EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr James Joseph **Premium Coaches Ltd**

Heard at: **London South Employment Tribunal**

On: **19 January 2022**

Before: **EJ Webster**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Robbins (Director)**

RESERVED JUDGMENT

1. The Claimant's application for reconsideration of tribunal Judgment dated 30 September 2021 in respect of Claim 2304767/2020 is allowed and that Judgment is revoked.

2. The Claimant's claims for unauthorised deductions from wages under claim 2304767/2020 are upheld as follows:
   (i) Underpaid holiday pay for one day on 11 March 2020 – amount to be confirmed (see conclusions below).
   (ii) Underpaid wages for 16 March 2020 – As the payment was not made on the day it was due (30 March 2020) an unauthorised deduction occurred. However, the respondent has now paid all amounts owing to the claimant in respect of this day's wages so no further compensation is payable.
   (iii) Underpaid furlough pay for May 2020 – the Respondent is ordered to pay £80.35 gross.

3. The Claimant's claims for unauthorised deduction from wages under claim 2307599/2020 are upheld with regard to 8.5 days' underpaid annual leave. The precise amount is to be calculated. The remaining underpaid holiday pay claims are not upheld.

4. The Claimant's claim for unauthorised deduction from wages under claim 2307599/2020 is upheld. The precise amount is to be calculated.

REASONS

The Hearing

1. The hearing was held by way of CVP. Although the claimant expressed concerns about the age of his laptop and the sound quality, the hearing progressed without difficulty.

2. I was provided with a digital bundle numbering 195 pages. Two versions of the bundle had been sent in by the respondent and it only transpired part way through the hearing that I was looking at an earlier version that had been superseded. Nevertheless, we ensured that I was taken to the correct documents throughout the hearing. It is worth noting that I was only referred to a handful of pages.

3. Neither party was legally represented. The claimant had received advice from a Mckenzie friend but she was not present at the hearing and the claimant confirmed that she was not a lawyer. It is not clear what advice if any the respondent had taken prior to the hearing.

4. Neither party provided witness statements. I therefore asked both individuals to take an oath at the outset of the hearing so that any information they provided was in effect taken as witness evidence. Both were given chances to outline their cases to me and both responded helpfully to questions from me. They were also given the opportunity to ask each other questions. In the event, neither individual asked each other anything.

5. The claimant provided a detailed schedule of loss with some calculations but as this had been drawn up with assistance from a Mackenzie friend, the claimant was unable to explain the calculations to me himself in any detail.

The Issues

6. The purpose of this hearing was twofold:
   (i) To consider the Claimant's application for reconsideration of my decision dated 30 September 2021; and
   (ii) To determine the Claimant's new claim for unauthorised deduction from wages.

   I address my findings in respect of each matter in turn.

Reconsideration of Tribunal Decision dated 30 September 2021

Background

7. At the hearing on 30 September 2021 which was to consider Claim 2304767/2020, the claimant informed me that he had a second claim (2307599/2020) that had been rejected by the Tribunal because of a difference between the name of the respondent on the ACAS certificate and the name on the ET1 form. The claimant had made a written application for that decision to be reconsidered on 31 August

2020 but that reconsideration had not been considered prior to the hearing. I accepted that application for reconsideration and gave reasons during the hearing. However, as the respondent had not been served the ET1 or given any time to respond to the claims therein, and because the Claim 2304767/2020 dealt with discrete issues in terms of the specific unauthorised deductions being claimed, I proceeded with the hearing in respect of 2304767/2020.

8. At the conclusion of the original hearing I gave oral reasons. The claimant subsequently requested written reasons which were sent to the parties on 15 October 2021. The claimant applied for reconsideration of that Judgment on 29 October 2021 and sent a second email dated 1 December 2021 in response to an email from the Tribunal with further information. I had considered the claimant's written application prior to this hearing hence ordering the hearing.

Submissions for reconsideration

9. In summary, the claimant was applying for a reconsideration because:
   (i) He had only received copies of many of his pay slips during the initial hearing on 30 September 2021;
   (ii) The first hearing was via CVP meaning that he was struggling to keep up with the disclosure of documents via email because his laptop was old meaning that it wasn't easy for him to consider the pay slips and other documents as they came through;
   (iii) The last minute disclosure and his technical IT difficulties meant that he had not had a proper opportunity to consider the implications of those pay slips and use them to carry out the calculations of how his holiday had been calculated ;
   (iv) He stated today that had he been able to properly understand how his holiday had been calculated and how many hours he had worked across the relevant period, he would have been able to make the argument he made to be today in reference to his second claim; namely that the respondent had not calculated his holiday pay correctly because they had ignored how much time he actually worked and only used his contractually stated 'normal' hours;
   (v) He pointed out that he had been emailing the respondent from the point of his dismissal asking for the pay slips but they had not responded until the hearing date;
   (vi) During the hearing on 30 September 2021, Mr Robbins had said that the claimant's earnings in May 2020 were less than £2,500 (the relevant cap for the purposes of the Furlough scheme) and subsequent disclosure since that hearing had demonstrated that this was factually incorrect.

