his driving licence on request by the respondent when he reported unfit to work through ill health, and at the various requests thereafter?

14.2.5 Did the claimant further act in breach of the duty of good faith in claiming sick pay whilst he knew that he did not have a valid licence and/or would not have been able to obtain one because of his state of health?

14.2.6 Did any of the aforesaid amount to gross misconduct which had allowed the respondent to terminate the claimant's employment without notice?

Redundancy Pay

14.3 Is either:

14.3.1 the claimant entitled to the balance of his statutory redundancy pay (under s135 of the ERA) of £521.30 (having received £533.43), being 7.5 (five continuous weeks employment x 1.5) at £140.63, leaving £521.30 outstanding; or

14.3.2 the respondent entitled to reduce the period of employment to three years because the claimant had driven illegally without a licence?

[The Tribunal was not aware of any legal principle which would permit such an adjustment to the award, but it is an issue the respondent wishes to advance].

14.4 Do the above breaches of contract disentitle the claimant to the balance of his redundancy pay? *[The Tribunal was not aware of any authority which would extend the principle in Boston Deep Sea Fishing C Ltd v Ansell, to the right to a redundancy payment. That is the principle which would preclude the right to notice pay, set out in paragraph 8(2) above].*

14.5 Does section 140(1)(b) of the Employment Rights Act 1996 apply so as to preclude the claimant from being awarded the balance of his statutory redundancy pay in circumstances in which it could not have done in the absence of conduct entitling the employer to terminate the contract without notice?

14.6 Is the claimant estopped by any equitable principle of not being permitted to bring a claim to court without clean hands as a result concealing from the respondent facts which would have justified the termination of his contract at an earlier date for reasons other than redundancy?

14.7 Is the contract tainted with illegality by reason of the claimant having driven without any valid licence and not obtaining any replacement such that he is not entitled to bring a claim for a redundancy payment?

Holiday Pay

14.8 Is the claimant entitled to untaken but accrued holiday from 1 April 2018 to 21 November 2018 of 67.8 hours?

14.9 Do the above breaches of contract disentitle the claimant to his claims holiday pay? [*The Tribunal was not aware of any authority which would extend the principle in Boston Deep Sea Fishing C Ltd v Ansell, to the right to holiday pay. That is the principle which would preclude the right to notice pay, set out in paragraph 8(2) above].*

14.10 Is there any principle of law whereby the claimant would be estopped by the equitable principle of not being permitted to bring a claim to court without clean hands as a result of concealing from the respondent facts which would have justified the termination of his contract at an earlier date for reasons other than redundancy?

14.11 Is the contract tainted with illegality by reason of the claimant having driven without any valid licence and not obtaining any replacement such that he is not entitled to bring a claim for holiday pay?

RELEVANT LAW

Illegality

15. The respondent argues that the claimant's contract of employment was tainted by illegality and that he is not entitled to any remedies relating to his claims in the Tribunal. It is common ground that this contract was not illegal when the claimant started working for the respondent because the claimant had a valid driving licence for driving minibuses at the start of his employment. The respondent argues that the contract became illegal during its performance because the claimant's entitlement to drive a minibus lapsed on or around his 70th birthday.

16. The key principles that I must consider are set out in the case of *Enfield Technical Services Ltd v Payne* [2007] IRLR 840 EAT (as upheld by the Court of Appeal [2008] IRLR 500). In summary, these are:

    16.1 that the employee knew of the facts producing the illegality (though not necessarily that it was in law illegal); and

    16.2 that the employee participated or acquiesced in the illegality.

17. A further point that I must consider is whether the Tribunal would 'condone' any illegality by enforcing the claimant's contractual terms (for example, *Blue Chip Trading Ltd v Helbawai* [2009] IRLR 128 EAT).

18. Ms Williams also referred to the case of *Newland v Simons & Willer (Hairdressers) Ltd* [1981] IRLR 359 EAT in her submissions. However, *Newland* appears to deal with the scenario where one party is guilty of some illegal purpose and the other party contends that they did not know of the illegality. There was no suggestion by the claimant that the respondent was guilty of any illegal purpose in these circumstances.

Equitable principles (redundancy pay and holiday pay claims only)

19. The claimant is not seeking any equitable remedy in relation to his claims (for example an injunction). Equitable principles therefore do not appear to be relevant to the consideration of the claimant's claims and any remedies available.

