EMPLOYMENT TRIBUNALS

Claimant:	Mr N Ithia
Respondent:	Key Electrical Solutions Ltd
Heard at:	Midlands (East) Region By Cloud Video Platform and attended (hybrid)
On:	11, 12, 13 January 2021 **Reserve decision:** 23 April 2021
Before:	Employment Judge Victoria Butler **Members:** Mr J Akhtar Ms R Wills

Representation

Claimant:	In person (with his brother in attendance for support)
Respondent:	Mr K McNerney, Counsel

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that:

1. The Claimant's claims of direct race discrimination, automatically unfair dismissal, wrongful dismissal and breach of contract in respect of course fees are not well-founded and are dismissed.

2. The Claimant's claim of non-payment of wages for the months of September and October 2019 and outstanding holiday pay is well-founded and succeeds. A hearing will be listed to determine remedy.

2. The Respondent's counterclaim is not well-founded and is dismissed

RESERVED REASONS

Background

1. The Claimant presented his claim to the Tribunal on 6 January 2020 after a period of early ACAS conciliation between 30 October 2019 and 30 November 2019.

2. The case came before Employment Judge Rachel Broughton ("EJ Broughton") at a Closed Telephone Preliminary Hearing on 22 April 2020 at which she asked the Claimant to provide reasons why his claim for unfair dismissal should not be struck out given that he did not have at least two years' qualifying service. The Claimant subsequently confirmed that his unfair dismissal claim was one of automatically unfair dismissal for health and safety reasons[1] and for asserting a statutory right in respect of non-payment of wages, lack of payslips and issues relating to his working hours.

3. EJ Broughton dismissed the Claimant's claim for age discrimination on withdrawal.

4. In relation to the race discrimination claim, the Claimant confirmed that his claim was one of direct discrimination under section 13 Equality Act 2010("EQA").

5. The Claimant relies on the following allegations in respect of his direct race discrimination claim:

i. Training course - August 2019

6. The Claimant attended a training course on 17 – 23 August 2019. He alleges that he asked for permission to attend the course and sent those requests directly by email to Mr Martin Key and Ms Rebecca Harker, in addition to making verbal requests, but the Respondent refused to allow him to attend. Accordingly, the Claimant had to book annual leave to attend the course and cover the fees and expenses himself, whereas the Respondent paid the fees and expenses for a colleague who also attended. He relies on an actual comparator, Mr Mitchell Hinks. The Claimant has not been reimbursed for the fees.

ii. Training course – October 2019

7. The Claimant makes the same complaint in respect of a course in October 2019. His comparators are other engineers who he says attended the course.

iii. Payslips and pay

8. The Claimant complains that he did not receive payslips for the duration of his employment with the Respondent and, therefore, could not check he was being paid correctly.

9. He says he raised complaints in this regard to both Ms Harker and Mr Key by email and verbally, and with the office administration team.

iv. Failure to give 30 days' notice of work allocation

[1] This claim was ultimately not actively pursued

10. The Claimant says that when he joined the Respondent, he was told verbally by Mr Key that he would be given 30 days' notice of jobs. Other engineers were given such notice whereas he was not. The last occasion when the Claimant worked was 21 October 2019.

11. The Claimant's claim in respect of breach of contract is as follows:

i. Holiday pay[2]

12. The Claimant alleges that he is owed outstanding holiday pay. The Respondent accepts that he is entitled to payment for accrued but untaken holiday as at the effective date of termination. However, it says that the Claimant failed to submit his timesheets for September and October 2019 and, therefore, it has been unable to work out what payment is due to him.

ii. Unpaid wagesf[3]

13. The Claimant claims his pay for September and October 2019. The Respondent agrees that it has not paid him for this period but was unable to do so because he failed to submit his timesheets.

iii. Unpaid course fees and expenses

14. The Claimant also claims breach of contract in respect of the course fees in the sum of £1,210 and £2,070.

The Respondent's counterclaim

15. The Respondent issued a counterclaim against the Claimant in respect of costs incurred by it consequent of: i. the Claimant retaining the Company van after his dismissal resulting in it being impounded; ii. the Claimant incurring parking fines for the van; iii, the Claimant's failure to return the Respondent's i-pad; and, iv. his failure to return the Respondent's megger tester.

16. It calculates that the amount of the counterclaim, after offsetting the wages that it accepts are owed to the Claimant, is £5,915.28.

17. EJ Broughton ordered the Claimant, amongst other things, to provide his timesheets for September and October 2019, which he duly did by way of email dated 6 May 2020.

18. The case was the subject of a further Closed Telephone Preliminary Hearing before Employment Judge Britton ("EJ Britton") on 28 September 2019. There

[2] At the hearing the claim was advanced as an unauthorised deduction of wages under s.13 ERA but this is largely academic because the Respondent concedes that it did not pay the Claimant for September and October 2019 and also owes his holiday – only the amounts payable remain in dispute.
[3] As per footnote 2.

were a number of case management issues resolved but, more importantly, EJ Britton clearly spent some considerable time discussing with the Claimant his wages claim for September and October 2019 and recorded the following:

> "***The wages claim***
>
> *5. He complied with this unless order, including as to outstanding holiday pay. I quantified it with him today and being about £5.564k. The Respondent has conceded that it owes him, as again quantified today, about £4.6k …*"

The issues

19. The Respondent prepared a draft list of issues which we used throughout the hearing as follows:

Jurisdictional Issues[4]

(i) Are any or all of the Claimant's claims for discrimination or unlawful deduction from wages out of time?

(ii) If the claims for discrimination are out of time, do the allegations of discrimination made by the Claimant amount to an act extending over a period of time so as to bring the Claimant's claims in time?

