Case No: EA-2020-000383-AT
(previously UKEAT/0254/20/AT)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 July 2021

Before :

HIS HONOUR JUDGE AUERBACH
MR H SINGH
MR D G SMITH

- -

Between :

MR W AUGUSTINE	**Appellant**
- and -	
DATA CARS LTD	**Respondent**

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- -

Mr W Augustine the **Appellant in person**
Mr P Nolan (TaxiLaw) for the **Respondent**

Hearing date: 21 July 2021

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JUDGMENT

SUMMARY

NATIONAL MINIMUM WAGE

The claimant worked as a driver for the respondent from February to September 2016. His claims included a claim that he had been underpaid the National Minimum Wage, and claims for holiday pay and of wrongful dismissal.

At a preliminary hearing the tribunal determined that the claimant was an employee. At a further preliminary hearing, in November 2019, the tribunal gave judgment by consent in relation to the holiday pay claim. The present appeal related to decisions made at a further preliminary hearing in February 2020. The EAT held as follows.

(1) The tribunal had erred by not treating payments made by the claimant to rent his vehicle as reductions, when calculating what he had been paid, for the purposes of his NMW claim. They were clearly expenses "in connection with" the employment for the purposes of regulation 13 **National Minimum Wage Regulations 2015**.
(2) The same applied in respect of the costs of his uniform.
(3) The tribunal did not err by failing to make a declaration that the claimant's claim for holiday pay was well-founded. That claim had been disposed of by a judgment given by consent at an earlier hearing pursuant to rule 64. The tribunal had not adjudicated that it was well founded, and, in any event, that judgment could not subsequently be revisited.
(4) The tribunal had erred in dismissing the claimant's claim for consequential losses (section 24(2) **Employment Rights Act 1996**) on a factual basis that was mistaken. The claim was ambitious, but needed to be considered afresh by the tribunal on the correct factual basis.
(5) The tribunal did not err in not holding that the respondent was estopped from asserting a different figure for a week's pay, for the purposes of the NMW, from that which underpinned the calculation of the holiday pay figure which was awarded at the November 2019 hearing. The tribunal had not, at that hearing, adjudicated the amount of a week's pay, and the judgment by consent stated in terms that the respondent was conceding the holiday pay award only. Nor had the tribunal erred by not revisiting the holiday pay award in light of its determination of the amount of a week's pay for the purpose of the NMW claim. There was no basis to revisit that award, which had been made in the amount specified by consent.
(6) The tribunal had not erred in concluding that the figures put forward by the respondent for what the claimant had been paid, took account of cancellations and no shows. There was conflicting evidence on the point, and the tribunal considered the state of the evidence on both

sides to be unsatisfactory. The assessment of that evidence (or lack thereof) and issues of credibility were a matter for the appreciation of the tribunal. It did not overlook where the burden of proof lay. The EAT could not interfere in its determination on this point.

(7) The claimant had applied for the award of compensation for wrongful dismissal to be enhanced on the basis that the ACAS Code on Disciplinary and Grievance Procedures applied but had not been followed. The tribunal had erred by not considering that issue, and would need to so on remission.

HIS HONOUR JUDGE AUERBACH:

Introduction – the Employment Tribunal's Decision

1. The claimant in the employment tribunal (who is now the appellant) worked for a period of time as a driver for the respondent. He brought a number of complaints. He appeals in respect of a number of aspects of the decision of the tribunal (Employment Judge Siddall) arising from a hearing on 17 February 2020. By that time, the claimant had already been found at an earlier hearing to be both a worker and an employee of the respondent.

2. At the February 2020 hearing, among the issues that the tribunal had to decide were whether the respondent had failed to pay the claimant at the rate of the national minimum wage and, if so, to what extent. The tribunal found in the claimant's favour on this point and awarded him £19.04, but, following a reconsideration application, that award was amended to £574.73. Another complaint considered at the same hearing was of wrongful dismissal. That succeeded and the tribunal awarded the claimant one week's pay.

3. At that hearing the claimant appeared on his own behalf and Mr Bansal, driver liaison manager, appeared for the respondent, and the tribunal heard evidence from them both.

4. The tribunal identified at the start of its reasons that it had already been determined that the claimant was a worker and an employee of the respondent, and the rights which flowed from that. It noted that at an earlier hearing a claim for holiday pay had been dealt with by consent, which is an aspect to which we will return.

5. The tribunal noted next that there was a dispute in relation to the claimant's start date. He said he had started on 19 February 2016; Mr Bansal said he had started on 23 February that year. For

reasons the tribunal gave, it accepted the claimant's case that the start date had been 19 February 2016. It was common ground that the end date was 13 September 2016.