20. I note that the wording of the redundancy pay legislation (set out below) stated that the Tribunal has a 'just and equitable' discretion whether to award all or part of any redundancy payment in circumstances where the employee could have been summarily dismissed by the respondent. The Tribunal does not have any such 'just and equitable' discretion under the wording of the legal provisions relating to notice pay (wrongful dismissal) and the unauthorised deductions from wages legislation, under which the claimant's holiday pay claims have been brought (both of which are set out below).

21. I also note that Employment Appeal Tribunal ("**EAT**") observed in the case of *Hurley v Mustoe (No.2)* [1983] ICR 422 that: *"the introduction of the equitable doctrine of "clean hands" into the assessment of common law damages is, so far as we are aware, a novelty. The equitable doctrine of coming to equity with clean hands is dealing with the exercise by a court of equity of its powers to grant an equitable remedy; it does not apply to claims for damages at common law."* Any award for notice pay would constitute damages at common law.

22. I have considered the issue of whether any 'equitable principles' apply in more detail to the redundancy pay legislation in the section of this judgment dealing with 'Redundancy pay' below.

Notice pay (wrongful dismissal)

23. The claimant's claim for notice pay is a claim for breach of contract under Article 3 of the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994.

24. An employee would usually be entitled to the greater of his contractual notice period and his statutory minimum notice period, provided that they were not in fundamental breach of contract.

25. The claimant's statutory notice period is determined by s86 of the Employment Rights Act 1996 (the "**ERA**"). I note that because the claimant's five week statutory

notice period under s86 of the ERA is greater than his contractual notice period, then s88 of the ERA also applies. Section 88 of the ERA states that employees with normal working hours who are incapable of work because of sickness may be entitled to be paid their full remuneration during any notice period. The relevant provisions are:

s88(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours –

…(b) the employee is incapable of because of sickness…

…the employer is liable to pay the employee for the part of normal working hours covered by [paragraph (b)] a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

26. I have also considered the following caselaw relating to notice pay:

    26.1 I note the claimant's submissions refer to the case of *Morton Sundour Fabrics v Shaw* (1996) 2 KIR 1, as authority that an employee must be provided with clear and unambiguous notice of termination of employment; and

    26.2 at common law, an employer can defend a wrongful dismissal claim by relying on facts found out after dismissal which would have justified summary dismissal for gross misconduct (*Boston Deep Sea Fishing & Ice Co Ltd v Ansell* (1888) 39 CHD 339, CA). I also note that the respondent's submissions refer to the case of *Williams v Leeds United Football Club* [2015] EWHC 376 (QB) as a more recent example of the courts applying this principle. For the avoidance of doubt, this caselaw is applicable only to contractual claims (such as wrongful dismissal) and not to any statutory claims (such as redundancy pay or holiday pay).

Redundancy pay

27. The claimant must first establish that his employment was terminated by reason of redundancy in order to bring a claim for statutory redundancy pay under s135 of the ERA.

28. Section 139(1) of the ERA states that an employee:

    …shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

    (a) the fact that his employer has ceased or intends to cease –

    (i) to carry on the business for the purposes of which the employee was employed by him…

    (b) the fact that the requirements of that business –

    (i) for employees to carry out work of a particular kind…

    Have ceased or diminished or are expected to cease or diminish.

29. However, this is subject to the exclusions set out in the ERA. Section 140 of the ERA states that an employee may not be entitled to statutory redundancy pay if:

    29.1 their employer could have terminated their employment without notice; and

29.2 the conditions set out in section 140 are met.

30. In those circumstances, the Tribunal has a discretion (if it considers it 'just and equitable') to order the employer to pay the employee all or such part of the employee's statutory redundancy pay as the Tribunal 'thinks fit'. The relevant legislation is set out below:

s140 Summary dismissal

(1) Subject to subsections (2) and (3), an employee is not entitled to a redundancy payment by reason of dismissal where his employer, being entitled to terminate his contract of employment without notice by reason of the employee's conduct, terminates it either –

(a) without notice,
(b) by giving shorter notice than that which, in the absence of conduct entitling the employer to terminate the contract without notice, the employer would be required to give to terminate the contract, or
(c) by giving notice which includes, or is accompanied by, a statement in writing that the employer would, by reason of the employee's conduct, be entitled to terminate the contract without notice.

…

(2) Where the contract of an employee who –
(a) Has been given notice by his employer to terminate his contract of employment...

…

…is terminated as mentioned in subsection (1) at any relevant time…an [employment tribunal] may determine that the employer is liable to make an appropriate payment to the employee if on a reference to the tribunal it appears to the tribunal, in the circumstances of the case, to be just and equitable that the employee should receive it.