10. Mr Robbins, on behalf of the respondent stated that there was no need for me to reconsider my original decision. The claimant would have been provided with all his pay slips at the time that he was paid and he therefore rejected the idea that the claimant had not had access to the pay slips prior to the hearing on 30 September 2021. Mr Robbins also submitted that the claimant was in any event wrong concerning the need for the respondent to use any reference period to calculate his holiday pay because his contract provided him with normal working hours and he had been paid in accordance with that contract. This had been

addressed at the previous hearing and I had made findings accordingly. The claimant had accepted at the last hearing that he had received payments of amounts over and above what the respondent had contractually owed the claimant and therefore there were no payments owed to the claimant.

The Law

11. Rule 70 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states:

> *"70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."*

12. I consider that it is in the interests of justice to reconsider the claimant's claim for unauthorised deductions from wages in respect of underpaid holiday pay, as I accept that the claimant did not have a proper opportunity to consider the evidence relied upon by the respondent at the original hearing and because new evidence has come to light through disclosure showing that some of the evidence upon which I relied to reach my conclusions on 30 September 2020 was inaccurate. The claimant is a litigant in person, he expressed difficulties in understanding how the wages had been computed throughout the hearing but had not been able to articulate to me why this was relevant at the original hearing because he did not have the pay slips or any other document to refer to demonstrating how many hours he had been working.

13. Further, the evidence regarding the claimant's actual hours worked in May 2020 are clearly different in the documents provided in the bundle from that which Mr Robbins originally said to me at the first hearing and is new evidence.

14. Whilst I accept that the tribunal orders for preparation for the original hearing did not order exchange of documents, the fact that the claimant had little or no time to consider the documentation relied upon by the respondent at the hearing, means that the claimant was unfairly prejudiced at the original hearing. I have to balance the injustice to the claimant against that to the respondent. I am aware of the principle that a party ought not be given a second bite at the cherry just because they did not argue their case properly the first time round. Nevertheless, I consider that this is not what happened on this occasion. On this occasion the claimant was adversely prejudiced by the fact that as a litigant in person he had little or no time to properly consider the evidence before him and put together his arguments because of the late disclosure of highly relevant documents and the misleading nature of some of the documents and evidence before me. I have considered Mr Robbins' argument that the claimant ought to have had copies of the pay slips from when he had been sent them originally, however the claimant had made it clear in correspondence in the lead up to the hearing that he needed access to the pay slips because he did not have copies and the respondent had not provided them

until the hearing. This situation meant that the claimant was unable to properly explain to me why he felt that his holiday pay had not been properly calculated at the first hearing.

15. I therefore consider that it is in the interests of justice to reconsider my original decision.

16. In addition, having had the reconsideration application, made by the claimant I note of my own accord that I had failed to properly consider the wording of s24 ERA 1996 which states:

*"Where a tribunal finds a complaint under section 23 well-founded, it **shall make a declaration to that effect** and shall order the employer—*

(a)in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

(b)in the case of a complaint under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15,

(c)in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and

(d)in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision."

17. It was accepted in evidence by the respondent during the initial hearing that it had been late in paying the claimant any of the monies that were the basis for that claim. Its case was that although late, they had made good the payments at a later date. When I put the wording of s24 ERA 1996 and in particular the phrase highlighted in bold above to Mr Robbins, he said that he had no comment to make on that part of the provision as he was not legally trained but accepted again that the respondent had been very late in making the payments to the claimant but that this had been due to the pandemic and mistakes within their payroll system.

18. The submissions made by the claimant regarding why his original claim ought to succeed are one and the same as the arguments that he made to me regarding his second claim. In my conclusions I shall address each claim separately, however, my analysis and fact findings apply to both claims and I believe it is therefore easier to set them out together. I recognise that one tribunal decision does not bind another – nevertheless, nothing I was told today challenged the majority of my factual conclusions in my original judgment, instead, they have given me information from which I must draw additional conclusions which inform my decisions.

Judgment for claims 2307599/2020 and 2304767/2020

19. By an ET1 dated 16 November 2020 the claimant brought a second claim against the respondent for notice pay, holiday pay and 'other payments'.

20. ACAS Early Conciliation in respect of that claim was commenced on 25 June 2020 and the ACAS certificate relied upon (R162589/20/38) was issued on 25 July 2020. This is the same ACAS certificate as was relied upon in claim number 2304767/2020.

21. The claimant relied on his schedule of loss sent in on the morning of the hearing as being the totality of his claim. The schedule of loss included requests for underpaid furlough pay, underpaid holiday pay and underpaid notice pay as well as interest payable on all the unpaid amounts. For ease of reference I have copied the schedule claimed by the claimant below as it is a helpful indication of the dates and amounts being claimed in a situation where the claimant did not articulate his claim in any detail during the hearing, did not provide a witness statement and did not take me to many documents within the bundle during the hearing. Dates on which the claimant says that holiday pay was underpaid are below:

SCHEDULE OF LOSS AS AT 19th January 2022

Holiday Pay Losses

28/3/19	I day holiday daily average wage is £132.93	Paid £89.60	
		Owed	£ 43.33
		Interest for 996 days	£ 9.96
19-20/6/19	2 days holiday daily average wage is £136.00 x 2 = £272.00	paid £192.00	
		Owed	£ 80.00
		Interest for 935 days	£ 18.70
24-26/8/19	3 days holiday daily average wage is £153.78 x 3 = £461.34	paid £288.00	
		Owed	£173.34
		Interest for 843 days	£ 33.72
18-19/10/19	2 days holiday daily average wage is £150.34 x 2 = £300.68	paid £192.00	
		Owed	£108.68
		Interest for 812 days	£ 16.24
20/12/19	1 day holiday daily average wage is £136.86	paid £96.00	
		Owed	£ 40.86
		Interest for 751 days	£ 7.51
Jan 2020	18 days holiday daily average wage is £136.86 x 18 = £2463.48	paid £1728.00	
		Owed	£735.48
		Interest for 720 days	£115.20
11/3/20	1 day holiday daily average wage is £129.24	paid £0	
		Owed	£129.24
		Interest for 655 days	£ 19.65
30/9/20	9.5 days holiday daily average wage is £138.06 x 9.5 = £1311.57	paid £912.00	
		Owed	£399.57
		Interest for 477 days	£ 42.93
		Total Holiday Loss	£1710.50

Unpaid Wages Losses

16/3/20	1 day wages 14hrs @ £12ph is £168.00	paid £0	
		Owed	£168.00
		Interest for 655 days	£ 26.20
		Total Wages Loss	£168.00

Unpaid Furlough Losses

31/5/20	Furlough should have been maximum of £2,500.00	paid £2,419.65	
		Owed	£ 80.35
		Interest for 599 days	£ 11.98
		Total Furlough Loss	£ 80.35

Unpaid Notice Pay

30/9/20	Incorrect average used, correct notice pay is £754.06	paid £672.00	
		Owed	£ 82.06
		Interest for 477 days	£ 9.54
		Total Notice Loss	£ 82.06
		Total of All Losses	**£2040.91**

Total Interest Claimed @ 8% on losses £ 311.63

Please Note:
For all losses accepted by the Tribunal I would ask that there be an uplift of 25% with regard to the Respondent not following ACAS procedure/guidelines in respect of calculating holiday pay & notice pay and if possible that uplift is also applied to the interest claimed.

I am not knowledgeable on what can be claimed so would ask that perhaps on top of my losses compensation may be able to be awarded. For reasons that the Respondent has a history of breaching the rights of its employees; even after a Tribunal gave Judgment against them in March 2020 for this same reason of paying holiday pay at the wrong rates to its employees. I do not know how such things are calculated but as my claim covers the following breaches would ask the Tribunal to consider making an award of compensation to send a message to the Respondent that they cannot continue to knowingly breach the rights of their employees. Here are my grounds which I think the evidence shows that the Respondent has carried out the following breaches:-

Breach of Contract by not paying holidays at the legal average rates of 12wks & 52wks
Breach of Contract for notice pay - by not paying correct notice pay
Unlawful Deductions from Earnings - by not paying holiday & notice pay at the correct rates
Breach of Contract under the Implied Terms of Mutual Trust & Confidence by knowingly defrauding employees even after they were aware that they were unlawfully miscalculating holiday pay.

Signed: James Joseph  Date: 18/1/2022

22. I have considered the fact that a claimant cannot bring the same claim twice due to the principle of estoppel. There is a clear overlap between some aspects of the two claims. I am reconsidering claim 230476/2020 insofar as it applies to holiday pay and underpaid furlough pay because it was this that the claimant said he had

been unable to fairly calculate due the lack of pay slips. I shall therefore assess his original claim which was regarding the holiday period taken on 11 March 2020 as part of my reconsideration of that claim. All other aspects of the 'underpaid holiday' pay claim shall be taken as having first being brought at the date that claim 2307599/2020 was issued i.e. 20 November 2020.

23. Having carefully considered the Claimant's second ET1, it only makes reference to 8.5 days' under paid holiday pay. It makes no reference whatsoever to the other periods of underpaid holiday pay leave specified in the Claimant's schedule of loss above which go back to March 2019. No application to amend the claimant's claim was made to me. I have considered the overriding objective and my obligation to put the parties on a level footing given that the claimant is unrepresented in order to consider whether the presentation of this schedule of loss amounts to an application to amend the claim. However the claimant has provided me with absolutely no explanation whatsoever as to why the detail of his claim or the possibility of underpaid holiday pay stretching back over his entire employment, was not raised in the grounds of claim of either ET1 or in any correspondence since then. He has been well able to identify his concerns regarding my original judgment and has received help and assistance from someone regarding the detail of his claim as is clear from the schedule of loss and various correspondence with the respondent. I therefore do not accept that either of the claimant's claims raise holiday pay claims beyond the 1 day on 11 March 2020 and the subsequent underpaid 8.5 days' annual leave that was paid in lieu on termination. I also do not consider that an application to amend has been made to include claims going further back. Nevertheless, if I am wrong in that, I address the point further below in relation to the timing of the claims in my conclusions below.

24. I am also reconsidering the furlough pay claim in respect of May 2020 as the pay slips now provided demonstrate a different rate of pay from that stated in evidence by the respondent during the original hearing.

25. I am also reconsidering the one day unpaid wages on 16 March 2020 given that the respondent accepts that they did not pay the claimant on time though they did eventually pay him the wages owed to him for that day.

26. The claim for notice pay has been raised for the first time in claim 2307599/2020 and shall be considered as a new claim presented on 20 November 2020.