6. The tribunal then turned to a dispute, which had a number of features to it, over how much the claimant had actually been paid over the course of his contract, and in particular what the position was regarding adjustments made to his pay for customers who were no shows, customers who had cancelled, or customers who had underpaid their fare. These matters were addressed in the following passage:

> "4. There is dispute over what the Claimant earned over the period of his contract. At the hearing in July I ordered the Respondent to produce details of what they said the Claimant had been paid, and details of any charges or fees incurred by him as part of the driver agreement. The Respondent produced records from its 'icabbie' software system which recorded that he had been paid a total of £14,670.15. The Claimant disputed this figure. He said it made no allowance for customer 'no shows', cancellations or underpayments. On the schedule that he produced in response to the Respondent's schedule and dated 25 October 2019 he asserted that he had only been paid £11,582.
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> 5. The Claimant produced a detailed statement setting out what he said he had been paid each week and the charges he had incurred. However he was not able to produce evidence in support of his statement. He said that he did not keep record of the jobs he did or what he earned each day. As a mini cab driver he could be paid both by card or in cash. He told me he had completed a tax return for the tax year to 5 April 2016 but that this showed he owed no tax after the deduction of all his expenses.
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> 6. In response the Claimant's concerns about the 'icabbie' records produced, Mr Bansal replied that if a customer cancelled or did not turn up, the driver could press a button on the app that was used in the vehicle and the system would be adjusted to show that the driver had earned nothing. Where the customer underpaid the arrangement was less certain. The driver would have to notify the office and he would be expected to try and recover the shortfall from the customer. I asked about the rate of cancellation and 'no shows'. Mr Bansal estimated that out of a thousand bookings, there might be 50 or 60 'no shows' and maybe 3 or 4 cancellations of booked jobs.
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> 7. The state of the evidence presented by both parties as to the correct level of earnings was unsatisfactory. I have noted the reversal of the burden of proof required by section 28 of the National Minimum Wage Act 1998 under which where an employee asserts that he was paid less than the NMW it will be presumed that he is correct unless the contrary can be established. The onus therefore falls upon the Respondent to satisfy the tribunal that they have met their legal obligations to pay the right amount.
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> 8. The Respondent's evidence had been obtained from their electronic records of the hours for which the Claimant had been logged into the app as available for work, the jobs dispatched and the jobs accepted by him, and their record of the price for each job. On

> the basis of this evidence they assert that the Claimant was paid over £14 per hour, well above the NMW.
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> 9. That figure made no allowance for any deductions in respect of charges and expenses. The Claimant argued, as noted above, that it also made no allowance for 'no shows' cancellations and underpayments. In relation to no shows and cancellations, I accept Mr Bansal's evidence that a driver could communicate these through the app and that the job would then not show upon the records (meaning that the potential earnings for the job would not be taken into account). However I accept the Claimant's evidence that the level of payments claimed by the Respondent would not necessarily take into account the situation where a customer had underpaid and that the icabbi system would record the full price for the journey.
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> 10. That said, I was concerned that the Claimant's assertions about his earnings were unsupported by evidence and had potentially been underestimated, given that he kept no records of jobs done and cash payments received. He asserted that his figure must be right as it was the basis of calculation of his holiday pay claim, the total of which had been conceded by the Respondent. However the Respondent had not conceded the total for national minimum wage purposes.
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> 11. I conclude that the Respondent's evidence based on its software records should be accepted as evidence of hours during which the Claimant was at work and jobs that he carried out and received payment for, and that no shows and cancellations have been accounted for. However I consider that the Claimant should be given the benefit of the doubt in terms of customer underpayments, no details of which are provided in the evidence supplied by the Respondent.
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> 12. I have therefore taken the Respondent's total earnings figure of £14,670 and applied to it a discount of 6.35% to represent a notional overall rate of shortfall on the basis of Mr Bansal's evidence, leaving an earnings figure of £13,738 for 1064 hours worked."

7. There was then a dispute as to whether, for the purposes of the national minimum wage calculation, certain payments made by the claimant fell to be deducted, by reference in particular to regulations 12 and 13 of the **National Minimum Wage Regulations 2015**. The tribunal addressed these aspects in the following passage:

> "13. The question then arose as to whether the total earnings figure should be reduced to reflect payments made by the Claimant. The Respondent argued that it should not. The Claimant referred me to the provisions of the National Minimum Wage Regulations 2015 and I have paid particular attention to regulations 12 and 13.
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> 14. It is not in dispute that the Claimant was required to pay fees totalling £160 a week to the Respondent: a 'circuit fee' of £148 and a fee for renting equipment of £12 a week. This gave him the equipment to be fitted in his car and access to the Data Cars circuit, or booking dispatch system. He communicated with the office and accepted jobs via an app. He paid a £200 deposit to rent the equipment. He was required to have a vehicle to be a mini cab driver. Initially he provided his own leased vehicle, but after a few weeks he started renting a vehicle from a company associated with the Respondent. It was a

requirement of TFL that he had a particular level of insurance to operate as a mini cab driver. In the Claimant's counter schedule he records that he paid £2035 by way of insurance costs and deposit. Whilst working for the Respondent he incurred fuel costs of £960.