(3) in subsection (3) "appropriate payment" means –
(a) the whole of the redundancy payment to which the employee would have been entitled apart from subsection (1), or
(b) such part of the redundancy payment as the tribunal thinks fit.

Equitable principles and redundancy pay

31. I note that the Employment Appeal Tribunal ("**EAT**") considered in the case of *Hurley v Mustoe (No.2)* [1983] ICR 422 whether the tribunal in that case was entitled to construe the words 'just and equitable' in the compensation provisions of the Sex Discrimination Act 1975 (the "**SDA**") to allow the tribunal to consider principles of equity when calculating compensation. Section 65(1) of the SDA provided:

(1) Where an industrial tribunal finds that a complaint presented to it under section 63 is well-founded the tribunal shall make such of the following as it considers just and equitable – (a) an order declaring the rights of the complainant and the respondent…; (b) an order requiring the respondent to pay to the complainant compensation…; (c) a recommendation that the respondent take within a specified period action...

32. The EAT in *Hurley* overturned the tribunal's decision to reduce the complainant's compensation because of her conduct towards the respondent (which included

taking part in demonstrations outside her former employer's restaurant, causing a loss of business). The EAT held that the words 'just and equitable' applied to the Tribunal's selection of the appropriate order, rather than the amount of any compensation awarded.

33. The redundancy pay legislation does not provide for 'compensation' for claimants; instead it provides for a remedy of statutory redundancy pay based on a statutory formula. However, s140 of the ERA confers a 'just and equitable' discretion on the Tribunal to determine whether or not to make an award for all or part any statutory redundancy pay to which the claimant may have been entitled if the provisions of s140(1) of the ERA did not apply. Equitable principles do not apply to the amount of any award made, once the Tribunal has determined that it is 'just and equitable' to make an award, in accordance with the EAT's decision in *Hurley v Mustoe*.

Holiday pay (unauthorised deductions from wages)

34. The claimant's claim for holiday pay is brought as a claim for unauthorised deductions of wages under the ERA. Section 13 of the ERA states as follows:

(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 or not 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 occasion.

(3) Where the total amount of wages paid on any occasion by an employer employed by him is less than the total amount of the wags 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 form the worker's wages on that occasion.

35. Section 23 of the ERA states as follows:

(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…

36. Section 24 of the ERA states as follows:

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer –
(a) In the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13…

(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

37. The following caselaw is relevant in relation to the claimant's claim for holiday pay. The Employment Appeal Tribunal held in *Asif v Key People Ltd* EAT 0264/07 that s13(3) of the ERA emphasises that this is a claim for wages that are payable on any particular occasion. As a result, a claim for wages cannot be overturned on the basis that an employee was in breach of his contract at the time at which the wages should have been paid.

38. I also note that the claimant's hourly pay rate at the time that his employment terminated was less than the National Minimum Wage ("**NMW**") rate for the claimant's age category at that time. The NMW legislation implies a term into all contracts of employment to the effect that an employer will pay its employees at the NMW rate or more. The relevant legislation is set out in section 1 of the National Minimum Wage Act 1998 as follows:

Section 1 Workers to be paid at least the minimum wage

(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage…"

39. The Tribunal is required to calculate any holiday pay due to the claimant based on the applicable NMW rate of £7.83 per hour, rather than the claimant's contractual pay rate of £7.50 per hour.

FINDINGS OF FACT

40. The claimant was employed under a part-time contract in the role of a driver and handyman from 2 September 2013. The claimant worked 18 hours and 45 minutes per week, and his rate of pay at the time his employment terminated was £7.50 per hour.

41. I note that the claimant's pay rate at the time that his employment terminated was below the National Minimum Wage for employees aged 25 and over of £7.83 per hour (applicable from April 2018). However, the claimant received 6 months' statutory sick pay during his absence from 27 November 2017 onwards and did not receive any other pay prior to the termination of his employment.

42. The claimant's key duties involved driving the respondent's minibus to pick up elderly day centre users, take them to the day centre and return them home. He also did other odd jobs for the centre as and when required, such as assisting with arrangements for lunch at the centre and taking centre users shopping.