(iii) Would it be just and equitable to extend the time limit for submitting such claims?

(iv) If the claims for unlawful deduction of wages are out of time, do they form part of a continuous period of deductions without a break in the chain?

S104 Automatic Unfair Dismissal

(v) Was the Claimant dismissed for asserting a statutory right pursuant to s104 of the Employment Rights Act 1996 (ERA)?

(vi) Did the Claimant's grievance of 28 October allege that the Respondent had infringed the Claimant's rights in relation to his right to be paid and to receive payslips pursuant to s104(1)(b) and s104(4)(d) of the ERA?

(vii) Did the Claimant make these allegations in good faith?

(viii) To what extent, if any, has the Claimant mitigated his losses?

[4] Jurisdiction was not pursued during the final hearing but given that we find the allegations relied on by the Claimant do not amount to jurisdiction it is academic in any event.

(ix) To what, if any, compensation is the Claimant entitled?

Unlawful Deduction from Wages

(x) Has the Respondent made a deduction from the Claimant's wages?

(xi) If so, was the deduction permitted by reason of

a) reimbursement of an overpayment;
b) a statutory provision;
c) a relevant provision of the Claimant's contract; or
d) the Claimant's written consent?

(xii) If there has been an act of discrimination, what amount should be awarded?

Direct Discrimination

(xiii) Did the following acts occur:

a) The Respondent refused to allow the Claimant to attend a training course on 17–23 August 2019.
b) The Respondent refused to reimburse the Claimant for the training course on 17–23 August 2019.
c) The Respondent refused to allow the Claimant to attend a training course on 7–9 October 2019.
d) The Respondent refused to reimburse the Claimant for the training course on 7–9 October 2019.
e) The Respondent did not pay the Claimant's wages on time.
f) The Respondent failed to pay the Claimant's wages in September and October 2019.
g) The Respondent dismissed the Claimant on 5 November 2019.

(xiv) If the acts set out at 13 are found to have occurred, did the Respondent treat the Claimant less favourably than it treated or would treat the relevant comparator? (The Claimant has yet to establish specific comparators for each situation)

(xv) If so, was the less favourable treatment because of/on the grounds of the Claimant's race, contrary to s9 and s13 of the Equality Act 2010?

(xvi) If there has been an act of discrimination, what amount should be awarded?

Employer's Contract Claim

(xvii) Did the Claimant do the following acts:

a) Fail to return the Respondent's van, resulting in the van being impounded by Haringey Council.
b) Incur several parking fines that were attributed to the Respondent.
c) Allow the Respondent's van to incur damage while in his possession.
d) Fail to return the Respondent's iPad.
e) Fail to return the Respondent's Megger Tester.

(xviii) Did these actions breach the Claimant's Contract of Employment?

(xix) Did the Respondent incur costs or losses as a result of the Claimant's actions?

(xx) Is the Claimant liable for these costs or losses?

The hearing

20. We heard the case on 11, 12 and 13 January 2021 and made a Reserved Decision on 23 April 2021.

21. Prior to the hearing, the parties presented a bundle of documents and witness statements.

22. Page numbers in these Reasons are references to the page numbers in the agreed bundle.

The application to amend

23. At the hearing itself, the Claimant made an application to amend his claim in respect of his wages claim. It has always been understood that he was claiming wages for the period September and October 2019. This is reflected in the various case management summaries prior to this hearing.

24. However, at the hearing the Claimant said that he was also claiming unpaid wages for the months of May, June, July and August 2019. This claim was not particularised in the pleadings to date.

25. Mr Mordey, the Respondent's Solicitor, was permitted to explain the focus of discussions before EJ Britton on 28 September 2019. He clarified his understanding that the wages claim was restricted to September and October 2019 and EJ Britton had been keen to ensure that that hearing before him was a final attempt to clarify the claims.

26. The Claimant submitted that he had always claimed a total of £11,308 in respect of unpaid wages from the outset of his claim - which included non-

payment of wages for the additional months. He refers to this sum in his schedules of loss on 6 May 2020 and 11 November 2020 and said the figure had always been the same.

27. However, the document at page 190 in the bundle was the first time he had explained the specific breakdown. In respect of the claim for May – August 2019, he said he was disputing the *amounts* paid as opposed to September and October 2019 which were not paid at all. He asserted that EJ Britton had not explored the figures with him fully at the previous preliminary hearing

28. Mr McNerney submitted that the Claimant was trying to convince the Tribunal that he did not get a fair hearing before EJ Britton. It was clear that EJ Britton had gone through the claim in detail with the Claimant and at no point did the Claimant say that the figures set out in his case management summary dated 28 September 2020 were wrong. He described the Claimant's schedule of loss at page 191 of the bundle as "*a fantasy schedule of loss*".

29. In addressing the principles set out in ***Selkent Bus Company (trading as Stagecoach) v Moore [1996] IRLR,*** Mr McNerney submitted that the Claimant had opportunity at three previous preliminary hearings to clarify his claim, but the application was only made on day two of this three-day hearing***.*** The Claimant also had opportunity to confirm that EJ Britton's summary was wrong and it was entirely inappropriate to make the application at this stage of the hearing, nor was it proportionate. Accordingly, the application should be dismissed.

30. We adjourned to consider the application. We concluded that the balance of injustice and hardship would fall against the Respondent if we allow the amendment. In arriving at this conclusion, we took the following into account:

31. At the preliminary hearing before EJ Broughton on 22 April 2020, she ordered the Respondent to send the Claimant copies of his May, June, July and August 2019 payslips so they were in his possession by 29 April 2020.