Facts relevant to both claims

27. The relevant factual conclusions in my Judgment for case 2304767/2020 are copied below. Neither party today sought to challenge the factual conclusions. Largely the facts underpinning the situation were not in dispute. The claimant simply stated that a week's pay ought to have been calculated according to different rules, and based on his average wage over 52 weeks as opposed to using his contractual entitlement to be paid the 'normal' rate for an 8 hour day when on holiday.

1. *"By a claim form dated 24 August 2020 the claimant brought claims in respect of unpaid holiday pay for one day on 11 March 2020, one day of unpaid wages on 16 March 2020 and a shortfall in his furlough payment entitlements of £31.*

2. *The claimant was employed as driver from 14 December 2018 until 18 September 2020. I was not given a reason for the termination of his employment and it was not relevant to the case I was deciding.*

3. *The Claimant was meant to be paid the March payments in his March pay on 30 March 2020. The ACAS Early Conciliation process commenced on 25 June and lasted until 25 July. The Claimant's ET1 was accepted by the tribunal on 24 August 2020.*

4. *In March 2020, the drivers at the respondent were told to take any accrued but untaken holiday because it could not be carried over from March to April when the next holiday year started. In addition, this was the month that the Covid pandemic struck and the country went into lockdown.*

5. *The respondent accepted that the claimant was owed 1 day of holiday for this month. They accept that there was a severe delay in paying that money to the claimant.*

6. *The respondent also accepted that it owed the claimant for 14 hours of work on 16 March 2020 and that there was a severe delay in paying it to the claimant.*

7. *However they state that these payments were made to the claimant as evidenced by the pay-slip dated September 2020. I was provided with that pay slip which shows that the claimant received £912 in respect of 9.5 days' holiday pay. This was, according to the respondent, the 1 day that they owed him from 11 March and 8.5 days accrued but untaken holiday that he had accrued between 1 April 2020 and his termination date. When broken down this amounts to 9.5 days holiday calculated on the basis of 8 worked hours at £12 an hour. This is what the claimant's contract states was the rate of pay for holiday pay. I saw a copy of this contract and this was not disputed by the claimant.*

8. *The same pay-slip also records that the claimant was paid for 32 hours at £12 an hour receiving a total of £384. The respondent states that this was in respect of a payment for the 14 hours they owed him for 16 March 2020 plus a good will payment because it had been so delayed. The claimant stated that he could not believe that they would make such a good will payment and did not trust that this payment reflected what he was owed.*

9. *I accept in the absence of any evidence from the claimant that he was owed the £384 in respect of anything else, that this money was intended to pay the claimant in respect of 16 March 2020.*

10. *The claimant did not dispute that he had received the monies as set out in the September pay-slip though there was some question as to when he had received the full amount. He nevertheless accepts that he had received all the*

amounts that were set out in the pay-slip even if they were not paid on 30 September 2020."

28. The new information I was provided with today allowed me to find the following additional facts.

29. Although I had sight of the claimant's contract at the initial hearing, the new information I was provided by the claimant about the hours he actually worked meant that I considered it afresh. The claimant's contract states as follows:

"7 Hours of Work

7.1 Your normal hours of work shall be 90 hours every fortnight. Because of the nature of the Company's business and the need for flexibility, your hours may vary at the reasonable discretion of the Company. Your start and finish times are not fixed. Your hours of work will be allocated to you based upon the operational needs of the Company. You will not be asked to work hours in excess of any hours permitted by EC Regulations No 561/2006.

7.2 You are required to work additional hours as necessary to ensure the adequate performance of your duties and responsibilities. Your normal rate of pay will apply to any additional hours of work.

7.3 In accordance with the Working Time Regulations 1998 there is a normal limit of 48 hours of working time in each seven days averaged over a seventeen week period. You agree that the 48 hour week limit in the working time regulations shall not apply to you. You may cancel this opt-out by giving three months written notice.

…..

Holidays
10.1 You are entitled to 28 days holiday (including statutory public holidays) each calendar year for full time employment (or pro-rate for part-time staff.) During such holidays, you will be entitled to receive 8 hours pay per day. Should you work on a bank holiday you will become entitled to an additional day off in lieu. The Company reserves the right to nominate when you take up to 5 days holiday in each calendar year which may be done retrospectively at the end of the working month.

10.2 You shall not take holiday without the prior consent of the Company and shall not in any event take in excess of ten (working) days' holiday consecutively. You may not carry any unused holiday entitlement forward to a subsequent holiday year and you will not be entitled to receive pay in lieu of any unused Company holiday entitlement except in accordance with clause 10.3 below.

10.3 If you start or leave your employment during any year, then your holiday entitlement shall be calculated on a pro rata basis for that year at the rate of 1.67 days for each complete month of service. Upon termination of your employment, you shall be entitled to pay in lieu of any unused Company holiday entitlement unless the employment is terminated by the Company for gross misconduct or you are required to repay the Company for holiday taken in excess of his entitlement as outlined within this clause. You agree that any sum so due will be deducted from any money owing to you. The Company reserves the right to require you to take any unused Company holiday entitlement during your notice period.