15. The Claimant was required to keep his vehicle clean and tidy and he incurred valet costs of £310 whilst working for the Respondent. (The Respondent now provides this service to its drivers for free). He could elect to take more valuable jobs by providing a particular type of vehicle and by wearing a uniform which he purchased from the Respondent.

16. I have considered whether any of these sums operated to reduce the Claimant's earnings when considering whether he was paid the NMW.

17. The circuit fee, equipment rental fee and equipment deposit fee had to be paid before the Claimant was able to access the Respondent's booking system. I am satisfied that the equipment, app and access to the system amounted to services that he was required to purchase from the Respondent and as such those payments fall within regulation 12(e).

18. There is little guidance in the case law at present as to what constitutes an 'expense', payable to the employer or to a third party, in connection with employment, under regulation 13. HMRC note NMWM11100 offers some guidance and directs the employer to consider expenses incurred that are 'a requirement of the work, rather than by choice'.

19. Applying this guidance, it was a requirement of the job that the Claimant filled his vehicle with fuel and that he had the correct type of insurance to operate as a mini cab driver. I am satisfied therefore that those sums should be deducted for NMW purposes - they were not reimbursed by the Respondent. Likewise I am satisfied that the Claimant had to incur cleaning charges as it was a requirement that he kept his vehicle clean.

20. The Claimant was not required to rent a vehicle from the Respondent or its associated company. He could have provided his own vehicle provided it was less than five years old and he could be offered various levels of work on this basis. Recruitment adverts for the Respondent which were in the bundle clearly showed that it would engage 'owner drivers' as an alternative to 'company car drivers'.

21. Likewise the Claimant was not obliged to purchase a uniform: he only needed a uniform if he wanted to do a certain level of work, described as 'silver', 'gold' or 'business class' on the advertising material. This was entirely optional.

22. I conclude that the fuel costs, insurance costs, circuit fees, equipment rental fees, fuel costs and cleaning are all costs that should be deducted from total earnings when deciding whether the Claimant was paid the national minimum wage. Rental payments for the vehicle and uniform costs fall outside regulation 12 and regulation 13."

8. The tribunal then went on to consider the claim for wrongful dismissal, which it held was well-founded.

9. Further on, the tribunal considered a claim for consequential loss. This was argued to arise under section 24(2) **Employment Rights Act 1996**, which provides that where a wages claim has succeeded, the tribunal may order the employer to pay the worker, in addition to the amount of wages in question:

> "… such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of."

10. The Tribunal dealt with this consequential loss claim in the following paragraph:

> "31. The Claimant pleads his case as both a claim under the National Minimum Wage legislation and as a claim for unlawful deductions from salary. In relation to the latter, he claims consequential losses under section 24(2) of the Employment Rights Act including cost of household energy bills and wasted costs of completing the 'knowledge' test set by TFL to enable him to become a black cab driver. I make no award for such costs as I am not satisfied that they are attributable to any deduction made by the Respondent. The Claimant asserts that he has been unemployed since leaving the employment of the Respondent. He had aimed to complete the knowledge test but had been unable to do so on financial grounds. He has been claiming Universal Credit. It is not clear to me why the Claimant is unable to find alternative employment. He is an accomplished person with a law degree and has presented his claim to the tribunal with considerable skill. Whilst I would be sympathetic to him not wishing to work in the mini cab industry again in light of his particular experience, he has offered no reasonable explanation as to why he was not able to mitigate his losses and why his only efforts to find an alternative career have been his unsuccessful efforts to complete the knowledge."

Grounds of Appeal and Arguments in Support

11. The claimant put in a notice of appeal which was considered on the sift by Griffiths J. He considered that the challenge to the tribunal's approach to payments to third parties for the purposes of the national minimum wage calculation was arguable. He commented that other grounds were of less obvious merit and drew attention to the fact that it is not a ground of appeal to seek to challenge or disagree with findings of fact. However, he allowed all of the grounds of appeal to proceed to a full appeal hearing.

12. The grounds of appeal and the arguments advanced by the claimant in support of them are set out in immense detail by him, both in the original grounds of appeal and in the skeleton argument

that he produced for the purposes of today, which significantly overlaps with those grounds. We also heard rather briefer oral argument from him this morning. We have considered all of his detailed arguments and contentions. In what we will say now we only summarise what seem to us to have been the principal points that he advanced.