32. On 6 May 2020, the Claimant confirmed that he was missing payments for September and October (and included a schedule of how many hours he had worked) along with accrued holiday he believed he was owed for the period May – November 2019. At no point did he allege that he had been under-paid for the months May – August 2019. Accordingly, this was an entirely new claim which was substantially out of time. The Claimant was dismissed from the Respondent on 5 November 2019 and the application to amend was not made until 12 January 2021, some fourteen months after the effective date of termination.

33. In terms of the timing and manner of the application, we were satisfied that he made the application too late in the day, mid-hearing when he had had plenty of opportunity to do so previously, especially given that there have been three preliminary hearings, and the Respondent was not in a position to defend the

claim. Accordingly, the balance of injustice would fall heavily against the Respondent if the application were allowed and it was, therefore, refused.

The evidence

34. We heard evidence from the Claimant and from Ms Rebecca Harker, Operations Manager, for the Respondent.

35. We found the Claimant to be excitable and his evidence not only unreliable but, at times, was also incredible. By way of example, his account of when he understood he had been dismissed changed during the hearing – on one occasion he said it was when he first contacted on ACAS, on another he said it was at the hearing before EJ Broughton on 22 April 2020. However, he claimed unfair dismissal in his originating claim so was clearly aware of the fact of his dismissal at the time of issuing proceedings (and we find as fact that he was dismissed on 5 November 2019 and that he was aware of the same as at that date).

36. On the other hand, Ms Harker's evidence was entirely truthful. She was what we can only describe as unflappable under cross-examination and gave credible responses to all matters put to her. Accordingly, where there was a conflict in the evidence, we preferred that of Ms Harker.

The facts

37. We made our findings of fact based on the material before us, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We resolved conflicts of evidence that arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

38. Having made findings of primary fact, we considered what inferences we should draw from them for the purpose of making further findings of fact. We have not simply considered each particular allegation but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

Background

39. The Respondent is an electrical solutions provider based in Lincoln. Its owner and Director is Martin Key and Ms Harker is the Operations Manager. Prior to becoming Operations Manager, Ms Harker was employed as the Office Manager and has worked at the Respondent for circa seven years.

40. Ms Harker has a wide range of duties, which include overseeing all of the jobs that the Respondent is engaged to do. She ensures that all of those jobs are planned into both the Respondent's and the engineers' schedules and that

they are completed on time. She also deals with the invoicing and plays a key role in managing client relationships.

41. Ms Harker is typically involved in the recruitment of new engineers. The usual recruitment process for the Respondent is to advertise vacancies on 'Indeed'. Thereafter, she contacts any applicants and completes an initial screening. Thereafter, suitable applicants are booked for an interview.

42. However, this was not the case with the Claimant who was employed directly by Mr Key. Mr Key and the Claimant had a mutual friend, Mr Robert Richier. Mr Richier asked Mr Key to employ the Claimant as a favour because he was looking for work. Accordingly, the Claimant did not go through any formal recruitment process and had minimal experience in the Respondent's business. He commenced employment on 2 May 2019.

43. Mr Key was not involved in issuing the Claimant with his terms and conditions of employment, save that he agreed with Ms Harker that the Claimant's salary would be £24,000 per annum as a trainee electrical tester given his minimal previous experience. The Claimant was issued with a contract of employment which he signed and he worked under its terms (pages 71-82). The Respondent also has an equal opportunities policy (pages 83-85).

44. The Claimant's contract confirmed his salary of £24,000 and at no point was he advised that he would be given 30 days' notice of any work. This would be operationally impossible given the nature of the Respondent's business - jobs can be booked, changed, re-scheduled or cancelled at short notice.

45. At no time was the Claimant told that his pay would increase from £24,000 to £32,000 after four weeks and there was no provision for such in his contract. No engineer at the Respondent is paid £32,000 per year, even the most senior engineers.

46. The Claimant (and others who were employed by the Respondent more recently) was not paid for travel time but was paid a higher hourly rate of pay in contrast to those employed under older contracts who are paid for travel time but receive a lower hourly rate of pay.

47. The Respondent pays its employees on the 16th of each month but payment is dependent on engineers submitting their timesheets on time so the appropriate payroll process can be undertaken. Engineers must submit their timesheets from their iPads showing the date of each job, the postcode of the job location and how many hours they have worked. This is a straightforward process and most engineers submit their timesheets at the end of each day. The Respondent uses payroll software called "QuickBooks" which automatically generates payslips and sends them to employees on their iPads.

48. Ms Harker is responsible for reviewing the timesheets and uses the van tracker system (more below) alongside the original details of the engineers' jobs to

check whether they have recorded the correct amount of time. Once she has checked the timesheets, she sends the final pay information to Mr Key who authorises payment to the engineers.

49. The Claimant was often paid late because he failed to submit his timesheets or did so after the deadline for doing so. On other occasions, he submitted his timesheets incorrectly, despite guidance from Ms Harker (more later).

50. Each engineer is provided with a company van, an iPad and a megger tester in order to carry out their work. Once the engineers are allocated their vehicle, a tracker is fitted. However, the Claimant went out of his way to avoid having his tracker fitted despite requests from Ms Harker for him to come to the office to get it fitted. On one occasion, he arrived at the Respondent's premises to collect parts from the qualified supervisor ("QS") team who were based on the 2nd floor. The Claimant asked the QS team not to tell Ms Harker that he was in the building purely to avoid getting the tracker fitted.

51. The Respondent's practice is that new engineers shadow more senior engineers for the first few weeks so they can learn the Respondent's processes and procedures before they are permitted to work on their own. This is particularly important because the Respondent undertakes work in secure buildings, such as banks, which means that engineers have learn to enter premises in a secure manner. They also need to learn how to use its iPad programme amongst other operational matters.

