Claim No: 1601598/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr D Stanley

Respondent: Cresta Cars Limited

Heard at: Cardiff (CVP) **On:** 20 May 2021

Before: Employment Judge R Evans

Representation

Claimant: In person

Respondent: Ms J Ferguson (Counsel)

JUDGMENT

1. The Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay the claimant the sum of **£158.22** which is the net gross figure.

2. The Respondent is ordered to pay the claimant the sum of **£551.19** which is the gross figure, as holiday pay (or compensation for accrued paid annual leave pursuant to *para*
14 of the Working Time Regulations 1998;

3. The Respondent shall pay the Claimant additional compensation of two weeks' pay totalling **£483.50** pursuant to *section 38 Employment Act 2002* for its failure to provide the Claimant with a written statement of employment particulars.

REASONS

1. By Form ET1 received on 24 July 2020 the Claimant, who hails from Bridgend, made a claim against the Respondent which is now limited to a claim for notice pay, holiday pay and arrears of pay.

2. The Respondent is CRESTA CARS LIMITED. It is a holding company for Cresta Mini-Bus and Coach Hire, a private hire bus company based in Bridgend which holds a range contracts including local authority and education. The Respondent has existed since around 1987

becoming a limited company in 1997. It has defended the claim by Form ET3 which disputes the entirety of the Claimant's claim.

3. The Claimant says that he is owed:

a. £360.00 by way of notice pay;

b. 43.22 days of accrued holiday pay;

c. a now reduced 27.25 hours in unpaid wages between 16 December 2019 and 27 March 2020; and

d. £3,245.18 in unauthorised deductions from his wages from the date on which he was furloughed to 6 June 2020.

4. The claim amounts to £6,965.33, that being less the £150.00 statutory guarantee pay he sought to pursue via an amended claim dated 19 January refused by Employment Judge Jenkins on 6 May 2021. It is also less 34.5 hours paid by the Respondent in the last fortnight in respect of the unauthorised deduction of wages from December 2019 to

March 2020.

5. The Claimant engaged ACAS on 19 June with the early conciliation certificate issued on 19

July 2020.

6. The proceedings have benefitted from case management from Employment Judge Harfield on 7 January 2021. The directions on that occasion provided for an application to amend the claim to include a claim for statutory guarantee pay to be made by 21 January 2020. That application was made but not successful. There was provision for witness evidence, disclosure and filing of a bundle.

7. The case has been timetabled to a Final Hearing before me today to be effective by remote means. This is due to the proceedings having occurred during the COVID-19 global pandemic. Accordingly, today's Hearing was effective via Cloud Video Platform (CVP). All parties consented to such an approach and I was

satisfied that it was necessary, proportionate and in the interests of justice to proceed via CVP. The Hearing proceeded without any real technical issues.

8. The Claimant appeared in person and Ms Ferguson, Counsel, appeared for the Respondent.

9. Through the course of the Hearing I considered a number of documents which included the parties' statements. After 8:00pm on 18 May 2021 the trial bundle was sent to the Tribunal. Whilst I note that there was a delay in the refusal of the Claimant's application to amend his claim, the parties should have, in my judgment, have continued to prepare the case for the Final Hearing. The amendment was a very narrow one. The bundle should not have been filed as late as it was. It runs to over 300 pages. I have not been able to read the whole bundle and the parties were invited to direct me to any relevant documentation in support of their positions.

10. In addition, I heard oral evidence from:

a. the Claimant; and

b. Mr Ian Williams, the Respondent's managing director.

11. I read their statements. I also heard submissions from the parties and I am very grateful to everyone for their participation today.

ISSUES IN THE CASE

12. The issues, as I see it, remain as set out on the face of the Case Management Order of 7 January 2021. I directed the parties to para 43 of that document at the outset of the proceedings and no one took issue with those issues. The issues were as follows:

a. Employment status

i. Was the claimant's contract of employment terminated on 9 January 2020? If so, what was the claimant's employment status thereafter. In particular, what were the claimant's relevant terms and conditions?

b. Wrongful Dismissal / Notice Pay

i. What was the Claimant's notice period?

ii. Was the Claimant paid for that notice period?

c. Holiday Pay (*Working Time Regulations 1998*)

i. What was the Claimant's leave year?

ii. How much of the leave year had passed when the Claimant's employment ended?

iii. How much leave had accrued for the year by that date? How much paid leave had the Claimant taken in the year? Were any days carried over from previous holiday years? iv. How many days remain unpaid?

v. What is the relevant daily rate of pay?

d. Unauthorised Deductions

i. Were the wages paid to the Claimant less than the wages he should have been paid in respect of:

(1) Holiday pay;

(2) The arrears of pay set out in the Claimant's Schedule 2;

(3) Furlough pay as set out in the Claimant's Schedule 1. ii. Was any deduction required or authorised by statute?

iii. Was any deduction required or authorised by a written term of the contract?

iv. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

v. Did the Claimant agree in writing to the deduction before it was made?

vi. How much is the Claimant owed?

