EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J P S Pinto		Zulfiqar Ahmed t/a One 2 One Cars

Heard at: London Central **On**: 1, 2, 3, 4 February 2022
and in chambers on 16 and 17 March 2022

Before: Employment Judge Stout
Tribunal Member L Jones
Tribunal Member S Brazier

Representations
For the claimant: In person
For the respondent: Miss J Duane (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The Tribunal did not have jurisdiction to hear the Claimant's claim for unfair dismissal (including automatic unfair dismissal) under Part X of the Employment Rights Act 1996 (ERA 1996) and in any event it is in substance not well-founded and is dismissed;
(2) The Respondent did not contravene ss 13 and 39 of the Equality Act 2010 (EA 2010) and the Claimant's claim for direct age discrimination is therefore dismissed;
(3) The Respondent did not contravene ss 27 and 39 of the EA 2010 and the Claimant's claim for victimisation is therefore dismissed;
(4) The Respondent did not breach the Claimant's contract and/or make any unlawful deduction from his wages in respect of notice pay, furlough pay or holiday pay;
(5) The Claimant's claim for holiday pay under the Working Time Regulations 1998 (WTR 1998) is not well-founded and is dismissed.

REASONS

Introduction

1. Mr Joaquim Pinto (the Claimant) was employed by Mr Zulfiquar Ahmed (the Respondent) as a Controller/Administrator in his taxi business. The Respondent holds a Transport for London (TfL) operator's licence and trades as One2One Cars. In these proceedings the Claimant brings claims as identified in the List of Issues below, including claims of unfair dismissal, automatic unfair dismissal for having taken action to avoid serious and imminent danger/having made protected disclosures, direct age discrimination, victimisation, breach of contract and other payments, and breach of the right to be accompanied to a disciplinary hearing.

The type of hearing

2. This has been a remote electronic hearing by video under Rule 46 which has been consented to by the parties.

3. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. There were no issues with connectivity.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

5. The issues to be determined had been largely agreed by the parties prior to the hearing. Following discussion at the hearing they were further clarified so that the protected acts relied on by the Claimant for his victimisation claim were specified, and the legal issue arising in relation to whether he was continuously employed from 2011 or only from 2016 was identified, together with the Claimant's claim under s 38 of the Employment Act 2002. Further, at the end of the hearing, having heard the evidence, the Tribunal identified to the parties that further issues potentially arose on the facts of the case in relation to illegality and also the *Hogg v Dover College* [1990] ICR 39 principle and invited them to make submissions thereon as part of closing submissions. The final list of issues incorporating all those points, and reorganised into a more helpful order for decision-making purposes, is therefore as follows:-

<u>Illegality</u>

(1) Did any of the following illegal conduct occur:
   a. The Claimant not having the right to work between 2011 and 2015;

b. The Respondent paying the Claimant partly in cash from 2018 onwards, but neither party paying tax on those cash earnings;
c. The Respondent claiming, and the Claimant receiving, more by way of furlough than was properly payable under the statutory scheme?

(2) If so, what impact (if any) should that illegality have on the claims in these proceedings?

Breach of contract / reasonable instruction / *Hogg v Dover College*

(3) Was the Respondent's requirement in October/November 2020 for the Claimant to return to work on either 16 hour or 24 hour shifts at National Minimum Wage a breach of contract and/or an unreasonable management instruction and/or a dismissal by conduct within the *Hogg v Dover College* principle. This requires consideration of:
a. What were the Claimant's hours of work prior to furlough?
b. What was the Claimant's hourly rate under his contract? Was it the National Minimum Wage (£8.72) or £11.25?
c. What were the implied terms of the contract so far as changing shifts was concerned?

Direct Age Discrimination (EA 2010, s 13)

(4) By selecting the Claimant for redundancy, did the Respondent treat the Claimant less favourably than the Respondent treats or would treat others because of his age?

Victimisation (EA 2010, s 27)

(5) Did the Claimant do a protected act or acts for the purposes of s.27(1)(a) and s.27(2) EA 2010? *The Claimant relies on his communications at pp 195-198 of the bundle, his alleged oral conversation with the Respondent of 30 October 2020 and his email of 31 October 2020 at p 133.*
(6) Was the Claimant subjected by the Respondent to a detriment because of that protected act(s) when he was told that he would be put under the supervision of employee Sajjad Ali?

Unfair Dismissal (including automatically unfair dismissal)

(7) Did the Respondent dismiss the Claimant by conduct in November 2020?
(8) What was the Claimant's effective date of termination, bearing in mind ERA, s 97(2) ERA 1996 and that the Claimant's statutory notice entitlement under s 86 ERA 1996 was four weeks?
(9) Whether the Respondent dismissed the Claimant in November 2020 or by notice of 15 January 2021, what was the sole or principal reason for dismissal?
(10) Was it the Claimant's health and safety concerns, i.e. did either of the following occur and was the sole or principal reason for dismissal that he took the following action:

a. The Claimant on 2 November 2020:
    i. left or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work
    ii. in circumstances of danger
    iii. which the Claimant could not reasonably be expected to avert and
    iv. which he reasonably believed to be serious and imminent (ERA 1996 s 100(1)(d))?
b. Further or alternatively, the Claimant:
    i. in circumstances of danger
    ii. which he reasonably believed to be serious and imminent
    iii. took appropriate steps to protect himself from the circumstances of danger (ERA 1996, s 100(1)(e))?

(11) Alternatively, was the reason or principal reason for dismissal that the Claimant was redundant, i.e. had the requirements of the business for employees to carry out work of a particular kind diminished, and was the Claimant's dismissal solely or mainly attributable to that? (ERA 1996, s 139), and if so:
a. Did the circumstances constituting the redundancy apply equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer?
b. Was the reason the Claimant was selected for dismissal that he had made a protected disclosure (s 105(6A) ERA 1996)? *The Claimant maintains that he made a disclosure orally concerning health and safety in the basement to the Respondent on 2 November 2020.*

(12) Was the sole or principal reason for dismissal a the Claimant's conduct or some other substantial reason (SOSR), i.e. a potentially fair reason for dismissal under s 98(2) ERA 1996?

(13) Was the dismissal fair in all the circumstances?

<u>Holiday pay</u>

(14) Was it not practicable for the Claimant to take the annual leave to which he was entitled under regulation 13 of the Working Time Regulations 1998 (WTR 1998) for the year 2019/2020? *(The parties are agreed that the leave year for the purposes of that regulation ran from April 2019 to March 2020. The Claimant avers that leave could not be taken due the Respondent instruction to the claimant to not to go on leave during Respondent absence from the country and considering the Respondent was away from the country from beginning of February 2020 till end of May 2020.)*?

(15) If so, was the Claimant entitled on termination of employment to a payment in respect of leave for the year 2019/2020 under regulation 14(5) of the WTR 1998?

(16) Did the Respondent properly calculate the holiday pay for the holiday year 2019/2020 that the Claimant was paid on termination of employment, i.e. did the Respondent correctly calculate it on the basis of the Claimant working 30 hours per week at an hourly rate of £8.72 or

should the Respondent have calculated it based on the Claimant working 48 hours per week at a rate of £11.25?

Other payments

(17) Was the Claimant entitled to notice pay? If so, the parties are agreed that his statutory notice entitlement under s 86 was 4 weeks.
(18) Was the Claimant paid the correct furlough pay? If not, what was the correct amount of furlough pay?

Right to be accompanied (ERA 1999, s 10)

(19) Did the Claimant reasonably request to be accompanied to the appeal hearing on 4 February 2021?
(20) If so, did the Respondent refuse to permit him to be accompanied?
(21) If so, what compensation should the Claimant be entitled under s 11(3) ERA 1999 (maximum two weeks' pay)?

Remedy

(22) Is the Claimant entitled to a redundancy payment or to a basic award for unfair dismissal?
(23) If so, what length of service is to be taken into account in calculating that payment? (*The Claimant avers his employment period was from February 2011 to January 2021. The Respondent avers that the Claimant's employment period was from March 2016 to February 2021.*) This will require consideration of:
   a. Whether the relationship between the Claimant and the Respondent between July 2015 and March 2016 was *"governed by a contract of employment"* for the purposes of ERA 1996, s 212(1);
   b. Whether the Claimant was during that period *"absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose"* (ERA 1996, s 212(3)(c)).

(24) Is the Claimant entitled to a compensatory award for unfair dismissal? If so, in what amount?
(25) Is the Claimant entitled to an award in respect of injury to feelings in respect of any unlawful conduct under the EA 2010?
(26) Should any compensation awarded to the claimant be reduced in accordance with the principles set out in *Polkey v AE Dayton Services Ltd [1987] ICR 142*? If so, then to what extent is Polkey reduction justified to reflect the inevitability of fair dismissal?
(27) Should any compensation awarded to the Claimant be reduced because of contributory fault and/or under s 123(6) ERA 1996?
(28) Did either party fail to comply with the ACAS Code of Practice? If so, should there be an increase or reduction in compensation of up to 25% under 207A of TULR(C)A 1992? (*The Respondent submits that the Code of Practice did not apply because the dismissal was for Some Other Substantial Reason.*)

(29) If the Tribunal finds in favour of the Claimant what award should be made to him under Employment Act 2002, s 38 for the Respondent's failure to provide him with a written statement of terms and conditions of employment as required under ss 1 and 4 of the ERA 1996?

The Evidence and Hearing

6. We were provided by the Respondent with a bundle of documents running to 453 pages. In addition, in the course of the hearing, we admitted into evidence (with the consent of both parties) a number of further documents, including: the Case Management Hearing bundle; correspondence between the parties relating to disclosure; various identity documents for the Claimant and Home Office letters concerning his 'settled status'; Government guidance on furlough and settled status; text messages between the Claimant and Zain Ahmed; and an email from the Respondent's telephone service provider.