Contract terms

43. The parties provided two documents relating to the claimant's contractual terms, one headed 'Contract of Employment' and the other headed "Statement of Terms and Conditions", together with a job description of the mini-bus driver duties. The following provisions are relevant to the claimant's claims:

43.1 **Contract of Employment**:

43.1.1 Holiday*: "You are [entitled] to 4 weeks paid holiday per year and statutory Bank Holidays as per local Authority practice…Holidays are calculated on the basis of complete calendar months; if you start or finish part way through a working month, that month will not count. Staff working part-time or job share will have their leave calculated on a pro-rated basis, usually in hours rather than days";*

43.1.2 Notice*: "Either party may terminate the Contract of Employment by giving minimum 4 weeks' notice of termination.*

43.2 **Statement of Terms and Conditions:**

43.2.1 Business Vehicles (clause 9): this clause included provisions stating that:

"You are required to hold a full driving licence in order to undertake your duties. In the event that your licence is withdrawn for whatever reason or duration and you cannot reasonably undertake your duties or be redeployed, your employment will be terminated.

For insurance purposes your employer is required to take a copy of your driving licence each year.

43.2.2 Holiday entitlement (clause 10): this stated that:

"...you will receive 4 weeks holiday together with nominated statutory holidays that fall on your normal working days…

…You will accrue holiday entitlement at the rate of 1/52 of annual entitlement for each complete week of service."

43.2.3 Termination of employment (clause 16): *"Either party may terminate this contract by giving a minimum of 4 weeks written notice of termination.*

The employer reserves at its absolute discretion the right to pay salary in lieu of notice and in the case of gross misconduct reserves the right to dismiss without notice or pay in lieu".

44. I find that the claimant's written terms clearly state that it was a term of the claimant's contract of employment as a driver for the respondent that:

44.1 the claimant had a full driving licence which enable him to drive the respondent's business vehicles, including the respondent's minibus; and

44.2 the claimant must inform the respondent if he were no longer entitled to drive a minibus because his entitlement to do so had lapsed.

Claimant's sickness absence

45. The claimant went on sick leave on 27 November 2017 and did not return to work before his employment terminated. His GP's fit notes stated that the reason for his absence was work-related stress. The respondent wrote to the claimant to request permission to contact his GP for a medical report. The report was provided on 21 March 2018 and stated that:

45.1 the claimant suffered from medical conditions, but that his *"prognosis is good. None of these are likely limiting illnesses";*

45.2 *"There are occasional restrictions to driving when it comes to irregular heart rates. However if Mr Gian Singh is on a blood thinning medication which he is (Rivaroxaban) then this should not cause any significant restrictions on his work as a van driver. With his diabetes the DVLA would not need to be involved as he is not taking any medication which is likely to drop his blood sugars".*

45.3 *"As [he] is not in need of any significant modifications at present. I would suggest a robust risk assessment is completed on his return from holiday.*

45.4 *As far as I am aware there should be no significant restrictions or ongoing problems at present related to the above conditions.*

45.5 *The medication should not cause any significant problems with his driving…".*

46. I accept that the GP's report was a broadly accurate summary of the claimant's medical condition as at 21 March 2018 and that there were no significant medical concerns regarding the claimant's ability to drive. In reaching this finding, I have considered that:

46.1 Mr Sharma stated during his evidence that he believed that the claimant's GP was acting as an 'advocate' for the claimant and that this medical report did not reflect the claimant's true medical condition at that time. Mr Sharma stated that he works for the Department of Work and Pensions ("**DWP**") and that he has seen GP medical reports for other individuals that are contradicted by the DWP's medical reports. However, the respondent did not obtain any medical evidence to contradict the claimant's GP's report or seek to challenge the contents of the report during 2019; and

46.2 I note that the claimant's GP did not meet with the claimant before preparing the report. However, the GP noted that the claimant had seven appointments with the GP practice since January 2018.

Day Care Centre redundancies

47. Bradford Council informed the respondent at some point during the first half of 2018 that the respondent's grant for their Day Centre would not be renewed. The respondent did not have sufficient funds to run the Day Centre without this grant. The respondent sent standard letters prepared by their adviser to all staff (including the claimant) working at the Day Centre as follows:

47.1 **26 August 2018** - letter from Dr Suresh Tailor (respondent's Secretary), inviting staff to attend a consultation meeting on 4 September 2018 *"to discuss the funding issue from the Council"*;

47.2 **4 September 2018** – letter from Mr Sharma, stating that Bradford Council had decided to terminate the respondent's funding for the Day Centre on 31 December 2018. The letter also stated that: *"If we are unable to receive any alternative viable funding it would result in the end of employment for staff in the day centre as there are no other suitable jobs available. Unfortunately, if there are no viable alternatives available after our consultation process then you would be at risk of redundancy. As discussed at the meeting, I would welcome any suggestions that might avoid the closure and to that end another consultation meeting will be held on 11 September 2018."*

47.3 **11 September 2018** – letter from Mr Sharma stating *"Unfortunately, the decision to withdraw funding has been confirmed and as we have been unable*

to find alternative funding and we have no suitable jobs available, I'm afraid this letter confirms the notice given to you that your employment will end on 31st December 2018 due to redundancy."

