EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109318/2021 (V)

Held remotely in Glasgow by CVP on 11 and 12 October 2021, with deliberation in chambers on 13 October 2021

Employment Judge: Ian McPherson

Mr Scott Baptie	**Claimant** **In Person**
Mr Mark Hutchison **Trading as 3D Transport**	**Respondent** **In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) The claimant resigned from the respondent's employment on 19 February 2021, giving one week's written notice, and the effective date of termination of his employment by the respondent was 26 February 2021.

(2) The claimant was not dismissed by the respondent, and his complaint of automatically unfair dismissal by the respondent, contrary to **Section 100 of the Employment Rights Act 1996**, is not well founded, and accordingly it is dismissed by the Tribunal.

(3) Further, the claimant was paid his wages and holiday pay outstanding at the effective date of termination by the respondent, and the complaints of unlawful deduction from wages, and / or failure to pay holiday pay, are not well founded and, accordingly, those heads of complaint are also dismissed by the Tribunal.

REASONS

Introduction

1 This case called before the Tribunal, sitting as an Employment Judge sitting alone, for a 2-day Final Hearing conducted remotely by CVP, the Tribunal's video conferencing facility.

2 By ET1 claim form presented on 29 April 2021, the claimant complained of unfair constructive dismissal, and that he was owed arrears of pay and holiday pay, following the termination of his employment with the respondent. He alleged that he had been led to resign from the respondent's employment for health and safety reasons.

3 The claim was defended by the respondent by ET3 response presented on 25 May 2021. After Initial Consideration by Employment Judge Robert Gall, on 2 June 2021, the case was allowed to proceed, and that Judge ordered that the case be listed for a Telephone Conference Call Case Management Preliminary Hearing to clarify the basis of the claim, in particular where the claimant did not have 2 years' qualifying service, although he made reference to what appeared to be health and safety issues.

4 The case thereafter called before Employment Judge Alan Strain for that Telephone Conference Call on 2 July 2021, at which Judge Strain clarified that the claimant was complaining of automatically unfair dismissal contrary to **Section 100(1)(d) and (e) of the Employment Rights Act 1996**.

5 Judge Strain issued a written Note and Orders, dated 2 July 2021, and sent to both parties by the Tribunal on 6 July 2021, and they included an Order that the claimant should provide Further and Better Particulars of all of his heads of claim, as well as a Schedule of Loss, detailing the basis upon which he had calculated his sums sued for, being failure to pay 16 weeks pay at £575 per week, failure to pay overtime of £700, and failure to pay holiday pay of £100.

6 The claimant answered that Order from the Tribunal by an email to the Tribunal, on 22 July 2021, sent at 22:15, entitled "***Schedule of Loss Scott***

Baptie", in which he quantified his monetary claims against the respondent as lost wages/shortfall of **£10,400**; overtime of **£720**, and holiday pay of **£74**.

7 Subsequently, the claimant varied those amounts, by further email of 7 September 2021, stating he had suffered wage loss of **£11,500 (**minus **£1,000** on temporary work), **£720** overtime, and **£100** holiday pay, totalling **£11,320.** Thereafter, by email of 26 September 2021, the claimant provided a "***financial update***", stating that he was left ***"£9843 out of pocket since being left with no option but to resign de to health and safety."*** This is the amount of compensation that he sought from the respondent at this Final Hearing.

8 The respondent intimated his response to the claimant's Further and Better Particulars, and Schedule of Loss by email of 12 August 2021, where he disputed liability for any unfair dismissal, and submitted that there were no sums outstanding to the claimant at termination of his employment with the respondent. The respondent maintained that position at this Final Hearing when appearing and opposing the claim brought against him.

Final Hearing before this Tribunal

9 This Final Hearing was conducted remotely by me sitting in my chambers at Glasgow Tribunal Centre, and both parties attending remotely by the Tribunal's CVP (Cloud Video Platform) facility. As such, it was held in public in accordance with the Tribunal's Rules of Procedure, and it was conducted in that manner because a face to face, in person Hearing was not considered appropriate in light of the restrictions in place to deal with the Coronavirus (Covid 19) pandemic. It was in accordance with the Tribunal's overriding objective to do so, there being no objection by either party.

10 Employment Judge Muriel Robison made standard Case Management Orders for a CVP Final Hearing on 22 July 2021, and these were issued to both parties, including Orders about documents and details of the claimant's financial loss. Notice of Final Hearing by CVP was issued by the Tribunal to both parties on 31 August 2021, reminding parties that

where, as here, CVP Orders had been issued previously, parties should prepare for the Final Hearing as per those Orders.

11 While Employment Judge Strain had, on 2 July 2021, made Case Management Orders for a Joint Bundle of Documents to be lodged, and a black, A4 size ring binder folder was lodged with the Tribunal on 24 September 2021, with separate sets of productions for each of the claimant, and respondent, respectively, rather than a single Joint Bundle, those productions were separately labelled, and there was no consecutive numbering of the entire Bundle.

12 Despite a clear and unequivocal Case Management Order to that effect, parties had not jointly prepared a single set of documents, in chronological order and with numbered pages, incorporating all documents intended by both parties to be referred to at this Hearing. Further, the A4 ring-binder folder provided did not include the claimant's email and attachments of 26 September 2021 at 19:05 to the Tribunal, and it had to be added to the papers available to me during the course of this Final Hearing.

13 Further, additional documents referred to by one or other of the parties, in giving their oral evidence to the Tribunal, that had similarly not been intimated in the original sets of documents for use by the Tribunal, were received and added to this folder. Though late, I allowed these additional documents to be received as they were clearly relevant to the consideration of the issues before the Tribunal for judicial determination. Where appropriate, I detail those additional documents in my findings in fact.

14 In addition to this documentary evidence, the Tribunal heard oral evidence from each of the claimant, and respondent, in turn. As both parties were not represented, they each agreed that evidence in chief should be elicited by a series of structured and focused questions asked of each in turn by me as the presiding Judge, and the witness then cross-examined by the other party. This method was considered appropriate having regard to the Tribunal's duty to deal with the case fairly and justly, and to take account of the fact that the Tribunal was dealing with two unrepresented, party litigants.

15 Again, while the Tribunal received short oral closing submissions from both parties, after the close of the evidence led, it was agreed to give them an adjournment, after close of the evidence, to prepare a short written closing statement, which the Tribunal received, and neither party made any further submission to the Tribunal in this regard, having seen the other party's short written closing statement. There was no expectation, on the Tribunal's part, that as unrepresented parties, they would make closing submissions as might be expected from professional representatives.

Issues for the Tribunal

16 While Employment Judge Strain had conducted the Telephone Conference Call Case Management Preliminary Hearing on 2 July 2021, there was no agreed List of Issues before the Tribunal at the start of this Final Hearing. As such, as presiding Judge, I spent some time, in discussion with both parties, before taking their oral evidence, clarifying the issues in dispute, before the Tribunal proceeded to take evidence from both parties. Both the claimant and respondent gave their evidence on affirmation, and each was cross-examined by the other party. I heard from the claimant first, and then from the respondent.

17 The issues identified in discussion with the parties for determination by the Tribunal at this Final Hearing were as follows: -

a) *Was the claimant dismissed by the respondent, or did he resign?*

b) *What was the effective date of termination of the claimant's employment with the respondent?*

c) *If the claimant was dismissed, was his dismissal automatically unfair for either of the pled heads of complaint of automatically unfair dismissal contrary to* ***Section 100(1)(d) or (e) of the Employment Rights Act 1996****?*

d) *In the event the claimant satisfied the Tribunal that he was automatically unfairly dismissed by the respondent, the Tribunal noting that he did not seek to be reinstated, or re-engaged by the respondent, what compensation should be awarded to him for unfair dismissal?*

e) Were there any amounts of unpaid wages, and / or holiday pay, due to the claimant at the effective date of termination of his employment with the respondent and, if so, what sums (if any) should the Tribunal order the respondent to pay to the claimant in that regard?