13. We have identified essentially six grounds of appeal. The first relates to the tribunal's decision that payments by the claimant for use of a rented vehicle did not fall to be deducted when calculating the amount of remuneration he had received for the purposes of the national minimum wage. The claimant argues that the tribunal was wrong not to allow deduction of that item. He submits that he was required by his contract to use a private hire vehicle in the performance of the role, and that this reflected statutory requirements as well.

14. The claimant says that the test, and the only relevant test, in regulation 13(b) of the **National Minimum Wage Regulations 2015**, was whether the rental payments were payments to any person other than the employer on account of "the worker's expenditure in connection with the employment". The claimant says that it was not in dispute that he had paid these payments to two successive rental companies; and he says that the only correct conclusion was that they were in connection with the employment. In so far as the tribunal referred to the HMRC guidance note, that was not binding on it. What it had to apply was the wording of the regulation; but in any event the approach he argued for was not inconsistent with the HMRC approach.

15. The claimant also advanced some other arguments in support of this ground, including his contention that X Credit Hire Limited should be treated as in partnership with the respondent for these purposes, because it had common ownership, and directorship, and there were other features that were common to both companies.

16. He also advanced an argument that not to allow this item against the national minimum wage calculation created a situation where drivers like him had to put in more hours to keep their head above water, risking a breach of the 48-hour maximum working week in the **Working Time Regulations 1998**.

17. Ground 2 related to the tribunal's conclusion that payments in respect of uniform did not fall to be deducted for the purposes of the national minimum wage calculation. Once again, the claimant said that the relevant test was whether this was a payment in connection with the employment. He suggested that the payment fell either within regulation 12(2)(e) or regulation 13(1)(a), which applies to deductions made by the employer, or payments made by, or due from, the worker to the employer, as respects the worker's expenditure in connection with the employment. He said that the reason he wore the uniform was because he was required to. It bore the respondent's logo. He worked as what was called a 'gold driver' and those drivers were required to wear the uniform. He had no other use for the garment. The tribunal, he said, should have concluded that payment for it was in connection with the employment.

18. Ground 3 relates to the matter of holiday pay. The background is that this had been dealt with at an earlier hearing in November 2019. As the judge recorded in the minute of that hearing, both parties came to the hearing with rival calculations of holiday pay. The judge continued:

> "3. … The claimant does not want to accept the respondent's calculation as he says it impacts upon his national minimum wage calculation. The claimant however says that he cannot afford to wait until February 2020 for remedy to be determined. Eventually, the claimant agreed to accept the respondent's offer in respect of holiday pay and judgment was entered in his favour in the sum of £1,354.29. A separate judgment will follow."[1]

19. A judgment was indeed produced arising from that hearing, which reads in relevant part:

> "By consent, and in respect of the holiday pay claim only, the respondent concedes the sum of £1,354.29 is due to the claimant."

[1] There was a misstatement in this paragraph, as it was the respondent that agreed to accept the claimant's figure.

20. The ground of appeal before us is that the tribunal, in its February 2020 decision, erred in failing to make a declaration that the holiday pay complaint was well-founded. The claimant says that section 24(1) of the **1996 Act** requires the tribunal, where it finds a complaint to be well-founded, to make a declaration as well as awarding compensation. This is mandatory. He had, in his submissions at the February 2020 hearing, asked the tribunal to do that and it had erred by failing to do so.

21. Ground 4 contends that the tribunal erred in not making an award for consequential losses as claimed. This related in particular to loss associated with the claimant being unable to complete the Knowledge, which he says he would have been able to do promptly, had the respondent paid him at the proper rate. He also claims for penalty charges that he incurred in relation to unpaid utility accounts. The claimant says that the tribunal erred in reaching its decision on these claims on the footing that he had not had any work since his relationship with the respondent ended in September 2016 until the date of the hearing in February 2020. Not only was this not true, but it was not the case that he advanced before the tribunal. He *had* had other work, and indeed that was in the public domain because of litigation that he had been involved in, in relation to work that he had done since the end of his relationship with the respondent. He also sought to challenge the tribunal's conclusions that he had not taken sufficient steps to find other employment in the succeeding years.

22. Ground 5 related to the calculation of the amount of a week's pay in this case. The claimant said that in relation to the earlier award in respect of the holiday pay claim, the respondent had agreed the underlying rate of a week's pay. It could not thereafter properly be permitted to rely upon a different figure for the rate of a week's pay at the subsequent hearing in February 2020, for the purposes of the national minimum wage calculation. The figure that underpinned the award of holiday pay was £414.54 per week. The respondent had sought to rely on a different figure at the February

2020 hearing, and the tribunal had made its award at that hearing on the basis of a rate of £465 per week. But, he submitted, the respondent was estopped from changing its position on this.