7. We received witness statements and heard oral evidence from the Claimant, the Respondent and the Respondent's son, Zain Ahmed. We intend no disrespect to the younger Mr Ahmed, but to avoid confusion in this judgment between the Respondent and also another character in these proceedings with a similar name (Mr Shahid Ahmad), we will refer to the younger Mr Ahmed in this judgment as "Zain".

8. We also received two sets of further submissions from the Claimant after the conclusion of the hearing and before our deliberation days. They were copied to the Respondent but the Respondent did not respond. We have taken all the submissions into account.

9. We explained our reasons for various case management decisions carefully as we went along.

The facts

10. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

The Claimant's contract and employment history

11. The Respondent is a sole trader who runs a taxi service, licenced by TfL, and trades as One2One Cars. The Claimant was employed by the Respondent as a Controller/Administrator. At no point was he provided with any written terms and conditions of employment. The relationship between the two parties was thus governed by an oral contract. The parties are in dispute about all significant elements of that relationship. They are in dispute as to:

when the contract relevant to this claim started, what its terms were (including what and how the Claimant was paid and what his hours of work were) and how and when that contract came to an end.

12. The parties do agree that the Claimant first started working for the Respondent on 5 February 2011. The parties also agree that when the Claimant was first engaged by the Respondent, the Respondent did not carry out proper 'right to work' checks. He permitted the Claimant to start work on the basis of seeing his National Insurance card. The parties further agree that the Claimant worked for the Respondent until July 2015. Thereafter, there is no agreement.

13. The Claimant claims he was continuously employed from 5 February 2011 to 22 January 2021. The Respondent in the ET3 maintained that there was a break in the Claimant's service between July 2015 and 5 March 2016 when he rejoined, and that his contract ultimately terminated on 25 February 2021.

14. The Claimant's case is that he agreed with the Respondent that he could take authorised absence. He said in his witness statement this was agreed verbally with the Respondent and Shahid Ahmad, and that they informed him that during his time off he should not take up any permanent employment elsewhere and could resume anytime. The Claimant did not in his witness statement explain why he took the time off. Nor did he explain this when questioned by Miss Duane in cross-examination. He appeared reluctant to give a reason, maintaining he did not need to. However, when questioned by the Judge, he said that it was because his parents were ill/elderly and he wanted to spend more time with them.

15. The Claimant maintains that he had a conversation with the Respondent in July 2015 in which the Respondent authorised his absence and told him he could return to the Respondent when he was ready and that the Respondent told him he must not work for anyone else while he was away.

16. The Respondent's case, in respect of which Zain Ahmed has given evidence, is that on 15 July 2015 six officers from the Home Office arrived at the Respondent's offices while the Claimant was out on a break. They asked for the Claimant (Zain could not remember precisely what they called him), Zain called the Claimant in the presence of the officers and told him that officers from the Home Office were asking for him. They waited for a short period (the precise timing is immaterial) and then left. The Claimant never came back from his break, but texted Zain at 1.50pm to ask him to tell the Respondent that he was going to be longer than expected. The Respondent accepts that thereafter there was a conversation between him and the Claimant. The Respondent maintains that it was to the effect that he could not employ the Claimant if he did not have the right to work, and that he said the Claimant could not work anywhere in the UK if he did not have the right to work.

17. The Respondent's case is that after this the Claimant did not return to work at all until 2016, by which time he had obtained Portuguese nationality. The Respondent said that the Claimant had in January 2016 presented a copy of

his Portuguese birth certificate (and this is the date that the copy we have seen was obtained). The Respondent was not happy with this and did not allow him back to work until the Claimant produced a Portuguese identity card in March 2016. The Respondent was under the impression that the Claimant was previously of Indian nationality, and produced a copy of the Claimant's Indian passport that expired in 2008. The Respondent was not fined by the Home Office for employing an illegal worker, but was warned that if he did so he may face a £10,000 fine. He said that was a lot of money for him and after this threat he was very clear that he needed to see right to work documents before he could employ anyone.

18. The Claimant disputes the Respondent's case. He says that he has always had Portuguese nationality and thus the right to work in the UK as an EEA national. He says that he asked to come back to work in January 2016, but the Respondent did not have work for him until April 2016. The Claimant provided us with a Portuguese identity card. The Claimant said the duration of the card was 10 years, but the Respondent said it was five years. The card itself does not help us as it only says that it expired in March 2021. The Claimant explained that, as per the copy of his Portuguese birth certificate issued in January 2016, he was born in Goa, India, which is a province formerly annexed to Portugal and whose citizens are therefore entitled to Portuguese Citizenship as of right. The Claimant also provided a copy of his latest Portuguese identity card that expires in March 2031 and is thus valid for 10 years. The Claimant accepts that the Indian constitution does not permit Indian nationals to hold dual nationality, and says that he has recently relinquished his Indian nationality but holds an Indian Overseas Citizen card (which he showed us). He says, however, that there is no problem having two nationalities, it is only if you travel on your Indian passport while also holding another nationality you may be fined. The Claimant confirmed that when he first entered the UK in 2002 he entered on an Indian passport and we therefore infer that at that point he had not claimed his Portuguese nationality.

19. The Respondent did not issue the Claimant with a P45 at any point between July 2015 and April 2016, so as far as HMRC records are concerned the Claimant appears to have been continuously employed. The Respondent says this is because he believed the Claimant did not have the right to work and he did not want to issue a P45 as that might have given the appearance that the Claimant did have the right to work. As the Claimant was still 'on the Respondent's books', he was issued with a P60 at the end of the 2015 financial year. On the Claimant's return to work, the Claimant's payslips initially continued to show a start date of 5 February 2011, but from February 2017 this was changed to 5 March 2016. The Claimant never asked the Respondent to change this back.

20. The Claimant further asserts that the Respondent frequently allowed other employees to have long breaks from work but treated them as continuing in employment. The Respondent denied that. He said that employees might be allowed extended vacations for a few weeks, but no one was allowed to go away for months at a time.

21. The Claimant also disputes the accuracy of 5 March 2016 as the date of his return to work. He says there is 'no evidence' he returned to work on that date. We note that HMRC records (reading 187 and 188 together) show no earnings for the Claimant for March 2016. Earnings start again in April 2016 (189). However, as the Respondent accepts it employed him from 5 March 2016 we find that the Claimant was from that date the Respondent's employee, even if he did not earn anything until April 2016.

22. In communications in November and December 2020 and in the appeal meeting on 4 February 2021 the Claimant and Respondent both set out their respective positions regarding his previous right to work. The Claimant did not at the appeal meeting on 4 February 2021 dispute what the Respondent said about the prior history, or his acquiring Portuguese nationality. The Claimant said that he did not dispute this at that meeting because he felt he had made his position clear in his letter of 16 November 2020.

23. We do not need to resolve every element of dispute between the Claimant and Respondent about what happened in 2015. We find Zain's evidence that there was a Home Office visit in July 2015 in general terms to be plausible, and the Claimant's WhatsApp message of 15 July 2015 provides some support for Zain's account. We further accept the Respondent's evidence that he was warned by the Home Office about not employing people who did not have the right to work to be plausible, and that he took on board that he did not have the right documentation on file for the Claimant and then required him to produce the right documentation when he returned in 2016. We find that the Claimant was lacking the necessary documentation to prove he had the right to work, and that this must therefore have been the Claimant's reason for stopping work at this point. This conclusion is supported by the fact that the Claimant did not prior to 2016 produce to the Respondent any document evidencing his right to work in the UK. While we can accept that the Claimant did in fact have the right to work as a Portuguese national by birth, he did not, however, always have the paperwork to prove it as when he entered the UK in 2002 he did so on his Indian passport and thus on his own account of the rules cannot have claimed his Portuguese nationality at that point. The Claimant also accepted that when starting in employment with the Respondent he provided his NI number and no Portuguese documents.

24. Our conclusions in this regard are further supported by the fact that the Claimant had at no point prior to being pressed by the Judge at the hearing provided any explanation for his leaving the Respondent in 2015. The Respondent's account has, however, been essentially consistent at all times and fits with what with the documentary and oral evidence we have. Since the Respondent believed that the Claimant did not have (or was not in a position to prove) that he had the right to work, there can have been no agreement that the Claimant's employment was continuing during this period. We therefore prefer the Respondent's version of the conversation that happened between him and the Claimant at this time. When the Respondent said that the Claimant could not work elsewhere, this was because he did not believe that the Claimant had (or could prove) that he had the right to work,

not because he was regarding the Claimant as still his employee. The Respondent's reason for not issuing the Claimant with a P45 is consistent with this version of events and we accept it. The issuing of a P60 is automatic because no P45 had been issued and is not material.

25. This whole sequence of events also fits with what happened with the Claimant obtaining a re-print of his Portuguese birth certificate in January 2016, which the Respondent did not treat as sufficient evidence of right to work, and only being allowed to return to work once he had produced a Portuguese national identity card. It further fits with the Claimant's payslips from 2016 onwards. Initially, they recorded a 2011 start date because that is what was on the Respondent's system as a result of the foregoing events. This error was rectified in 2017 and the Claimant did not at any point complain that start date was wrong.

26. Finally, given our conclusions about the reasons for the Claimant's absence, it is immaterial whether the Claimant is right that the Respondent sometimes authorises employees to have long periods of absence for holiday for other reasons because in his case the reason for the break in service was because the Respondent believed he did not have the right to work. It follows that he was not being treated as an employee during that period. His period of continuous employment for the purposes of his claims in these proceedings started on 5 March 2016.