Findings in Fact

18 There was a degree of conflict in the evidence heard by the Tribunal. I found the following facts proved, on the balance of probabilities, after considering the evidence led before the Tribunal, both oral and documentary, and after taking into account the brief closing submissions made by both parties.

19 I have not sought to set out every detail of the evidence which I heard, nor to resolve every difference between the parties, but only those which appear to me to be material. My material findings are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

20 On the basis of the evidence heard from the claimant and respondent, and the various documents spoken to in evidence, and included in the Bundle provided to me for this Final Hearing, along with the additional documents lodged in the course of this Hearing, I have found the following essential facts established: -

(1) The claimant, aged 51 years at the date of this Final Hearing, was formerly employed by the respondent as an HGV Driver, working from the Tarmac depot at 279a Shettleston Road, Glasgow.

(2) Prior to starting in the respondent's employment, the respondent assisted the claimant to sit the required assessments for Tarmac, and provided him, at the respondent's expense, with safety training courses, and an on-board tablet to escalate any safety related issues to Tarmac.

(3) The claimant's employment by the respondent commenced on 27 July 2020, and ended on 26 February 2021, after he had

given one week's notice of resignation to the respondent, on 19 February 2021, by text, copy produced by the respondent, as document RDCNO1, sent by the claimant at 13:10 on 19 February 2021 and stating: ***"Just giving the weeks notice as discussed earlier. Last day Friday 26. Cheers."***

(4) The text was preceded by a discussion, on the Tarmac site, on 19 February 2021, when the respondent had attended to assist the claimant in addressing a problem on the claimant's vehicle with a handle on the back of the concrete mixer that had fallen off the back of the claimant's truck. After the temporary repair had been done, at McPhee Mixers, the claimant there and then indicated that he wanted to leave the respondent's employment. Nobody else was present during their brief conversation, although other people were coming and going on the site, while they were both there.

(5) The respondent asked the claimant to confirm in writing, as per his contract of employment, which he did by that text. While his contractual period of notice was one month (as per clause 19 (notice of termination) of the claimant's written statement of terms ands conditions of employment, copy produced to the Tribunal by the respondent as an additional document, the claimant only gave one week's notice of leaving his employment, and he worked the week to 26 February 2021.

(6) In his oral evidence to the Tribunal, the claimant stated that, having been on site for about 1.5 to 2 hours that morning, and having seen the repair to the handle done by Mr Hutchison, he was not happy with it, as the repair to the handle was not secure, and there still was an ongoing situation with the platform not being safe.

(7) As he stated that he had spoken to the respondent in person on site about these matters, the claimant stated that he saw no point in putting his health and safety concerns in writing to the respondent when resigning by text. He added that he did not put

his concerns in writing, nor raise them elsewhere, including Tarmac, as Mr Hutchison "***is the company***", and he did not work for Tarmac.

(8) The effective date of termination of the claimant's employment with the respondent was agreed between the parties at this Final Hearing as being 26 February 2021, notwithstanding the P45 issued to the claimant stating 5 March 2021. A copy of that P45 was produced to the Tribunal as an additional document from the respondent.

(9) The respondent, who trades as 3D Transport, has a small staff, currently 7 employees, including drivers, who worked at the Tarmac depot. The respondent is a private individual, who has been engaged in the transport and haulage business, for more than 20 years. He has contracts in the construction industry, with Tarmac, and his business also does deliveries for Curry's electric stores. He operates his business under an operator's licence from the Traffic Commissioner for Scotland. He has no permanent business address, and runs his business from his private, home address.

(10) The claimant's employment with the respondent was initially on a probationary basis, for 3 months, and when that probationary period expired, the probationary period was not extended, and the claimant continued to work for the respondent as he had done since 27 July 2020.

(11) There was produced to the Tribunal by the respondent, as an additional document, a full copy of the 11-page written statement of terms and conditions of employment issued by the respondent to the claimant, and signed by both parties on 4 August 2020.

(12) While the claimant stated in evidence that he did not remember signing it, he believed the respondent's evidence that he had done so on 4 August 2020, although his recollection was that he had received something after his probationary period of 3 months had ended, on or about 27 October 2020. After he was shown

the signed copy, produced by the respondent, the claimant stated that his signature did not look like this signature, but he was not saying that he had not signed it.

(13) This full 11 pages superceded the one-page document REC01, produced by the respondent in his original folder, which was only page 3 of 11. References therein to "***the Company***" are a misnomer, as the respondent is a sole trader, and his business is not incorporated as a private limited company.

(14) While clause 1 of that written statement of terms and conditions of employment stated that the claimant's period of continuous employment with 3D Transport would commence on 27 October 2020, parties were agreed, at this Final Hearing, that the claimant had been continuously employed by the respondent from 27 July 2020, the start of his employment and the start of his 3-month probationary period.

(15) In terms of clause 5 of that written statement of terms and conditions of employment, it was provided as follows: -

> "*Your basic rate of pay will be £110.00 per day any hours worked over 50 in a single 5-day week (Monday – Friday) will be paid at an additional hourly rate of £11.00. You will be required to work every second Saturday, you will receive a payment of £50.00 for work carried out between 7am and 12pm and an additional £11.00 per full hour worked after 12pm on any Saturday that you are on duty. You will be paid weekly in arrears by BACS to a bank or building society account of your choice."*

(16) Clause 6 of that written statement of terms and conditions of employment, related to the claimant's hours of work. It provided as follows: -

> "*The Company works 6 days throughout the year, except for a number of holidays that are specified in advance. Therefore, your hours will be worked on any day of the week*

according to a rota system. Hours of work will be rostered as far in advance as possible. As the amount of work on any particular day is variable, there are no normal hours of work. Unless otherwise specified, your normal start time each day is 7.00am and your normal finishing time is when the day's tasks assigned to you have been satisfactorily completed. You will be required to take rest breaks in line with Working Time and Tachograph Regulations. Our aim will be to provide you with 22 days' work per 4-week period."

(17) Holidays were dealt with at clause 8 of the written statement of terms and conditions of employment, which provided as follows: -

"The Company's holiday year runs from 1 January to 31 December. In addition to the 8 normal public holidays you are entitled to 20 normal working days as holiday in each holiday year at your normal basic rate of pay, making a total of 28 days. If your contracted hours are less than 40 per week then your holiday and bank holiday entitlement will be pro-rated accordingly. Plants will be closed for two weeks over the Christmas and New Year period. Holiday entitlement will be used to cover this period. A maximum of 10 days holiday can be taken at any one time… Unused holiday entitlement may not be carried forward to the next holiday year. You will not be entitled to payment in lieu of any unused holiday other than on termination of your employment from either party. If your employment commences or terminates part of the way through the holiday year, your entitlements to holidays during that year will be calculated on a pro-rata basis. Deductions from final salary due to you on termination of employment will be made in respect of any holidays taken in excess of entitlement. During your first year of employment, your holiday entitlement will accrue monthly in advance at the rate of one twelfth of the annual entitlement."

(18) When working for the respondent, at the Tarmac site, and deliveries to other places from that site, the claimant drove an HGV vehicle, being a 32-ton cement mixer truck, with an 8-metre drum attached to it. At the rear of the truck, there was a platform for the truck driver to stand on when washing down the drum of the cement mixer.

(19) Maintenance and security of the respondent's vehicles was dealt with at clause 16 of the written statement of terms and conditions of employment. In terms thereof, the claimant agreed to keep the vehicle in a clean and tidy manner, to ensure that it was properly secured and maintained at all times by carrying out daily checks, and two examples of daily checks were produced to the Tribunal by the respondent at documents RCS01/RCS09, dated 28 July 2020, and 26 February 2021.