23. His second point under this ground was that, the tribunal having determined as part of the outcome of the February 2020 hearing that the applicable rate of a week's pay was £465, it should then have revisited the earlier holiday pay calculation using *that* figure, as there could only be one figure for a week's pay, with the same formula underpinning both issues.

24. The claimant also had a point about the burden of proof, but this substantially arose in relation to what we will call ground 6, which concerned the tribunal's approach to the question of cancellations and no shows. The claimant contended that the tribunal had erred by accepting the evidence of Mr Bansal on this subject as the basis for its decision. Essentially, he said that there were three errors. The first was that the tribunal failed to have regard to the burden of proof, which, under section 28 **National Minimum Wage Act 1998**, lies on the respondent to show that it has paid at the national minimum wage rate, rather than on him to show that it has not.

25. Secondly, he said that the tribunal should not have relied upon Mr Bansal's evidence in circumstances where the respondent had been under a duty to keep records which would have shown the true position in this regard, but where it had failed to produce those records to the tribunal or in response to various statutory requests that had been made by the claimant.

26. Thirdly, he said that the tribunal should not have regarded Mr Bansal as a credible witness on this matter when, said the claimant, he (Mr Bansal) had demonstrably misled or, on the claimant's case, lied to, the tribunal. He had done so in particular by putting his name to a pleading asserting that the claimant had, for a certain number of days, been driving uninsured when, on the claimant's case, Mr Bansal knew that was not true; and because he had signed a county court pleading relating

to a claim arising from the car rental, which was wrongly presented in the name of the respondent company, as opposed to its sister company with which the car rental agreement had been made.

Respondent's Answer and Further Matters

27. The respondent put in an answer to the notice of appeal at a time when it was not legally represented and which indicated that it intended to defend the appeal and to rely on the reasons given by the employment tribunal as correct. Although it made certain other points, including about the respondent's financial situation, it did not otherwise address the legal issues to which the appeal gave rise. The respondent also put in a skeleton for the purpose of this hearing, which again did not particularly address the legal issues.

28. However, the day before this hearing a new representative, Mr Nolan of Taxi Law, applied to amend the answer, in particular to raise what amounted to further grounds for resisting the appeal and/or a cross-appeal. This application asserted that a number of the claimant's claims should have failed because of the provision in section 23(4A) of the **1996 Act** to the effect that a wages claim, including a national minimum wage claim, can only cover a period going back two years, ending with the date of presentation of the complaint. The claimant opposed that application and said that in any event the underlying point was unmeritorious.

29. The claimant appeared today in person and Mr Nolan appeared for the respondent. We heard argument on the amendment point this morning. We concluded that the proposed amendment was indeed unmeritorious. That was because the complaint had been raised sufficiently soon, so that going back two years would cover the whole period of the claimant's relationship with the respondent. When we first considered the matter, this was on the basis that the amended particulars of claim could be seen to have raised the complaint that the national minimum wage was not properly paid throughout the period of the relationship when those particulars were presented. That was on 4

February 2018. The claimant in fact, during the course of the hearing, pointed out to us that that complaint had been identified in his original claim form in 2017 as well, which Mr Nolan accepted.

30. Mr Nolan's principal argument had been that that pleading was not sufficient to identify the complaint without any further particulars, but we do not agree. The only requirement in section 23(4A) relates to time being counted back from the presentation of the complaint. It does not require all the particulars of the complaint to have been given for these purposes. Having regard in particular to the fact that it was unmeritorious, but also in view of its lateness and the point not having been raised in the tribunal, we therefore refused this application to amend.

31. In the claimant's skeleton argument for this hearing, he raised an additional point over and above the six grounds that we have identified. This was that the tribunal erred in failing to consider whether its award of one week's pay for wrongful dismissal should have been uplifted under section 207A **Trade Union and Labour Relations (Consolidation) Act 1992** on the basis of non-compliance by the respondent with a relevant ACAS Code. The claimant showed us that he had raised this matter in his skeleton argument for the February 2020 hearing, and he said it was an error for the tribunal not to have addressed it. Mr Nolan opposed the application by the claimant to amend his grounds of appeal to add this point.