27. We add that we acknowledge that one element of the factual picture does not wholly fit with our findings above is that the Claimant's Portuguese identity card, on the basis of which the Respondent re-employed him in March 2016 may have been valid and in existence since 2011 as the Claimant tells us that Portuguese identity cards last for 10 years and that does appear to be the case with his most recent one, which was issued in 2021 and is due to expire in March 2031. However, we have no corroborative evidence that all Portuguese identity cards last for 10 years. The Respondent thought that the first card he had seen had a five-year period, presumably because he saw it first in 2016 and it was due to expire in 2021. But, whatever the position in this respect, even the Claimant does not assert that he provided the Respondent with a Portuguese identity card in 2011 as evidence of his right to work. He accepts he provided it for the first time in 2016. As such, this does not affect our conclusions above, in particular that (for whatever reason) the Claimant was not in 2015 in a position to prove that he had the right to work, the Respondent did not believe that he had the right to work and it was not until March 2016 that the Claimant produced to the Respondent the necessary evidence.

<u>The other employees of the Respondent</u>

28. The Claimant was aged 47 at the time of his dismissal, the Respondent was 58, Mr Ali Sajjad was 35, Mr Sheeraz Hafiz was 42, Mr Mushtak was 58 and Mr Asif was 41. In addition, during 2020 the Respondent employed Mr Dawud, Mr Khan and Mr Wariach.

29. Zain Ahmed, the Respondent's son, was employed in the business until about 6 or 7 years ago. Shahid Ahmad was a relative of the Respondent who was employed in the business until about May 2019 and since then has run his own business out of the same building.He would be asked by the Respondent to keep an eye on his business when he was away. The Respondent was clear that Mr Ahmad had no authority to take any decisions, but Shahid's status in this respect was not known to the Claimant, who had a good relationship with him and continued to communicate with him about matters concerned with the Respondent's business. WhatsApp messages between them in the bundle indicate that Mr Ahmad was, at least, acting as agent for the Respondent with apparent authority during March 2020.

The Claimant's hours of work and wages

30. The payments to the Claimant according to his payslips are as follows. He is paid at national minimum wage on all of them, and there is no overtime on any of them. We set them out here because the payslips are scattered around the bundle, not in chronological order and it is hard otherwise to analyse them:-

    a. April 2016 to March 2017 – hours not specified;
    b. April 2017 to November 2019 – paid at national mimum wage for 40 hours per week;
    c. December 2019 (5 weeks) – 150 hours, i.e. 30 hours per week (328);
    d. January 2020 (4 weeks) – 120 hours (327);
    e. February 2020 (4 weeks) – 120 hours (324);
    f. March 2020 (4 weeks) – 64 hours (323) (i.e. 16 hours per week);
    g. April 2020 – 5 weeks, 80 hours (i.e. 16 hours per week) (330);
    h. May 2020 – 4 weeks, 64 hours (i.e. 16 hours per week) (341);
    i. June 2020 – 120 hours furloughed pay at 80% plus an "underpayment" of £616 (340) – the Claimant said in oral evidence this was backpay for April and May 2020 as he should not have been paid at 16 hours per week for that period; the Respondent in its Response stated that this was *"underpayment of furlough based on Claimant's request to consider government guidance to claim the higher value from the preceding year (increased from 16 to 30 hours) 4 weeks pay x 30 hours";*
    j. July 2020 – 128 hours furloughed pay 80% (339), i.e. this equates to 40 hours per week at 100%;
    k. August 2020 – 128 hours furloughed pay 80% (338), i.e. this equates to 40 hours per week at 100%;
    l. September 2020 – 128 hours furloughed pay 80% plus an *"underpayment"* of £669.70 (337) – the Claimant and Respondent give the same conflicting explanation for this *"underpayment"* as for that in June 2020;
    m. October 2020 (5 weeks) – 160 hours furloughed pay 80% (336) (i.e. 40 hours per week at 100%);

n. November 2020 – 128 hours furloughed pay 80% (335) (i.e. 40 hours per week at 100%);
o. December 2020 – 128 hours furloughed pay 80%, minus £669.70 unauthorised absence (156, subsequently reissued as the same amount, but as just furlough pay: 334);
p. January 2021 – 0 hours (333);
q. February 2021 – Holiday Pay 153.73 units (331).

The position prior to December 2019

31. According to the Claimant's payslips, the Claimant worked 40 hours per week at the minimum wage from March 2016 to December 2019. The Respondent says that is all the work he did and all the money he was paid. The Respondent says that shifts varied in length and were not all 12 hours, but could be 8 or 10 hours. The Respondent accepted in his witness statement (paragraph 22 of first statement) that *"the opportunity for overtime was always available and, in some instances, the Claimant did work more than 40 hours per week, however, his contractual hours [did not change]"*. The Respondent in his letter of 24 November 2020 also wrote, *"while it is appreciated that during your time of employment, you have worked a considerable number of hours, your contractual hours were limited to 30 hours per week. Any hours beyond this has been considered as overtime hours"*. When asked in oral evidence why overtime never appeared on the Claimant's payslip, the Respondent answered that this was because although he may work more hours in some weeks *"on a monthly basis it would always stay at 40 hours"*. The Respondent in oral evidence maintained that he did not pay the Claimant any wages in cash.

32. The Claimant in his witness statement said that until November 2019 he *"worked from 7.00am til 19.00pm 5 days a week… and thereafter from December 2019 I worked 4 days a week 7.00am til 19.00pm Wednesday to Saturday"*. He maintained that all his shifts were 12 hours and that prior to December 2019 he was working five x 12-hour shifts, i.e. 60 hours per week. The Claimant further maintained that he was from mid 2018 onwards paid £11.25 per hour as a gross figure 'in his pocket'. In a message to the Respondent (p 117) on 3 August 2020 he stated that his income was *"2500 a month (including not on books)"*.

33. The Claimant when first asked about tax on these additional sums said that he understood it was the Respondent's responsibility to pay tax and that when he started in 2011 the Respondent had said that he would be responsible for the tax (the Claimant clarified in closing submissions that it was in 2011 that he said the Respondent had said this). When cross-examined the Claimant said that prior to 2017 he was paid completely in cash. After being repeatedly pressed by the Respondent's counsel, the Claimant accepted that if an employer and employee agreed not to pay tax that would be unlawful, but he said he had not agreed, he understood the Respondent had agreed to pay the tax and NI contributions. Later in cross-examination he said that he was aware that no tax was being paid on those

sums and that he called HMRC about this and was told that he should first speak to his employer about it. When questioned by the Judge, he said something different. He said that when his pay was increased to £11.25 per hour, he did not know whether it was a gross figure on which tax was to be paid or a net figure. He said he had not asked, but had *"assumed it was after tax and NI"*. In what was supposed to be closing submissions but turned (with the consent of the parties) into the Claimant giving further evidence, the Claimant accepted that there was no documentary evidence in the bundle of him raising with the Respondent that tax was not being paid on the money he was being paid 'off the books' (although he did raise with the Respondent a complaint about having registered him with HMRC under two employers which had resulted in a tax code error and him being asked to pay additional money because of a tax discrepancy, and he said he had contacted HMRC about this). The Claimant maintained in oral evidence that in around June 2020 he had informed the Respondent and HMRC that it was not correct that tax was not being paid on the additional monies he claims he was being paid outside his payslips

December 2019 to February 2020

34. In December 2019 according to the Respondent and the Claimant's payslips, the Claimant's hours were reduced to 30 hours per week by agreement. The Claimant maintains (as above) that he was at this point working 4 x 12 hour shifts, Wednesday to Saturday and thus doing 48 hours per week at £11.25 per hour, and being paid £540 per week. The Claimant says in his witness statement that on 5 January 2020 he informed the Respondent that his payslips had wrongly been changed to 30 hours when they should have shown 48 hours. We reject the Claimant's evidence on this because on his case his payslips had shown the wrong number of hours since at least 2018 and it is implausible that he would not have raised this with the Respondent and HMRC previously if he had really wished to be honest with HMRC about what he was earning.

35. The Respondent says that from December 2019 to February 2020 the Claimant was doing three daytime shifts of 10 hours. Mr Ali was doing four daytime shifts and Shiraz and Asif were working at nights. He accepted that there had to be, and was, only one controller working at any one time, but said that if there were gaps between shifts then he would cover it.

Our conclusions on the Claimant's historic hours of work and pay

36. Considering all the evidence (including the evidence we set out below as well as that above), we find that the Claimant was being paid more by the Respondent than was reflected on his payslips. That is the Claimant's case, on which he has been consistent throughout. It is, in particular, consistent with what the Claimant wrote in his unguarded WhatsApp messages of March and August 2020, in particular the August 2020 reference to 'off the books' payments, and the March 2020 messages which indicate the Claimant's pay being 'reduced' at that point to the national minimum wage (which could not have been the case if he was already on national minimum wage). The

WhatsApp messages also refer to the Claimant having had in the past a £5 pay rise, and to an acknowledgment from Mr Ahmad that the Claimant was the highest paid employee (which he could not have been if, as the Respondent contends all employess were on the minimum wage). The WhatsApp messages of March 2020 also include the Claimant setting out a calculation of his past earnings which is consistent with him having been paid at £11.25 per hour. It is also clear from the WhatsApp messages that the Claimant makes a distinction between the shifts that he was doing and hours that he was working and what he wanted reflected on his payslips. Thus he requests to reduce his hours on the payslips to 16 hours in order to claim government benefits, while simultaneously agreeing to work five 12-hour shifts over two weeks (i.e. 30 hours per week on average).