52. Given that the Claimant was not a qualified electrical engineer, he was required to spend longer shadowing qualified engineers than would normally be required. Once he completed his shadowing, the Claimant was permitted to go out and do some basic remedial work alone. However, he was not permitted to undertake more complex remedial or testing work at any point up to his dismissal.

53. More generally, the Claimant was considered unreliable by the Respondent. On occasion he would simply fail to turn up for work, seemed uninterested in the work that was allocated to him and Ms Harker was constantly having to chase him to either complete work, update job records or provide the relevant certification for the work he had done. On other occasions, he simply abandoned jobs part way through.

The Claimant's pay

54. On 12 July 2019, the Claimant emailed Mr Key and Ms Harker seeking guidance on how to complete his timesheets correctly. Previously, he had been claiming travel time, which he was not permitted to do. Ms Harker spent considerable time explaining to the Claimant how to complete the timesheets correctly. However, his repeated failure to do so resulted in his payments being late. On other occasions, he would either submit his timesheet after the deadline for doing so and on other occasions inputted too many hours. If other

engineers failed to complete their timesheets correctly then they too would suffer a delay in payment.

55. The Claimant raised issues relating to his pay on 17 July 2019 (page 94), 20 September 2019 (page 99) and on 2 October 2019 (pages SB 49-51) arising out of his failure to submit timesheets correctly.

56. On 2 October 2019, the Claimant queried why his salaried had not increased from £24,000 to £32,000 per annum, some four months since he alleged that that agreement was made. The Respondent failed to respond, albeit there was no agreement in this regard in any event.

The August and October courses

57. Prior to commencing employment, the Claimant undertook a trial day shadowing an engineer on 10 April 2019 (page 86). Following the trial, he emailed Mr Key, cc'ing in Ms Harker, as follows:

"*Hello Martin,*

The trial day went very well and I felt that this was an industry in which I'd like to progress. It was good to work with Peter and see the kind of work Key Electrical undertakes.

I have been looking at relevant Electrical courses and I think the course that best suits the works I completed with Peter are as follows:

- *City and Guilds Level 3 Award in Initial and Periodic Inspection and Testing of Electrical installations 2391-652, or*

- *EAL Level 3 Award in Electrical Installation Inspection, Testing, Certification and Reporting 2625.*

I have found some courses available starting soon so please let me know if this is the right course and whether you have any preference as to training provider.

Kind regards,

Iffy" (page 87).

58. Mr Key did not reply, and the Claimant sent the same email again on 29 April 2019 – page 88. Again, Mr Key did not reply but the Claimant had not yet commenced employment and was not ready to undertake any courses and it was not appropriate for him to be suggesting courses in an area of which he had little expertise.

59. The Respondent ensures that its engineers receive any training it deems

necessary and will authorise and book them on appropriate courses as and when their individual work schedules allow. Each course is booked directly by the Respondent and it is invoiced accordingly. Engineers are not expected to undertake such training in their own time.

60. For reasons that the Claimant is unable to articulate, he booked himself onto the City and Guilds 2391-652 Inspection and Test course on 17 – 24 August 2020. The Claimant had also booked annual leave for this week (pages 122-123). The Respondent was not aware why the Claimant had booked annual leave, nor did it have any reason to ask him.

61. Ms Harker learned that the Claimant had attended the course when another engineer, Mitchell Hinks, told her that the Claimant had been in attendance too. She was surprised to learn this given that the Respondent had not booked him on the course or authorised it.

62. Mr Hinks had been booked onto the course by the Respondent on those dates because he had no other work booked in that day. The course provider sent the Respondent email confirmation of its booking and also provided the Respondent with an invoice for him (SB3 – SB4).

63. The Claimant asked to be reimbursed for the fees and the Respondent took the view that the course was training that the Claimant would have been required to undertake at some point so offered to reimburse him, subject to; i.) receiving proof that he had successfully completed the course; and ii) that he undertook further training with a senior engineer so it could be satisfied that he was capable of carrying out this type of work for the Respondent. However, the Claimant failed to do either and as such, he was not reimbursed for the cost of the course.

64. The Claimant booked himself onto a further course without authorisation - BS767118 addition course on 7-9 October 2019 - when he had work booked in for those days (page 95). The Respondent did not feel he was ready to undertake the course, otherwise it would have booked him on it, and it already had concerns about his conduct and capability.

65. The other engineers who attended the October course had the Respondent's permission to do so and did not have any work booked in for those days. Their places were booked by the Respondent and paid for by it in accordance with usual practice. Given that the Claimant was not authorised to attend the course and was supposed to be working for the Respondent on those days, it did not offer to reimburse him for this course. There was no obligation on it, contractual or otherwise, to do so.

The Claimant's conduct

66. The Claimant failed to attend work on 10 October 2019 without explanation and, thereafter, rarely attended at all.

67. On 10 October 2019, the Respondent tried to contact the Claimant by telephone as he was scheduled to work. His mobile phone was turned off, so Ms Harker phoned his emergency contact to ensure that the Claimant was ok. She spoke to the Claimant's brother and asked him to ask the Claimant to contact the office. Ms Harker did not threaten to dismiss the Claimant during this call.

68. On a date in September or October 2019, Ms Harker received a call from one of the Respondent's electrical wholesalers who said that someone called '*Nadir*' was trying to buy a large number of parts on the Respondent's account. The parts were not for commercial use so would not be used by the Respondent's engineers in the course of their duties. However, Nadir was in the office with Ms Harker at the time, so it was not him. The wholesalers had taken the phone number of the person trying to buy the items and it emerged that it was the Claimant's.

