EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104964/2018

Held in Glasgow on 15 August 2018 (Preliminary Hearing); and 21 August 2018 (Written Representations)

Employment Judge: Ian McPherson

Mr William McGowan	Claimant Not Present and Not Represented
GCN (Scotland) Ltd	Respondents Represented by:- Mr Paul Santoni - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) The claimant having failed to appear, or to be represented, at this Preliminary Hearing, and having considered his non-attendance, and there being an explanation for it provided in Employment Judge Robison's decision of 31 July 2018 not requiring him to attend, but permitting him to attend and participate in terms of Rule 35, if he so decided, the Tribunal, in terms of Rule 47, decided not to dismiss his

claim against the respondents, but proceeded with the listed Preliminary Hearing in his absence, the respondents being represented and ready to proceed with the listed Hearing.

(2) Thereafter, having heard the solicitor for the respondents, in respect of his application dated 4 July 2018, inviting the Tribunal to reconsider, in terms of Rule 13, the decision made by Employment Judge Wiseman on 27 June 2018 to reject the employer's contract claim made in the ET3 response form dated 12 June 2018, the Tribunal refuses that reconsideration application, and confirms the rejection previously made by Judge Wiseman.

(3) Accordingly, the Tribunal orders the claim and response to be listed for a two hour Final Hearing for full disposal, including remedy if appropriate, to be determined before an Employment Judge sitting alone at the Glasgow Employment Tribunal on a date to be hereinafter assigned by the Tribunal, in September or October 2018, and to be intimated to both parties as soon as possible by issue of a Notice of Final Hearing from the clerk to the Tribunal.

(4) Having heard further from the solicitor for the respondents, and (a) the claimant having failed to send to the respondents, and copied to the Tribunal, by 27 July 2018, or at all, his Schedule of Loss and supporting documentation, as ordered by the Tribunal, per paragraph 3 of the standard Case Management Orders issued by Employment Judge Wiseman on 6 July 2018, under Rule 29, for the purposes of the Final Hearing in this case, and (b) the claimant not having corresponded with the Tribunal, in reply to correspondence from the Tribunal, and not responded to correspondence from the respondents' solicitor, from 6 July to 10 August 2018, the Tribunal decided, acting on its own initiative, in terms of Rule 37 (1)(d), that the claimant appears not to be actively pursuing his claim, and gives the claimant 10 days from the date of issue of this Judgment to make written representations to the Tribunal, in terms of Rule 37(2), to be copied at the same time to the respondents' solicitor, to confirm whether or not he continues to insist in his claim

against the respondents, and seeks to actively pursue his claim by participation at the Final Hearing, in which case to quantify the sums sought by him from the respondents for each of (i) 1 week's lie time, (ii) 4.5 days holiday pay, and (iii) 4 days' unpaid wages, or whether he now seeks to withdraw his claim against them.

(5) Finally, in light of the foregoing, the Tribunal refuses, as unnecessary, the respondents' solicitor's application dated 2 August 2018, seeking an order for further and better particulars directed against the claimant, requiring him to clarify the legal basis on which he is bringing his claim against the respondents.

REASONS

Introduction

1. This case called before me at 2.00pm on the afternoon of Wednesday, 15 August 2018 for a Preliminary Hearing, to ***'determine reconsideration of a decision to reject a counterclaim",*** as per Notice of Preliminary Hearing issued by the Tribunal to both parties under cover of a letter dated 1 August 201 8. Two hours was set aside for this Preliminary Hearing.

Claim

2. On 21 May 2018, following ACAS early conciliation between 13 April 2018, and 9 May 2018, the claimant presented his ET1 claim form to the Employment Tribunal, pursuing the respondents in respect of sums that he stated were owed to him by way of holiday pay, arrears of pay, and ***"other payments"*** when he resigned from his employment with the respondents on 22 March 2018 as an HGV Driver.

3. In Section 8.2 of his claim form, setting forth the details of his claim, the claimant stated as follows:-

> ***"When I resigned on 22 March 2018, I was due 1 week's lie time, full week that I had worked pay and my holiday pay. GCN only paid me £18.80. To date I have never received my final payslip or any P45 or any additional information. "***

4. Further, at Section 9.1, the claimant indicated that, in the event his claim was to be successful before the Tribunal, he sought an award of compensation only. In describing the compensation he was seeking, at Section 9.2, the claimant stated as follows:-

> ***"1 week lie-time; 4.5 days holiday pay; 4 days pay from Monday 19th March up to and including 22 d March 2018. In total 13.5 pay days."***

5. Further, in providing details of his earnings and benefits with the respondents, at Section 6 of the ET1 claim form, the claimant stated that, on average he was working 55 hours per week for the respondents, for which he received (gross) pay before tax of £446.18 weekly, providing (net) normal take home pay of £409.07 weekly.

6. The claim was accepted by the Tribunal on 4 June 2018, when a copy was sent to the respondents, requiring them to lodge an ET3 response, by 2 July 2018, and advising that the case was listed for a one hour Final Hearing before an Employment Judge sitting alone at Glasgow on Wednesday, 15 August 2018 at 2.00pm, to hear the evidence and decide the claim, including any preliminary issues.

7. In that Notice of Claim and Notice of Final Hearing, copied to the claimant, the claimant was advised that, unless the figures were set out in his claim, he must send to the respondents, within the following 14 days, details of the amount claimed and how it was calculated, and a copy of the calculations should be brought to the Final Hearing. While, in his ET1 claim form, the claimant states that he seeks compensation for each of (i) 1 week's lie time, (ii) 4.5 days holiday pay, and (iii) 4 days unpaid wages, he

does not quantify the monetary sums sought by him from the respondents for each of these heads of claim.