(20) These daily checks were "***walk round***" checks to be done by the driver on the respondent's vehicle, and answers uploaded by the claimant onto an application with a check recording system called "***Checked Safe***". The system records the times of the walk around, and where on the vehicle, the check driver is at the time of inspection, shown by compass direction.

(21) It operated on a traffic lights system, with green for pass, amber for defect, and red for a fail. If there was a defect, or fail, the system would alert the respondent. The claimant always gave green passes. If an unsafe vehicle was on the road, then there was the possibility of a Police Officer or DVLA check, and penalty points and possible fines for the driver, and the respondent as operator, if a vehicle was found to have a defect.

(22) The claimant routinely passed the required checks on the vehicle he was using as being safe to use, and he never informed the respondent timeously of any defects, or the vehicle being overweight, affecting the safety of the vehicle that required urgent attention by the respondent on account of being harmful, or potentially harmful, to health and safety, or as a serious and

imminent danger to the claimant or others. He stated that if he did not contact the respondent, it was because he, the claimant, was busy during the working day. The only health and safety issue that the claimant ever raised with the respondent was the lighting issue, on a site, and that was 2 days after the event in January 2021.

(23) In his oral evidence to the Tribunal, the claimant admitted that he knowingly ticked items as a pass, at daily checks at around 07:00am, even if they were not, and should have been recorded as a defect, or fail, as the respondent already knew about the vehicle's problems, and the claimant saw no point in going through the check process to tell Mr Hutchison what he already knew from him.

(24) In cross-examination by the respondent, the claimant stated that for any other employer, he would have ticked any damage / defect as a fail, but not for the respondent, and he stated that he ticked the vehicle check lists as knowing it was a false report, as he stated there was no point in doing otherwise, when he had spoken to the respondent about matters multiple times, but he alleged the respondent did not listen. He disputed the fact that the vehicle had passed a MoT test meant it was safe, and while the vehicle was assessed as roadworthy, he insisted that the platform was not safe to climb up and into.

(25) In terms of clause 34 of the written statement of terms and conditions of employment, the respondent agreed to take all reasonable practical steps to ensure the employees' health, safety and welfare at work, and the claimant, as an employee, had to familiarise himself with the respondent's health and safety policy and procedures in relation to health and safety at work, and to comply with the procedures at all times.

(26) It was also the claimant's legal duty to take care of his own health and safety and that of his colleagues, customers and visitors, and Clause 34 provided that a copy of the respondent's health

and safety policy had been given to him and updates would be provided and displayed on notice boards.

(27) In terms of clause 39 of the written statement of terms and conditions of employment, the respondent reserved the right to make reasonable changes to the claimant's terms and conditions of employment after consultation and reasonable notice, and these would be confirmed to him in writing within one month of the change. No changes to the claimant's terms and conditions of employment were made by the respondent, and no notice of any change was provided to the claimant.

(28) Finally, in terms of clause 40 of the written statement of terms and conditions of employment, the claimant signed that document, on 4 August 2020, on page 11 of 11, stating that he had read, understood and accepted the terms and conditions of employment as stated in that document and the policies referred to within it, and that he accepted that the terms and conditions contained in that written statement replaced in their entirety all existing terms and conditions, agreement and arrangements whether in writing or otherwise.

(29) While the respondent paid his other employees 4-weekly, he agreed with the claimant, prior to him starting his employment, that he would be paid weekly by BACS transfer. There was a dispute between the parties, at this Final Hearing, as to the claimant's normal working hours, and his weekly gross and net pay, while employed by the respondent.

(30) The claimant stated, in his ET1 claim form, that he had been employed from 25 July 2020 to 5 March 2021 as an HGV Driver, averaging 50 hours per week, and being paid £575 per week before tax (gross).

(31) The respondent produced, as document RHW01, a record of the claimant's hours worked for the respondent, during the 31 weeks of his employment, between 27 July 2020 and 27 February 2021, showing that the claimant's hours worked varied from week to

week, and that he worked 9 out of 31 Saturdays, and for the first 17-week reference period, he averaged 32 hours per week, while for the period to end of week 31, he averaged 38 hours per week.

(32) This record of hours worked, produced to the Tribunal by the respondent, was stated by him to be based on the claimant's tachograph records accessed by the respondent. While, in his oral evidence to the Tribunal, the claimant challenged the accuracy of the respondent's document, which had first been emailed to him by the respondent, with copy to the Tribunal on 6 September 2021, as part of the respondent's evidence, the claimant did not produce any alternative record of his hours worked for the respondent, to put to the respondent, in cross-examination, to challenge the respondents' document RHW01.

(33) The claimant stated, in cross-examination, that he did a lot more than 9 Saturdays, but added that he couldn't challenge the respondent's paperwork as he, the claimant, did not have the proper paperwork in front of him at this Hearing. He did not challenge Mr Hutchison's oral evidence that in preparing his document for the Tribunal, he had accessed the tachograph information related to the claimant.

(34) The claimant simply asserted in his evidence to the Tribunal that the hours he worked were probably not what Mr Hutchison had recorded, as the claimant felt that he worked a lot more, saying that he did 50 hours every week, multiple times not finishing until 7:00pm, and this would be shown on the Tacho Master site for his tachograph recordings, but he did not have access now to those recordings.

(35) The claimant produced, as his document CBS01, a screen print of a letter from his bank (HSBC UK) dated 28 February 2021 showing all payments made to him by the respondent, 3D Transport, between 25 July 2020 and 28 February 2021.

(36) This document excluded his final pay from the respondent, on 5 March 2021, in the sum of £550 gross, for 5 days basic pay, less

PAYE tax and NI, to give £442.85 net, as per the copy payslip dated 5 March 2021, produced to the Tribunal as an additional document from the respondent.

(37) The respondent also produced to the Tribunal, at documents RBS01/RBS03, a record of payments made to the claimant from the respondent's bank (Royal Bank of Scotland) between 10 August 2020 and 1 February 2021, annotated to show the day of the week on which the payment of wages was made to the claimant.

(38) The claimant produced to the Tribunal, as document CPS01, his payslip, dated 25 December 2020, showing a payment of £550.00 gross in respect of holiday pay.

(39) There was added to the documents produced to the Tribunal, by the respondent, a copy of the claimant's final payslip from the respondent, dated 5 March 2021, with no payment made in respect of holiday pay. It confirmed his basic pay at the rate of £110.00 per day, being £550.00 per week gross.

(40) Following termination of his employment with the respondent, on 26 February 2021, the claimant took steps to secure new employment. He produced to the Tribunal, as his document CJA01, copy email of 24 February 2021, showing an application for temporary work with Manpower UK Limited. This application was made after his notice of resignation, on 19 February 2021, had been sent to the respondent, and before its operative date on 26 February 2021, being the effective end date of his employment by the respondent.

(41) In his email of 6 September 2021 to the Glasgow ET, the claimant stated this was email confirmation that he applied for temporary work after "***I was forced to resign due to health and safety issues".*** At pages 12 to 15 of his email of 26 September 2021, a copy of which was added to the documents provided in his folder, the claimant provided some job applications as drivers applied for by him, being 11 applications for driver jobs submitted

between 2 April and 18 June 2021, where he stated that he heard back from one, and he was not selected for 3.

(42) In his oral evidence to this Tribunal, he stated that, as per his ET1 claim form, he had secured no other job at that stage (date of presentation being 29 April 2021), though he was now in full time, permanent employment with Site Batch, where he had been employed for the last 7 weeks, from around 17 August 2021, as an HGV driver earning £615 per week gross, for a 48-hour week.

(43) The claimant further stated, in his oral evidence at this Final Hearing, that he had been employed, for the four weeks prior to that, by Keedwell, Bothwell, as an HGV driver, at the rate of £500 per week gross, plus overtime, having started there on 16 July 2021.