37. The conclusion that the Claimant was partly being paid in cash is also consistent with the Respondent's acknowledgment that there were overtime payments that are not reflected on the payslips. The Respondent's explanation that the Claimant might do overtime in one week and then fewer hours the next is implausible: either it was 'overtime' or it was not. If, as the Respondent says, it was 'overtime' then it is implicit that the Claimant was paid for it, yet this 'overtime' does not appear on the payslips. We further note the Respondent's confirmation in the appeal meeting on 4 February 2021 that the Claimant's pay going forward would be what was 'on the payslip'. That is not the wording that would be used by someone who had hitherto only been paying what was on the payslip.

38. We therefore conclude that the Claimant was paid a substantial part of his earnings from the Respondent in cash. Having so concluded, we further accept what the Claimant says about the amount he was paid and the hours he was working. So far as the hours are concerned, the Claimant's assertion that all his shifts were 12 hours both fits with what he said in his unguarded WhatsApp messages and with commonsense as there are 24 hours in a day and the Respondent divided its controllers into day and nightshift workers. We find the Respondent's suggestion that there were variable shift lengths in those circumstances implausible.

39. We therefore find that, as at February 2020, the Claimant was working 48 hours per week at £11.25 per hour. Tax was only being paid on 30 hours of that at national minimum wage. The rest was paid in cash. The Respondent did not tell us the truth about this. We infer that this was because the Respondent knew the arrangement was unlawful as a fraud on the revenue. We further conclude that the Claimant also knew it was unlawful and that prior to his falling out with the Respondent over the events that led to this claim, he was quite content to go along with that arrangement as his reference in WhatsApp messages to 'off the books' payments makes clear. We reject his contention that he believed the Respondent was paying tax on the cash payments. When pressed, he said this was just an assumption on his part in any event, and we find that it was not an assumption. He knew tax was not being paid.

40. We further reject the Claimant's evidence that he sought to report this to HMRC. We reject his evidence in his witness statement that he raised this on 5 January 2020. On the Claimant's case what he was complaining about at that point was his payslip showing only 30 hours when it should have shown 48 hours, but on the Claimant's case his payslips had been wrong for years. If he had honestly wished to draw the cash payments to the attention of HMRC he should have done it years earlier. Moreover, his assertion about what he raised on 5 January 2020 does not fit with his later unguarded WhatsApp conversations. His (different) assertion in oral evidence that he raised the cash payments issue with HMRC in the summer of 2020 is also inconsistent with the documentary evidence which indicates that the only thing he was raising with HMRC was the fact that he had wrongly been registered as having two employers which had resulted in a tax code error requiring a repayment by him. The suggestion that he had sought to report to HMRC in the summer of 2020 the fact that tax was not paid on his cash payments appeared nowhere in his claim or witness evidence, but was (we find) invented by him when he realised that we the Tribunal considered it problematic that he may knowingly have participated in unlawful conduct. As it is, we conclude that the Claimant was knowingly participating in a fraud on the revenue in receiving cash payments from the Respondent on which tax was not paid. We deal with the implications of this in our conclusions section.

Historic events between the Claimant and Mr Ali

41. The Claimant says that from 2016 he asked not to work with Mr Ali because of his *"past unwanted harassment and age discriminatory behaviour towards me"*. The Respondent accepted that the Claimant had complained about Mr Ali, but denied that the Claimant had ever complained about past age discriminatory or harassing behaviour.

42. In February 2019 (195), June 2019 (196) and November 2019 (197) the Claimant complained in writing to Shahid Ahmad and then the Respondent about the conduct of Mr Ali Sajjad. In his communications the Claimant complains about 'unwanted remarks' and 'harasssment' by Mr Sajjad, but does not refer to any protected characteristic under the Equality Act 2010. The same goes for the Claimant's subsequent statement of January 2020 (198-199). The Claimant says that he mentioned orally that Mr Sajjad was making age discriminatory remarks, or that these were in communications on the Respondent's Cordic database. The Cordic system is the Respondent's customer/job database. Records are kept for 12 months and then destroyed. The Claimant had requested access to the Cordic log, but the Respondent had refused to provide it. The Claimant provides details of the alleged remarks in his witness statement at paragraph 3c as follows: *"passing unwanted remarks towards me and passing on my personal information to third parties without my consent, unnecessary interference in my work by passing on false information to management, passing comments on my age such as I been 'an old man' with no social and family life and loner who was not married and how no action has been taken or the issue not been addressed by management"*. He says that he raised these orally on 20

November 2019. We have considered whether the Claimant did at any point as he asserts complain about age discrimination or harassment related to age by Mr Sajjad. We find that he did not. Although we accept that there may have been a failure by the Respondent to provide full disclosure in relation to this as we have not seen the Cordic database information, we infer that anything on that system would have been consistent with the written documents from the Claimant that we do have on this topic. Age discrimination/harassment was not raised.

43. On 13 February 2019 the Claimant was granted Indefinite Leave to Remain as an EU national (219).

44. On 19 December 2019 there was an incident in the office involving the Claimant and Mr Sajjad in which the Claimant was alleged to have shouted at Mr Sajjad and pushed him. Mr Sajjad reported the incident to the police and provided a statement to the Respondent (105). Mr Sajjad said he was injured in the incident and called an ambulance. On 18 January 2019 the Claimant provided his side of the story (198). This letter also does not suggest that Mr Sajjad made any discriminatory remarks relating to age. In the letter the Claimant states he physically pushed Mr Sajjad away from him after a verbal altercation. He suggests that Mr Sajjad was not really ill as he was still taking calls while the ambulance crew was attending him.

45. After this, the Claimant says that he and Mr Ali did not work together. Mr Ali's statement at 105 however, indicates that he and the Claimant had actually had arguments before that incident and had been put in different rooms prior to this incident so that their desks were about 10m away from each other. The Respondent in his Response and in his witness statement says he changed the Claimant's shifts after the incident, but in oral evidence he said that the Claimant and Mr Ali had still been working together before lockdown. He explained that although he had changed their desks and their roles they were still working on the same shifts and thus were in the office at the same time. We accept the Respondent's evidence on this as it is corroborated by Mr Ali's statement.

46. The Respondent says that on 28 January 2020 the Claimant was issued with a Formal Written Warning (104) for failing to provide a timely statement in respect of the incident on 19 December 2019. The Claimant disputes that this was ever given to him. This particular dispute is not material to the issues we have to decide and we have not attempted to resolve it.

<u>Pandemic: variation in hours / furlough</u>

47. When the pandemic started and England went into national lockdown, the Respondent suffered a significant downturn in business. The Respondent himself was away at that point and Shahid Ahmad was keeping an eye on the business while he was away.

48. On 24 March 2020 the Claimant messaged the Respondent and Mr Ahmad (114 and 181) noting that he was not happy with his decision to give one of his shifts to Ali. He said that he was doing Wednesday to Saturday and had previously voluntarily given up one shift to accommodate others, but *"now from 3 shift u cut down to 2 shift n gave one shift to ali"*. He clarified that he would work Wednesday to Friday this week and then just two days the following week. He added *"Also Shahid could u please tell the accountant to reduce my hours of work in pay slip so that I can look for the govt to support me bcs I don't think I will be able pay for my expenses bcs currently I am not taking anything from govt like lots of people in the office do. Thanks"*.

49. The next day the Claimant messaged the Respondent again asking him *"Could you please either take me out of paye or could u pls keep as part time showing I am working 16 hours a week starting from April please … Thanks bcs I might claim from govt for some support now that I working for few days. Thanks"* (115). We observe that it is clear from these WhatsApp messages that the Claimant and Respondent were aware that the Claimant's payslips did not reflect the pay he was actually receiving, and that the Claimant himself was willing to ask to be 'taken out of PAYE' altogether so as to reduce his 'official'/'transparent' level of pay (on which tax was paid) in order to enable him to claim Government benefits to which he was (presumably) not actually entitled because his earnings both on and off the books actually exceeded the relevant threshold.

50. On 26 March 2020 in a message to Mr Ahmad (181) the Claimant wrote that he did not mind if Mr Ahmad reduced his pay by £20 per shift and noted *"You must also consider if there is work or no work the person who sits in office has to still sit for 12 hours".* He noted that the reduction would leave him on the minimum wage and that when things are normal he would be *"back to the present wages"*. Mr Ahmad agreed that *"when things get better we will go back to the normal wage".* The Claimant wrote *"take into account in last 5 yrs I have got increase of only 5 pounds once where's I know some staff go increase every year but I did not say nothing".* Mr Ahmad in reply stated *"You are the highest paid, when everyone is doing same work"*. This latter point was confirmed in the Respondent's Grounds of Resistance.

51. On 27 March 2020 the Claimant continued his complaints pointing out that Wednesday to Saturday had been his shifts *"for last almost 7 to 8 yrs"*. He also refers to Shahid having decided to *"reduce 20% of the wages"* and for the Claimant having to work 3 days and 2 days in every second week.

52. By WhatsApp message of 27 March 2020 the Claimant agreed (albeit while expressing his unhappiness) to reduce his shifts to only Thursday and Saturday in the week he was doing two shifts (116).

53. At some point between March 2020 and June 2020 the Respondent placed a number of staff, including the Claimant, on furlough. The Claimant in his witness statement says he was placed on furlough on 6 June 2020 and we accept his evidence in this regard. We infer that until June 2020 he was continuing to work on the basis agreed in March 2020, i.e. an average of 2.5

shifts per week at minimum wage, although only 16 hours per week of those were put through the Respondent's books on the payslips.