30. Mr Robbins explained that this contract was introduced for a number of reasons. The main one was that as the hours offered to the drivers fluctuated over the year (with the summer usually being much busier than the winter), they decided to ensure that the drivers had a guaranteed level of pay. They therefore committed to paying the drivers for at least 140 hours per month. This is not reflected in Clause 7 above which states that the normal hours would be 90 per fortnight which, if applied would mean that they would get approximately 180 hours per month. However, all discussions on this point with the parties was around the fact that the minimum required and paid was 140 hours not 180. In response to a question from me, Mr Robbins confirmed that this payment would be made even if a driver did not actually work 140 hours in a month because there was insufficient work to offer.

31. He acknowledged that there may well be periods during the year when a driver worked far in excess of the 140 hours per month but stated that a driver was free to turn down any hours offered over the 140. The drivers generally worked a 6 days on, 2 days off shift pattern. However he said that if the drivers did not want to work that pattern they could ask to work a 4 on 4 off pattern which would reduce the hours that they were available to work. He said that this contract had been introduced based on legal advice following a different Tribunal claim brought against the respondent for holiday pay. The concept of the normal hours was partly to ensure drivers had a basic rate of pay but also to ensure simplicity regarding the calculation of holidays following that decision. He said that the legal advice they had received informed them that this was a fair way to proceed.

32. The claimant disagreed slightly with that analysis. He said that although his contract stated that he only needed to work 180 hours per month, he was routinely assigned jobs that took him well over the 140 hours mentioned by Mr Robbins. He was not asked whether he wanted that work it was just assigned. He did not consider that he could say no to work once it was assigned.

33. Mr Robbins did not completely rebut that assertion and clause 7 has the following relevant sentences:

7.1 …. "Your hours of work will be allocated to you based upon the operational needs of the Company.

7.2 You are required to work additional hours as necessary to ensure the adequate performance of your duties and responsibilities.

However he did say that work was assigned to people because generally they wanted the work and the pay. When drivers expressed the desire not to work so many hours, they were moved to the 4 on 4 off shift pattern.

34. All hours were paid at the contractual rate of £12 per hour. No hours worked were paid at a higher 'overtime' rate.

35. The claimant took me to a spreadsheet (pgs 39-40) which set out the hours he had actually worked in the year prior to the pandemic in March 2020. Mr Robbins agreed that this spreadsheet accurately reflected the hours that the claimant had worked. They were as follows:

Dates	**Hours worked**
21 March – 20 April 2019	257.25
21 April – 20 May	268
21 May – 20 June	281.5
21 June – 20 July	310.5
21 July – 20 August	266.25
21 August – 20 September	280.25
21 September – 20 October	270.25
21 October – 20 November	268.5
21 November – 20 December	235.75
21 December – 20 Jan	218.25
21 January to 20 Feb 2020	246
21 Feb – 18 March 2020 (lockdown)	150.25

36. Although the claimant accepted that he worked 6 days on and 2 days off he did not accept that there was any other pattern to his hours. This lack of a pattern is confirmed by Clause 7 of his contract.

37. The claimant stated that the reality of his working life was that until the pandemic he had always worked far in excess of the 'normal' working hours allowed for in his contract and therefore he ought to have his holiday pay calculated according to the hours he actually worked as opposed to clause 10 of his contract.

38. Mr Robbins said that any time over and above 140 hours was voluntary and that the claimant would not have been penalised if he had asked to reduce his hours to the contractual minimum. He also stated that the claimant had not raised this as an issue during his employment and only raised it on termination. Mr Robbins also highlighted that as a company they always paid their drivers for the entire shift and did not make any deductions for any rest breaks taken during a shift. He said that on some shifts the drivers would be resting for 2-3 hours at a time whilst waiting for the passengers. This was the first time this argument had been raised by the respondent and no detail or evidence was provided regarding the company policy on rest breaks and the correlation to pay. Mr Robbins stated that their general policy was to pay for an entire shift regardless of the length or frequency of breaks and I find that even if not stated in writing, the contractual reality was that the company paid all breaks and that the drivers reasonably expected this to be paid

as part of their wages. The respondent cannot seek to retrospectively derogate from that now simply because it might increase their liability in terms of holiday pay.

39. At the first hearing Mr Robbins stated that in May 2020 the claimant's earnings had been below the threshold of £2,500 during that month and therefore he had been paid less than that. The pay slip for that month shows that he was paid £1871.50 (page 45). However the spreadsheet at page 39-40 which Mr Robbins accepted before me today was an accurate reflection of the hours worked by the claimant, showed that he had worked 281.5 hours and been paid £3,378 gross for that month. I accept that this spreadsheet is an accurate representation of the hours and pay for the claimant during the month of May 2020 given that it was a document apparently created by the respondent and Mr Robbins accepted it was a true record. No explanation was provided as to why this was different from the payslip at page 45.

The Law

Statute

40. s13 Employment Rights Act 1996

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employ.

41. S24 ERA 1996

(1)Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a)in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

(b)in the case of a complaint 33. under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15,

(c)in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and

(d)in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision.

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

33. S221 Employment Rights Act 1996

(1)This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2)Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

(3)Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—

(a)where the calculation date is the last day of a week, with that week, and

(b)otherwise, with the last complete week before the calculation date.

(4)In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

(5)This section is subject to sections 227 and 228.