Further Argument, Discussion and Conclusions

32. We turn to ground 1 first, relating to the vehicle rental use payments. The pertinent paragraphs of the tribunal's decision are 14 and 20. The core point raised by the claimant is simply that on the undisputed facts found, these were payments on account of his expenditure in connection with the employment. Mr Nolan referred to the history and wider context of this industry. He said that this point potentially had wide ramifications. This was historically a peculiar industry, which was extensively licensed and regulated. It was an industry in which historically those who worked in it

were self-employed and provided their own vehicles, either because they had vehicles of their own which they were able to use, or by making their own arrangements to rent them, as the claimant did in this case. This context was important and a different and distinct approach was required.

33. However, we observe that, in this case, it was indeed the respondent's original contention that the clamant was neither an employee nor a worker, and on that basis he would not have been entitled to the national minimum wage at all. But by the time of the hearing with which we are concerned, the respondent had lost that argument. The tribunal had found that the claimant was an employee of the respondent and therefore was entitled to the national minimum wage. The issue that the tribunal now had to decide was simply about the correct approach to the calculation of the national minimum wage, in accordance with the **2015 Regulations**, given that the claimant was an employee. The only issue that we need, or are able, to decide is whether the tribunal erred in law in its approach to that.

34. The tribunal's reasons for concluding that this deduction was not allowable in the calculation was essentially because it would have been open to the claimant to perform the service by providing his own vehicle. But the tribunal had found, plainly correctly, at paragraph 14 of its decision, that, one way or another, the claimant was required to provide a vehicle, whether his own vehicle or one that he rented, to perform the services that he was employed by the respondent to perform. The claimant referred us to numerous provisions of his contract to that effect.

35. The claimant is correct that the relevant legal test was whether the expenditure on renting a vehicle was in connection with the employment, and, which was not disputed, not reimbursed by the respondent. The fact that the claimant could have met his obligation by using his own vehicle, if he had one, is not relevant to the application of that test. What was relevant was whether the expenditure incurred by the claimant was in connection with the employment.

36. It did not, in fact, have to be a requirement of the employment. It neither had to be necessarily incurred, nor wholly or exclusively incurred. The test that Parliament has determined appropriate in the context of a national minimum wage calculation is whether the expenditure is in connection with the employment. The tribunal did not apply that test, but decided the matter on a different and irrelevant basis; and it erred in doing so. It appears to us that, had the tribunal applied the correct test on the facts found, it could only have concluded that this expenditure was incurred in connection with the employment, and we will accordingly allow ground 1 and substitute a decision to the effect that the vehicle rental expenditure was allowable as a deduction when calculating the national minimum wage under regulation 13.

37. We turn to ground 2 relating to the uniform. Mr Nolan again made similar submissions about the peculiar nature of this industry, adding in relation to the uniform that there was an element of public protection involved. But once again our focus was, and had to be, on whether the tribunal erred in law in its approach to the national minimum wage calculation, given the prior conclusion that the claimant was an employee of the respondent. The basis of the tribunal's decision, that this item was not allowable, at paragraphs 15 and 21 of its reasons, was that wearing the uniform was optional and only needed if the claimant was doing a certain level of work.

38. However, once again the claimant correctly submits that the test is one of connection with the employment, this time under regulation 13(1): deductions made by the employer, or payments made by or due from the worker to the employer, as respects the worker's expenditure in connection with the employment. As a matter of fact (this appears not to have been disputed) the claimant was designated a 'gold driver' and was required as such to wear the uniform; but in any event he plainly wore this uniform in connection with the employment and that was why he rented it. The tribunal once again has determined the matter on an erroneous basis and, had it correctly applied the law to

the undisputed facts, it would have been bound to conclude that this expenditure fell within regulation 13(1). Accordingly ground 2 succeeds and we will substitute a decision to that effect.

39. Ground 3 relates to the failure of the tribunal to make a declaration that the claimant's claim in relation to holiday pay was well-founded. As we have noted, the holiday pay judgment was in fact given on an earlier occasion by a different tribunal; however, the claimant showed us that in his submission to the February 2020 tribunal, they were invited to revisit that decision and make a declaration.

40. We do not consider that it was an error of law for the tribunal to fail to do so. In November 2019 the tribunal had not found the holiday pay complaint to be well-founded. Rather, it had exercised its power to give a judgment by consent under rule 64 of the **Employment Tribunals Rules of Procedure 2013** which provides:

> "If the parties agree in writing or orally at a hearing upon the terms of any order or judgment a Tribunal may, if it thinks fit, make such order or judgment, in which case it shall be identified as having been made by consent."

41. Both the minute of the hearing in November 2019 and the wording of the judgment show that this was plainly what this tribunal did on that occasion. It would have been open to the parties to have invited the tribunal on that occasion to make an order by consent, including a declaration, although the tribunal might or might not have considered that appropriate in circumstances where it had not actually independently adjudicated the holiday pay claim. Be that as it may, no declaration was made and the matter was dealt with by consent. It is clear that the tribunal did not in fact adjudicate the point, and did not in fact determine that the complaint was well-founded.