THE FACTUAL MATRIX

13. I have listened to the evidence of the Claimant and Mr Williams very carefully and crossreferenced it with the papers in the case.

14. As is often the way, quite a lot of the background or chronology can be uncontroversial. However, I have to make findings of fact where matters are not agreed. The standard of proof is the simple balance of probabilities with no added gloss. The burden of proof in the premises of this case, rests with the Claimant.

15. Broadly speaking, I consider that the witnesses were generally trying to assist me and were internally consistent. Where I have preferred one version of events over another, it is generally because the account was better supported by other evidence and or the witness' recollection was better.

16. In addition, I should make special mention of the Claimant's written evidence. I have, only where absolutely necessary, referred to the matters concerning the local authority involvement that was, it seems to me, the precipitating event for the circumstances within which the parties find themselves

today. That is in no way, shape or form a criticism of anyone, it is just an observation of the reality. However, I would not want the Claimant to think that I have not read with care and interest what he has said. Rather, I am mindful of maintaining confidentiality. I simply need not refer to matters which are not relevant to my decision-making. Further, his statement seeks to go beyond his originally pleaded case and schedule of loss. I should make it absolutely clear that my findings are concerned with the issues I have identified.

17. The findings of fact that I have made are limited to the issues before me. They are as follows:

a. The Claimant worked for the Respondent as a coach driver from 20 February 2019.

That much is agreed and I have seen a contract of employment dated 20 February 2019. The basic rate was £8.45 per hour or £40.00 per day if it was, *'schools only'*. The Claimant was, according to the contract, employed on a full-time basis. There was a dispute about whether the Claimant was contracted to work 37.5 hours per week as averred by the Respondent. The reality is that his wage slips over the period February to December 2019 do not reflect that. There are some weeks where the payment is 37.5 hours but other weeks there are school transport block payments or simply less hours. Ms Ferguson told me that was because the Claimant was declining work. The Claimant said he was offered work and would take the work. Some weeks there was not any work. My finding is that there was an expectation between the parties that the Respondent would offer the Claimant continuous employment and offer him work on a very regular basis. That is the reality of what was happening. Some weeks were busier than others but broadly speaking from an overview of the payslips produced, the Claimant's pay fluctuated and would range from anything from £200.00 to £500.00 per week.

b. I accept, and it is relevant to find, that an expectation of the Claimant's role was to have Data Barring Service (DBS) check and part of his duties required operating on the school run as set out on the first page of the contract of employment. The Claimant disputed having seen this document. I simply do not know what the position is there. He had not

signed it. However, he had submitted to a DBS. The finding I am able to arrive at is that the Claimant knew and accepted that the school run and holding a school badge was a key component of his terms of employment, whether he had read that or not. It was implicit. The Claimant had submitted to a DBS and there was no issue. He was duly employed and issued a school transport badge for three years.

c. Both parties agreed, and perhaps Ms Ferguson more so given her familiarity with the Tribunal, that the fundamental issue and starting point was whether and when the Claimant ceased to be employed by the Respondent.

d. I am satisfied on the evidence that Bridgend County Borough Council (BCBC) had indicated on 9 December 2019 that the Claimant was not to work on any of the

Respondent's school transport contracts. The Respondent was notified by a Paula Davies of BCBC that information had come to light requiring further investigation. The following day, 10 December 2019, the Claimant was written to and told that his role had been restricted and he was urged to address the issue with BCBC's safeguarding team and was told that if the suspension from the school run as it were continued, then his employment would necessarily be terminated. Those findings are made out from the contemporaneous correspondence trail that runs from pp30 to 34 of the bundle. The Claimant, in any event, as is apparent to me on the face of the evidence, was aware of social services and police interest that compromised his ability to utilise his education badge. The Claimant was clearly quite upset by this whole interference. He told me unhesitatingly he would have continued to be employed but for the interference of BCBC. I have no evidence of BCBC's involvement before me and as I told the Claimant with some emphasis, I am not in a position to make any findings about that, nor do I need to. My finding is that Mr Williams was also motivated that the Claimant continue his employment if the issue could be resolved.