48. I accept Mr Sharma's evidence that the respondent posted the letters to the claimant because he was on sick leave at the time of the redundancy consultation meetings. It was common ground that:

    48.1 there was no direct contact between the claimant and the respondent during this period, either by telephone or otherwise; and

    48.2 the claimant did not attend any meetings with the respondent on 4 or 11 September 2018.

49. I accept the claimant's evidence that he did not receive the letter of 11 September 2019, which gave him notice that his employment would terminate on 31 December 2018. The key reasons for my finding are that:

    49.1 all of the letters were posted to the claimant's home address and the claimant confirmed that he was in the Bradford area during late August and early September 2018;

    49.2 I accept the claimant's oral evidence was that he did not receive the letter of 26 August 2018 and therefore did not attend the consultation meeting on 4 September 2018; and

    49.3 I accept the claimant's evidence that he was not aware that he had been made redundant and that he asked his union representative (Mr Jessop) to contact the respondent regarding the contents of the letter of 4 September 2018.

50. Mr Sharma then wrote to the claimant on 22 November 2018. The contents of the letter were as follows:

    "Further to our letter dated 11th [September] 2018, we enclosed a circular from DVLA regarding entitlement for driving a minibus (a copy is enclosed). According to the guidelines you are not entitled to drive a minibus if you are age 70 [years] or above.

    Unfortunately, we have been unable to find alternative funding and we have no suitable alternative jobs available for you, I'm afraid this letter confirms the notice given to you that your employment will end on 30 November 2018 due to DVLA guidelines. Staff who have been continuously employed for more than 2 years will be eligible for statutory redundancy pay in accordance with the government schedule. Details will be provided separately.

    If you wish to appeal against the decision to make you redundant, you must put your notice of appeal in writing to me, stating the grounds. Your letter must be with me within 5 working days of receiving this letter.

    I am sorry that your employment will come to an end in this way but thank you for your service and wish you all the best for the future."

51. It is common ground that the claimant received Mr Sharma's letter of 22 November 2018. The claimant later received his final payslip dated 28 December 2018. This payslip contained a reference to a gross payment for *"Termination (Redundancy)"* of £533.43. No deductions were made from this payment. The claimant also received a P45 dated 19 April 2019 which stated that his employment terminated on 22 November 2018 and that his total pay during the 2018/2019 tax year was £1131.68.

52. I find that the claimant's employment terminated on 30 November 2018. The reason for this finding is that Mr Sharma accepted during cross-examination that the claimant's employment terminated on 30 November 2018 (as stated in his letter to the claimant on 22 November 2018), not 22 November 2018 (as stated in the claimant's P45).

53. I find that the reason for the termination of the claimant's employment was due to his redundancy. Mr Sharma gave conflicting evidence on this point. I asked Mr Sharma when he suspected that the claimant was not entitled to drive a minibus. Mr Sharma was unsure and stated that it was some time between November 2018 and March 2019. Mr Sharma's letter of 22 November 2018 stated that he thought that anyone aged over 70 was not entitled to drive a minibus. However, it was not until Mr Sharma's letter to Mr Jessop (acting on behalf of the claimant) on 13 March 2019 that the respondent stated that they believed that the claimant had been working 'illegally'. I asked Mr Sharma why his letter to the claimant on 22 November 2018 stated that the claimant would be made redundant and why the claimant was paid his redundancy money if he thought that the claimant's licence did not enable him to drive a minibus. Mr Sharma said that the respondent thought that they had to pay the claimant his redundancy money. I note that this reflects Mr Sharma's letter of 13 March 2019 which states: *"We have paid his redundancy money for the period he worked with us as per law"*.

54. The respondent miscalculated the amount of the claimant's statutory redundancy pay. I asked Mr Sharma why the claimant was paid £533.43, which was £521.30 less than the claimant's actual statutory redundancy pay based on the claimant's contractual pay rate of £7.50 per hour. Mr Sharma said that the respondent's Treasurer had calculated the claimant's statutory redundancy pay using the government's schedules and was unable to explain the calculation that the Treasurer used.