54. The Respondent in its Grounds of Resistance says that the Claimant was placed on furlough in April and May 2020, with 80% furlough and topped up 20% by the Respondent so that he received 100% of his wages. According to the payslips (noted above), however, furlough commenced in June 2020. The Respondent's position is that it later (in June and then September 2020) paid the Claimant an 'underpayment' for April and May 2020 on the basis that he was on furlough during that period. We infer that the Claimant was in fact working in April and May 2020 and it was only retrospectively that it was decided to treat that period as furlough. As the Government scheme at this point did not permit part-furlough arrangements, we observe that this was probably an improper use of the furlough scheme, but we have not had to resolve the details of this for the purposes of determining the claims in these proceedings.

55. The Respondent in his letter of 24 November 2020 said that Mr Ali was the sole worker during the initial lockdown and everyone else was placed on furlough, but in his letter of 18 February 2021 he says that "all" staff were placed on furlough during lockdown. In oral evidence he said that the only people working during lockdown were him, Zain and Mr Ali. We prefer his oral evidence as there must have been someone other than the Respondent working during lockdown if the business remained open as both parties agree it did.

56. By WhatsApp of 29 May 2020 the Claimant suggested that when calculating furlough pay the accountant should use the Government's Covid calculator putting in that they received variable salaries each month rather than fixed salaries as appeared on the payslips (117). A WhatsApp from the Claimant of 25 June 2020 suggests that he has just had his furlough pay for June. This was calculated as the Claimant had requested, i.e. on the basis that if he had been working he would have been doing 40 hours per week. That is what the Claimant was doing the previous year, but it was not in accordance with the agreed reduction to 30 hours on the payslips from December 2019, nor was it in accordance with the Claimant's requested reduction to 16 hours on the payslips.

57. By WhatsApp of 3 August 2020 the Claimant messaged the Respondent's accountant saying that as per their conversation he was to have been furloughed from April 2020 instead (117).

58. In the WhatsApp of 3 August 2020 the Claimant also reports that his last year's employment is still showing as two employers with HMRC and there his tax has been calculated incorrectly and he has been asked to pay an extra 350 odd pounds as tax. In this message he also states *"I really don't want to loose out bcs my income from 2500 a month (including not on books) is gone down to £1000 so I should really appreciate if u could look at the furloughed calculation again".* He then set out furlough calculations and wrote *"Mr*

Ahmed when govt is paying for my wages I think we must take every money from govt which is rightful owned …".

59. On 9 August 2020 the Claimant was seeking new living accommodation and told a referencing agency that he was working as an administrator and earning £25,000 per year (119) and asked if the Respondent would give a reference to that effect. The Respondent replied that that was fine. A reference was accordingly prepared the next day (191) which confirmed that the Claimant was a Portuguese National currently employed on a permanent basis as Office Administrator since 2010 at a salary of £25,000 gross per annum. The letter purports to be signed by the Respondent but the Respondent denies signing the letter himself and we are satisfied it is not his signature as it is clearly different from that at 190 which he did sign. It is, however, not material to the issues we have to decide that the reference at 191 was not signed by the Respondent as he agreed to it by WhatsApp message the previous day. The Claimant said in oral evidence that this letter was based on his full earnings from the prior year at 60 hours per week, £11.25 per hour, discounted by 20% to reflect him being on furlough, but that would give a gross salary of £28,080 so does not explain the £25,000 figure. Nor is it in line with what he was receiving according to his payslips. Even taking it on the basis of the February 2020 pay (324), for example, gross pay was £11,822.40 per annum, based on 30 hours per week at £8.21 per hour. We find that the Claimant simply obtained a reference for a round figure sum that was sufficient to guarantee he would be able to rent the property he wanted. It bore no relation to what he was really earning (either on or off the books).

60. On 1 September 2020 the Claimant complained to the Respondent that his payslip was £708 short (119).

61. On 5 September 2020 the Claimant emailed the Respondent asking him to look into the furlough calculation (129). In this email he asserts his furlough calculation should be *"done on my last year earnings of the corresponding month payment because of my variable wages. Since my earning in the financial year ending 2019-2020 was not fixed every month and since it was variable hence you need to calculate 80% furloughed amount on my last year pay, for ex (if I am furloughed in the month of August 2020 you need to take into account 80% of my earning on gross figure for 2019 August pay. In this case it was £1585.50 on payslip 80% of which would be £1268 which was not the case on the payslip issued for the month of august 2020."* At this point therefore the Claimant was basing his furlough calculation on his 'on the books' pay as stated on the payslip, albeit that he was asserting that furlough should be claimed as if he did not receive a fixed salary monthly when in fact he did.

62. The Claimant's email of 5 September 2020 refers again to him having contacted HMRC but not about the question of tax not being paid on his cash payments. Rather, it refers to him complaining about the accountant entering him into two employments under the same employer resulting a tax shortfall.

63. On 26 September 2020 the Claimant sent a WhatsApp to the Respondent asserting that his furlough pay ought to be based on 48 hours per week x £11.25 per hour x 80% *"because that is what my pay was before COVID19 and not £8.72 per hour"* (119). The Claimant had thus decided at this point to claim in full what he was being paid 'off the books' by way of furlough pay. The Respondent suggested that this was the first time that the Claimant had claimed he was paid at this higher rate, but this is not correct as the WhatsApp messages from March 2020 dealt with above make clear he was already claiming at that point that he had been paid at the higher rate.

64. So far as what happened with furlough is concerned, in the light of all the evidence, we find that the Claimant worked reduced hours during April and May 2020, but then was placed on furlough from the beginning of June 2020 and agreed with the Respondent that he would retrospectively be treated as having been furloughed in April and May 2020. The Respondent arranged backpay accordingly as appears from the payslips for June and September, as detailed in its Response. The Claimant was paid furlough as if he was working 40 hours per week, which he had not done (according to the payslips) since prior to December 2019. We asked the Claimant why he thought he was entitled to be paid more on furlough than if he was working and he said that that was what the Government's guidance was in relation to variable-paid workers. The Claimant appears to have considered it justified to reinstate his August 2019 level of pay, notwithstanding his agreement to reduce that when he reduced his shifts in December 2019, on the basis that in March 2020 his pay had been reduced on an exceptional basis so that his pay had been 'variable' in the couple of months immediately prior to furlough being claimed. The Claimant's interpretation of the guidance was in our judgment unreasonable and not what was intended by the scheme (even before the Claimant started to suggest he should be paid furlough on the basis of his 'off the books' earnings as well as his 'on the books' earnings). The Claimant was seeking to maximise benefit to himself from the furlough scheme. The Respondent went along with what the Claimant proposed.

<u>Claimant asked to return to work</u>

65. On 16 October 2020 (we take this date from the Claimant's ET1 rather than the date in his witness statement as it seems to us more likely to be correct) the Claimant says that he met with the Respondent at the Respondent's offices. The Claimant says that the Respondent told him it was unlikely he would be brought back from furlough and that he should start looking for work outside the firm, and that his shifts had been allocated to Mr Ali on a full-time basis, while other shifts had been given to Mr Sheeraz who was previously only working nights.

66. The Respondent disputes this. The Respondent's case is that the Claimant was asked to return to work on 16 October 2020, and that on that day they met to discuss his return. The Respondent's position at that point was that the Claimant could come back to work on 16 hours per week, being the number of hours the Respondent contends he had requested to work in

March 2020. The Respondent states that at this meeting the Claimant asked about being made redundant rather than coming back to work on reduced hours. The Respondent was willing to consider this and so obtained a redundancy calculation from his accountant. That was based on the Claimant having commenced service on 5 March 2016 and having earned the minimum wage since that date. The Claimant was unhappy with the Respondent's calculation.

67. We accept the Respondent's evidence that redundancy was the Claimant's idea because if it had been the Respondent's idea, the meeting would have been preceded by a redundancy consultation letter such as the Respondent sent on 27 October (below), rather than the discussion starting before that letter was sent.

68. By email of 23 October 2020 the Claimant sent the Respondent his calculation of his redundancy pay (131), which he considered was £6,994, plus notice period of £5,400 and holiday pay of £4,721, i.e. a total of £17,115. This was based on his claimed 9 years' service and pay at £11.25 per hour for 48 hours per week.

69. By email of 27 October 2020 the Respondent sent the Claimant a letter inviting him to a redundancy consultation meeting (134). The attached letter (166) takes the form of a standard redundancy consultation letter. It refers to previous meetings on 16 and 23 October 2020 and proposes a third meeting on 30 October 2020 to discuss *"Finishing off Furlough in accordance with the Government Guidelines"*, *"Why your position has been proposed for redundancy",* the terms of redundancy and ways it might be avoided. The letter suggests that the Claimant 'opted for' furlough during the previous period. The Claimant replied saying he would attend the meeting (134).

70. The Claimant and Respondent met on 30 October 2020. We infer that at that meeting they were unable to agree on redundancy terms and so the Respondent asked the Claimant to return to work and understood the Claimant had agreed to do so. The Respondent confirmed this by email the same day asking him to return to work on Monday 2 November 2020 at 8am (134).

71. The Claimant in reply asked for confirmation that his hours would be the same, 12 hours per day, 4 days per week. The next day the Claimant emailed again (133) asking whether, now the government had announced an extension to the furlough scheme, the Respondent still wanted him to come back to work. He said he had no issues with coming back to work on the terms and conditions and salary he was on before furlough, which he states were 12 hours per day and £11.25 per hour for four days. He asked not to work with Mr Ali on the same shift because *"as discussed with you on 30th of October 2020 and in previous occasion that Mr Ali and myself should not be put in the same shift as you are well aware that in the past there has been many problem when we too worked together which has led to lot of animosity and which has led to not a conducive working environment"*. This letter

contains no complaint of age discrimination. The Claimant suggested how his not working with Mr Ali could be achieved.