e. On 6 January 2020 the Claimant's school permit was revoked following a professionals' meeting. I note the contents of that meeting to be confidential. I am not speculating as to the reasons for the meeting, there is no need. However, it was clearly identified that the Claimant's badge had been revoked and he could not appeal the decision. Neither party suggested that the chronology was any different to that which I have just set out.

f. On 7 January 2020 Mr Williams indicated by email (at p35 of the bundle) that following the professionals' meeting the previous day, that he would have to dismiss the Claimant owing to him not being permitted to work on school contracts. He indicated that he would need to commence the dismissal process and urged the Claimant to seek legal advice around the safeguarding issue. In addition, that same day the Claimant sent a written reply in terms at p35 of the bundle,

'I fully understand the difficult position this has put you in and the reasons for your actions. I am sorry this happened and I am extremely disappointed with the situation. Should you need any assistance with work that I am able to do, please call me anytime. I would be happy to work for you again …'

g. There is no other way those emails can be interpreted save in the terms I have outlined – the Claimant was to be dismissed and he was accepting of the reality. The Claimant distanced himself from the finality of his comments in his email during his evidence. I took him to the final lines, *'… thanks for your time, over these months. All the best'* and he conceded a degree of finality was evident from that email. On 9 January 2020 the Claimant was written to at p37 of the bundle.

The key extract is,

'Due to the severity of the concerns raised and the fact that it would appear BCBC are not going to permit you the opportunity to appeal the decision I regret that your employment will need to be terminated with immediate effect. I sincerely thank you for your loyalty over your period of employment and highly recommend that you have a suitable solicitor

address the matter. In the meantime, can you let me have a time sheet for your last period of employment so that I can prepare your final salary and plan for P45 documents etc to be produced.'

h. The correspondence is unambiguous. However, the Claimant, understandably, considered the position to be anything but clear. There was no P45 issued and the payslips remained. Mr Williams' evidence was that the employment had to come to an end and thereafter he was willing to provide casual work for the Claimant. The Claimant initially told me that he had not spoken to Mr Williams about this at all. When I probed him about there being no conversation in the months that followed, he conceded there may have been a discussion. I took him to p38 of the bundle which was correspondence from Mr Williams to the Claimant's solicitors.

It said, *inter alia*,

'I confirm that Mr Stanley was formally given notice of termination. As I have known Mr Stanley for several years and I was reasonably confident that Mr Stanley was being unfairly treated by BCBC. However, I have recently managed to provide Mr Stanley with a little casual work but not within the School

Transport operation.'

i. I broke to allow the Claimant to consider further questions he may wish to pose to Mr Williams and whilst he did ask some very penetrative questions around the unpaid wages, he did not deal with 9 January 2020 in any meaningful way. I had taken him to the Order of 7 January 2021 and the issues recorded therein on two occasions by that point. I had explained the central importance of this issue as well as I have already alluded to. I note his oral evidence was that there was other work.

j. Having regard to the evidence I have alluded to, my finding is that there was a dismissal on 9 January 2020. I accept that the reason for dismissal was due to the Respondent being unable to guarantee the Claimant work owing to his predicament. I note the Claimant said he was expecting something more formal such as a meeting but as Ms Ferguson urged upon

me, that letter was unambiguous. She is right. Not only that, the Claimant was warned this was on the horizon in December 2019 and there was then the email correspondence on 7 January 2020 which left little to the imagination. I acknowledge the reality is that little changed on the ground but crucially, the Claimant's role had been curtailed and neither party considered there to be any expectation upon the Respondent to provide the Claimant with work. I note that the Claimant said in his evidence he was hopeful of work and had not claimed benefits. His income thereafter significantly decreased. He put that down to reduced work in January to March in the transport industry. I do not accept that. He was not able to do the school runs and was not Mr Williams' port-of-call. Further, the payment of the Claimant's holiday pay in the following week, whether correctly calculated or not, is further indicative of the dismissal.

k. I am satisfied that the Claimant was offered casual employment thereafter with the Respondent utilising him on contracts that he was not excluded from. The date being utilised was 10 January 2020. There was no written contract but I am mindful that the Claimant said there was not one before. I accept there was an *ad hoc* and casual arrangement where it was envisaged Claimant was to be provided with hours where possible. Indeed, as the Claimant said in his written evidence, he continued to be provided with work, *'… when I was needed.'* That was materially different in my judgment to the circumstances in existence before 9 January 2020.