55. I also note that any entitlement that the claimant may have had to statutory redundancy pay should have been calculated using the national minimum wage rate applicable at the time (i.e. £7.83 per hour), rather than on his actual wage rate of £7.50 per hour). The correct statutory redundancy pay calculation (if the claimant were entitled to statutory redundancy pay) should have been based on a weekly pay of £146.81 (i.e. £7.83 x 18.75 hours per week).

    5 (continuous years' employment) x 1.5 (factor for the claimant's age) x £146.81 = £1,101.08

Driving Licence

56. The claimant produced his driving licence at the start of his employment with the respondent. His driving licence entitled him to drive a minibus without additional permissions at that time. Minibuses fell under the Driving and Vehicle Licensing Agency's ("**DVLA**") 'Category A' for driving licence entitlements at that time.

57. I accept that the claimant produced a copy of his driving licence to Mr Shukla (who was responsible for managing the respondent's day care centre) each year (or as requested by the respondent) up until his sick leave from 27 November 2017 onwards. I also accept the claimant's evidence that the respondent did not ask him to produce a copy of his driving licence after he went on sick leave on 27 November 2017.

58. The key reasons why I accept the claimant's evidence on these points are as follows. The respondent disclosed a copy of the claimant's driving licence which expired in 2014 and this was included in the bundle. I do not accept Mr Sharma's evidence that the claimant failed to produce his driving licence after 2014 because:

    58.1.1 Mr Sharma's evidence was that he did not have any direct dealings with the claimant regarding his driving licence. Mr Sharma stated that the respondent's committee instructed Mr Shukla to ask the claimant for his driving licence and that Mr Shukla said that he had done so;

    58.1.2 I note that Mr Shukla's statement reflects Mr Sharma's evidence. However, Mr Shukla was unable to attend the hearing today and he could not be questioned on his evidence;

    58.1.3 the respondent disclosed a copy of the claimant's counterpart to his driving licence which expired on 19 January 2016 and this was included in the bundle. The counterpart states that the claimant was entitled to drive Category A vehicles (which included minibuses) from 29 July 1976 to 19 January 2016; and

    58.1.4 the respondent wrote to the claimant on several occasions between 27 November 2017 and 22 November 2018 (e.g. regarding a medical report for the claimant and the letters regarding the claimant's potential redundancy), but did not request the claimant's driving licence in any of those letters.

59. The claimant was 67 years old when his employment commenced. He reached his 70th birthday on 20 January 2016. The claimant does not dispute that the DVLA requires drivers who are age 70 or over to make an additional application if they wish to drive a minibus. However, the claimant's position is that he did not know that he had to make an additional application to the DVLA to drive a minibus once he reached the age of 70.

60. The claimant disclosed his current driving licence which is valid from 5 December 2018 to 12 February 2022. His current driving licence does not entitle him to drive a minibus (which the DVLA categorises as a 'D1' vehicle). The claimant did not provide any documents relating to his previous driving licences. He stated that he returned each of his previous driving licences to the DVLA on each occasion that he applied to renew his licence.

61. I accept the claimant's evidence that he was not aware of the requirement to make an additional application for entitlement to drive a minibus at the age of 70. The key reasons why I accept the claimant's evidence are that:

    61.1.1 the claimant was a bus driver before he worked for the respondent. His employer dealt with all matters relating to his professional driving licence requirements to drive a bus on his behalf. The claimant did not drive minibuses on a professional basis before he worked for the respondent;

    61.1.2 I accept Mr Sharma's evidence that all drivers are sent a letter by the DVLA when their licence is due to expire around their 70th birthday, reminding them to renew their licence. Mr Sharma referred to a sample letter from the DVLA (which the DVLA sent to

Mr Balakrishnan) which states that: *"Please note that you cannot use the online service…if you wish to renew a C1 (medium sized vehicle) or D1 (minibus) entitlement (see guidance notes, section 2) – you will need to apply by post."* However, I accept the claimant's evidence that he did not receive a copy of that letter from the DVLA. I find that is unlikely that the claimant would not have applied for a minibus licence if he had been made aware of the need to do so, given that he applied to renew his driving licence when he reached the age of 70;

61.1.3 I accept the claimant's evidence that the respondent did not inform the claimant that he needed to make an additional application to the DVLA to drive a minibus at any time until the respondent wrote to the claimant on 22 November 2018;