Response

8. By letter dated 12 June 2018, the respondents, through their solicitor, Mr Paul Santoni of Freelands, Solicitors, Wishaw, submitted a completed ET3 response form, indicating that they defended the claim, and they wished to make an employer's contract claim in response to the claimant's claim, and referring to the attached covering letter from Mr Santoni.

Respondents' application for sist of Tribunal proceedings refused by the Tribunal

9. In his covering letter to the Tribunal, dated 12 June 2018, and copied to the claimant, in terms of Rule 92, advising the claimant that he should notify the Tribunal in writing, within 7 days, if he wished to oppose or make any representations in relation to the respondents' application for a sist, Mr Santoni stated as follows:-

> 'We *enclose herewith* a *Response Form in connection with the above case. We require to make an application to stay the proceedings and in particular in regard to the provision of Further and Better Particulars in regard to the response and the counterclaim to avoid any prejudice to any ongoing criminal investigation concerning the Claimant and his employment with the Respondents.*
>
> *The Claimant was found stealing diesel from the Respondents on 22 March 2018. He was suspended on that day although he appears to have accepted that he treated himself as having resigned with effect from that day.*

The Claimant has been charged in relation to that although no date has been given to our clients in relation to the date for any criminal proceedings. There are also ongoing criminal investigations concerning other quantities of diesel.

As ***the Claimant is entitled to be advised by the Tribunal that he does not require to say or write anything which may incriminate himself in regard to allegations of criminal activity in our submission it would be appropriate to submit the details of the Counterclaim and have the Claimant respond to these. That is quite apart from any obligation to give evidence at an Employment Tribunal.***

Separately and additionally it may prejudice an ongoing police enquiry in relation to this Claimant. Accordingly in our submission it would be appropriate for the proceedings to be stayed for a period of say three months and for us not to be required to submit a detailed response and in particular the counterclaim.

We ***confirm that in terms of Rule 92 we have intimated this application to the Claimant. We attach a copy of the correspondence intimating this.***

We look forward to receiving a determination by the Tribunal at the earliest date. "

10. While Mr Santoni had referred to ***"Counterclaim" ,*** in terms of the Tribunal's Rules of Procedure, the formal title is ***"Employer's Contract Claim".*** The Tribunal accepted the respondents' ET3 response, and a copy was sent to the claimant, and ACAS, under cover of a letter from the Tribunal dated 27 June 2018.

11. Further, on direction from Employment Judge Lucy Wiseman, to whom Mr Santoni's letter of 12 June 2018 was referred. Employment Judge Wiseman considered his application to sist the proceedings, pending the conclusion of the related criminal proceedings, but she refused the respondents' application on the basis that it appeared to her that the Tribunal could determine the monetary claims without prejudicing anyone's position regarding the criminal investigation.

Rejection of Employer's Contract Claim

12. Further, by letter to Mr Santoni, dated 27 June 2018, the respondents' solicitor was advised that it appeared to Employment Judge Wiseman that the Tribunal could not consider the employer's contract claim because the Employment Tribunal does not have jurisdiction because Article 4 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 only allows such a claim where the employee has brought a claim for breach of contract.

13. The claimant had not brought a breach of contract claim, held Judge Wiseman. Mr Santoni was advised that he had the right to apply for a reconsideration of Judge Wiseman's decision to reject and, if he wished to do so, he must apply in writing, within 14 days, explaining why he believed the decision to reject the employer's contract claim to be wrong, and whether he wished a Hearing to consider his application for reconsideration.

Initial Consideration of Claim and Response

14. On 6 July 2018, having considered the file, at Initial Consideration, I decided that the claim and response should proceed to the listed Final Hearing on 15 August 2018, but with an extended duration of 2 hours, rather than the standard 1 hour, and I also instructed that standard Case Management Orders be issued to parties.

15. Those standard Case Management Orders were signed by Employment Judge Wiseman on 6 July 2018, and a copy of those Orders were attached to the Tribunal's letter to both parties, dated 6 July 2018, intimating my decisions at Initial Consideration, including additional Orders on the respondents to supply Further and Better Particulars of their defence, and clarify whether or not they accepted the claimant was due any monies.

16. Further, as there was a dispute between the claimant's asserted earnings, in the ET1 claim form, and the information provided in the ET3 response, where only a figure had been provided for gross weekly wages at £405, but no detail about net weekly wages, I further ordered the respondents to ensure copy payslips and other documents, relating to the claimant's disputed payments, were included in the Bundle of Documents for the Final Hearing.

Respondents' application for Reconsideration of the Rejection Decision

17. On 4 July 2018, further to the Tribunal's letter of 27 June 2018, Mr Santoni made application for reconsideration of Employment Judge Wiseman's decision to reject the employer's contract claim. He applied for a reconsideration of that decision, copying it to the claimant, in terms of Rule 92, and, in particular, stating as follows:-

> 'We *appreciate the position in regard to the Employment Tribunals (Extension of Jurisdiction)(Scotland) Order 1994. Further the claim as lodged appears to be a breach of contract claim and is not one which had either been stated to be a deduction of wages or alternatively registered with the Tribunal for the deduction of wages. Accordingly at this stage we consider that we are entitled in the absence of any stipulation to say this is not a contractual case to have this matter proceed and for our Counterclaim for breach of contract to be so recorded.* IVe *accordingly wish to apply fora reconsideration of this decision."*

Respondents' Further and Better Particulars/Documentation provided to the Tribunal

18. Thereafter, on 17 July 2018, with copy sent at the same time to the claimant, in terms of Rule 92, Mr Santoni, further to the Tribunal's letter of 6 July 2018, and with apology for the delay in replying, responded as follows :-