l. It is not controversial that on 27 March 2020, the Respondent placed the Claimant on furlough. There is correspondence dated 30 March 2020 which confirms the date of furlough and the standard terms of furlough (i.e. 80% up to £2,500.00). The Claimant signed his agreement on 31 March 2020. There is context to this in a message sent to employees via What's App message the same day which said, *'terms will be 80% gross of 37.5 hours for those contracted. Those who have been on varied hours will have previous average but I hope to work around this …'* It is also not controversial that the Claimant was paid on the basis of a 20-hour week on

an 80% basis. It is quite apparent to me from the thread of messages to which I referred that Mr Williams was demonstrating considerable care, candour and commitment to his employees in the most depressing and challenging of times for both him as an employer, and them as workers and employees.

m. I have to consider the schedule of purported deductions in earnings provided by the Claimant at pp271 to 272 of the bundle. Ms Ferguson asserted there was no evidence to support the contention that the Claimant was owed 62.25 hours. I reject that submission. My finding is that the Claimant was not paid the 62.25 hours that he identifies in that schedule. I have reached that finding having regard to the following factors:

i. the Respondent has itself, within the last two weeks, made a payment for 34.5 hours of those hours having reviewed the position and realised that the payments it made were incorrect; ii. by way of example, other than suggesting that a timesheet was not provided at the time, Mr Williams could not explain the 8.5 hours not paid in the week ending 21 February 2020; iii. the Claimant was quite obviously not paid the correct holiday pay when his contract ended in January 2020 – it took until June 2020 to put that right when an additional 5 days' holiday pay was paid; iv. the Claimant had been keeping the record at pp271 to 272 for a considerable period prior to his dismissal so this is a contemporaneous document and in my view is probative against Mr Williams' explanation;

v. I note Mr Williams said he could have provided an explanation but this document has been in existence for some time and he referred to seeing it back in early 2020 so I do not accept that assertion on balance; and vi. whilst I acknowledge Mr Williams' account of different periods of rest and the like when working on the replacement rail service in January 2020 for example, it was vague and very difficult to follow and the Claimant was not challenged in cross-examination on

this point which is positively not a criticism of Ms Ferguson who would have been in difficulty doing so.

n. The reality is that the overall state of the arrangements in the Respondent company in terms of holiday pay, contractual agreements and payment generally were at times less than adequate for the reasons I have already identified. Holiday pay was not paid or was paid late and the Claimant was obviously paid incorrectly. Indeed, the Respondent's case was that it did not believe that the Claimant was entitled to holiday pay from 10 January 2020. It did not have an adequate grip of his arrangements at that time which, I could well accept, may have been exacerbated by the COVID-19 pandemic and getting to grips with the furlough scheme.

o. Turning to the furlough arrangements, as far as I can glean from the wage slips from p132 of the bundle, the Claimant was paid £180.00 per week gross on the
80% furlough rate. This was 20 hours at £9.00 per hour. The parties agreed that. The balance was therefore £144.00 per week and from 3 April to 5 June 2020 he was paid £144.00 per week save for the week of 3 April 2021, which was £163.60 due to a PAYE refund of £19.60. There were also some other deductions over that period.

p. The Claimant, very reasonably, wrote to Mr Williams on 26 May 2020. I have seen the exchange from p109 of the bundle. He wanted clarification as to his employment status, the furlough situation and any outstanding holidays that he had. The reply, that day, was that the Claimant was on a zero hours contract following his school badge having been withdrawn in January 2020. Furlough was to continue until 1 August 2020 on an 80% basis and Mr Williams indicated he would check what the balance of the holiday pay was, pointing to there having been holiday pay paid following his suspension from school driving. The Claimant was asked the position as to the school badge and he explained that a couple of meetings around the issue had been cancelled due to COVID-19. The holiday pay calculation was chased by the Claimant on 4 June 2020 and he sought payment for the same. He also sought an explanation for the furlough calculation. He asserted that if an

employee was employed for 12 months on a variable wage it should be an average of the preceding 12 months. I should add that I explained the furlough calculation in the event that I were to find he was dismissed on 9 January 2020 to him. He accepted that. Mr Williams asked for an update as to the school badge situation indicating he may need to take legal advice. He set out that as the Claimant was dismissed on 9 January 2020 and the furlough calculation was his average income from that point. Mr Williams emphasised that an inability to carry out school contracts would likely render the Claimant surplus to requirements and indicated the Claimant may be better off claiming benefits. The Claimant set out the furlough guidance for Mr Williams who again explained the calculation he had applied. He was emphatic that continued employment was contingent on resolution of the school badge. That exchange of correspondence is in the bundle from p119. Mr Williams, rightly, in my judgment, told the Claimant that he could only maintain those on furlough that were genuinely likely to return to work.