The Claimant's grievance and his dismissal

69. Shortly thereafter, Ms Harker and Mr Key discussed the Claimant's employment. They concluded that he should be dismissed given his unreliability, his general conduct and capability, his purchasing parts on the Respondent's account for personal use, the fact that he ignored his schedule of work and attended the course on 7-9 October 2019 without authorisation. Accordingly, Ms Harker scheduled a meeting with the Claimant for 28 October 2019 at which she would dismiss him.

70. By this stage, the Claimant suspected that the 'writing was on the wall' so to speak about his continued employment and instead of attending the meeting on 28 October 2019, he submitted a grievance as follows (pages 108-109):

> "*…*
>
> *Despite numerous attempts to seek a resolution of the issues I have raised over the months; I am yet to have a satisfactory resolution, therefore please accept this email as me raising a grievance.*
>
> *Please provide me with your full grievance procedure upon receipt of this email.*
>
> *During this grievance I would like to raise all the matters I raised previously as they remain unresolved, especially my lack of pay.*
>
> *I am aware that other employees have been paid on schedule for this month. However, yet again, I have not received my wages or any information as to the amount I am being paid, any deductions being made, when I will receive them or a reason for the delay.*

I am losing funds when I'm not paid the correct funds and on time and this process has to be resolved immediately.

Failure to pay for my electrical training courses below, which is in line with my employment and which other employees attended;

City & Guilds 2391-52 Inspection and Testing course: £3,000
BS: 7671: 18th Edition course: £1,000

I sent an email to you on 30 September 2019 in which the following issues were raised:

1. *Pay and current contract*
2. *Payslips*
3. *Timesheets*
4. *Weekend working*
5. *Job allocations and locations*
6. *Equipment*
7. *Training*
8. *Company policies*
9. *Further role*
10. *Roles and responsibilities within the company*

On Thursday 10th of October 2019, I received a phone call from the office at 10:09 and was unable to return the call until 11:43. Given the nature of my job and working with live electricity, it is not always possible to receive or respond to calls instantly.

I am very disappointed that the company contacted my emergency contact to ask them to get hold of me and requesting that I call them back immediately and threatening that, if I did not, I would lose my job by the end of the day. This caused a lot of unnecessary alarm, pain, worry, discomfort, panic and stress to my family.

The emergency contact is only to be used for emergencies.

I would like the following to occur within the next 24 hours;

1. *You to provide me with my wage slips for previous and the current payment date*
2. *My wages to be paid*
3. *My back pay to be confirmed and paid*
4. *To be able to work in a safe environment without fear, bullying or discrimination.*

I would like the following to occur within the next seven days:

1. *The issues I have previously raised to be prioritised and resolved*

amicably
2. *You to agree my wage slips will be produced in advance of each payment date*
3. *You to agree my future wages will be paid in advance or on time each month*
4. *You to agree my wages to be paid correctly*
5. *The training courses I attended to be paid for*
6. *You to confirm I will be able to work in a safe working environment without fear, bullying or discrimination*

I am no longer in the position where I can obtain additional funds to make up for the shortfall of my wages, therefore any subsequent losses as a result of your failure to pay me will be forwarded on to yourselves, whereby I will expect you to make a full settlement of my losses.

Regards,

…"

71. Ms Harker responded seventeen minutes later as follows (page 110):

"*Morning Nguta*

You did not submit any timesheets this month, the cut off date is the 5th I actually didn't do the timesheets until the 13 and you still hadn't submitted any timesheets. How can we pay you if we don't know your hours?

Please can you clarify who told you we would be paying for any training courses? Your 2391 you booked yourself and submitted a weeks holiday for in the system, we knew nothing about you attending that course until another one of our engineers were there at the same time. We also offered to reimburse you for the course if you went with a current engineer and did some training on testing. Everyone's courses are booked in at different time throughout the year in line with their work schedule and for the 18 edition you took it upon yourself to just turn up to the course after having a conversation with Lucy in admin who went through your work with you for the following week. You then completely ignored your calendar and jobs and turned up to the course when you were not booked to attend at that time.

You have repeatedly refused to attend the office to get your tracker fitted on your vehicle and you have also been attending Electric Base wholesalers and using Nadirs name from the office to gain parts you do not require for key electrical jobs. This is theft from the company and gross misconduct and an instant sackable offence. You also do not sync paperwork on time and if you have any issues on site rather than call the office you mark your job incomplete and go home.

The instance of calling a family member was that you hadn't returned a call

from the office since the previous day, your emergency contact is there to protect you and if we cannot get hold of you for a length of time we will contact your emergency contacts. I spoke to your brother myself and all I asked was that if he could get hold of you and ask you to call me as soon as possible.

No pay or pay slips will be issued in advance, pay day is the 16th of the month and it will remain this way for you and every employee of key electrical. If you do not submit timesheets by the 5" then your wages will be delayed, I cannot pay you if I don't know your hours.

It is down on your calendar for you to attend the office today please can you confirm you are on your way to the office?

Kind regards,

…"

72. The Claimant failed to attend the office for the scheduled meeting and emailed Ms Harker later that afternoon at 2:46 pm stating that no work was booked in for him that day. He also queried if she had paid his wages (page 111).

73. Ms Harker confirmed minutes later that the entry for him to attend the office had been in his diary for the last two weeks. She also asked him to confirm that he had submitted his timesheets (page 112).

74. The Claimant replied the following day saying that they had been submitted (page 113).

75. By 30 October 2019, the Claimant had not attended the Respondent's premises nor undertaken any work for it and emailed Ms Harker chasing a response to his grievance dated 28 October 2019. He made no comment about Ms Harker's email confirming that he had the appointment to attend on 28th in his diary for several weeks (page 115).