> "1. *It Is not accepted that the employee is due one weeks lie time.*
>
> 2. *It is accepted that subject to the defence that the employee is entitled to 4.5 days holiday pay.*
>
> 3. *It is accepted that subject to the defence that the employee is due to be paid 4 days pay from the 19 to 22 March.*
>
> 4. *We enclose herewith details of the employee's pay for the week from 5 January 2018 through to 23 March 2018. The Tribunal will note that the total gross pay for the period is £6,167 and the net pay is £4,950. Accordingly that works out at an average gross pay of £513.91 and an average net pay of £412.50.*
>
> 5. *We enclose some pay slips as ordered. "*

19. Specifically, pay slips dated 23 February, and 2, 9 and 16 March 2018, were supplied, along with a copy of the respondents' payroll history report for the claimant dated 12 July 2018, providing details of his pay processed between 5 January 2018 and 30 March 2018. It was not explained why only 4 payslips were produced, and not all payslips provided to the claimant.

Further procedure directed by the Tribunal

20. Mr Santoni's application of 4 July 2018 to reconsider the decision to reject the employer's contract claim, and his correspondence of 17 July 2018 with Further and Better Particulars for the respondents, and documentation, was referred to Employment Judge Muriel Robison. As intimated to parties in the Tribunal's e-mail of 31 July 2018, they were advised that Mr Santoni's application dated 4 July 2018, for reconsideration of the decision to reject the *"counterclaim"* was considered by Employment Judge Robison under Rule 13, but Employment Judge Robison was not prepared, on the basis of those written submissions, to accept the counterclaim in full, and she directed that the application must be considered at a Hearing.

21. Judge Robison, in those circumstances, directed that the Final Hearing set down for 15 August 2018 was converted to a Hearing for reconsideration of the rejection of the counterclaim, and extended to 2 hours. Although only the respondents would require to attend that Hearing, Employment Judge Robison considered that it was appropriate for the claimant to attend the Hearing, given that he has a legitimate interest in the application, in terms of Rule 35.

22. Accordingly, the Tribunal's e-mail of 31 July 2018 stated that the claimant would therefore be invited to attend this Hearing, although he did not require to do so. It was also indicated that, if appropriate, other case management issues would also be discussed at this Hearing.

Respondents' application for Further and Better Particulars from the claimant

23. Thereafter, on 2 August 2018, by e-mail sent to the Tribunal, and copied to the claimant under Rule 92, Mr Santoni, in reply to the Tribunal's e-mail of 31 July 2018, stated as follows:-

> *"Presumably the matter could be fairly easily clarified by Mr McGowan confirming whether this claim is one which is for*

breach of contract or made under another statutory basis. Clearly if it is made for breach of contract then that would have some significant effect in the way this is dealt with. We ***look forward to hearing from you in regard to this. It may be simpler that an Order is directed to Mr McGowan to clarify the legal basis on which he is bringing this claim.*** We ***therefore respectfully suggest that this should be regarded as a request for Further and Better Particulars directed against the claimant."***

24. On 10 August 2018, following referral to Employment Judge Mary Kearns, , she directed, as intimated by the Tribunal by letter e-mailed to both parties, that Mr Santoni's application be placed on the casefile, and his request for an Order could be discussed at this Preliminary Hearing on 15 August 2018.

Preliminary Hearing before this Tribunal

25. When the case called, at 2.00pm, on the afternoon of Wednesday, 15 August 2018, the claimant was not in attendance, nor represented, but Mr Santoni was in attendance, unaccompanied, acting on behalf of the respondents.

26. Having noted, from my pre-read of the casefile, that while the claimant had failed to appear or be represented, there was an explanation for that, provided in Employment Judge Robison's decision of 31 July 2018, I decided not to dismiss the claim against the respondents, but proceeded with the listed Preliminary Hearing in the claimant's absence, Mr Santoni being present and ready to proceed with his applications before the Tribunal for this listed Hearing.

Submissions for the Respondents

27. I invited Mr Santoni to address me on his application for reconsideration of Employment Judge Wiseman's rejection of the employer's contract claim

made in the ET3 response form. As set forth in his covering letter of 12 June 2018, Mr Santoni advised me that the claimant had been found stealing diesel from the respondents on 22 March 2018, when he was suspended, although he then resigned with effect from that date.

28. Mr Santoni further advised, again as per his letter of 12 June 2018, that the claimant had been charged in relation to that stealing of diesel from the respondents, although as at the date of his letter to the Tribunal, his clients had no information as to any criminal proceedings, although criminal investigations were then stated to be ongoing concerning other quantities of stolen diesel. He described the claimant as having been caught ***"red handed"*** on 22 March 2018, and resigning that day.

29. Further, with regard to Employment Judge Wiseman's rejection of the employer's contract claim, Mr Santoni stated that he accepted that there cannot be an employer's contract claim against a Wages Act claim, and that is why he had applied for what he referred to as "review" of Employment Judge Wiseman's decision to reject, as he submitted to me that a failure to pay wages can be a breach of contract, and he described that as being ***"trite law".***

30. Byway of further clarification of his position, in that regard, Mr Santoni then provided, and handed up, to me an extract from Professor Douglas Brodie's text book on ***""The Contract of Employment*** (2008), in particular Chapter 11 ***(""The Work-Wage Bargain"),*** at paragraphs 11.01 and 11.02, describing a key element of the employment contract being the employer's obligation to pay wages, and that a breach of that obligation can have a number of unfortunate practical consequences for the employee, and it is not surprising to find that the Courts are of the view that any breach is likely to be material. If their wages are not paid timeously it will be a question of fact and degree whether or not the ensuing breach is material.