34. S222 ERA 1996

(1)This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

(2)The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.

(3)For the purposes of subsection (2)—

(a)the average number of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of twelve weeks, and

(b)the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.

(4)In subsection (3) "the relevant period of twelve weeks" means the period of twelve weeks ending—

(a)where the calculation date is the last day of a week, with that week, and

(b)otherwise, with the last complete week before the calculation date.

(5)This section is subject to sections 227 and 228.

35. S 223 ERA Supplementary.

(1)For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only—

(a)the hours when the employee was working, and

(b)the remuneration payable for, or apportionable to, those hours,

shall be brought in.

(2)If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall

be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.

(3)Where—

(a)in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

(b)the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime),

account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

36. S 224 Employments with no normal working hours.

(1)This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2)The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a)where the calculation date is the last day of a week, with that week, and

(b)otherwise, with the last complete week before the calculation date.

(3)In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.

(4)This section is subject to sections 227 and 228.

37. S 234 ERA Normal working hours

(1)Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2)Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3)Where in such a case—

(a)the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and

(b)that number or minimum number of hours exceeds the number of hours without overtime,

the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

38. Working Time Directive

The right to a paid holiday is provided for by the Working Time Regulations ("WTR") 1998. These implement within the United Kingdom what is now provided for by the Working Time Directive of 4th November 2003 (2003/88/EC, replacing Directive 93/104/EC) (the "WTD"). Article 7 of the WTD provides:

"Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions of entitlement to, and granting of such leave laid down by national legislation and/or practice.

2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

39. s 16 Working Time Regulations - Payment in respect of periods of leave

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply—

(a)as if references to the employee were references to the worker;

(b)as if references to the employee's contract of employment were references to the worker's contract;

(c)as if the calculation date were the first day of the period of leave in question; and

(d)as if the references to sections 227 and 228 did not apply.

40. The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018

Amendments to regulation 16 of the Working Time Regulations 1998 [came into effect from April 2020]

10.—(1) Regulation 16 of the Working Time Regulations 1998(**1**) is amended as follows.

(2) At the end of paragraph (2) insert "and the exception in paragraph (3A)".

(3) In paragraph (3)—

(a)in sub-paragraph (c) omit "and";

(b)after sub-paragraph (d) insert—

"(e)subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—

(i)in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii)in any other case, 52; and

(f)in any case where section 223(2) or 224(3) applies as if—

(i)account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—

(aa)where the calculation date is the last day of a week, with that week, and

(bb)otherwise, with the last complete week before the calculation date; and

(ii)the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.".

(4) After paragraph (3) insert—

"(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3) as if references in that section to the employee were references to the worker.

(3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday."

Case Law

41. The case of Bear Scotland Ltd discussed many of the points relevant to my determination of the claimant's cases today. In that case, the EAT held that:

(i) Article 7 of the WTD requires normal remuneration to be paid during holidays. What constitutes 'normal' depends on the circumstances. Where there is a settled pattern of work it should be obvious, where there is no settled pattern, then an average should be used. That average should be taken over a reference period.

(ii) There should be an intrinsic or direct link between the payment claimed and the work a worker is **r**equired to carry out**.** Article 7 requires non-guaranteed overtime, where the employer is not obliged to provide the overtime, but the worker is obliged to work it if requested to be considered when calculating the average pay or determining the settled working pattern. The position regarding voluntary overtime was less clear.

(iii) The WTR 1998 should be interpreted to conform with Article 7 of the WTD; this was permitted under the principle of indirect effect.

42. The position as regards employees with no normal working hours was not required to change as a result of the case law, since their holiday pay was already calculated over a reference period which took account of all elements of remuneration and is therefore arguably compliant with the Directive.

43. In *Dudley Metropolitan Borough Council v Willetts and others UKEAT/0334/16* the EAT held that voluntary overtime pay, out-of-hours standby payments and call-out payments should be included in pay for the four weeks' leave under regulation 13 of the WTR 1998. This was so even though there was no obligation for workers to accept the offer of overtime, or to participate in the on-call rota. Payments for voluntary work which is normally undertaken should not be excluded as a matter of principle.

44. *Willetts* was expressly approved by the Court of Appeal in *East of England Ambulance Service NHS Trust v Flowers [2019] EWCA Civ 947*, a case brought under Article 7 of the WTD. The court held that voluntary overtime pay should be taken into account by the employer when calculating the four weeks' paid leave under Article 7 of the WTD, so long as the payments are sufficiently regular and paid over a sufficient period.

45. The claimant is bringing claims in respect of a series of what he says are underpayments of his holiday pay. Bear Scotland established that in order to establish a "series", there cannot be more than three months between deductions.

46. This has subsequently be addressed ‘obiter’ by Lady Justice Simler in the case of Smith v Pimlico Plumbers Ltd [2022] EWCA Civ 70 which was handed down after I heard this case. That addresses the difference between the cases of Chief Constable of Police v Agnew [2019] NICA 32 [2019] IRLR 792 (“Agnew”) and Bear Scotland Ltd v Fulton [2015] ICR 221 (“Bear Scotland”) when assessing what amounts to a series of deductions for the purposes of an unauthorised deduction from wages claim. I consider its relevance to this case below.