(44) He made no reference in his evidence to the Tribunal on ever having been employed by Calor Gas, and leaving the respondent's business to start another job delivering gas bottles, as referred to by the respondent, in his response of 12 August 2021, copy produced to the Tribunal as his document RSL01/RSL03. The respondent, in his evidence to the Tribunal, stated that he had been advised of that new job for the claimant by another driver at the Tarmac site, who was an owner / driver of another vehicle at the Tarmac sire, but not one of the respondent's employees.

(45) While his email of 26 September 2021 referred to him claiming Universal Credit totalling **£1718.75**, and those payments by the DWP were clearly shown on his bank statements, between 17 March and 16 July 2021, his further statement in that email, stating that his earnings from other employment totalled **£757.87**, was not capable of verification.

(46) There were various payments in over the period covered by his bank statements from various sources, including Manpower UK, Transactive, www.HL.co.uk, Binance UAB, Hargreaves

Lansdow HLAM, Crypto, Starling, Global Logistics, Stock Must Go Ltd, Foris DAX MT Limited, and Ent Mag Ltd, and it was not highlighted to show what was earnings from other employment.

(47) No vouching documentation was produced by the claimant in respect of either of his two cited recent new employments, or his earnings therefrom, other than his bank statements produced to the Tribunal, as part of his 26 September 2021 email, showed some 4 payments in from Keedwell (Scotland) on 29 July, and 5, 12 and 18 August, totalling **£1,745.24.** The sum paid in by Keedwell was in excess of the sum stated by the claimant as being **£757.87** from other employment.

(48) His bank statements, from March to August 2021, did not cover the whole period up to date of this Final Hearing, as there were no bank statements produced from 1 September 2021 onwards, and those produced were not highlighted to show payments in from other employment, whether temporary, casual, permanent, or self-employed, as required by the Tribunal's case management orders requiring mitigation of loss evidence to be produced by the claimant.

(49) Following termination of his employment with the respondent, the claimant notified ACAS, on 28 April 2021 and they issued their ACAS Early Conciliation Certificate on the same day following which, on 29 April 2021, the claimant presented his ET1 claim form to the Employment Tribunal suing the respondent as his former employer.

(50) At section 8.2 of his ET1 claim form, the claimant set out the background and details of his claim, as follows: -

"*All involve Mark Hutchison 3d transport. Constructive dismissal a steel handle fell off the vehicle between the depot and delivery a new one was provided by mark and he attempted to fit it himself the handle was not secured properly and it fell off again between the depot and a delivery I am unsure of when or where this happened or if any damage was*

done or if anybody was injured. Mark then fitted another one leaving two metal spikes protruding out the back of the truck. 19 and 24 February. Pictures proof. Constructive dismissal there is a platform on top of the truck for cleaning if it is broken and unsafe to stand on. It's about eight feet high. Pictures proof. Constructive dismissal the hgv was overweight after informing mark more weight was added twice. 25 February Pictures proof. Constructive dismissal being sent onto building sites in the dark without any lighting. 21 January. Video proof. Wages I was not paid properly once my wages were up to four days late. Bank statements as proof. Wages no overtime paid. Wages holiday pay average was not paid I worked every second Saturday it was not included. Wage slip proof."

(51) Further, at section 9.1 of his ET1 claim form, the claimant stated that, in the event his claim was successful, he was seeking an award of compensation from the Tribunal and, at section 9.2, when asked to detail the compensation he was seeking, the claimant then stated as follows: -

"Compensation I am looking for is missing wages £575 \ week for eight weeks to date. Overtime estimate £700. Holiday pay average £100. Stress from the day I started employment being late to pay CSA for my four children. Stress being late with my rent and council tax every week and them threatening to take court action against me with added costs. Stress about my licence being endorsed with penalty points and fines and being unable to seek further employment. Stress about my safety and the safety of others. I will be contacting a lawyer for assistance in regards to stress and breach of contract for proper legal representation and costs will follow."

(52) When the respondent lodged his ET3 response, on 25 May 2021, defending the claim, he stated that the dates of employment given by the claimant were not correct, and he stated that the

claimant's employment had started on 27 July 2020, and ended on 26 February 2021. He disagreed with the hours of work claimed by the claimant, and stated that it was on average 40 hours each week, and that the claimant's weekly pay before tax (gross) was £550/£600, while his normal take home pay (net) was £442.65/£476.35.

(53) At section 6.1 of the ET3 response, defending the claim, the respondent set out the facts on which he relied to defend the claim, as follows: -

"1) 19/2/21- Handle fell off truck, Mr Baptie was advised to go to McPhee Mixers for new handle to be supplied and fitted. He went and got handle but didn't get it fitted as instructed. He then returned to depot and advised me that handle needed to be fitted. I fitted the new handle using a bolt and was very secure when fitted. The second handle was not fitted by myself as suggested by Mr Baptie. I was not present. I was informed that the handle had somehow fallen off again and a spare was made available and fitted by Mr Baptie's colleague Mr Henderson. Mr Baptie did not inform me of any concern he had with the fitting of the handle. (statement from A Henderson available).

2) The platform for washing down the drum of concrete mixer received damage prior to Mr Baptie's appointment. This damage was repaired and whole back end of truck was shot blasted and repainted to give Mr Baptie a fresh truck for starting. Mr Baptie performs a walk round check of truck with a app called Checked safe. Page 8 of the check asked about the condition of this platform, on every check done by Mr Baptie he has passed the check as being safe for use. The check is automatically emailed to me once submitted so that I am aware of any defects that need attention. I have never

been informed by any means of any concern Mr Baptie had with platform. (copies of checks available).

3)Over weight vehicle- At no point has the truck been over weight. the truck is a 32 ton mixer truck with a 8 meter drum attached to it. Tarmac instruct us to go to weight bridges to weight truck and this allows them to calculate how much concrete can be loaded in back. They calculated 7.5 cubic meters could be loaded keeping truck in its parameters.
1 cube of concrete weighs around 2.4 ton x 7.5 = 18 ton. Leaving 14 ton for the weight of the truck with fuel and water. The heaviest weight recorded was 13.6 ton. A later weighing recorded 13.5 ton and at this point Tarmac advised that truck could be loaded with 7.6 ton however this has never been done and has always had a max of 7.5 cube loaded. The difference on carrying capacity can be influenced by the driver by ensuring the drum is washed out and not allowing build up of concrete which can add weight. Again I have received no communication from Mr Baptie stating that he has had any concern regarding truck being overweight. I have never told or expected Mr Baptie to risk his licence or my operating licence by driving an illegally over weight truck.

4)Poor lighting- Mr Baptie arrived at a site in Bishopbriggs Glasgow at 5:10pm on 19th January 2021.There is no other record that Mr Baptie visited this site other than on an afternoon. He contacted me on 21st January informing me that there was a lack of lighting for discharging in the evening on this site and asked what he should do. Mr Baptie has been previously instructed that if he ever has any issues to contact Tarmac office or myself so we can make safe. Mr Baptie has passed safety training courses and had a tablet on board with him that he can use to escalate with Tarmac management any safety related issues. Had he contacted someone on the 19th January when on this site he would have been asked if he felt uncomfortable or if there was a

safety issue. If his response was yes he would have been told to abort deliver and reroute to a Tarmac plant where load could be safely discharge. However Mr Baptie waited two days to bring this issue to anyone's attention. When i was informed of situation I immediately reported situation to Tarmac office so issue could be rectified before another truck was sent out when dark.