72. On 1 November 2020 the Claimant and Respondent spoke on the telephone (284). When questioned about this conversation by the Claimant, the Respondent said that he had explained what he was offering was for the Claimant to come back to work on a part-work, part-furlough. The Claimant did not challenge this. We accept the Respondent's evidence that this is what he said in this conversation. Indeed, the Respondent mentioned at another point in cross-examination that he thought he was offering the Claimant a return on a part-work, part-furlough basis and this is also what he said at the appeal meeting in February 2021 (92). Notwithstanding that the Respondent did not tell us the truth about paying the Claimant partly in cash, we accept that what he said about offering part-work, part-furlough was genuine as that was how it appeared to us hearing him questioned, and he did in fact continue paying the Claimant as if he was on part-furlough, just deducting from the Claimant's pay the 16 hours per week that he had asked him to work. We acknowledge in so finding that the Respondent's letter of 16 November 2020 was inconsistent with this, but this is not the only letter from the Respondent that is inconsistent with his oral evidence. (The redundancy letter is another example.) English is not the Respondent's first language and he appeared to us to have difficulty engaging with written materials in English. We infer that the Respondent had help from another person or persons with drafting of a number of formal letters and that he either did not read all of them or understand their import. We nonetheless accept his oral evidence on this point about part-furlough as genuine.

73. On 2 November 2020 the Claimant attended at the Respondent's offices, but did not actually start work as he had been instructed to do. The Claimant called the Respondent just after 8am (285). The Respondent was not in the office. The Respondent told the Claimant to go in and work, and confirmed that Mr Ali was working there and he would work under him. The Claimant did not want to do that. When the Respondent arrived later they had a discussion. The Respondent did not give any evidence in his witness statement about the conversation on 2 November, but in oral evidence he accepted there had been a conversation and that he had told the Claimant to go down to the basement and work 'under' Mr Ali. He accepted that the Claimant had made clear that he did not want to work with Mr Ali. He did not accept the Claimant said anything about health and safety at this point and we accept the Respondent's evidence on this point as it is consistent with the terms of the Claimant's subsequent letter of 5 November 2020 which reads as if it is raising a health and safety point for the first time. The Respondent did accept that they had discussed terms and conditions for redundancy. The Claimant in his witness statement says that the Respondent asked him to put forward a settlement offer, and the Claimant offered £6,000. The Respondent did not deal with this in his witness statement and the Claimant did not put it to him, but we accept the Claimant's evidence on this as it is consistent with his letter of 5 November 2020.

74. By email and letter of 3 November 2020 the Respondent issued the Claimant with conditional a *"Notice of Intention to Termination the Job"* (141 and 168) in which the Respondent wrote *"I write in the light of my email 30 October 2020 offering an alternate to your job redundancy further to our Redundancy Consultation meeting on 30 October 2020, I have given you an opportunity for return to work on Monday 2 November 2020 at 08.00 hours but you failed to return to work and refused our offer an alternative of your job redundancy. Your job will be terminated after 4 weeks from the date of this letter should you fail to respond this notice or show up on the job"*. We infer from the nature of the English in this document that the Respondent did not get assistance with this letter. The Claimant saw this as a notice of dismissal, but it was not in our judgment. It was an ultimatum or warning but not a notice of dismissal.

75. By a long letter of 5 November 2020 the Claimant responded to the 'notice of intention to termination' (136). In this he makes clear his objections to working with Mr Ali at all, and to returning on 16 hours per week at minimum wage of £8.72 per hour rather than what he regards as his previous working arrangements. The Claimant also raises his objection to working in the basement on health and safety grounds. He stated (without suggesting he had mentioned this previously) *"I feel it is unsafe and unhygienic and hazardous and have lots of health and safety concern and hence I find it unsafe to work in that environment"*. He stated that unless the Respondent obtained certification from the local authority in relation to health and safety he would not return to work. He complained again about the redundancy terms offered by the Respondent, suggested there was a *"hidden malice agenda"* and withdrew his offer of settlement of £6,000. He expressed unhappiness about the Respondent's unwillingness to settle 'on an amicable basis'. He asked for confirmation of his furlough status.

76. The Claimant by email of 12 November 2020 (140) chased for a response.

77. The Respondent replied by letter of 16 November 2020 (170). The Respondent clearly had assistance with this letter. The letter withdraws the previously issued 'notice of intention to termination'. It refers to the Claimant's previous request to reduce his working hours to 16 hours and states that these are now his contractual hours. It states his normal working days were Wednesday to Saturday and that he is now being offered two of those shifts. The letter asks the Claimant to attend on 20 November and 21 November, working 8am-4pm, and that if more shifts become available, they will be offered to him. The letter makes clear that there is no hierarchy and the Claimant is not regarded as working 'under' Mr Ali, and that shifts will be changed so that he is not working with Mr Ali at all and is working on two of his original three working days. The letter makes very clear that the Claimant will not be placed on furlough and there is no intention to place him on furlough. The letter alludes (consistent with the Respondent's case) to it being the Claimant who requested to be placed on furlough in the first place, and to be made redundant and also to his previous issues regarding right to work in the UK.

78. The Claimant replied to the Respondent's letter of 16 November 2020. The Claimant's letter is not dated, but we find it was sent on 19 November 2020 (142). In this letter he states that he had not wanted to reduce his hours from 30 hours to 16 hours in March 2020. He says that the reduction was because of Mr Shahid reducing his shifts to two days as a result of Covid and that he objected. He maintained the changes were temporary. He said that there was no time in his employment when he worked for less than 48 hours per week, and that prior to December 2019 he had been doing 5 x 12-hour shifts of 60 hours per week at £11.25. The Claimant then complains about changes to his Tax Code with HMRC and suggested that this had changed his personal allowance (which does not make sense as nothing reduces a person's personal allowance), and states in general terms that he has complained in the past about payslips and P60 not being correct. He went on to complain about what he was offered by way of shifts to return to work and his unhappiness about the Respondent's calculation of his redundancy payment. Regarding furlough, he asked that if the Respondent was not able to provide him full time employment of 48 hours per week he should be kept on furlough. As to right to work, he maintained that he had always had the right to work as a citizen of an EEA member country. He refused to rejoin on 16 hours per week as it was not in line with his original terms and conditions. He expressed concerned about health and safety in the basement and asked to see the certificate from Westminster Council certifying that it was a fit working environment. He threatened Employment Tribunal proceedings if he did not hear within 7 days.

79. By letter of 24 November 2020 (with which it is clear the Respondent had help) (172), the Respondent reiterated that redundancy was only explored because the Claimant asked for it. The offer of 16 hours per week is restated, working in the basement, but it is said that more shifts will be offered when the Respondent can. This letter acknowledges the issue with the Claimant's Tax Code. The letter goes on: *"Whilst it is appreciated that during your time of employment, you have worked a considerable number of hours, your contractual hours were limited to 30 hours per week. Any hours beyond this has been considered as overtime hours"*. The Claimant was asked to return to work with immediate effect. The letter also acknowledged the claims about the basement, but said there were 'no issues' with the basement.

80. By letter of 25 November 2020 (146) the Claimant replied continuing to assert his reasons for not returning to work and reiterating his already stated position on hours of work, pay, tax code, redundancy, etc. He closed the letter by indicating that he has been in contact with ACAS.

81. By email of 2 December 2020 (150) the Claimant chased the Respondent for confirmation of his employment status.

82. On 4 December 2020 the Respondent replied by letter (174). The Respondent reiterated his position, but indicated that he was now able to offer 24 hours per week working 7am-7pm on Friday and Saturday, with intention to offer shifts in line with his expectations when able to do so. The Respondent confirmed that the Claimant had been treated as on furlough for

November 2020, but that this would not happen for December 2020 (although in fact in the event the Claimant was paid furlough for December 2020 as well). The Claimant was asked to confirm within 7 days whether he wished to continue working with the firm.

83. The Claimant emailed on 8 December 2020 (151) referring to negotiations through ACAS and stating that an amicable solution needed to be found to the dispute and that had been his intention since the outset. The Respondent did not reply.

84. The Claimant emailed again on 19 December 2020. He asserted that he had been underpaid furlough and also claimed for untaken holiday during the pandemic in the light of government guidance. He asked the Respondent to provide the logs of his working time in January and February 2020 and data from the Cordic system (152). The Respondent has never provided these. The Claimant also asked to be told what the Respondent had claimed from HMRC in respect of furlough. The Respondent did not reply.

85. By email of 20 December 2020 the Claimant asked the Respondent to consider homeworking as London was in Tier 4 restrictions (153). The Respondent did not reply to the email. The Respondent says he explained to the Claimant that he could not work from home because, although calls can be taken from home under the terms of the TfL licence, cars cannot be despatched from home. The Respondent said the one person who did work from home was an administrator not a controller. The explanation for refusing homeworking that the Respondent gave in his second statement in these proceedings was not mentioned in his February 2021 letter (178) or his first witness statement. In the letter and first witness statement the Respondent said that working from home could not be offered because *"we do not have the necessary facilities/software for this"*. However, while the Respondent may not have had the licence conditions in mind at the time, it is very clear from the licence terms at 112 that the TfL licence requires bookings only to be accepted from the licenced address, so on that basis a controller could not lawfully work from home.

86. By email of 24 December 2020 (154) the Claimant referred again to ACAS, asked again about his employment status, working hours and hours of pay and present status on furlough. The Claimant also asked whether, if he was not on furlough, he could take his annual leave for both 2019/20 and 2020/21 which he calculated (wrongly, as he worked part-time and was not entitled to carry forward) to be a total of 56 days, commencing on 13 January 2021. The Respondent did not reply.