Conclusions

Holiday pay

47. As both parties were unrepresented, they made very few submissions at all and certainly neither party drew any distinction between types of leave or which legislation was being relied upon.

48. Mr Robbins stated that he felt that the holiday pay claims were out of time in respect of anything more than 3 months before the submission of the ET1. He accepted that in principle the holiday pay paid on termination was in time. He did not voice any concerns regarding the conclusions I had reached on time in my original Judgment for the first case.

49. Regulation 16 (1) of the WTR provide that a worker is entitled to be paid a week's pay in respect of each week of annual leave. Regulation 13 allows for basic leave (4 weeks) and Regulation 13A covers additional leave (1.6 weeks' leave). The mechanism for calculating a week's pay is set out in s 221-224 ERA. The 12 week reference period has been changed to 52 weeks with effect from 6 April 2020.

50. I firstly address whether the claimant's contract allowed for 'normal hours'. The contract is not particularly clear - but I conclude that he did have normal hours of 90 per fortnight which the company was obliged to offer (or at least pay for) and he was obliged to accept. Across any one month he was assigned jobs that varied in length and days. He worked a set shift pattern of 6 days on and 2 days off but how many hours he worked across those days fluctuated in terms of times and days and duration. Nevertheless, he had a guaranteed number of hours (90 per fortnight) in accordance with his contract of employment. I accept that he would not have been forced to accept work over that period of time and the company was not obliged to offer time over that period. The fact that his pay rate remained the same after he had worked 90 hours per fortnight, does not detract from the fact that any hours beyond the 90 hours were considered 'additional'.

51. I therefore consider that the claimant was a 'time worker' under s222 ERA because his remuneration varied according to the amount of time he worked. This means that a week's pay must be calculated in accordance with the case law and the relevant reference period.

52. Bear Scotland established that a week's pay needed to be calculated by using an average of pay received when calculating a normal week's pay. That pay needed to be directly linked to the work done. Here it is clear that there was no settled pattern, therefore an average ought to be used. It is clear that there was a direct link between the pay that the claimant received and the work that he did as he was paid by an hourly rate. I do not accept that Mr Robbins' argument that the claimant was paid for rest breaks somehow detracts from this. The company chose to pay its drivers for rest breaks and rest hours formed part of their shifts and in effect part of their working time for the purposes of remuneration.

53. Following the Court of Appeal in *East of England Ambulance Service NHS Trust v Flowers [2019] EWCA Civ 947*, the court held that voluntary overtime pay should be taken into account by the employer when calculating the four weeks' paid leave under Article 7 of the WTD, so long as the payments are sufficiently regular and paid over a sufficient period.

54. I therefore consider that the claimant's weekly pay needs to be calculated by reference to an average taken over the 52 week period prior to the date that the holiday was taken certainly by reference to the 4 weeks' pay allowed for by the Working Time Regulations.

55. With regard to the 1.6 weeks 'additional' leave allowed for under the WTR but not proscribed by the Working Time Directive, I turn to the ERA 1996 for this calculation. I consider that following the change in the reference period from 6 April 2020, the ERA now establishes that an average over a 52 week period must be used to calculate a week's pay and this must therefore include the overtime worked by the claimant.

Notice pay

56. The claimant was on furlough at the time that he was made redundant. His employment terminated on 18 September 2020. Where an employee's employment terminated before 30 September 2021, the amount of a week's pay is the amount payable by the employer under the employment contract in force on the calculation date. As set out above, 'normal working hours' for the purposes of the ERA is now calculated by taking an average of 52 weeks' pay. The Furlough scheme further states that the following rules apply:

    (i) the normal working hours, in relation to any period during which the employee is furloughed, include furloughed hours, and

    (ii) the amount payable, in relation to any period during which the employee is furloughed, is calculated disregarding any reduction in the amount payable as a result of the employee being furloughed — Regs 3(2)(a) and 4.

In other words, the claimant's notice pay ought to be calculated on the basis of 100% of a normal week's pay and this therefore means using the ERA calculation provisions and taking the average over the past 52 weeks.

Furlough Pay

57. As I found in my earlier judgment the Claimant's furlough pay ought to have been calculated by reference to the month's wages in the corresponding month a year earlier. The figures provided by the respondent regarding the relevant month's pay in 2019 were not correct in the last hearing and new documents demonstrate that the claimant's pay ought to have been calculated according to those figures. This means that the claimant was underpaid as his earnings in the month of May 2019 were in excess of the maximum £2,500 and he should therefore have received this capped amount as opposed to the lower sum paid.

Unpaid wages – 16 March 2020

58. I have reconsidered the claimant's claim for unpaid wages on 16 March 2020. I heard nothing today that challenged my findings of fact that the claimant had been paid everything he was entitled to with regard to that payment. I quote the relevant fact findings again:

11. "The same pay-slip also records that the claimant was paid for 32 hours at £12 an hour receiving a total of £384. The respondent states that this was in respect of a payment for the 14 hours they owed him for 16 March 2020 plus a good will payment because it had been so delayed. The claimant stated that he could not believe that they would make such a good will payment and did not trust that this payment reflected what he was owed.

12. I accept in the absence of any evidence from the claimant that he was owed the £384 in respect of anything else, that this money was intended to pay the claimant in respect of 16 March 2020."