31. Mr Santoni also provided, and handed up to me, an extract from ***""Tolley's Employment Handbook"*** (32nd Edition, 2018), edited by Sean Jones QC,

in particular an extract from Chapter 8 (Contract of Employment), at paragraphs 8.47 (employer's remedies for breach of contract of employment).

32. Under reference to paragraph 8.47a (acceptance of fundamental breach) he drew my attention to the narrative that if the employee is in fundamental breach of his contractual obligations, the employer can accept the breach and bring the contract to an end, and such a fundamental breach will generally consist of gross misconduct, extreme incompetence, or a major failure to carry out the work required of the employee.

33. Also, under reference to paragraph 8.47b (damages), Mr Santoni referred me to the narrative that an employer may bring proceedings against an employee for damages for breach of contract, and situations which may give rise to such proceedings are a breach of the employee's duty of fidelity, breach of his duty of care and failure to give the notice of termination he is contractually obliged to give.

34. Next, Mr Santoni advised me that the claimant had made no reply to the standard Case Management Orders issued by Employment Judge Wiseman on 6 July 2018, as he had not seen a Schedule of Loss from the claimant, and he enquired whether the Tribunal had received any correspondence from the claimant in reply.

35. He further stated that there had been no reply by the claimant to any of the correspondence which had been copied to him, in terms of Rule 92, including the application for reconsideration on 4 July, the Further and Better Particulars on 17 July, and the more recent application for Further and Better Particulars, intimated on 2 August 2018.

Clarification sought by the Tribunal, and further Submissions

36. Having heard from Mr Santoni, I asked him if he was in a position to update the Tribunal as regards the criminal investigations, by way of the ongoing

police enquiry referred to in his letter of 12 June 2018, or any update on potential criminal proceedings against the claimant.

37. In reply, Mr Santoni stated he did not have the up-to-date position, but he could readily check with his client. I allowed a short adjournment, for him to telephone his clients, and make enquiry about any ongoing police investigation/criminal proceedings.

38. While we adjourned for that purpose, when the Hearing re-convened, Mr Santoni advised me that he had been unable to get hold of either of the respondent's two directors, or their HR manager, but he gave an undertaking to provide the relevant information to the Tribunal by no later than 4.00pm the following day, Thursday 16 August 2018.

39. By way of further explanation of the respondents' position, and again under reference to his covering letter of 12 June 2018, Mr Santoni explained that the respondents did not want to give the claimant much information, or "a *heads up",* on the criminal investigation/criminal proceedings, but he accepted, in answer to a request from me for further information, about the value of the respondent's counterclaim, that his letter of 12 June 2018 had not specified any particular sum being sought from the claimant, by way of counterclaim.

40. Mr Santoni further explained that that was still the case, as he had not yet received a quantification of the stolen diesel from his clients, nor any vouching documents from his clients. He further accepted that the respondents could, instead of proceeding by way of counterclaim in the Employment Tribunal, raise a civil action against the claimant in the Sheriff Court.

41. While he had requested the relevant information, to quantify the counterclaim, from his clients on 8 June 2018, and he had more recently sent them a reminder, Mr Santoni advised me that he had still had not received that quantification, or vouching information.

42. Further, Mr Santoni also stated that there was a "question ***mark'*** over whether the claimant intends to proceed with his claim against the respondents, as he has not provided a Schedule of Loss, as ordered by the Tribunal on 6 July 2018, and he suggested that the Tribunal may wish to ask the claimant if he wishes to proceed with his claim, rather than proceed to list the case for Final Hearing, if the employer's contract claim is not allowed in.

43. If it is allowed in, Mr Santoni recognised that the claimant would require to be given the opportunity to reply, within the usual 28 day period, and that would have an implication for the timeline on assigning any Final Hearing in the claim, and any counterclaim, in due course. He also stated that it was unfortunate that, the respondents' Further and Better Particulars of 17 July 2018, having clarified what they say is due to the claimant, ***"subject to the defence"*** (which he clarified to mean subject to the respondents' counterclaim) had not been replied to by the claimant, either to him, or to the Tribunal.

44. In summary, and under reference to the respondent's Further and Better Particulars lodged on 17 July 2018, Mr Santoni stated that the respondents accept that the claimant is due 8.5 days, out of the 13.5 days claimed, and the issue which arises is the amount of a week's pay, and the daily rate payable to the claimant. On the basis of the average net weekly wage of £412.50, Mr Santoni stated that it equated to a daily rate of £82.50 per day. On that basis, he stated 8.5 days' pay would equate to a net payment to the claimant of £701 .25.

45. I commented that, on the limited information available to the Tribunal, there was a factual dispute between the parties, as regards the claimant's normal working hours, and his weekly wages, the ET1 claim form stating that the claimant worked an average 55 hours per week, yet the respondents assert 45 hours per week, according to the respondent's ET3 response. There was no joint agreement of the claimant to the respondents' asserted weekly figures for the claimant's gross and net

weekly wages, as per the respondents' Further and Better Particulars of 17 July 2018

46. I then enquired whether matters were perhaps clarified in the claimant's written statement of the employment particulars issued by the respondents. In reply, Mr Santoni stated that he did not have a copy of those to produce to the Tribunal, at this Hearing, but he understood that the respondents did issue written particulars to their employees, and he would make enquiry, and provide the relevant information to the Tribunal, when replying, about the ongoing police enquiry/criminal proceedings, the following day.

jd 47. I pause here to note and record that his email of 16 August 2018, to which I refer below later in these Reasons, does not include a copy of any such written statement of the employment particulars issued by the respondents. Accordingly, I direct that if the case proceeds to Final Hearing, he, or the claimant, should ensure that the Bundle of Productions includes a copy of that document.