76. Ms Harker responded on 5 November 2011 as follows (page 116):

"*Nguta*

As you have not showed at the office as requested since last Monday and have not been to work since, please can you arrange to return you van and equipment to the office ASAP. If the van is not returned along with all our equipment it will be eported (sic) *stolen to the police as of close of play tomorrow.*

Kind regards,

…*"*

77. The Claimant understood that he had been dismissed from the Respondent with immediate effect and his effective date of termination was 5 November 2019. He did not query why he had not been allocated any work thereafter, nor did he attend at the Respondent's premises.

78. On 7 November 2019, Ms Harker emailed the Claimant as follows (page 117):

> "*Hi Iffy*
>
> *Just to let you know the van has now been reported stolen to the police.*
>
> *Kind regards,*
> *…*"

79. After his dismissal, the Claimant failed to return the Respondent's van. The police spoke with the Claimant on two occasions and asked him to return the vehicle as it has been reported stolen or, alternatively, to arrange for it to be collected. Thereafter, the Claimant refused to take calls from the police.

80. Whilst the van was in the Claimant's possession, he incurred parking fines that were paid by the Respondent amounting to £730.

81. Ultimately, the van was recovered by the van hire company. On recovery, it was discovered that significant damage had been incurred and the keys were irretrievable. As a result, the Respondent incurred costs of £714 plus VAT.

82. The Claimant failed to return his iPad and megger tester, but these were returned to the Respondent at this hearing. However, the Respondent incurred costs for the SIM contract, which could not be cancelled whilst the Claimant had it in his possession.

The law

83. Direct discrimination – section 13 EQA provides:

"*13 Direct discrimination*

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
> *…..*

84. It is not necessary for a Claimant to have an actual comparator to succeed in a claim of direct discrimination. A comparison can be made with a hypothetical person, as long as the circumstances are not materially different.

85. We have had regard to the following cases: Madarassy v Nomura International

plc [2007] IRLR 246 (CA); Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; and Igen Ltd & others v Wong [2005] IRLR 258, CA

86. Burden of proof – section 136 EQA provides

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

…"

87. We have had regard to the following cases: Igen Limited v Wong [2005] IRLR 258,; Madarassy v Nomura International PLC [2007] ICR 867; Fraser v University of Leicester UKEAT/0155/13/DM; Hewage v Grampian Health Board [2012] IRLR 870, SC and Amnesty International v Ahmed [2009] ICR 450 EAT.

88. Unauthorised deductions from wages - section 13 Employment Rights Act 1996 ("ERA") provides:

"13 Right not to suffer unauthorised deductions.

(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.*
>
> *……..*

89. Dismissal for asserting a statutory right - section 104 ERA provides:

"*104 Assertion of statutory right.*

> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*
>
> > *(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
> >
> > *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*
>
> *(2) It is immaterial for the purposes of subsection (1)—*
>
> > *(a) whether or not the employee has the right, or*
> >
> > *(b) whether or not the right has been infringed;*
>
> *but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*
>
> *(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.*
>
> *(4) The following are relevant statutory rights for the purposes of this section—*
>
> > *(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,*
>
> *……*

90. Breach of contract - the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") provides:

"***Extension of jurisdiction***

> 3. *Proceedings may be brought before an [employment] tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> > *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
> >
> > *(b) the claim is not one to which article 5 applies; and*
> >
> > *(c) the claim arises or is outstanding on the termination of the employee's employment.*
>
> 4. *Proceedings may be brought before an [employment] tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> > *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
> >
> > *(b) the claim is not one to which article 5 applies;*
> >
> > *(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and*
> >
> > *(d) proceedings in respect of a claim of that employee have been brought before an industrial tribunal by virtue of this Order.*"

Employer's contract claims

91. Under Article 3(c) of the Order, the claim must arise, or be outstanding, on the termination of the employee's employment. In ***Peninsula v Sweeney [2004] IRLR 49***, the EAT concluded that a claim will only be "*outstanding*" on the termination date if it is a claim which, as at that date, was immediately enforceable but remained unsatisfied.

Submissions

92. We had the benefit of oral submissions from both parties, which were helpful. They are not set out in detail but both parties can be assured that the tribunal

has considered all the points made, even where no specific reference is made to them.

The Claimant's submissions

93. The Claimant relies on the following comparators who are all engineers:

- Harry Logston
- Michael McKlevie
- David Walsh
- Justin Wills
- Mitchell Hinks
- Seamus Keane

94. He submitted that the Respondent selected individuals for courses based on a personal likeness of the individual and their race. He also submitted that the Respondent chose to ignore his grievance dated 28 October 2019 because of his race.

95. His view is that the Respondent had a discriminatory practice resulting in the provision of an inadequate contract; a policy of not paying the correct salary; a policy of not paying the correct rate in that some engineers were paid for travel time and others not. His role was a "*point to point job*" so he should be paid travel time.

96. He believes that he was dismissed for raising a grievance and the matters contained therein. Further, not paying his September and October salary was an act of retaliation.

97. The Claimant also submitted that the Respondent's case had been '*put together*' after his dismissal.

98. To summarise, he said that he had been treated differently to white colleagues as a result of being black for the following reasons: in that there were different contracts in place; in respect of the allocation of work; in respect of the allocation of notice for jobs; in respect of travel expenses; in respect of payment of wages; in respect of training offered and, finally, practices of '*general treatment*'.

99. He said that his evidence was clear whereas the Respondent's evidence was not supportive of the case it now advances.