q. On 6 June 2020 Mr Williams made enquiries of BCBC on behalf of the Respondent as to whether the Claimant was able to resume school transport duties. The emphatic answer was *'no'* and I accept the summary of the email at p130 to that effect. It is also not controversial that on 6 June 2020 the Claimant was told of

BCBC's position. He was told that furlough applied to those that were realistically going to be retained and Mr Williams' view was that the balance of the business outside of school badge work would not be sufficient. Mr Williams said he had stopped claiming furlough on 29 May with a final payment on 5 June 2020. The Claimant was no longer required by the Respondent. Mr Williams, I accept, was not happy with the outcome. Later on 18 June 2020, Mr Williams told the Claimant that he had checked his holiday pay to January 2020 and this amounted to £403.20 gross, £376.74 net. He invited the Claimant to return to the business if the DBS issue with BCBC was resolved (p128 of the bundle). A wage slip was generated on 19 June 2020 for the aforementioned amount.

r. It is quite apparent to me that the Claimant was accordingly dismissed for a second time on 6 June 2020.

THE RELEVANT LAW

18. I turn to the applicable law which may be summarised as follows.

Employment and Worker Status

19. An "employee" is defined by *section 230(1) Employment Rights Act (ERA) 1996* as being, *'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.'* The term, *'Contract of employment'* is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. 20. A Tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

21. A *'worker'* is defined by *section 230(3) ERA 1996* as being:

'an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'

22. It is worth noting for the purposes of this claim, a worker is entitled to unpaid wages and holiday pay at the statutory level of 5.6 weeks.

23. The case law confirms that for a contract of employment to exist between parties and/or for there to be a worker relationship between parties, there must be a direct contractual relationship between the employer and employee/worker per *James v. Greenwich London Borough* Council [2008] ICR 545 and *Smith v. Carillion Ltd* [2015] IRLR 467; and that there must exist a requirement for personal service per *Express and Echo Ltd v Tanton* [1999] ICR 693 and *Pimlico Plumbers Ltd v Smith* [2017] IRLR 323. A contractual relationship can only be implied if it is necessary to do so.

The guidance in *Smith v. Carillion Ltd* [2015] IRLR 467 CA sets out the principles applicable to whether a contractual relationship can be applied.

24. In *Smith*, Elias LJ set out,

'21. The question arises whether and in what circumstances a contract between the worker and the contractor to whom he is providing his services can be implied. This question has been considered by the Court of Appeal on a number of occasions. In submissions before us counsel focused on two authorities in particular, namely James v Greenwich London Borough Council [2008] EWCA Civ 35; [2008] ICR 545 and Tilson v Alstom Transport [2010] EWCA Civ 169; [2010] IRLR 169. It is not necessary to analyse these cases in any detail since the principles they espouse were not disputed. For the purposes of this case they may be summarised as follows:

(1) The onus is on a Claimant to establish that a contract should be implied: see the observations of Mance LJ, as he then was, in Modahl v British Athletic

Federation [2001] EWCA Civ 1447, [2002] 1 WLR 1192, para 102.

(2) A contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in James which considered two earlier decisions on agency workers in this court, Dacas v Brook Street Bureau (UK)

Ltd [2004] ICR 1437and Cable and Wireless plc v Muscat [2006] ICR 975. It is

sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed (para. 23). Mummery LJ stated that the EAT in that case had:

"... correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213, 224:

"necessary . . . in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

(3) The application of that test means, as Mummery LJ pointed out in James (para.24), that no implication is warranted simply because the conduct of the parties "was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract." (4) It is, however, important to focus on the facts of each case. As Mummery LJ observed in James (para.51): "there is a wide spectrum of factual possibilities.

Labels are not a substitute for a legal analysis of the evidence." The question a Tribunal needs to ask is whether it is necessary, having regard to the way in which the parties have conducted themselves, to imply a contract between worker and end user.

(5) Accordingly, if the arrangements which actually operate between the worker and the end user no longer reflect how the agency arrangements were intended to operate, it may be appropriate to infer that they are only consistent with a separate contract between worker and contractor. This may be because the agency arrangement was always intended to be a sham and to conceal the true relationship between the worker and the contractor. But it may also be simply because the relationship alters over time and can no longer be explained by the dual agency contracts alone. However, the mere passage of time cannot be enough to justify the implication of a contract on necessity grounds: James para.31 per Mummery LJ.