48. Mr Santoni further explained that, in working out the claimant's average gross and net earnings, as set forth in his e-mail of 17 July 2018, he had done so, having regard to the relevant statutory provisions, which I note here are to be found at Section 221 of the Employment Rights Act 1996, for employment with normal working hours, where an employee's remuneration varies from week to week.

Reserved Judgment

49. Concluding this Preliminary Hearing, at 2.45pm t I reserved my Judgment, and advised Mr Santoni that I would proceed to issue a written Judgment, and Reasons, as soon as possible, after receipt of his e-mail to be received the following day with further information.

Respondents' Further Information / Written Representations

50. Thereafter, by e-mail sent to the Glasgow Tribunal on 16 August 2018, and copied to the claimant, in terms of Rule 92, Mr Santoni advised as follows:-

> IVe ***refer to the Preliminary Hearing in relation to this case which took place on 15 August. At the Preliminary Hearing you requested some Further and Better Particulars from us and additional information in relation to this case.***
>
> ***We therefore confirm as follows:-***
>
> ***1. The Crime Reference Number is NE035505 18.***
>
> ***2. We confirm that the matter was reported to the Police and our clients have had confirmed to them by the Police that the Claimant has been charged with theft. The exact nature of the charge is not specifically known to our clients and clearly would be subject to the discretion of the Procurator Fiscal as to what offences are charged or not***
>
> ***3. In regard to the sums to be counterclaimed for at the present time in relation to the incident which led to the Claimant resigning these are:-***
>
> ***a. Costs for removing the diesel, cleaning out diesel tank and returning lorry - £324***
>
> ***b. Costs of hiring alternative vehicle for 2 days and tank being stripped - £408.56***
>
> ***c. Quantity of diesel removed by Claimant estimated at 40 litres at £1.28 a litre being £51.20.***

TOTAL £783.76

4. We confirm that there are ongoing investigations in relation to any other diesel having gone missing. However the above figures and information relates specifically to the incident in which the Claimant resigned.

In order to assist the Tribunal we enclose a Statement of Defence and Counterclaim in relation to the ET3 as requested.

We confirm that we have intimated this correspondence and the Statement of Defence and Counterclaim to the Claimant in terms of Rule 92.

51. Attached to his e-mail, Mr Santoni provided the following ***Statement of Defence and Counterclaim:***

The Claimant was employed as a Driver by the Respondents. On 22 March it was reported to the Respondents that they had seen the Claimant's lorry parked nearby their work beside the Claimant's car. Investigations were carried out and the Claimant was caught draining diesel fuel from the Respondent's lorry, which he was charged with driving, into two large 25 litre plastic containers. He was using a rubber hose and dipping into the diesel tank on the lorry using that. He immediately admitted responsibility for what was happening. He was advised that Investigatory Disciplinary Proceedings would commence. He resigned with immediate effect on 22 March.

COUNTERCLAIM

As a consequence of his conduct the rubber from the hose would contaminate the diesel in the tank and therefore potentially damage the engine components and fuel components of the vehicle. The vehicle required to be sent to a garage, Trucks Unlimited, who drained the tank, cleaned the tank out, and to replenish the tank and check the fuel system. The contaminated diesel would require to be destroyed and the total cost was £324. The Respondent's truck was off the road for two days whilst this procedure was carried out and a replacement truck was hired at a cost of £408.56. In addition there was 40 litres of diesel which was stolen by the Claimant and because it had been taken by rubber hose consequently the diesel was contaminated and had to be destroyed. The cost of diesel was £51.20. The Respondent's counterclaim the sum from the Claimant

DEFENCE TO THE CASE.

1. There was no lie time due to the Claimant. He was paid his wages in the week following the termination of each week.

2. It is accepted that he was entitled to four and half days holiday pay which had accrued.

3. It was accepted that he would be entitled to payment for the four days from 19 to 22 March.

4. The Claimant's working week was 45 hours. His average pay for the 12 weeks ending on the date of termination of his employment was a net pay of £412.50 and therefore the total sums, if any, due would for eight and half days totalling £701. 25.

Issues before the Tribunal

52. The issues before the Tribunal were to consider (a) whether or not the decision made by Employment Judge Wiseman on 27 June 2018 to reject the employee's contract claim should be reconsidered, and (b) to consider any case management in relation to this claim more generally, including the respondents' application on 2 August 2018 for Further and Better Particulars from the claimant.

Relevant Law

53. Rule 23 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides that any *"employer's contract claim"* shall be made as part of the response, presented in accordance with Rule 16, to a claim which includes an *"employee's contract claim".*

54. An *"employee's contract claim"* is defined, in Rule 1, as being a claim brought by an employee in accordance with Articles 3 and 7 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.

55. An *"employer's contract claim"* is defined, in Rule 1, as being a claim brought by an employer in accordance with Articles 4 and 8 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.

56. An employer's contract claim may be rejected on the same basis as the claimant's claim being rejected under Rule 12, for substantive defects, in which case Rule 13 shall apply. Rule 13 (1) provides that a claimant whose claim has been rejected (in whole or in part) under Rule 10 or 12 (and, by application of Rule 23, this includes an employer's contract claim) may apply for a reconsideration on the basis that *"either (a) the decision to reject was wrong; or(b) the notified defect can be rectified."*

57. Rule 13 (2) further provides that the reconsideration of rejection application shall be in writing and presented to the Tribunal within 14 days of the date

that the notice of rejection was sent. It shall explain why the decision is said to have been wrong, or rectify the defect and if the claimant (in this case, the respondents, as the party presenting the counterclaim) wishes to request a Hearing, this shall be requested in the application.