5) Payments- Mr Baptie was contracted to work up to 50hrs Monday - Friday. In all the weeks he worked for me he never once worked 50 hours Monday to Friday so no overtime was due for his week day work pattern. On his first 17 week reference period he worked an average of 36.5 hours per week. on his second reference period he worked an average of 38 hours per week.(a spreadsheet showing weekly hours worked is available). Mr Baptie was also required to work every second Saturday morning when required. Out of the 31 weeks he was with me he worked 10 of these. Mr Baptie was paid £50.00 up to 12pm and on average worked 4 hours per shift. There is no requirement to pay an overtime rate for working on a Saturday.

When Mr Baptie commenced working for me he was told his wage was four weekly. After he had been through tests to start job at an expense to myself he advised that he thought he would struggle on the four weekly system and asked if i could accommodate him by paying weekly. I was not over keen on this idea as I also work on the road over the weekend for up to twelve hours a day, and it would also create more work for accountant. However I agreed to his request but advised him that if I was on the road it could be difficult to make the payment. Also if payment was made after 12pm on a Saturday some banks won't credit account until Monday. On one occasion the full BACS system went

down preventing any payments or transactions being made. This took several days to clear the back log."

(54) At this Final Hearing, there was produced as document RSL01/RSL03, a copy of the respondent's response (by email of 12 August 2021, to the claimant's Schedule of Loss) as per the claimant's email of 22 July 2021. The respondent's response to the claimant's points are shown **in bold type**, as per the response provided by Mr Hutchison. In his oral evidence to the Tribunal, the claimant stated that he disagreed with every one of Mr Hutchison's replies.

(55) That respondent's response reads as follows: -

"Schedule of loss Scott Baptie.

PLATFORM The platform on the truck was damaged before I started and was never repaired. It required welding not painting. Mark Hutchison informed me when I started he would get it done it never happened. It was damaged the full length of my employment. Pictures proof.

REPLY - Truck was fully repaired prior to Mr Baptie's employment by blacksmith evidence available. The discussion regarding getting it repaired after his start date is fiction.

OVERWEIGHT The vehicle was overweight three times on one day with extra weight added each time February 25 and proof of this was sent to Mark Hutchison throughout the day with nothing being done. Pictures proof.

***REPLY - There was no discussion ever between Mr Baptie and myself during the whole of his employment relating to over weight vehicle evidence of loads that day available**.*

DARKNESS Multiple building sites had no lighting only proof of one January 19 other concrete mixers in the Shetleston

(sic) *plant had several lights around the vehicle Mark Hutchison refused to fit these to his trucks. Ongoing through full length of employment.*

REPLY - There is no Tarmac spec trucks at Shettleston with additional rear lighting. Evidence available.

HANDLE The handle on the rear of the vehicle fell of between a delivery and the plant February 19. I informed Mark Hutchison and I was told to go Blantyre for a new one. On arrival it was extremely busy and they could not install it Mark Hutchison came to the plant to fit it he took it away and got a hole drilled through it and brought one bolt without a nut. The bolt would not go through the hole as the hole was slightly offset so he hammered it in bending it and it wasn't all the way through due to the hole offset position. To secure a bolt it has to have a nut on the end this one had no nut and wasn't even through the hole. I told mark it was going to fall of again and I wasn't going to drive it he said I had to drive it as he needed the truck out making money. At that point with all the other health and safety issues ongoing and now this unsafe repair I had no choice but to resign for my safety and the safety of other and handed in my notice. Pictures proof. A few days later the handle had fell of again February 24 and mark instructed a driver to fit a new one not a mechanic even after two had fallen of, at no point was mark concerned about where these heavy metal handles had landed when coming off at over 50 mph only that he had to buy more. The one that the driver fitted was old and had no plastic covering the end leaving a metal spike sticking straight out the back of the truck about four inches long. Pictures proof.

REPLY- A temporary repair was made to handle. The nut would not go on because the bolt was so tightly on that it threaded. If the handle actually fell off on the 24th at no point did I instruct anyone to replace it. The first I heard was a call from Mr Henderson (college) (sic)

informing me that Mr Baptie had no handle but it was ok because he had a spare in his truck which he fitted and truck was up and running again. The spike that Mr Baptie is referring to is actually called a retaining clip with flat edges and are widely used on vehicles.

LOST WAGES Since I had to resigned I have lost out on 20 weeks wages so far up to July 16 with a total of £11500. This is made up of 10 weeks at £550 and 10 weeks at £600. Out of these 20 weeks I have worked 2 weeks totalling £1100. Leaving a shortfall of £10,400 up to July 16. Bank statements available.

REPLY- Mr Baptie left my business and started another job with Calor Gas delivering gas bottles. He also walked out on this position within a week as he didn't realise that weekend work was involved. I am finding it difficult to understand why Mr Baptie feels I'm responsible for paying him a wage when he has arranged to go to another job after working only one of the four weeks notice period required putting me at another financial loss. Also the weekly payments of £600 are paid only if Saturday work is available they are not guaranteed he only worked 9 Saturday shifts out of the 31 weeks he worked with me.

WAGES BREACH OF CONTRACT My wages were paid late every week during the full length of my employment between one day and four days up to 9pm before I received them leaving me late to pay all my bills including rent and council tax and CSA payments for my kids. Making me stressed every week with threats of court action from them. I have a letter from my bank stating that the payments I received were paid no more than 3 hours before I received them meaning if I was paid at 9pm on Tuesday mark paid the money in after 6pm on Tuesday.

REPLY-This is not a health and safety matter. However why Mr Baptie is claiming that his wages where late every week baffles me as statement evidence shows the true picture. Mr Baptie was never once paid 4 days late.

OVERTIME It was agreed with mark before I started that any hours after 5pm would be paid at £12 hour I never received any overtime payment during the full length of my employment. 30 weeks overtime 2 hours a week is 60 hours times £12 totalling £720. Mark has to keep a record of the times I worked past 5pm so this should be available.

REPLY - Mr Baptie's contract states that he has to work 50 hours Monday-Friday before overtime payment would be introduced he never once worked over 50 hours a week and often worked under 40 hours but still received full wage. In the fourteen years I've had a contract with Tarmac I have never paid overtime to someone for working past a set time per day. Overtime has always been paid on working past a set number of weekly hours. So again this discussion never took place and is untrue.

HOLIDAY PAY I went on holiday for 2 weeks at Christmas and received no overtime or Saturday overtime included in either week of holiday pay. Hours average 2 hours overtime £24 and Saturday minimum payment £50 totalling £74.

REPLY - Mr Baptie was paid full weeks holiday wage for the weeks he was on holiday he didn't work overtime as he was on holiday. No Saturday payment was made because he didn't work the Saturday as he was on holiday and the plant was closed.

This tribunal is the first time I have known about any of the issues Mr Baptie states he had, other than poor lighting on a delivery site, but even then it took Mr Baptie two days to communicate any concerns. As soon as I

was informed about the lighting issue I contacted Tarmac to advise of the concern. Almost all of the allegations Mr Baptie has stated are quite simply untrue in a bid to bolster his case. In the 21 years I have been a sole trader this is the first time anyone has taken me to a tribunal. I was somewhat taken back when I received the tribunal notice considering the effort that I made to assist Mr Baptie to sit the required assessments from Tarmac before he was even aloud (sic) ***to sit in my truck. I have also been considerate of Mr Baptie's financial difficulties by changing to a weekly payment from a four weekly like everyone else. I have been patient with Mr Baptie with his costly errors during his employment like running out of diesel on the M8 again not contacting me until it was too late. So for Mr Baptie to now go down this route because he couldn't gain employment after walking out on his Calour*** (sic) ***Gas job i feel is morally wrong."***

Tribunal's assessment of the Evidence

21 In considering the evidence led before the Tribunal I have had to carefully assess the whole evidence heard from each of the claimant, and the respondent, and to consider the many documents produced to the Tribunal by both parties. My assessment of that evidence is now set out in the following sub-paragraphs: -