(6) If an Employment Tribunal has properly directed itself in accordance with these principles, then provided that there is a proper evidential foundation to justify its conclusion, neither the EAT nor this court can interfere with the Tribunal's decision: see Tilson per Elias LJ, para.9.

22. It is also important to bear in mind that it is not against public policy for a contractor to obtain services in this way, even where the purpose is to avoid legal obligations which would otherwise arise were the workers directly employed: James para. 56-61; Tilson paras.10-11. That will frequently but by no means always be the reason why the employer enters into a relationship with an agency. A contract cannot be implied merely because the court disapproves of the employer's objective.'

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25. Therefore, there must be:

a. a contract (between the worker and the alleged employer);

b. an obligation on the worker to provide work personally;

c. mutuality of obligation, and

d. an element of control over the work by the employer.

Actual Dismissal

26. Actual dismissals occur where the employer terminates the contract. If the words used (oral or written) are clear it is an express dismissal.

27. Problems can arise where the employer's words or actions are ambiguous. If so, the Tribunal must take into account all the surrounding circumstances, and if the words used are still ambiguous the Tribunal should ask itself how a reasonable employer or employee would have understood those words in the circumstances. That applies whether the ambiguous words are spoken or in correspondence.

28. If the words used are unambiguous, they may generally be taken at face value without the need to analyse surrounding circumstances per *Sothern v. Franks Charlesly & Co* [1981] IRLR 278, CA. There may be no room to consider what the person using the words actually intended or what the reasonable recipient might have assumed was intended.

Notice Pay, Wrongful Dismissal and Breach of Contract

29. In terms of a claim for breach of contract, I have power pursuant to the *Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order")* to deal with claims for breach of contract in limited circumstances. In particular (and relevant to this claim),

a. such claims must be brought by employees and not workers;

b. such claims relate only to breaches of contract outstanding on the termination of employment; and

c. the maximum amount that I may award a claimant is £25,000 (though there is separate redress in the civil jurisdiction for any sum above that).

30. Such claims can only be brought on the termination of a contract of employment and within three months (*articles 4 and 7 of the Order*) excluding any extension for any conciliation period.

31. Under *article 7 of the Order* a claim must be presented within three months beginning with the effective date of termination of the contract giving rise to the claim with the Claim No: 1601598/2020 provision for the Tribunal to extend time where satisfied that it was not reasonably practicable for the claimant to have presented the claim within the primary time limit and where satisfied the claim was presented within such further period as the Tribunal considers reasonable.

32. An employee is entitled to notice pay on termination of their contract of employment in accordance with either,

a. the terms of their contract (provided that they are not less favourable than the statutory minimum award); and

b. in the event of no contract, the statutory award pursuant to *section 86 ERA) 1996* (the statutory minimum).

33. If there is no expressly agreed period of notice, there is an entitlement at common law to *"reasonable"* notice of termination. This must not be less than statutory minimum notice but, in some circumstances, could be more. What is "reasonable" notice may depend on the type of job and what is common for that sort of role/sector.

34. In the event that I find a claim for breach of contract proven I can proceed to make an award of damages which:

a. seeks to put a claimant in the position they would have been in but for the breach of contract; and

b. there is an obligation on a claimant to mitigate their loss, the burden of proof being on the respondent to show that the claimant has not taken reasonable steps to mitigate his/her loss.

Unauthorised Deduction of Wages

35. *Section 13(1) ERA 1996* provides,

'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.'

36. There is no period of qualifying service and claims may be brought by workers as well as employees. The *Agency Workers Regulations 2010* provide minimum guarantees for workers including pay. A worker is defined by *section 230(3) ERA 1996* and includes someone working under a contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

37. Wages are defined in *section 27 ERA 1996* and it means, *'any sums payable to the worker in connection with his employment.'* This includes salary.

38. *Section 13(3) ERA 1996* set out that,

'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.'

39. A deduction is a complete or partial failure to pay what was properly payable on a particular occasion.

40. The time limit for bringing a claim for unpaid wages is three months beginning with the date of payment of the wages from which the deduction was made, *section 23(2)(a) ERA 1996* applied. There is an extension for early conciliation. The time limit is strict. An extension may not be granted unless it was not reasonably practicable to present the claim in time and it was presented within such further period as the Tribunal considers reasonable.