58. Thereafter, Rule 13 (3) provides that if the claimant (in this case, the respondents, as the party presenting the counterclaim) does not request a Hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a Hearing but, otherwise, the application shall be considered for a Hearing attended only by the claimant (in this case, meaning the respondents, who had made the application for an employer's contract claim to be accepted).

59. In the circumstances of the present case, Employment Judge Robinson directed, on 31 July 2018, that there should be this Hearing, to consider the respondents' application for reconsideration, but that the claimant was not required to attend, but he could do so if he so wished. She invited him, as an interested party, under Rule 35, given he is the claimant in the principal claim against the respondents.

60. Further, Rule 13 (4) provides that if the Employment Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.

61. In this case, as the employer's contract claim was rejected by Employment Judge Wiseman, notice was not given to the claimant, under Rules 24 and 25, which provide that a claimant's response to an (accepted) employer's contract claim shall be presented to the Tribunal office within 28 days of the date that the response, notifying of the employer's contract claim, was sent to the claimant.

62. Accordingly, in the present case, if the reconsideration application is to be successful, the claimant will be entitled to notice under Rules 24 and 25, and 28 days to lodge a response to the respondents' counterclaim.

Discussion and Deliberation

63. In coming to my reserved decision on this matter, I have taken into account the terms of the ET1 claim form, and ET3 response, held on the case file, parties' correspondence to the Tribunal, including the respondents' Further and Better Particulars, and Mr Santoni's oral submissions to me at this Preliminary Hearing, as also the additional information provided by him thereafter, as noted above at paragraphs 50 and 51, in his email of 16 August 2018., which was referred to me by the clerk to the Tribunal on 21 August 2018.

64. In considering the reconsideration application, I firstly wish to note that when the claim was presented, in the ET1 claim form at section 8.1, the only boxes ticked by the claimant were that he was owed holiday pay, arrears of pay, and other payments. In particular, he did not tick that he was owed notice pay which is, generally speaking, the most commonly used breach of contract claim brought by an employee before the Tribunal, when they have not received the notice pay which they consider due from their employer.

65. In the present case, of course, given the ET1 claim form discloses that the claimant resigned from his employment with the respondents on 22 March 2018, rather than he was dismissed by his former employers, it is perhaps not surprising that there is no claim for any notice pay due. The claimant resigned, he was not dismissed, and so no notice pay would be due to him from the respondents.

66. The ET3 response similarly states that the claimant resigned, and he was not dismissed by the respondents. The claimant may have been in breach of contract for resigning without notice to the respondents, but no such

argument was presented in the ET3 response lodged by Mr Santoni for the respondents.

67. Given both parties agree there was a resignation, and not a dismissal, that equally, I think, explains why, at section 8.1 of his ET1 claim form, the claimant did not tick the box indicating that he was bringing a claim that he had been unfairly dismissed (including constructive dismissal). While it is true that, at section 8.1, the claimant did tick the box indicating he was owed *"other payments"* , there is no reference in the further narrative of his claim, at section 8.2, nor at section 9.2, where he describes the compensation he is seeking from the respondents, which explains *"other payments"'* (if any) he was seeking from the respondents.

68. The only matters expressly referred to by the claimant in his ET1 claim form, as being monies owed to him by the respondents, are holiday pay, and arrears of pay for his last four days at work, and one week's lying time.

69. On presentation of the ET1 claim form, when it was accepted by the Tribunal administration, on 4 June 2018, and served on the respondents, the vetting officer in the Tribunal's administrative staff registered the claim against the administrative jurisdictional codes *"WTR (AL)", "WA",* and *"FWP".*

70. These relate, in turn, to an alleged failure to pay statutory annual leave entitlement under the Working Time Regulations 1998, Regulation 30 ("WTR(AL)"); failure to pay/unauthorised deduction from wages, under Section 23 of the Employment Rights Act 1996 ("WA"); and failure to provide a pay statement, under Section 11 of the Employment Rights Act 1996 ("FWP").

71. For failure to pay holiday pay, or wages properly due and payable, the Tribunal, as well as making a declaration to that effect, has the statutory power to award compensation, under Section 12 of the Employment Rights Act 1996, where in a reference, under Section 11, to a Tribunal

finding that an employer has failed to give an employee any pay statement in accordance with Section 8, the Tribunal shall make a declaration to that effect, but there is no power to award any financial compensation. The claimant's remedy in that regard is purely declaratory, and not monetary.

72. In seeking to make an employer's contract claim, in the ET3 response intimated on 12 June 2018, section 7.1 makes it clear that an employer's contract claim is "on/y *available in limited circumstances where the claimant has made a contract claim",* and there is reference to *"guidance".* At section 7.2, when asked if they wished to make an employer's contract claim in response to the claimant's claim, Mr Santoni ticked that box.

73. While directed to complete question 7.3, where the ET3 requires a respondent to set out the background and details of their (counter) claim, and refers them to guidance for more information on what details should be included, section 7.3 was completed by Mr Santoni only by way of, in manuscript, writing "see *attached correspondence",* being his covering letter of 12 June 2018, the terms of which I have reproduced above at paragraph 9.

74. In considering this matter, I have had regard to the terms of the ET3 response, and Mr Santoni's covering letter of 12 June 2018. I have also had regard to the *"guidance"* referred to on the ET3 claim form. That guidance is set forth in the HMCTS guidance booklet, T422 *("Responding to a Claim to an Employment Tribunal"),* available online, and from Tribunal offices.

75. At page 6 of that guidance booklet, it refers to breach of contract claims, as follows:

> *Breach of contract claims*
>
> *If a claimant is no longer employed, he or she may make a claim against an employer for breach of contract In certain*

circumstances, this entities you to make an employer's contract claim.