87. On 2 January 2021 the Claimant emailed again (275) stating he would give the Respondent a 'final time' to resolve the matter amicably. He continued: *"I have nothing to lose since employment tribunal service is free and secondly I will not have to pay responded solicitors fee if the judgments goes against me. But you may end up paying thousand of pounds if you appoint a solicitor to represent you and with the proof I have it is very likely the judgment will go in my favour. But I am not forcing you to accept my offer but its your decision*

if you want to settle it amicably or let the tribunal decide". He said he had offered to settle for £10,000, but would win £25,000 if he went to Tribunal. The Respondent did not reply.

88. By email of 4 January 2021 (227) the Claimant asked again about his employment status in the light of the further lockdown announced by the government. There was no response from the Respondent.

89. By email of 7 January 2021 the Claimant queried what he had been paid for December 2020 and asked how he could be on furlough and unauthorised absence at the same time (155). The Respondent did not reply, but in response to the Claimant's complaint the reference to unauthorised absence was removed from the payslip, and the payslip reissued just showing the Claimant as being on furlough.

90. By email of 12 January 2021 (154) the Claimant chased for a response and indicated that in the absence of a reply he was taking that as confirmation of his annual leave request and that he would be taking annual leave from 13 January 2021.

Termination of employment

91. By email of 15 January 2021 (157), attaching a letter (175), the Respondent terminated Claimant's employment. He wrote *"Despite our reasonable attempts in offering you shifts, we are satisfied that you no longer wish to work at this firm and and are seeking to use the furlough scheme for your own gain. With regret, please therefore regard this letter as notice of termination of your employment. Your notice period is 7 days and as of 22/01/2021 you will no longer work for the firm. I confirm your holiday entitlement will be paid in accordance with the amount of time you have accrued over the year".* We observe at this point that the Claimant's statutory notice period was in fact four weeks.

92. The Claimant replied by email of 18 January 2021 stating that the reason for termination of employment was not clear and asking for reasons and details of an appeal process.

93. By email of 29 January 2021 (158) the Respondent informed the Claimant that the reason for his dismissal was that he had *"failed to come to work when he had been asked to do so"*. He told the Claimant that if he wished to appeal he should confirm in writing. The Claimant replied immediately that he did wish to appeal.

94. By letter of 2 February 2021 the Respondent invited the Claimant to an appeal meeting on 4 February (177). The Claimant replied that he would be attending, and said he would expect a neutral note-taker to be present. The Respondent did not tell the Claimant he could be accompanied at the meeting, nor did the Claimant ask to be accompanied.

95. An appeal meeting took place on 4 February 2021. Handwritten notes were taken by a notetaker (92). The Claimant contended in cross-examination that he asked to be accompanied and this was refused, but this was not in his witness statement or claim form and does not feature in the notes of the appeal and we therefore find he did not make such a request. The matters the Claimant says he raised at the meeting are detailed in paragraph 31 of his witness statement. The Claimant was not happy with the notes of the meeting and they are not agreed, but as we have not found either the Claimant or the Respondent to be wholly reliable witnesses, we consider that the notes are the best evidence we have of what was said at the meeting. The notes of the meeting show that the Respondent thought he had offered the Claimant to return on 24 hours per week *"and rest furlough"*. The Claimant did not refer to age discrimination. The Respondent gave an account of the Home Office visit in 2015 and circumstances surrounding that which is consistent with his position in these proceedings, and the Claimant did not dispute it. The Respondent said that the Claimant worked full time 40 hours per week and that furlough was given based on that. The Claimant asked what rate for the 40 hours and the Respondent replied *"according to payslip"* (which we note, consistent with our findings above, is not the response of somebody who is only paying an employee what is in the payslip). The Claimant asked again for £10,000 to settle the claim.

96. Following the meeting, the Respondent wrote to the Claimant informing him that his appeal was dismissed (178). The Respondent reiterated his previous position and offered two options: *"1) You return to work on a 24 hour contract (12 hours per day) paid at a rate of £8.72. Once the firm is in a position to do so, we intend to offer you hours up to 40 hours. 2) Your employment is terminated on the grounds that you do not wish to work for this firm any longer."*

97. On 10 February 2021 the Claimant replied (161) complaining about the outcome, stating that the only reason he had not returned to work was because the Respondent had not provided him with his original terms and conditions, and he asked for payment.

98. The Respondent replied on 18 February 2021 (179) repeating his previous position and concluded that the Claimant was still welcome to return to work, but that if he did not return to work by 25 February 2021 he would presume he did not wish to return to work at all and would consider his employment terminated. The Respondent confirmed that the Claimant would be paid 5.12 weeks for the year 1 April 2020 to 31 March 2021. The Respondent stated that any holiday from before that should have been taken prior to March 2020. There was some further correspondence about holiday pay, but the holiday pay was duly paid in accordance with the Respondent's letter.

99. HMRC recorded the Claimant's leaving date as 28 February 2021 in accordance with the Claimant's P45.

100. In the meantime, so far as the Tribunal process is concerned, the Claimant had formally contacted ACAS on 1 December 2020, ACAS issued a

certificate on 12 January 2021 and on 11 February 2021 (the day after he received the appeal outcome) the Claimant commenced these proceedings.

Holiday arrangements

101. The Respondent was away between February and May 2020. The Claimant said that in the past when the Respondent was away he was not allowed to take holidays. He accepted he could have taken holiday any time between April 2019 and February 2020, and that he had not asked to take holiday at any point until the email of 24 December 2020 detailed above. The Claimant was on termination of employment paid in lieu of his holiday entitlement for 2020/2021.

Conditions in the basement

102. The Claimant in his witness statement says that the basement had no ventilation, no social distancing, no windows, water leakage and the main gas pipeline was easily visible, and only a wooden partition to the toilet, untreated waste drains sometimes overflowed and the smell was 'unbearable'. He asserts that TfL had refused to issue a licence to the Respondent to use the basement 'on health and safety grounds' and that the basement had not been used for 7 or 8 years. The Claimant said that before lockdown he was working on the ground floor not in the basement. The Claimant said that he raised all these matters orally with the Respondent on 2 November 2020. However, this is much more detail than he put in his claim form or any of his written communications at the time.

103. The Respondent understood that the Claimant was raising health and safety concerns about the basement in general terms, and denied it at the time (in particular in the letter of 16 November 2020), but denies that the Claimant gave any of the details that he now puts in his witness statement. He further disagrees with the Claimant's opinion about the basement. He says that the Claimant did work there from 2011, although acknowledges it was not being used prior to lockdown. He says that the basement is clean and social distancing was observed with more than 2 meters between desks. He says he has an office there. He says that the local authority/TfL had passed the basement as a suitable place for work. The Respondent had a TfL licence from 11 December 2016 to 10 December 2021 (111) and says (and we accept) the licence was renewed for a further five years from 10 December 2021. The Respondent says that the TfL compliance team visit every six months and that if there were issues relating to health and safety the licence would not have been re-issued. He says that the licence refusal to which the Claimant refers related to an application made to be a TfL Examination centre which required space for minimum 15 people which the Respondent did not have.

104. The Claimant has obtained, through a request under the Freedom of Information Act 2000, information about why the Respondent's application of

November 2016 to be a TfL Examination centre was turned down. It states that the Respondent's application failed to meet criteria which included provision of a health and safety policy, description of health and safety management system, copies of risk assessment and safe systems of work for fire and office and other matters. However, this evidence does not bear the weight that the Claimant is seeking to put on it. On the face of the document, it suggests that the Respondent did not in 2016 have various written policies in place that were required for that particular application. But, it may well be, as the Respondent says, that the actual reason the application was turned down was because whatever the policy documents sent in were they did not meet the criteria for that particular application because there was not space for 15 people. In any event, this evidence tells us nothing about what the state of the basement was in 2016 and absolutely nothing about what it was like in 2020.

105. The Claimant also asserted that the Respondent did not have planning permission to use the basement. We do not accept that planning permission has anything to do with health and safety of employees, but in any event, it is apparent from the letter of 14 January 2020 (127) that the Respondent did have planning permission to use both the basement and ground floor of the property as a mini cab operator office and car hire provider office during the period with which we are concerned.

106. We have been provided with photographs of the basement, which look to us to be unremarkable. The room appears clean and tidy. In the photographs there are people talking standing close together, which the Claimant stated indicated social distancing was not being observed, but we cannot tell whether it was or not from the photographs as they just capture a moment in time. There is nothing to suggest that the Respondent's evidence that desks were 2 meters apart is not correct.

107. We have considered all the evidence and conclude that the Claimant in his witness statement has embellished considerably on the state of the basement. He did not raise all these matters at the time. It is clear that the Respondent was licenced to operate from the premises during 2020, and that planning permission was in place. We accept the Respondent's evidence that TfL does on its inspections consider health and safety issues and that no concerns were raised by TfL during this period, with the licence being renewed on expiry in December 2021. There was no obligation on the Respondent to obtain any further certification from the local authority. While as a basement it may not have been the most pleasant place to work, it looks perfectly acceptable in the photographs. We accept that desks were socially distanced; the Claimant's allegation that social-distancing was not practiced is an afterthought and embellishment. We do not accept that there were any problems with the basement that reasonably posed any health and safety risk. We find that the Claimant raised these purported health and safety concerns in an effort to bolster his case for refusing to return to work. They were not genuine or reasonable concerns on his part.