41. For a number of deductions to be a *'series'* there has to be, *'… sufficient frequency of repetition'*, that is a sufficient factual and temporal link (per Langstaff P in *Bear Scotland*

v. Fulton [2015] IRLR 15*)*. It is probably not necessary for all the deductions in a series to be unlawful provided that there is at least one in-time proven unlawful act. There is authority for that in *Ekwelem v. Excel Passenger Service Limited* [2013] EAT 0438/12 and *Royal Mail Group limited v. Jhuti* [2018] EAT 0020/17.

42. In *Bear Scotland,* the EAT held that a gap of more than three months between any two deductions will break the *'series'* of deductions.

Holiday Pay

43. A claim for holiday pay may be brought as a breach of contract, unauthorised deduction of wages or under the *Working Time Regulations 1998*, the latter applying to workers.

44. In terms of time limits, the same provisions apply as I have already set out in terms of breach of contract and unauthorised deduction from wages. In terms of complaints under the *WTR 1998*, the jurisdictional time limit is three months beginning with the date the right to take annual leave was not permitted or the date payment should have been made. 45. Where there is no contractual right to payment in lieu of accrued leave then the appropriate route is likely to be under the *ERA 1996* or the *WTR 1998*.

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46. The *WTR 1998* provide workers with an entitlement to 5.6 weeks leave each leave year (including any bank holidays the worker is entitled to take).

47. If a worker has worked only part of a leave year, *para 13(5) of the WTR 1998* provides for pro rata accrual.

48. Holiday entitlement will relate to a leave year. If the leave year is set out in writing then that leave year will apply. If there is no leave year set out in writing, the provisions of *paras 13(3) and 13A(4) WTR 1998* apply namely, if a claimant started after 1 October 1998, their leave year begins on the anniversary of their start date.

49. The starting position under the *WTR 1998* is that the worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year per *para 13(9)(a)*

WTR 1998. If they only worked part of the final year, they will be entitled to be paid in lieu of such part of the pro rata entitlement that they accrued but did not take as leave. The *WTR 1998* do not make provision for carrying over any unused leave from the four weeks and the 1.6 weeks additional statutory leave can be carried over if there is a *'relevant agreement'* per *para 13A(7) WTR 1998*.

50. The payment due under *para 14(2) WTR 1998* shall be, *'such sum as may be provided for the purposes of this regulation in a relevant agreement'* pursuant to *para 14(3)(a) WTR 1998* (i.e. the contractual agreement) or, if no provisions of a relevant agreement apply, a sum calculated by way of the formula set out in *para 14(3)(b) WTR 1998*. An entitlement cannot be less advantageous than the statutory minimum.
51. There are exceptions, developed in case law, allowing the 4 weeks' *WTR 1998* leave (but not the additional 1.6 weeks' leave) to be carried over in situations where the worker was unable to take leave and the most pertinent authority is the decision in *King v. Sash Window Workshop* [2018] IRLR 142 ECJ which provided an entitlement to be paid when the worker was denied any entitlement to leave.
52. I am mindful of *paras 13(10) and (11) WTR 1998* which arise as a result of the global

COVID-19 pandemic but they do not apply in this instance.

Furlough Scheme

53. To be eligible for furlough, an employee or worker had to be employed or working on 19 March 2020.
54. The Treasury Direction of 15 April 2020 indicated that for an employer to make a claim for a furloughed employee, there was a requirement for a written agreement. Further guidance on 20 April 2020 indicated at para 6.7 that, *'… if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.'* As such, there needs to be a written record.
55. The fact that an employer has failed to make a claim for a furlough payment does not, however, invalidate the responsibility it has to pay an employee or worker's wages.
56. It is correct to say that where a variation of contract is shown to have been expressly agreed by parties, it will clearly be enforceable.

57. Where an employee or worker's terms and conditions change, the employer is obliged to issue them with a written statement of the change within one month of it taking place. A change that has been properly brought about is not invalidated by a failure to issue a written statement of change.
58. However, all that being said, *section 13 ERA 1996* is explicit that there shall be no deduction unless the parties signify consent in writing.
59. In terms of workers on varied hours who were not employed for the full tax year, i.e. after 6 April 2019, the proper course of action was to claim 80% of the average monthly wage from the date they started working for the employer. This is achieved by calculating the amount earned in the tax year to the day before the worker was furloughed then divide it by the number of days they were employed for from the start of the tax year inclusive of non-working days. That would then be multiplied by the furlough days and by 0.8.