Any such employer's contract claim must be included in the response form and must be made within 28 days of the date that the copy of the claim form was sent by the Tribunal.

76. Further, in that same HMCTS guidance, specific guidance is given at pages 12 to 15 on ***"Filling in the response form".*** Of note, and material for present purposes, is the guidance given, at section 7, on page 14, which states as follows:

7 Employer's Contract Claim

7.1 Please refer to the section on Breach of Contract claims above for details of the circumstances when a respondent can make an employer's contract claim.

7.2 Please tick the box to confirm you wish to make an employer's contract claim in response to the employee's contract claim and continue to section 7.3.

7.3 In the space provided please set out the details of your claim, including any important dates.

77. This guidance is actually less than what is stated on the ET3 response form, at section 7, employer's contract claim, on page 5, where section 7.3 states: ***Please set out the background and details of your claim, including all important dates.***

78. It refers to ***"background",*** as well as details of the (counter) claim and calls for ***"alF*** important dates, rather than ***"any".*** Unlike section 9 of the ET1 claim form, where a claimant needs to detail what remedy they seek from the Tribunal in the event their claim is successful, there is no similar requirement in the ET3, where a respondent brings an employer's contract claim, to state what amount of financial compensation they are seeking

from the claimant, as there is at section 9.2 of the ET1 claim form to *"give as much detail as you can about how much you are claiming and how you have calculated this sum."*

79. Given the Tribunal's overriding objective, under Rule 2, to deal with cases fairly and justly, including, so far as practicable, that parties are on an equal footing, the requirements of fair notice and proper specification of an employer's contract claim appear less onerous than the requirements on a claimant to detail financial compensation sought from a respondent.

80. Previously, in Scotland, under the Employment Tribunal (Scotland) Practice Direction No.3, made by Colin Milne, then President of the Employment Tribunals (Scotland) ,on 14 December 2006, it was provided that when a respondent wished to present a claim against a claimant ("a *counterclaim")* in accordance with Article 4 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994, they should, if reasonably practicable, specify the amount claimed as part of the detail of the counterclaim.

81. However, that Practice Direction by the former President of the Employment Tribunals (Scotland) was revoked by the current Scottish President, Judge Shona Simon, on 10 February 2014, under powers confirmed by Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, so that the former requirement to specify the amount claimed as part of the detail of a counterclaim is no longer there by way of Presidential Practice Direction.

82. At this Hearing before me, Mr Santoni was unable to specify the amount being sought by his clients from the claimant by way of counterclaim. His additional information, supplied in his email of 16 August 2018, as reproduced above, at paragraphs 50 and 51 of these Reasons, now quantifies the value of the counter claim at £783.76, and confirms, subject to the counterclaim, that the respondents accept the claimant is due eight and half days totalling £701.25.

Disposal

83. Having carefully considered matters, I do not consider it to be in the interests of justice to allow the employer's counterclaim to now be accepted, when there is still no breach of contract claim before the Tribunal, the claimant not seeking notice pay, and the claimant himself not alleging that the respondents were in fundamental breach of contract, entitling him to resign, and complain of unfair constructive dismissal.

84. Further, and in any event, having regard to the Tribunal's overriding objective, under Rule 2, to deal with the case fairly and justly, including the saving of expense, and avoiding delay, is another reason to confirm Employment Judge Wiseman's rejection. This case should, at this diet of Hearing, have been at its Final Hearing, for what are, in terms, principally monetary claims. It was on that basis that Judge Wiseman previously refused Mr Santoni's application for a sist of proceedings.

85. Employment Judge Wiseman, who rejected the employer's contract claim, was right to do so, on the basis of the information available to her at that time. Mr Santoni has not convinced me that Judge Wiseman was wrong. Indeed, given the terms of his own email, of 4 July 2018, reproduced above at paragraph 17 of these Reasons, he appreciated the position in terms of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994,

86. I am satisfied, having reconsidered Judge Wiseman's decision, that her decision was correct, and that this Tribunal has no jurisdiction to consider Mr Santoni's counterclaim.

87. Further, and in any event, it was not set forth in the ET3 response originally lodged, even when read along with the covering letter of 12 June 2018. At best, it indicated that the respondents wished to make a counter claim, and further detail would follow. It was, at that stage, not in a form that the claimant could have sensibly responded to.

88. In that form, even if the claimant had brought a breach of contract claim, and so a counterclaim was competent, the counterclaim stated on 12 June 2018 was wholly lacking in proper specification and fair notice to both the claimant, as well as the Tribunal, as to its background, factual and legal basis and quantification of the sum sued for, which would all have called for further and better particularisation, and quantification from the respondents.

89. Employment Judge Wiseman's decision to reject the purported employer's contract claim was not wrong, but wholly appropriate. As such, it is in the interests of justice that I confirm her earlier decision, and refuse Mr Santoni's application for reconsideration of the previous rejection.

90. In light of the updated information on police inquiry/criminal proceedings now provided by Mr Santoni, in his email of 16 August 2018, while it is stated that the claimant has been charged with theft, there is no indication that criminal proceedings against him are yet contemplated, or instituted, by the Procurator Fiscal. As such, there is no reason not to list the case now for its Final Hearing.

91. In any event, even if criminal proceedings were contemplated, or instituted, I do not see how a Final Hearing in this case, about monetary claims, would prejudice any criminal proceedings against the claimant, nor prejudice a fair trial. The respondents in this case have accepted liability for 8.5 days, and there remains a dispute about 5 day's lying time. That, and the dispute about the amount of a week's wages, is not likely to involve any evidence that might prejudice any criminal proceedings. Nor is any evidence about whether or not the claimant was issued with all his payslips.