The Respondent's submissions

100. The Respondent submitted in respect of the dismissal that there were clear unequivocal reasons for the Claimant's dismissal which can be seen at paragraphs 26, 39, 55 and 71 of Ms Harker's witness statement. In respect of the non-payment of wages, there was clear evidence in the bundle that the

Claimant was failing to submit his timesheets, either on time or correctly. In respect of the courses, the Respondent's evidence was that the Claimant had booked himself on these courses without the Respondent's permission and he attended the second course when he knew that he should have been working.

101. Turning to the reason for dismissal, the Claimant ignored reasonable management instructions, was unreliable, and had been using the Company's account to order electrical parts for his own use. The reasons are set out clearly at page 110 in the bundle. The principal reason for the Claimant's dismissal was not that he raised a grievance or complaint about his pay or because of race discrimination. It was simply because of the matters listed above.

102. Ms Harker's evidence was clear and credible, and she had given good and believable answers under cross-examination.

103. In respect of the counterclaim, it was submitted that what the Claimant owes should be offset against what the Respondent owes him.

Conclusions

Unfair dismissal

104. The Claimant alleges that he was dismissed for asserting a statutory right pursuant to section 104 of the Employment Rights Act 1996.

105. It is not in dispute that the Claimant raised a grievance on 28 October 2019 alleging that the Respondent had infringed his rights in relation to the right to be paid and to receive payslips. The full content of this email is set out at paragraph 71 above.

106. The question is whether his dismissal, or the principal reason for his dismissal, was because he had asserted a statutory right.

107. We are entirely satisfied that the Claimant was not dismissed for asserting a statutory right. As explained above, we found Ms Harker's evidence in this case to be entirely reliable and are satisfied that the reasons for the Claimant's dismissal were those set out in her email dated 28 October at page 110 in the bundle, namely that; the Claimant failed to submit his timesheets; booked himself on to training courses without the Respondent's permission and attended the second course when he was scheduled to work; he repeatedly refused to attend the office to get his tracker fitted on his vehicle; he attended the electrical wholesalers and used a colleague's name to gain parts that he did not require for electrical jobs amounting to theft; he failed to sync paperwork on time and, failed to attend for duties without explanation.

108. The Claimant has provided no evidence to counter the allegations against him. He was at great pains during the hearing to demonstrate, for example, that

work that was scheduled on 7-9 October 2019 was not in his diary. He relies on the fact that at the time that his diary for his work was printed off for these proceedings, the work was no longer there. However, we accept Ms Harker's evidence that it was no longer there because the work was not undertaken by the Claimant on the scheduled days and was re-allocated elsewhere in the diary on different days.

109. Further, we are entirely satisfied that the decision to dismiss the Claimant was made *before* he submitted the grievance dated 28 October 2019. Mr Key and Ms Harker were simply at the end of their tether with the Claimant's conduct and accordingly Ms Harker scheduled a meeting with the Claimant on 28 October 2019, which we accept was in his diary. We also accept Ms Harker's view that the Claimant knew that the writing was on the wall and lodged a grievance in an attempt to avoid his dismissal. We are satisfied that his raising of a grievance post-dates the decision made by the Respondent to dismiss him, albeit it had not been communicated to him at the time.

110. Turning to Ms Harker's email of dismissal, she acknowledges that it did not explicitly advise the Claimant that he was dismissed. However, the fact of his dismissal was clear since Ms Harker directed him to return the company property and warned him that if the van was not returned along with all of the Respondent's equipment, it would be reported stolen to the police as at close of play the next day.

111. Viewed objectively, we are satisfied that the Claimant would have taken this email as notification of his dismissal. We are also satisfied that the Claimant had understood that he was dismissed, particularly given that he was not allocated any further work, nor did he contact the Respondent in this regard. His evidence on this point was entirely inconsistent in the hearing when he said initially that he had not appreciated that he was dismissed until the first case management hearing before EJ Broughton. However, this is simply not the case because in his Claim Form he indicated that he was claiming unfair dismissal. We do not accept that any reasonable person would believe that they remained employed when they had received the email in the terms from Ms Harker on 5 November 2019.

112. Given that we are satisfied that the Claimant's dismissal was solely down to his conduct, his claim that he was automatically unfairly dismissed for asserting a statutory right fails.

<u>Direct race discrimination</u>

The training courses

113. We have found as fact that the Respondent offers appropriate training to ensure its engineers are fully qualified and up to date. When appropriate courses become available, the Respondent will book engineers to attend around their work schedule. The course is booked directly by the Respondent

and it is invoiced by the course provider accordingly. Engineers are not expected to undertake such training in their own time.

114. The Claimant alleges that the Respondent refused to allow the Claimant to attend the training course on 17-23 August 2019. Further, another engineer attended and that his fee for the course and his expenses for attending were paid by the Respondent but his were not.

115. Turning to the facts, we are satisfied that the Respondent did not 'refuse' to allow the Claimant to attend the course. The Claimant took it upon himself to suggest courses that the Respondent did not consider he was ready for, particularly given that he was not even employed when he requested the August training.

116. When the Respondent failed to respond to the Claimant's unsolicited request to attend the August training, he booked himself on it without authorisation and outside the Respondent's procedure during a period of annual leave. He did not advise the Respondent of the same.

117. We are puzzled as to why he would do this and incur the expense when there was no need to do so. Given that the Claimant was not authorised to attend the course in any event, there was no obligation on the part of the Respondent, contractual or otherwise, to reimburse him.

118. However, as a gesture of goodwill the Respondent advised the Claimant that it would reimburse him if he could establish that he had completed the training and subject to him undertaking further training with a senior engineer so it could be satisfied that he was genuinely capable of carrying out that type of work. The Claimant failed to do either and the Respondent did not reimburse him. We are satisfied that given the circumstances, there was no obligation on it to do so.