(1) Mr Scott Baptie: Claimant.

a) The claimant was the only witness led on his behalf. His evidence was confused, and confusing. It was of note, when asked in the early stage of day 1, before he gave his evidence, when I sought to clarify the basis of his claim, he agreed that it was principally a claim about automatically unfair dismissal for health and safety reasons, but he was not familiar with the statutory provisions upon which he was relying to pursue that claim

against the respondent under **Section 100(1)(d) and (e) of the Employment Rights Act 1996**.

b) To be fair, the respondent was equally unfamiliar with that statutory provision and, in the interests of justice, and to ensure that both parties were on an equal footing, as per the Tribunal's overriding objective under **Rule 2**. I arranged for the Tribunal clerk to email to both parties a copy of the full terms of **Section 100**.

c) The claimant's evidence in chief was, as agreed by both parties, elicited by questions asked by me, as presiding Employment Judge, and I gave him the opportunity to add anything further, if he felt that it was appropriate to do so. The only point he raised was to state that he had made a verbal agreement with the respondent to pay him his wages on a Friday, and he alleged that never happened.

d) When his attention was drawn to clause 5 of the written statement of terms and conditions of employment, and that he would be paid weekly in arrears by BACS, the claimant stated that he agreed that had nothing to do with health and safety, but he just added it in to his evidence to paint the bigger picture, as he felt there were problems from start to finish in this employment.

e) In giving his evidence to the Tribunal, the claimant did so remotely, by CVP, initially from his house but, when works in the premises above him became too noisy, he decanted, and thereafter gave evidence from his van, using his mobile phone. The claimant, who had a hard copy of the documents folder with him, blatantly shuffled the pages, so that, from time to time, it was difficult for the Tribunal and respondent to hear, and I had to request him not to do so noisily.

f) A further difficulty emerged when documents the claimant wished to refer to, or I was enquiring about, were not in

the A4 folder lodged with the Tribunal on 24 September 2021 and, accordingly, Mr Hutchison, as respondent, emailed various additional documents to the Tribunal office, which were then passed to me, by email from the Tribunal clerk. It was unfortunate that the claimant's email of 26 September 2021 was not included in the folder provided by the parties but, again, that was forwarded to me by the Tribunal clerk, and it was accessible to me during the course of the Final Hearing.

g) In section 8.2 of his ET1 claim form, the claimant referred to "pictures" and "bank statements" as "***proof***" of his allegations against the respondent. He produced bank statements, but not any for 1 September / 11 October 2021. He provided inadequate, and incomplete, vouching of his attempts to mitigate his losses.

h) He provided some photographs of what he referred to as the "***faulty handle***", "***faulty platform***", and "***overweight vehicle***", and I took them into consideration, weighing his evidence against that, oral and documentary, from the respondent. His documents CH01/CH04, CP01/CP04, and CW01/CW02, refer. The video footage provided by the claimant, in his email of 26 September 2021, of being sent into a building site in the dark, without any lighting, on 21 January 2021, was of very poor quality, and very short duration, only 24 seconds, and being very dark, I did not obtain much clarity from it.

i) I also had the respondent's photographs produced as RP01/RP05, RCS01/RCS09, RW01/RW04, and RPL01/RPL04, showing the platform and vehicle checks, for registration **RJ 66 STX** (a DAF Trucks CF 440 FAD Construction), texts from the claimant in September / December 2020 about overweight vehicle, and text from the claimant on 21 January 2021 about poor lighting, and photographs of other vehicles with rear lighting shown.

j) The claimant complained that his wages were not properly paid, including being up to 4 days late, and that holiday pay average wages were not paid for every second Saturday that he worked.

k) He did not lead any convincing evidence before the Tribunal that he had worked every second Saturday, nor that his wages were not paid properly. He stated, in his further and better particulars of 22 July 2021 that his wages were paid late every week, but this assertion was not borne out by the evidence available to this Tribunal.

l) The date and time of when his wages would be paid weekly was not the subject of any express contractual agreement between the parties, and any pre-contractual discussion between the parties about payments on a Friday was, in any event, superceded by the claimant signing his written statement of terms and conditions of employment, on 4 August 2020, which simply refers to payment by BACS.

m) The claimant also complained of "***stress",*** but he provided no independent, or vouching evidence to the Tribunal in that regard. In any event, it is trite law, and it has been since the seminal judgment of the then House of Lords, in **Dunnachie v Kingston upon Hull City Council 2004 ICR 1052,** that the calculation of any compensatory award for unfair dismissal, in terms of **Section 123 of the Employment Rights Act 1996**, permits only the award of sums in an unfair dismissal case that reflects the actual loss arising from the dismissal, and it is not legitimate to award sums such as injury to feelings caused by an unfair dismissal.

n) In short, at this Final Hearing, the claimant boldly asserted much, but he proved nothing as to the alleged factual and legal basis of his claim against the respondent.

o) Overall, I did not find the claimant to be a convincing, or credible witness, and where his evidence was at odds with that of the respondent, Mr Hutchison, I preferred the respondent's evidence, which was clear and coherent, and often vouched by cross reference to documents produced to the Tribunal.

p) Further, I agree with the respondent's closing statement to the Tribunal, which I detail more fully later in these Reasons, at paragraph 25 below, where Mr Hutchison stated that the claimant has shown ***"a complacent attitude to health and safety".*** The claimant's answers, in cross-examination by the respondent, as to why he had falsely recorded vehicle safety checks raise real and serious doubts about the claimant's character and fitness to be a driver, as well as his honesty and integrity.

(2) Mr Mark Hutchison: Respondent

a) Mr Hutchison was the only witness led on behalf of the respondent. Aged 50 years, he is the proprietor and sole trader of 3D Transport, a business he has run for 21 years.

b) In giving his evidence to the Tribunal. Mr Hutchison did so remotely from his home address, through CVP, clearly, and confidently, referring when appropriate to relevant documents in the folder, and additional documents available to me at this Final Hearing, as provided by the respondent, as and when the need to see relevant documentation arose from the evidence being given by both parties.

c) When he came to be cross-examined by the claimant, the respondent's answers to Mr Baptie's questions did not undermine his evidence in chief as the respondent, which had been elicited, as previously agreed, by questions from myself as the presiding Judge, and his position remained generally consistent, under cross-examination by the

claimant, with his pled defence to the case, as per the ET3 response, and his response to the claimant's further and better particulars of 22 July 2021.

d) In his response to the claimant's further and better particulars of 22 July 2021, the respondent stated that the platform complained of by the claimant was fully repaired prior to the claimant's employment, and that "***blacksmith evidence"*** was available. He lodged photographs, as part of his documents in his folder, and in his oral evidence he spoke of a blacksmith in Glenrothes doing the necessary repairs in June 2020. His evidence in that regard was convincing, and believable.

e) While, in section 6.1 of the ET3 response, the respondent had stated that a statement from a Mr A Henderson was available, about the fitting of a handle on the claimant's truck on 19 February 2021, neither party led Mr Henderson as a witness before this Tribunal, and no statement from him was provided to the Tribunal by either party. The respondent advised the Tribunal that Andrew Henderson was still an employee of 3D Transport.

f) Further, while in that same section 6.1, Mr Hutchison stated that out of 31 weeks of employment with him, the claimant worked 10 Saturdays, the respondent's oral evidence to this Tribunal is that it was 9 Saturdays, as per the table of hours worked by the claimant, spoken to by Mr Hutchison in his oral evidence under reference to his document RHW01, and stated to be prepared by him after accessing and downloading the tachograph information.

g) Overall, the respondent came across to the Tribunal as a credible and reliable witness, and where there was a dispute as between his evidence, and that of Mr Baptie, the claimant, as to what happened on site on 19 February 2021, and the discussion preceding the resignation text, I

have preferred the respondent's evidence about ghat, and about the condition of the vehicle as at 19 February 2021.

h) I considered that the respondent's evidence had the ring of truth to it, and his evidence was generally consistent with his narrative of events in the ET3 response, as spoken to by him in his own evidence at this Final Hearing. It was not at all undermined by the claimant's limited cross-examination.