92. There is no pleaded claim for breach of contract brought by the claimant in his ET1. Therefore, this Tribunal has no jurisdiction to hear an employer's contract claim / counterclaim. The main argument from Mr Santoni seems to be that the respondents' losses / expenses, arising from the alleged theft

of fuel by the claimant, are greater in amount than the sums they accept are due to the claimant for his admitted monetary claims.

93. In effect, through the Tribunal, Mr Santoni is seeking to effect "set-off" against sums properly due and payable to the claimant, arising from his former employment with the respondents, to defeat this claim. That is not, however, a defence to a claim of unauthorised deduction from wages under Part II of the Employment Rights Act 1996. Nor, in the absence of any contract claim in the ET1 has it ever been accepted by the Tribunal that there is an accepted counterclaim in these Tribunal proceedings.

Further Procedure

94. It is in accordance with the interests of justice, and the overriding objective, to proceed to do determine this claim before this Tribunal in early course, and I have therefore instructed the clerk to the Tribunal to assign a two hour Final Hearing for full disposal, including remedy if appropriate, before an Employment Judge sitting alone, on a date to be hereinafter assigned by the listing section in September or October 2018.

95. In refusing Mr Santoni's application for reconsideration, I do not consider that any prejudice is caused to the respondents. As he himself recognised, at the Preliminary Hearing before me, and he told me he had so advised his clients, his clients retain the right to sue the claimant, through the civil courts, in the local Sheriff Court.

96. They are therefore not without remedy, if they choose to instruct him to raise those civil proceedings against the claimant. If criminal proceedings are brought against the claimant, the respondents may be able, through the criminal courts process, to obtain a compensation remedy against the claimant.

97. Further, I have addressed the other outstanding case management applications before the Tribunal. I agree with Mr Santoni that there is a

"question mark' against the claimant's position, and whether or not he is actively pursuing his claim, but I do recognise that, with unrepresented party litigants, correspondence from the Tribunal, and from a respondent's professional agents, often goes without comment, or reply.

98. Such a */a/ssez faire* approach by the claimant is not consistent with the Tribunal's overriding objective, and the duty on parties to co-operate with each other and the Tribunal to further the overriding objective to deal with the case fairly and justly.

99. For Mr Santoni to play his part in these Tribunal proceedings, his clients should have provided him with the relevant information far earlier than they appear to haver done so. The respondents need to appreciate that a solicitor acts on the basis of instructions from a client, and that a client needs to brief their solicitor, and provide required information and documentation, in time for the solicitor to act within timeframes laid down by courts and Tribunals.

100. It was disappointing to learn from Mr Santoni that despite requests of his clients on 8 June 2018, and later, he appeared at this Hearing without full information, which is why, as an indulgence to him, I allowed him to provide additional information within 24 hours to better inform me as to the position of his clients.

101. While the detail now provided in the Defence and Counterclaim is helpful to me in understanding the case, this provision of additional information from Mr Santoni, on 16 August 2018, is information that was not available to Employment Judge Wiseman, when she gave her rejection decision, and so its provision now cannot rectify its absence then, when it is information that was in the respondents' position, and so could and should have been produced at the time of their ET3 resisting the claim.

102. Its production now has only arisen because of my judicial intervention, at this Hearing, in discussion with Mr Santoni. As such, while further and

better specification of the respondents' position is welcome, it comes far, far later, than it should have.

103. In all the circumstances, I have, however, decided that it is appropriate to issue the claimant with a Strike Out Warning at this stage, rather than Strike Out his whole claim for failure to actively pursue. A Strike Out at this stage, apart from the fact that the claimant has had no notice of it in advance as a possibility, would be disproportionate, particularly in circumstances where there is an acceptance by the respondents that the claimant is due at least 8.5 days pay from them.

104. Finally, as I consider the terms of the ET1 claim to be clear, and they were clear to the clerk to the Tribunal, on giving the 3 appropriate jurisdictional codes, on presentation, and acceptance by the Tribunal, on 4 June 2018, there is, in my view, no need for the respondents' request for Further and Better Particulars to be directed against the claimant, requiring him to clarify the legal basis on which he is bringing his claim.

105. That factual basis is self evident in the terms of the ET1 claim form itself, and the brief narrative there provided by the claimant. .It is unrealistic to expect an unrepresented, party litigant, such as the claimant, to be aware of, and so able to detail, the precise legal basis of their claim. The ET1 claim form does not require them to do so, and I do not consider it appropriate to order the claimant to do so, given the circumstances of the present case, where the respondents have been able to respond to his claim, in their ET3, and now in their new Statement of Defence and Counterclaim.

Action required by the Claimant

106. As per paragraph (4) of my Judgment, within no more than 10 days from the date of issue of this Judgment, the claimant must write to the Tribunal, for my attention, with copy sent at the same time to Mr Santoni, for the respondents, to make written representations to the Tribunal, in

terms of Rule 37(2), to confirm whether or not he continues to insist in his claim against the respondents, and seeks to actively pursue his claim by participation at the Final Hearing, in which case to quantify the sums sought by him from the respondents for each of (i) 1 week's lie time, (ii) 4.5 days holiday pay, and (iii) 4 days' unpaid wages, or whether he now seeks to withdraw his claim against them, in whole, or in part.

107. I have instructed the clerk to the Tribunal to return the casefile to me, after that period of time has elapsed, in order that I can then ascertain the claimant's stated position, and order listing of the case for Final Hearing, or other procedure, as may then be required, dependent upon his written reply to the Tribunal.

Employment Judge: **I McPherson**
Date of Judgment: **29 August 2018**
Entered in register: **03 September 2018**
and copied to parties