42. Whilst the claimant says that his mind was focused at that time on the financial aspect and he did not feel able to delay dealing with the matter, it is not open to him to seek in this appeal to go behind the terms of this consent order, which was effective and binding on the parties. There was no

proper basis for the employment tribunal in February 2020 to revisit a consent order to add a declaration, and indeed none on which a declaration could properly have been made, given that the tribunal had not adjudicated this complaint as being well-founded as such. Ground 3 therefore fails.

43. We turn to ground 4 relating to the consequential loss claim, which was unsuccessful before the tribunal. Mr Nolan made two principal submissions about this. Firstly, he said that the issue essentially was one of causation and remoteness. The tribunal had to decide whether the losses claimed were attributable to the failure to pay the national minimum wage on the relevant occasions. That gave rise to a causation test. The tribunal was entitled to take a view on the facts of this case that that test of causation, as between the failure to pay the national minimum wage and the losses claimed by the claimant, was not satisfied. Secondly, he said that this was not a matter with which the EAT could interfere. That judgment was one for the tribunal to make, based on the evidence and the facts presented to it.

44. As to this, the claimant says that the starting point was that the failure to pay the national minimum wage occurred in the period from February to September 2016, and the question for the tribunal was whether the losses that he claimed were attributable to that failure. We interpose that in addition, had the tribunal so found, it would also then have to consider what amount it considered appropriate to award, which is an additional test. In this case, the claims related to two losses the claimant said he had incurred. One related to the Knowledge, where he told us that the position was that the longstop for him to complete the final test was 17 August 2018. He said his case was that, had he been paid properly, he would have been able to fund the necessary steps during an initial six-month period.

45. The second matter related to utility penalties, where the claimant put into our bundle an extract from his witness statement identifying certain penalties as having been incurred between May and

November 2019, although he told us in submissions, and we accept, that penalties with another utility company were incurred in June 2017, which was referred to earlier in his witness statement. He says his case is that those penalties, although imposed in those time windows, were referable to arrears that first arose during the period when he was working with the respondent.

46. We observe that whilst the tribunal uses the term 'mitigation', the issue which it is really addressing in its decision in paragraph 31 is indeed one of causation. The tribunal proceeds there, however, on the understanding that the claimant asserted that he had been unemployed since leaving the employment of the respondent. The claimant told us that not only was this not the case, but he had not made any such assertion to the tribunal. What he had said was that he was unemployed at the time of the hearing in February 2020.

47. Mr Nolan had Mr Bansal sitting in court with him today and we were not told that the claimant's account of the evidence that he gave on this was disputed or not correct. It does appear to us therefore that the tribunal did reach its conclusions on this complaint on a mistaken and erroneous factual basis. This indeed appears to be in part what has led it to focus particularly on the claimant's work situation over the period described, although it may be that this was also to do with the dates on which the claimant was saying that the particular penalties had been incurred and/or the date that was the longstop for him to complete the final stages of the Knowledge. Be all of that as it may, the tribunal does appear to have proceeded on an erroneous factual basis. We have therefore concluded that this part of the tribunal's decision is not safe and that this ground of appeal should be allowed and the matter should be remitted to the tribunal for fresh consideration.

48. It will be for the tribunal, upon fresh consideration, to consider whether the financial losses claimed by the claimant are attributable to the failure to pay the national minimum wage rates in this case and, if so, what amount the tribunal considers it appropriate to award to the claimant in that

connection. It may be said that these claims look fairly ambitious, given what we have been told about them and the relevant timescales, and the fact the claimant did in fact have other work after his employment with the respondent ended. The evaluation of all of the full picture will be a matter for the tribunal and is not for us; but we consider it important that upon a fresh hearing, the tribunal have a clear account of how the claimant puts his case on this point, and clear evidence, such as is relied upon by him in relation to it, in order to adjudicate the matter fairly.

49. We turn to ground 5 relating to a week's pay. In relation to the estoppel point, we do not agree that the tribunal should have regarded the respondent as being obliged to proceed at the February 2020 hearing on the basis of the weekly rate that the claimant says informed the earlier calculation of holiday pay. The tribunal had not made any adjudication about that weekly rate, nor had the respondent made any specific concession in relation to it. The respondent had conceded the amount of holiday pay to be awarded as stated in the tribunal's judgment. It does not follow from the fact that the claimant can show that a certain weekly pay figure was used to arrive at that figure, that therefore the respondent was also conceding that that figure was the correct figure for all purposes.