59. Nevertheless, having reconsidered my earlier judgment I conclude that I erred by not making a declaration that the claimant had suffered an unauthorised deduction from wages on this date. I therefore find that the claimant did suffer an unauthorised deduction from his wages as he was not paid the payment on the pay date of 30 March 2020. I further conclude however that no award ought to be made in respect of this deduction as in accordance with s 25(3) ERA 1996 as the amount has already been paid to the claimant.

Time point

60. The claimant's first ET1 was issued on 20 August 2020 whilst he was still employed. That ET1 specified that he as owed money for a single holiday day on 11 March, an unpaid day of wages on 16 March 2020 and underpaid furlough pay. The claim did not reference a series of deductions and the claimant did not articulate that claim during the hearing. With the extension allowed for under the ACAS Early Conciliation procedure, all claims brought under that ET1 were within the relevant statutory limitation periods.

61. The claimant's second ET1 was issued on 16 November 2020 and references 8.5 days' holiday that was paid in lieu on termination of his employment 18 September 2020. It does not reference the multiple days of holiday now outlined in the claimant's schedule of loss. The ACAS Early Conciliation period ran from 25 June to 25 July 2020. Therefore any deduction made prior to 17 August 2020 is outside the primary limitation period of 3 months unless the claimant can establish a 'series' of deductions.

62. I have considered therefore what part of the claimant's holiday pay claim was brought in time by the second ET1 dated 16 November 2020. The respondent accepts that the holiday pay paid on termination was in time and I agree. That amounts to 8.5 days' holiday which were underpaid.

63. In the first instance, I do not accept that either of the claimant's ET1s make claims for any leave other than the one day on 11 March 2020 specified in Claim 2304767/2020 and the 8.5 days payable on termination as set out in Claim 2307599/2020. I do not accept that any application to amend has been made to

allow me to consider the claims regarding more historic underpaid annual leave. The claimant has had several opportunities to set out what his case was and he made no reference to earlier holiday entitlements until submitting his schedule of loss.

64. I find however that any claim in respect of days taken before that was not brought in time. The next date before previous date on which the claimant took annual leave was 11 March 2020. This is more than three months prior to 18 September 2020 which was when his employment terminated and his entitled to untaken leave during the preceding leave year crystallised. The case of Bear Scotland has established that where there is more than a 3 month gap between leave taken, then it cannot amount to a series of deductions.

65. Since hearing the claim the decision of LJ Simler in the Court of Appeal has obiter stated that Bear Scotland is wrong in terms of what constitutes a series of deductions and says that it is not necessary for there to be less than 3 months between each 'deduction' to establish a series. The NICA case of Agnew (which does not bind me) also states that a series of deductions can be established even where there is more than 3 months between payments. However neither the NICA nor obiter comments by the Court of Appeal bind me whereas the EAT decision in Bear Scotland does. I must therefore follow this authority.

66. In conclusion therefore I uphold the claimant's claim for unauthorised deduction from wages in respect of the 8.5 day's under paid holiday pay that was payable on termination. I do not accept that the claimant has at any point advanced a claim in the pleadings or made any application to amend regarding any overarching claim for underpaid holiday pay that predates this. In the alternative, I find that any claim regarding earlier underpaid holiday pay is out of time.

Compensation

67. Although the claimant submitted a detailed schedule of loss – it was only submitted less than 2 hours prior to the hearing and the respondent was not given a proper opportunity to consider those figures and calculations or respond to them. The claimant was unable to address me on how the numbers had been reached or what monies had already been accounted for as he had had assistance preparing the schedule.

68. I therefore make the following findings and request the parties carry out the calculations according to my judgment therefore avoiding the need for a further remedy hearing to oversee the calculations. Should this not be possible then a remedy hearing will be listed. All the figures below are the gross payments payable.

(i) 1 day of holiday pay for 11 March 2020 using an average of the previous 52 week's pay, less the payment already made of £96.

(ii) 8.5 days' holiday pay paid on termination using an average of the previous 52 week's pay, calculated in terms of full pay and disregarding any furlough reductions – less the payment already received of £1,152.

(iii) 1 week's notice pay calculated using the average of the previous 52 weeks' pay disregarding any furlough pay reductions and less monies already received of £672.

(iv) £80.35 in respect of underpaid furlough pay on 31 May 2020 as the claimant ought to have been paid the maximum amount of £2,500 and was only paid £2,419.65.

69. The claimant has set out a request for interest in respect of all the payments. Interest is not payable by employment tribunals in respect of unauthorised deduction from wages claims. S24(2) ERA provides that a tribunal can order the employer to compensate the claimant for any financial loss sustained as a result of the unlawful deductions for example overdraft costs or bank charges. No such losses have been outlined to me by the claimant. Unlike in civil courts, interest is not awarded as standard and no provision is made within the ERA for the award of interest. The sum payable under s24 ERA is that which has been deducted from the claimant's wages. Therefore no interest is payable to the claimant in this case.

70. The claimant has also sought an uplift for failure to comply with the ACAS procedure in calculating holiday pay and notice pay. The ACAS Code does not apply to unauthorised deductions from wages claims and is relevant only to disciplinary and grievance matters. Therefore no uplift shall be awarded in this respect.

Employment Judge Webster

Date: 2 February 2022