Closing Submissions

22 With both parties being unrepresented, party litigants, I explained to them that while they could address me on the relevant law, and their closing submissions on what they wanted me to do by way of final judgment, it is my responsibility, as presiding Judge, to apply the relevant law to the facts as I might find them to be in reviewing the evidence led before the Tribunal, and making my findings in fact, as set out earlier in these Reasons.

23 While I had copied to them, via the Tribunal clerk, the specific terms of **Section 100 of the Employment Rights Act 1996**, detailing the legal test for an automatically unfair dismissal for health and safety reasons, neither the claimant, nor the respondent, stated that they wished to address me on that matter, or on any other matter of the relevant law, nor whether the claimant had led sufficient evidence to allow the Tribunal to uphold his claim, in whole, or in part.

24 Perhaps not surprisingly, both parties were content to leave the application of the relevant law to myself as Judge, and they were content to make short, closing statements, on their own behalf which, in the event, they decided to do in writing, by emailing them to the Tribunal clerk, and making them available to the other party.

25 In his closing statement to the Tribunal, the respondent, Mr Hutchison, by email sent to the Tribunal clerk, on 12 October 2021 at 11:48, stated as follows: -

"I believe Mr Baptie's case should be dismissed.

He is claiming constructive dismissal on grounds of health and safety and has stated four health and safety areas that he was concerned about. After questioning he has now stated he left due to only two of these the platform and the handle.

Mr Baptie has failed to bring these concerns to my attention even though the facility to do so was provided by myself. The discussions he stated we had regarding the platform did not take place and feel confused how he thinks repairs can be made to defective equipment if it's not reported to myself. He has provided little evidence that the claimed defects are on my vehicle.

Discussions regarding contracted hours and payments also never took place.

I take seriously the safety conditions of my employees and the condition of the company vehicles they drive. I have proven myself to be of good repute to the traffic commissioner and have always remained in the green on their earned recognition scheme meaning that I am a competent operator.

Mr Baptie left of his own free will and did not give me the opportunity to address any of his concerns. He has shown a complacent attitude to health and safety by stating he was too busy to advise me of concerns of working in the dark. He has not been able to provide conclusive evidence of the claimed over weight vehicle.

I don't believe Mr Baptie has truthfully been concerned about health and safety within his role because he would have surely aimed these concerns directly to his employer to rectify and has not provided any evidence he did."

26 The claimant, Mr Baptie, likewise made a written closing statement, which he emailed to the Tribunal clerk, with copy to the respondent, on 12 October 2021 at 12:04. It purported to give evidence about his HGV driving experience, but he had not spoken to these matters in his oral evidence, and so the respondent and Tribunal were unable to cross-examine him, or ask him questions about his alleged penalty point and accident free 21

years. His closing statement was, as can be seen below, very brief, stating only: -

> *"As a hgv driver of 21 years without a penalty point or accident I had no option but to resign due to health and safety issues and imminent danger to myself or others."*

Reserved Judgment

27 In closing proceedings at around 12.10pm on the afternoon of Tuesday, 12 October 2021, I advised both parties that I was reserving my Judgment, which would be issued in writing, with Reasons, in due course, after time for private deliberation in chambers.

Relevant Law

28 Having established the above facts, I now apply the relevant law. As neither party was legally represented, and their closing submissions were brief and more related to the facts of the case, as they saw them, than an application of the relevant law, I have given myself a self-direction in the relevant law, which I now set out concisely for the assistance of both parties.

29 The claimant is not entitled to bring a claim for "ordinary" unfair dismissal under **Section 98 of the Employment Rights Act 1996** as he does not have 2 years' continuous service with the respondent. Accordingly, as per Employment Judge Strain's Note, the claimant is claiming automatically unfair dismissal under **Section 100(1) of the Employment Rights Act 1996**, which has no minimum qualifying period of service.

30 Specifically, following the Case Management Preliminary Hearing before Employment Judge Strain, on 2 July 2021, the claimant relies on **Section 100(1)(d) and (e)**. Each of these paragraphs of **Section 100(1**) constitutes an independent ground of an automatically unfair dismissal.

31 The statutory provision reads as follows: -

> **100 Health and safety cases.**

(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—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed

to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

32 Where, as in the present case, the employee lacks the requisite continuous service to claim "ordinary" unfair dismissal, the claimant acquires the burden of proving, on the balance of probabilities, that the reason for his dismissal was an automatically unfair reason, as per the Judgments of the Court of Appeal in **Smith v Hayle Town Council [1978] ICR 996,** and the Employment Appeal Tribunal in **Ross v Eddie Stobart Ltd EAT 0068/13.**

33 More recently, the Employment Appeal Tribunal has held, in **Oudhar v Esporta Group Ltd [2011] IRLR 739,** that the test in **Section 100(1)(e)** should be applied in two stages*: -*

"Firstly, the Tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged. Secondly, if the criteria are made out, the Tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or

proposed to take such steps. If it was, then the dismissal must be regarded as unfair."

34 In the present case, there was no express dismissal of the claimant by the respondent. Instead, the claimant relies upon a complaint of constructive dismissal. The law relating to constructive dismissal is contained in **Section 95(1)(c) of the Employment Rights Act 1996**. In order to prove that he was constructively dismissed, the claimant must show that he terminated his contract with or without notice in circumstances in which he was entitled to terminate it by reason of the employer's conduct and that the conduct was the reason for his terminating the contract.

35 In order to claim constructive dismissal, the employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and thus losing the right to claim constructive dismissal.

36 The leading case relating to constructive dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221,** which states that if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If the employee does so, then the employee terminates the contract by reason of the employer's conduct and the employee is constructively dismissed.

37 Further, the Court of Appeal, in **Lewis v Motorworld Garages Ltd [1986] ICR 157**, held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" by itself does not amount to a breach of contract.

38 As regards the law relating to unlawful deduction from wages**, Section 13 of the Employment Rights Act 1996** provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.

39 As regards holiday pay, the relevant law is to be found within the **Working Time Regulations 1998,** which makes specific provisions at **Regulations 13, 13A, 14, and 16**, to which the Tribunal has had regard, in considering the complaint under **Regulation 30** that the respondent as employer, has failed to pay the claimant a whole or any part of any amount due to him by way of holiday pay.

Discussion and Deliberation

40 In carefully reviewing the evidence in this case, and making my findings in fact, and then applying the relevant law to those facts, I have had to consider the questions that I set forth earlier in these Reasons, at paragraph 17 above, under "***Issues for the Tribunal***", and I now deal with each of those questions in turn.

Was the claimant dismissed by the respondent, or did he resign?

41 On the evidence available to the Tribunal, I am satisfied that the claimant was not dismissed by the respondent, actually or constructively, but that he resigned voluntarily, and he was not forced to do so by the respondent. He has established in evidence no basis to properly found a proper claim for constructive dismissal by the respondent. In particular, the claimant has presented no evidence to this Tribunal to establish that there was any fundamental breach of contract by Mr Hutchison as his former employer.

42 The terms of the claimant's text of 19 February 2021 to the respondent, intimating his resignation from employment, as set forth in the Tribunal's findings in fact, at paragraph 20(3) above earlier in these Reasons, was short, just 13 words, and very matter of fact.