119. Accordingly, we are satisfied that the reason why the Respondent refused to reimburse the Claimant was simply because he had attended without authorisation and, thereafter, failed to comply with the conditions set down by the Respondent after which it agreed to pay (despite there being no obligation on it to do so).

120. The same rationale applies to the training course on 7-9 October 2019. The Claimant did not seek permission to attend the course and, further, he booked himself on it when he was scheduled to work. Given the factual background to this, we are satisfied that the Respondent did not refuse to allow the Claimant to attend the course, rather he booked himself on it without its knowledge. The Respondent refused to reimburse him, but there was no obligation on it to do so in any event.

121. We considered whether his treatment in respect of the courses was less favourable than his comparators. The Claimant compared himself to Mitchell

Hinks in respect of the first course and to those engineers in attendance at the second. The comparators' material circumstances were different to those of the Claimant for the following reasons. Firstly, the Respondent authorised their attendance on the course - it booked them on the course directly with the course provider and paid the fees on receipt of an invoice from that provider. Those circumstances are entirely different to those of the Claimant who booked himself on the courses without the Respondent's knowledge or authorisation. In those circumstances, he cannot compare his treatment. If he compared himself to a hypothetical comparator whose material circumstances were the same, we are satisfied that the Respondent would have treated them in exactly the same way as the Claimant on both occasions.

122. To conclude, we are satisfied that the matters relied on in respect of the training courses were not less favourable treatment. A relevant comparator in the same circumstances would have been treated in exactly the same way. Accordingly, we are unable to draw any inference from the facts that it was because of his race - rather, it was for the reasons we set out above. Accordingly, the Claimant's allegations of direct race discrimination in respect of the courses are not well-founded and fail.

Wages

123. In respect of the Respondent not paying the Claimant's wages on time, again, we are satisfied that this was not less favourable treatment. The Claimant's treatment in this regard was as a direct result of his failure to either submit timesheets correctly, or on time. In fact, in respect of the September and October 2019 pay periods, the Claimant had still failed to submit his timesheets until after he issued these proceedings.

124. The Claimant has not pointed to an actual comparator but we are satisfied that a relevant comparator would be treated in exactly the same way and the Respondent was not obliged under any circumstances to pay any of its employees on the 16th of any month in the absence of the required timesheets. At no point has it refused to pay his wages - it has simply been unable to verify them absent the correct information.

125. Given are findings, we are unable to draw any inference from the facts that the non-payment of wages was because of the Claimant's race. Accordingly, the allegation is not well-founded and fails.

126. We apply the same conclusions above to the Claimant's claim of direct discrimination in respect of holiday pay and failure to provide payslips. The failure to pay holiday was a direct result of his failure to submit his timesheets (September and October 2019 were not provided by him until after he issued proceedings) and not for any reason relating to race. The lack of payslips was also a direct consequence of his failure to submit his timesheets properly. Again, we are satisfied that a relevant comparator would be treated in exactly the same way and, therefore, his allegation of direct race discrimination in this

regard is not well-founded and fails.

Dismissal

127. We considered whether the Claimant's dismissal on 5 November 2019 was an act of direct discrimination and concluded without a doubt that it was not. As above, we are satisfied that the reasons for his dismissal were those matters set out at paragraphs 69 and 71 above and not for any reason because of his race. We are also satisfied that a relevant comparator whose material circumstances were the same would also have been dismissed.

128. Given that we are satisfied that the reason for the Claimant's dismissal was his misconduct, we are unable to draw any inference that it was because of his race and, therefore, his allegation of direct race discrimination is not well-founded and fails.

129. We deal with the Claimant's allegation that he was told by Mr Key that he would be given 30 days' notice of his work allegation briefly. There was no agreement that the Claimant would be given such notice and as such, there was no less favourable treatment. Accordingly, his claim of direct race discrimination in this regard is not well-founded and fails.

<u>Breach of contract (course fees)</u>

130. In accordance with our findings of fact, there is no contractual basis on which the Claimant can claim his course fees. He was not authorised to attend the courses and did so of his own volition. There is no provision in his contract of employment, or elsewhere, that the Respondent is obliged to pay in these circumstances or at all. The Respondent agreed to reimburse the Claimant for the August 2019 course subject to two conditions (confirmation that he completed the course and a further period of training), neither of which he met.

131. We are satisfied that there has been no breach of contract of the Respondent's part and the claim is, therefore, dismissed.

<u>The Respondent's counterclaim</u>

132. We conclude that the Respondent's counterclaim must fail.

133. We do not dispute the amounts the Respondent says it incurred as a result of the Claimant's failure to return its van, the parking fine and damage to it that followed thereafter and his failure to return the iPad and megger tester. However, we have considered whether the claims were actionable at the time of the Claimant's dismissal on 30 October 2020. In respect of each and every head of claim, we are satisfied that it was not.

134. In respect of the van hire charges, these were incurred <u>after</u> the Claimant's dismissal. The same can be said of the parking fines and the damage (albeit

the Respondent cannot conclusively prove that the Claimant was responsible for the damage).

135. In respect of the iPad sim, again this was not an amount which had arisen and was actionable at the point of termination. The iPad itself and the megger tester have now been returned.

136. Accordingly, the Respondent's counterclaim fails because the claims arose after the Claimant's termination and the Tribunal does not have jurisdiction to determine them.

Unauthorised deduction from wages

137. The Respondent concedes that it owes the Claimant his wages from September and October 2019 and outstanding holiday pay, albeit the amounts are in dispute. Accordingly, the Claimant's claim in this regard succeeds and the amount payable will be determined at a remedy hearing to be notified to the parties in due course if they are unable to resolve it themselves.

____

Employment Judge Victoria Butler

Date: 16 July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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