61.1.4 I do not accept Mr Sharma's evidence that the claimant 'avoided' applying to the DVLA to drive a minibus because of the claimant's concerns regarding his health conditions. The claimant's GP report dated 21 March 2018 clearly states that there were no *"significant restrictions or ongoing problems"* relating to the claimant's medical conditions and that the medication that he was taking *"should not cause any significant problems with his driving"*. My full findings of fact regarding this report are set out above under the heading "Claimant's sickness absence"; and

61.1.5 I accept the claimant's evidence that he is currently in the process of applying to the DVLA for D1 entitlement to drive a minibus. I find it unlikely that the claimant would have made such an application if he had significant ongoing health problems which were likely to prevent any successful application.

Holiday year

62. I find that the claimant's contract stated that he would receive 5.6 weeks' holiday per year, but it provided conflicting methods of calculating any accrued holiday pay (as set out in my findings on the contract terms above). I find that the claimant's holiday pay accrued at the rate of 1/52th of his annual entitlement per week of employment.

63. The respondent's holiday year runs from 1 April to 31 March each year. The claimant did not take any holiday after 1 April 2018 and was not paid in lieu of any accrued holiday when his employment terminated.

64. Mr Sharma accepted in his evidence that the respondent did not pay the claimant in lieu of any accrued holiday, following the termination of the claimant's employment. Mr Sharma stated that he did not believe that the claimant was entitled to any holiday pay because the claimant had been absent on sick leave for the whole of the holiday year up to the date that his employment terminated. Mr Sharma also said that the respondent would not have paid any holiday pay to the claimant because the claimant did not hold a full driving licence with entitlement to drive a minibus at that time.

65. The claimant's schedule of loss stated that his unpaid holiday pay for his 2018 holiday year was £508.50 (based on a termination date of 22 November 2018). Ms Williams corrected this figure to £525.75 during her submissions, after Mr Sharma gave evidence that the claimant's employment terminated on 30 November 2018.

66. I asked Mr Sharma if he wished to challenge the claimant's calculation of holiday pay set out in the claimant's schedule of loss at the start of the hearing and during his submissions. Mr Sharma replied that he had not calculated the claimant's accrued holiday pay and did not seek to challenge the claimant's calculations.

Application of the law to the facts

Illegality

67. I have concluded that the claimant's contract of employment was not tainted by illegality. The key reasons for my conclusions are that:

    67.1 I found that the claimant was not aware that he needed to make an additional application to the DVLA for entitlement to drive a minibus as part of his driving licence after his 70th birthday. I found that the claimant had not received a letter from the DVLA highlighting this point and that the respondent did not raise this requirement with the claimant until Mr Sharma's letter of 22 November 2018; and

    67.2 I did not accept Mr Sharma's evidence that the claimant was trying to 'avoid' applying to the DVLA for entitlement to drive a minibus because the claimant was concerned about his medical fitness to drive. The claimant's GP's report dated 21 March 2019 did suggest that the respondent carries out a 'robust risk assessment' on the claimant's return to work but it did not contain any significant concerns regarding the claimant's ability to drive. In addition, the respondent did not obtain any medical evidence to contradict the GP's report.

68. The claimant was not aware of the facts producing the alleged illegality and the first part of the test in *Enfield Technical Services Ltd* is not met.

Equitable principles

69. I have concluded as a matter of law that equitable principles are not applicable to the claimant's claims for the reasons set out in the section headed 'Relevant Law' above.

Notice pay (wrongful dismissal)

70. The claimant was entitled to five weeks' statutory notice, which was greater than the four week notice period set out in his contract of employment.

71. I concluded in my findings of fact that the claimant did not receive the letter dated 11 September 2018, giving him notice that his employment would terminate on 31 December 2018. The claimant was given notice by the respondent's letter of 22 November 2018, which stated that the claimant's employment would terminate on 30 November 2018. The claimant therefore received around one week's notice, which was shorter than both his five week statutory notice period and his four week contractual notice period.

72. The respondent did not pay the claimant his remuneration during his notice period, as required by section 88 of the ERA. This was because the respondent mistakenly believed that no notice pay was due to claimant whilst he was on sick leave, having exhausted his statutory sick pay entitlement.

73. However, I have concluded that the claimant is not entitled to any payment in respect of notice pay. This is because I find that the term of the claimant's contract that he had a full driving licence that entitled him to undertake his duties, which included driving the respondent's minibus. I find that this term was a fundamental term of the

claimant's contract because the claimant was employed in the role of a driver and the vast majority of his duties related to driving the respondent's minibus.