43 Its friendly sign off, "***Cheers"***, is not indicative of any ill-feeling or coercion by the respondent towards the claimant, or of the claimant being forced to resign, as alleged in his ET1 claim form, and subsequent correspondence to the Tribunal, in particular his emails of 22 July and 26 September 2021,

the latter stating that he was "***left with no option but to resign due to health and safety."***

44 I agree with Mr Hutchison, after having heard both parties' evidence at this Final Hearing, that there is merit in the respondent's closing statement that: "***Mr Baptie left of his own free will."***

What was the effective date of termination of the claimant's employment with the respondent?

45 While the dates of employment in the ET1 claim form and ET3 response disagreed, both parties agreed, at this Final Hearing, after clarification of their respective positions, that the claimant's effective date of termination of employment was 26 February 2021, notwithstanding the P45 issued by the respondent on 5 March 2021 referring to that latter date as the claimant's leaving date. His last day of employment is agreed as having been 26 February 2021.

If the claimant was dismissed, was his dismissal automatically unfair for either of the pled heads of complaint of automatically unfair dismissal contrary to Section 100(1)(d) or (e) of the Employment Rights Act 1996?

46 This question no longer arises, as the Tribunal has found that the claimant was not dismissed, but that he resigned voluntarily. As such, his **Section 100** complaint falls away. In any event, even if he had established that he had been dismissed by the respondent, which this Tribunal finds he was not dismissed, he has not shown that he was unfairly dismissed, constructively, or otherwise, nor that he was automatically unfairly dismissed contrary to **Section 100**.

47 The mere fact that the claimant worked a further week with the respondent, after giving notice on 19 February 2021, working in the same vehicle as before throughout his employment with the respondent, and that he did not report any defects or fails in the daily checks shows that there is no basis in fact for any valid claim that he reasonably believed that he was at risk of harm, or potential harm, to his health and safety, nor has he shown any serious and imminent danger to himself or others. His claim under **Section**

100 is wholly unfounded in fact, and so it falls to be dismissed by this Tribunal.

In the event the claimant satisfied the Tribunal that he was automatically unfairly dismissed by the respondent, the Tribunal noting that he did not seek to be reinstated, or re-engaged by the respondent, what compensation should be awarded to him for unfair dismissal?

48 As the claimant has not established that he was dismissed, let alone unfairly dismissed, the matter of any compensation for unfair dismissal does not strictly speaking arise.

49 That said, in considering his "***financial update"*** of 26 September 2021 claiming **£9,934**, based on **£11,500** shortfall in wages (being 10 weeks at £600 and 10 weeks at £550), **£720** for unpaid overtime, **£100** for unpaid holiday average, less Universal credit totalling **£1718.75**, and other employment totalling **£757,87**, "***leaving £9843 out of pocket since being left with no option but to resign due to health and safety***", his documentary productions provided to the Tribunal, while of assistance in identifying his receipt of State benefits, namely Universal Credit, were not of any practical use in clearly identifying, and distinguishing from other amounts paid in to his bank account, all and any income from new employment, by way of mitigation of loss evidence from the claimant.

50 Income from any new employment, post-termination with the respondent on 26 February 2021, was not easily identifiable from the documents produced to the Tribunal and respondent by the claimant. I make this as an observation, and not a criticism of the claimant, as he is an unrepresented, party litigant, and thus not conversant with what is required by the Tribunal when preparing a properly collated schedule of loss and supporting vouching documentation.

51 In section 9.2 of his ET1 claim form, the claimant referred to various ***"stress"*** factors, as if they should be forming part of any assessment of compensation to which he might be entitled from the Tribunal, in the event of any success with his claim against the respondent. His evidence in this regard was scant, no more than mere assertion, unsupported by any

reliable evidence, and unsupported by any independent witness, or vouching documentation. Further, and in any event, non-pecuniary damages, such as injury to feelings, are not appropriate for any compensatory award for any successful unfair dismissal complaint, as per the House of Lords' judgment in **Dunnachie [2004] UKHL 36.**

Were there any amounts of unpaid wages, and / or holiday pay, due to the claimant at the effective date of termination of his employment with the respondent and, if so, what sums (if any) should the Tribunal order the respondent to pay to the claimant in that regard?

52 In his evidence to the Tribunal, the claimant accepted that he had received each week, though not necessarily on the same day of the week, his weekly wages from the respondents, and that (other than overtime and holiday pay, as claimed as still due and owing to him, but disputed by the respondent), he was not complaining of any shortfall in his wages, notwithstanding the terminology of "***shortfall***" used in his earlier correspondence with the Tribunal, and respondent.

53 As per the respondent's oral evidence to this Tribunal, and consistent with his 12 August 2021 reply to the claimant's further and better particulars, and schedule of loss, of 22 July 2021, the respondent explained in evidence that the claimant was paid a full week's holiday pay for the two weeks he was on holiday at Christmas 2020, when the Tarmac plant was closed, and that he did not work any overtime at those dates, as he was on holiday, so no overtime payment was due to the claimant for that holiday period. He stated that the claimant had been properly paid for that holiday period, and no further sums were due to the claimant.

54 The claimant, accepting that the respondent's holiday year for employees was 1 January to 31 December each year, did not seek any payment from the respondent for any outstanding accrued, but untaken holiday, due to him from 1 January 2021 to 26 February 2021.

55 The claimant did not establish in his evidence to this Tribunal that he worked more Saturdays than the respondent accepted, being 9 out of 31 weeks, and he accepted that he had been paid for those Saturdays worked. Mr Hutchison's reference, in his 12 August 2021 reply to the

claimant's schedule of loss, saying that the claimant worked 10 out of 31 weeks, was at odds with the document produced by him at this Hearing, but I was satisfied with the respondent's evidence about 9 Saturdays, notwithstanding the claimant's failed attempt - without producing any alternative calculations to put to Mr Hutchison as respondent under cross-examination - to successfully challenge that evidence by the respondent given in his document RHW01.

56 In section 9.1 of his ET1 claim form, the claimant referred to the fact that, as regards compensation sought from the Tribunal by an award against the respondent, he was looking for "***missing wages £575 / week***" for 18 weeks to date. His schedule of loss, submitted on 22 July 2021, sought "***lost wages / shortfall***" of **£10,400**, and that was followed up in his subsequent emails to the Tribunal on 7 September 2021, seeking **£11,500** (less £1000 on temporary work), and on 26 September 2021, this time seeking **£11,500** shortfall in wages, 10 weeks at £600 and 10 weeks at £550.

57 Based on the evidence available to the Tribunal, the claimant's calculations have used gross pay, whereas past loss of earnings for any unfair dismissal compensatory award should be assessed using net pay figures. Gross figures are used for any basic award of compensation for unfair dismissal.

58 In his oral evidence to this Tribunal, the claimant however accepted that his reference to wages "***shortfall"*** was an unfortunate misnomer on his part, as an unrepresented, party litigant, and that what he was actually seeking from the respondent, in the event of him securing an unfair dismissal finding against the respondent, was a compensatory award to include past loss of earnings from 26 February 2021 to date of this Final Hearing, along with any other award that the Tribunal felt might be due to him.

59 As the claim has failed, in its entirety, I need say nothing further on the matter of remedy, as it simply does not arise for determination by the Tribunal.

Disposal

60 For the foregoing reasons, I find that the claimant resigned, and he was not dismissed by the respondent, and he was not forced to resign from the respondent's employment. His complaint of automatically unfair dismissal under **Section 100 of the Employment Rights Act 1996** is not well founded, and my view it has been used by him in a cynical attempt to circumvent the fact that he did not have 2 years' continuous service to complain of "ordinary" unfair dismissal.

61 His unlawful deduction of wages, and holiday pay claims, are likewise not well founded and, accordingly, for all three heads of claim brought by the claimant against the respondent, they have all failed, and so I have dismissed them all, as per my Judgment above.

Employment Judge: Ian McPherson
Date of Judgment: 01 November 2021
Entered in register: 03 November 2021
and copied to parties