50. Further, and in any event, the judgment had stated in terms that the concession the respondent was making was in relation to holiday pay only. It would require an explicit and unambiguous concession by the respondent, that a certain figure was the correct figure for weekly pay, for the respondent to be in a position where it would be estopped from resiling from that concession. The tribunal was not wrong to treat it as not estopped in this respect. Nor was there any basis to say that the tribunal should have revisited and reopened the holiday pay judgment that had been made on a previous occasion by consent, because at the February 2020 hearing the tribunal hearing had come to a different figure for a week's pay from the one which the claimant says lay behind the holiday pay consent judgment. Once again, there was no concession that could properly be relied upon for that

purpose. The earlier judgment was made by consent and there was no adjudication or finding on the previous occasion as to the correct calculation of a week's pay. Ground 5 therefore fails.

51. We turn to ground 6 relating to the tribunal's conclusions regarding cancellations and no shows. The tribunal, at paragraph 6, referred to evidence that it heard from Mr Bansal, that a driver can press a button on the app when there is a cancellation or a no show, which will result in the position being logged by the software. The tribunal also referred to the claimant's case. In paragraph 7 the tribunal referred to the evidence from both sides being in some respects unsatisfactory. The tribunal noted the burden of proof and its implications expressly in paragraph 7. It identified that the respondent did have, and had produced, records from its software, in paragraph 8. It went on to say that it accepted Mr Bansal's evidence, specifically that the claimant could log into the app and log a cancellation or a no show; and that, together with its conclusions in relation to the software evidence, that led to its ultimate conclusions on this point (see also paragraphs 10 and 11).

52. In our judgment, the tribunal has considered carefully here all of the different sources of evidence available to it on this point, and indeed identified some shortfalls in the evidence on both sides. It has taken on board the burden of proof and it has come to a finding based on the evidence before it that it was entitled to reach. It is not arguable that the tribunal erred by failing to apply the burden of proof. It specifically referred to it and ultimately it had to make a finding of fact, weighing up the various elements of the evidence available to it. The tribunal also referred specifically to the fact that there were unsatisfactory aspects of the evidence on both sides. It was for the tribunal to consider what it made of the shortfalls in evidence presented to it and how these contributed to its overall picture on this point. It was also for the tribunal to weigh up the credibility of the witnesses before it. It was the tribunal that heard them give evidence, in particular Mr Bansal. It does not follow, even if a witness may be considered by the tribunal to lack credibility, or for there to be concerns

about their credibility, in relation to one matter, that a tribunal is therefore bound to disbelieve or discount their credibility in relation to another matter. All of this is for the appreciation of the tribunal.

53. The fact that the claimant was not obliged to keep records on this matter does not mean that it was an error for the tribunal to refer to the fact that he had not produced such records. Had he been able to do so, the tribunal might have considered that added more weight to the evidence on his side. Overall, these were all matters for the appreciation of the tribunal. The claimant clearly feels strongly that the tribunal should have not given Mr Bansal any credit at all, should have accepted his own evidence as outweighing that presented by the respondent, and should have regarded the deficiencies in the respondent's evidence as decisive in his favour. But it was a matter for the appreciation of the tribunal. It sufficiently addressed these points in its decision. We cannot interfere. This ground therefore fails.

54. We come finally to the additional ground that the claimant sought to add by amendment to his notice of appeal, relating to the failure to consider his submission for an ACAS uplift in relation to the wrongful dismissal award. Whilst Mr Nolan argued that we should not permit the claimant to amend his ground on the basis that it had been raised only in his skeleton argument, Mr Nolan did not suggest that there would be any particular difficulty in the respondent addressing or responding to it, and he did not make any further submission indeed as to why this ground was wrong or not arguable.

55. It appears to us that this ground is in principle correct. The claimant is correct to say that a wrongful dismissal complaint is among those listed in the relevant schedule, so that it can potentially, where successful, give rise to an uplift award under section 207A. It was not disputed that the claimant had in his skeleton asked the tribunal to make such an award, and not disputed that the tribunal failed to deal with this in its decision. That was an error on the tribunal's part. We should be clear that this

does not mean that the tribunal would have been bound to make such an award, or to make such an award in any particular amount. But it was an error to fail to consider it.

56. We do not consider that we should refuse to permit this ground to be run because it was raised late. We are mindful that we refused this morning to permit a late amendment to the answer and/or cross-appeal by the respondent, but each such application is considered on its own merits and there are two differences, we would observe. One is that the claimant did run his point in front of the employment tribunal. The ground of appeal indeed is that it was not addressed despite him raising it. And the second is that, whilst we concluded that the respondent's proposed point simply was not meritorious, the claimant's point is certainly at least arguable. We will therefore permit the amendment and allow this ground of appeal and remit this matter for consideration to the tribunal.