Section 38 Employment Act 2002 Award

60. Where a Tribunal finds in favour of a worker in a complaint of unlawful deductions from wages and breach of contract, and the Tribunal finds that the employer has failed to provide the employee or worker with a written statement of employment particulars, the Tribunal must award the employee or worker an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay. That now applies to workers following an amendment to *section 1 ERA 1996*. It is not in dispute that there was no contract for the new term of employment for the period from 10 January 2020.

CONCLUSIONS

61. I turn to my conclusions.

Employment Status

62. On the findings that I have made I am satisfied on the balance of probabilities that the Claimant's contract of employment, which was exactly that to that point, was terminated on 9 January 2020. Thereafter, there was a casual or *'ad hoc'* agreement where the Claimant was utilised on a *'zero hours'* contract and was a worker. There was no expectation upon the Respondent from 10 January 2020 to

provide the Claimant with any or any regular hours. There was no mutuality of obligation. As such, the Claimant was offered as and when work by the Respondent on the previous rate of pay of £9.00.

Notice Pay/Wrongful Dismissal

63. Owing to my finding about the Claimant's dismissal on 9 January 2020 his claim for wrongful dismissal and notice pay cannot succeed. It is out of time, the end of the threemonth time limit being in May 2020. I cannot glean from what I have seen that he was paid a week's notice and it is regrettable if that was not paid.
64. The Claimant avers that he was not paid notice when dismissed on 6 June 2020. As I have found him to have been a worker from 10 January 2020, he is not entitled to bring a claim for wrongful dismissal or notice pay pursuant to *section 86 ERA 1996*.

Holiday Pay (*Working Time Regulations 1998*)

65. I am mindful that the Respondent compensated the Claimant's claim for holiday pay in June 2020. Albeit, he still contends they were wrong in their calculations.
66. The Claimant's leave year was, in his initial employment, from 20 February. I am not sure that he appreciated that. He appreciated less that holiday pay could not be carried over save in the event of express agreement as I have already set out. In any event, I found that he was dismissed on 9 January 2020 and the jurisdictional time limit is three months beginning with the date the right to take annual leave was not permitted or the date payment should have been made. The new leave year was from 10 January 2020 the parties acknowledged. That meant that to 5 June 2020 there were 2.26 weeks in holiday pay owing. It was not in issue that the Respondent had failed to pay any holiday pay, believing the Claimant was generally not entitled to it (which I should add enhanced my finding about the change of circumstances on 9 January 2020 irrespective of the erroneous belief on the part of the Respondent).
67. 2.26 weeks is 15.82 days. The relevant daily rate of pay will need to be calculated bearing in mind what I say below. The entire amount is outstanding and owing.

Unauthorised Deductions

68. On the findings I have made, the Claimant is entitled to any unauthorised deductions in his pay from 10 January 2020. This amounts to 29.25 hours. There

has been a payment made by the Respondent for 34.5 hours to cover this. The reality is that the amount is

62.25 but 33 of those hours accrued in his previous employment with the Respondent and accordingly the claim is out of time. On the findings I have made, there was no justification for the deductions and I put it down to human error.

69. The period of furlough was 27 March to 5 June 2020. Broadly, that was, as I have said, 20 hours per week at 80%. The Claimant, in the event that I found him to have been dismissed on 9 January 2020, accepted the calculation at p282 of the bundle as the correct calculation. Similarly, I had asked Ms Ferguson about the accuracy of the Claimant's calculations in the event that I had found him in continuous employment. However, bearing in mind that that I have found that the Claimant's wages were 62.25 hours short, they need to be added to the average from 10 January 2020 only. That totals 29.25 additional hours which takes me to 241.75 on the Respondent's calculation.

70. In addition, p282 of the bundle is wrong as it takes into account the week of 3 April 2020, which was a point at which the Claimant was paid furlough. The correct period is 10 January to 27 March 2020. The furlough agreement was not signed until after then in any event.

Judgment Calculation

71. The Claimant is therefore entitled to:

a. Holiday pay at a rate of 241.75 x 2.28 = **£551.19**.

b. Arrears of pay for the furlough period:

i. 241.75 / 11 = 21.97 hours x 0.8 = 17.58

hours ii. 17.58 x £9.00 = **£158.22**.

c. It is necessary to make an award for the lack of employment particulars pursuant to *section 38 EA 2002*. I limit this to two weeks' pay at the average of £241.75 which totals **£483.50**.

72. The total award is **£1,192.91**.

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Signed by Employment Judge R

Evans 17 June 2021

JUDGMENT SENT TO THE PARTIES ON 21 June 2021

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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