74. The claimant has accepted that he did not apply to the DVLA for entitlement to drive a minibus after the age of 70. The claimant did not have a full driving licence which permitted him to undertake his full duties. He was in fundamental breach of contract and his claim for wrongful dismissal fails. Ms Williams stated in her submissions that the claimant 'did not act in bad faith' in failing to the DVLA for entitlement to drive a minibus. However, there is no requirement for any fundamental breach of contract to be in 'bad faith' for the purposes of a wrongful dismissal claim.

75. Given my conclusions above, it is not necessary for me to reach a conclusion in relation to the other potential breaches of contract that the respondent has alleged in the list of issues.

Redundancy pay

76. I have concluded that it is not just and equitable to make an award to the claimant for the balance of all or part of his statutory redundancy pay. The points that I have considered in reaching this conclusion are set out below.

77. The claimant was dismissed by reason of redundancy for the purposes of s139 of the ERA because I have found that the reason for the claimant's dismissal was wholly or mainly due to the fact that the respondent was proposing to close its Day Centre, due to Bradford Council's decision to cease its funding grant to the respondent.

78. The circumstances in which the claimant was dismissed for redundancy fall within the exclusions to the right to statutory redundancy pay set out in s140(1) of the ERA, this is:

    78.1 the respondent was entitled to dismiss the claimant without notice because the claimant did not hold a driving licence which entitled him to drive a minibus (as per my conclusions on the claimant's claim for notice pay (wrongful dismissal);

    78.2 the respondent's letter of 22 November 2018 met the conditions of s140(1)(b) of the ERA, i.e. that the respondent had given the claimant shorter notice than required. This was because the respondent's letter of 22 November 2018 stated that the claimant's employment would end on 30 November 2018.

    78.3 as a result, I have a discretion to award the claimant all or part of the balance of his statutory redundancy pay as an 'appropriate payment' for the purposes of s140(3) of the ERA, if it is just and equitable to do so. However, I have found that it is not just and equitable to make any such award. The key reasons for my decision are:

        78.3.1 the claimant was in fundamental breach of contract at the time of his redundancy; and

        78.3.2 the claimant has already received around half of his statutory redundancy pay from the respondent (he has been paid £533.43 out of his potential statutory redundancy pay of £1,101.08).

Holiday pay (unauthorised deductions from wages)

79. The respondent admitted that they did not pay the claimant in lieu of his accrued holiday pay following the termination of the claimant's employment for the reasons set out in my findings of fact. I have already concluded that the claimant was in

fundamental breach of contract at the time that his employment terminated (as set out in my conclusions on the claimant's notice pay claim above). However, that conclusion does not prevent the claimant from claiming holiday pay under the statutory provisions relating to unauthorised deductions for the reasons set out in the Employment Appeal Tribunal's decision in *Asif v Key People* referred to in the section of this judgment setting out the relevant law for holiday pay above.

80. I conclude that the claimant should have been paid in lieu of his accrued holiday pay, following the termination of his employment. I have found that the claimant's holiday accrued at the rate of 1/52th of 5.6 weeks per week of employment. The claimant's accrued holiday pay for the period 1 April to 30 November 2018 was as follows:

    1/52 x 5.6 weeks x 35 weeks' employment (1 April to 30 November 2018) = 3.77 weeks' pay

81. Ms Williams submitted that the claimant's holiday pay should be calculated in accordance with his updated schedule of loss. Mr Sharma did not make any submissions regarding the way in which the claimant calculated his holiday pay.

82. I have concluded that the claimant's hourly pay rate at the time that his employment terminated was less than the National Minimum Wage ("**NMW**") rate for the claimant's age category at that time. The Tribunal is required to calculate the claimant's holiday pay based on applicable NMW rate of £7.83 per hour because it is an implied term of the claimant's contract that he was paid in accordance with the NMW rate applicable during that period.

83. I have concluded that the claimant should have been paid holiday pay of £553.48 gross, calculated as follows:

    3.77 weeks' pay x 18.75 hours per week x £7.83 per hour = £553.48 gross

Conclusions

84. I have concluded that the claimant's claims for notice pay (wrongful dismissal) and for the balance of his statutory redundancy pay fail.

85. I have upheld the claimant's claim for holiday pay and the respondent must pay the claimant £553.48 gross in lieu of his accrued holiday pay on the termination of his employment.

Employment Judge Deeley
6 March 2020