Conclusions

Illegality

The law

108. The leading authority now on the illegality defence is *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, which was applied by the Supreme Court in *Grondona v Stoffel and Co* [2020] UKSC 42, [2021] AC 540. In *Patel v Mirza* the Supreme Court (Lord Toulson JSC, with whom the other members of the court agreed) held at [120] that a three-stage approach should be taken:

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary: (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

109. With regard to the third stage, at [107] Lord Toulson JSC observed:

> In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. … I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.

110. In *Grondona v Stoffel & Co*, the Supreme Court (Lord Lloyd-Jones JSC, with whom the other members of the court agreed) emphasised (at [26]):

> The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play or to carry out a policy-based evaluation of the relevant laws. It is simply seeking to identify the policies to which the law gives effect which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. In considering proportionality at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand. Finally, in this regard, since the overriding consideration is the damage that might be done to the integrity of the legal system by its adopting contradictory positions, it may not be necessary in every case to complete an exhaustive examination of all stages of the trio of considerations. If, on an examination of the relevant policy considerations, the clear conclusion emerges that the defence should not be allowed, there will be no need to go on to consider proportionality, because there is no risk of disproportionate harm to the claimant by refusing relief to which he or she would otherwise be entitled. If, on the other hand, a balancing of the policy considerations suggests a denial of the claim, it will be necessary to go on to consider proportionality.

111. The questions identified by the Supreme Court in the earlier case of are *Hounga v Allen* [2014] UKSC 47, [2014] ICR 847, which concerned an employment context, also remain helpful (ibid, [44]):

    a. Would the award of compensation allow the individual to profit from wrongful conduct in entering into the contract?

    b. Would the award of compensation permit evasion of a penalty prescribed by the criminal law?

    c. Would the award of compensation compromise the integrity of the legal system by appearing to encourage those in similar situations to enter into illegal contracts?

    d. Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in similar situations to enter into illegal contracts of employment? (For example, in that case, by engendering a belief among employers that they could discriminate with impunity against illegal workers.)

Conclusions

112. Regarding the potential matters of illegality that we identified at the start of proceedings, we have found as facts that:

    a. The Claimant did have the right to work between 2011 and 2015 because, having been born in Goa, he had Portuguese nationality as of right. However, he had not produced to the Respondent evidence of his entitlement to work during this period. The failure to produce evidence of right to work is not in itself illegal conduct, so far as the Claimant is concerned.

    b. The Respondent paid the Claimant partly in cash from 2018 onwards. Tax was not paid on the cash element of the Claimant's earnings and both parties were aware of that and knew that it was unlawful. There was an implicit agreement between the Claimant and the Respondent to defraud HMRC of the tax that was due on the cash element of the Claimant's earnings. It is immaterial in this respect that as the Claimant was on PAYE the primary obligation lay with the Respondent to pay tax and NI on the Claimant's earnings. What is unlawful is that they both agreed to avoid paying tax and NI on the cash sums. Further, had there not been such an agreement, the likelihood is that (even assuming the Respondent had agreed to pay the Claimant more than the national minimum wage 'on the books') the £11.25 per hour figure that the Claimant was paid would have been used by the Respondent as a gross figure. Thus we find (on the balance of probabilities) that it is the Claimant who has been the principal beneficiary of this unlawful agreement as he has received in cash earnings in gross which he should only have

received net of tax. Alternatively, they may have agreed to split the difference so that it could be said that the Respondent has also benefited from the unlawful arrangement, but it is highly unlikely in our judgment that if the parties had agreed to 'go straight' the Respondent as a small business would simply have agreed to pay the Claimant's tax and NI on top of the £11.25 figure. The Claimant has thus in our judgment certainly profited from this unlawful agreement.

c. The Claimant adopted (and persuaded the Respondent to accept) an unreasonable interpretation of the government's furlough guidance. He was between April 2020 and December 2020 paid more than was intended by the government scheme as he was paid for more hours on furlough than he was contracted to work for in the period immediately prior to furlough. The Claimant's contention that he was entitled to do this because he was a 'variable hours' worker was unreasonable because he was not a 'variable hours' worker. His hours of work had only changed by agreement in December 2019 and again in March 2020. His hours were not variable. The Claimant was seeking to maximise benefit to himself from the furlough scheme. However, on the basis of the evidence before us we do not consider that we can go so far as to find this was actually unlawful or that there was an intention on the part of the Claimant or Respondent to defraud the furlough scheme. The Claimant's WhatsApp message suggests merely that he was seeking to obtain the maximum to which he (albeit unreasonably) considered he was 'entitled'.

113. Having reached our conclusions on the substance of the Claimant's claims for the reasons set out below, we returned to consider the principles in *Patel v Mirza* and *Grondona v Stoffel* we have set out above. The purpose of the income tax system is to ensure that all earners make a fair contribution to the public purse (what is fair being determined by the government/Parliament and enshrined in income tax legislation). For the reasons set out below, we have decided that the Claimant's victimisation/discrimination/health and safety complaints fail on their merits. We do not consider them further. The Claimant's contractual/unfair dismissal/holiday pay claims however would in parts succeed on the merits subject to this issue of what impact the unlawful conduct should have on those claims. Insofar as the Claimant's complaints depend on the unlawful untaxed cash payments that he received, the impact of denying those parts of the Claimant's claims would be that the Claimant was not permitted to profit from his own wrongdoing in participating in a long-term agreement to defraud the revenue. The flip-side would be that the Respondent would not be held liable for reneging on/failing to 'honour' that unlawful agreement. So far as the contractual elements of the claim are concerned, there are no wider public policy arguments. The issue is simply whether the Claimant should be permitted to advance claims (whether by way of breach of contract or unlawful deduction from wages or compensation for unfair dismissal) calculated on the basis of, and by reference to, the part of his contract with the Respondent that included a mutual agreement to

defraud the revenue. In our judgment, that would be contrary to public policy and bring the legal system into disrepute. The cash payments the Claimant received were not a one-off. This was a long-term agreement and over the years the Claimant (or possibly both parties) have reaped significant profit from it. The seriousness of the unlawful conduct here, and its duration, could potentially have justified the denial of the whole claim. However, that is not the approach we have taken. We have decided that the proportionate response, which is in our judgment consistent with maintaining the integrity of the tax and legal systems, is to deny the elements of the claim that are founded on the unlawful part of the Claimant's contract. That is what we have done in our reasoning below in relation to each of the relevant claims. We acknowledge that the effect of doing so is that each of those claims fails, but that is not because we have regarded the illegality as a complete bar to the claims. Rather, it is a consequence of the Claimant not being permitted to advance claims based on the unlawful element of his contract.

Continuous employment

The law

114. Section 211 ERA 1996 stipulates that an employee's period of continuous employment begins on the day in which an employee starts work and ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

115. Section 212(c) ERA 1996 states that any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment or which the employee is absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose.

116. In *Curr v Marks and Spencer Plc* [2002] EWCA Civ 1852, it was stated that for a contract to be regarded as continuing during a period of absence, there must be a "meeting of minds" between the parties.

Conclusions

117. We found as facts for the reasons set out above that between July 2015 and 5 March 2016 the Respondent believed that the Claimant did not have the right to work in the UK and that it would not be lawful for him to continue in employment as he had not produced to the Respondent satisfactory proof of right to work. We therefore concluded that there was no agreement that the Claimant's employment was continuing during that period. We further concluded that it was immaterial whether the Respondent had a custom and practice of permitting employees to have long breaks from work, because in the Claimant's case it is clear that his employment ceased because the Respondent believed he did not have the right to work. In the Claimant's case therefore there was no agreement that his employment was continuing. It

follows that there was a break in the Claimant's employment between July 2015 and March 2016. We have however assumed in the Claimant's favour that his continuous employment started on the date identified by the Respondent, i.e. 5 March 2016 rather than the later April 2016 return to work date contended for by the Claimant.

Breach of contract / reasonable instruction / *Hogg v Dover College*

The law

118. An employment contract is for most purposes like any other contract. The parties are free to agree the terms of their relationship. In this case the contract between the parties was oral. Determining the terms of an oral contract is a question of fact: *Maggs v Marsh* [2006] EWCA Civ 1058 at [26] and *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [82] *per* Lord Neuberger. As those cases make clear, we can take into account the subjective understanding and intentions of the parties and their post contract actions in deciding what is agreed. We assume that, as with written employment contracts, we should bear in mind the relative bargaining power of the parties in assessing that evidence: *cf Autoclenz Ltd v Belcher and ors* [2011] UKSC 41, [2011] ICR 1157. However, in this case, involving an individual claimant against an individual respondent running a small business, the difference in bargaining power is not particularly great (although we acknowledge that ultimately the Respondent as employer had 'the upper hand').

119. Also relevant to this issue is the case law on when an employment contract may be regarded as terminated by conduct. The leading case is *Sandle v Adecco* [2016] IRLR 941, in which HHJ Eady QC gave guidance as follows:

> 25. Dismissal is defined by section 95 ERA 1996 , which, relevantly, states:
>
> > "95. Circumstances in which an employee is dismissed
> >
> > (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if) –
> > (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> > …
> > (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."
>
> 26. Determination of this question will require the ET to consider who really terminated the contract of employment (see per Sir John Donaldson MR in *Martin v Glynwed Distribution Ltd* [1983] ICR 511 CA, at 519G-H). Where the question of termination is to be determined in the light of language used by an employer that is ambiguous, the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener in the light of all of the surrounding circumstances (see *Martin v Yeoman Aggregates Ltd* [1983] ICR 314 EAT); the approach is that of contract law (see *Willoughby v CF Capital plc* [2012] ICR 1038 CA, at paragraph 26).

27. For the Claimant, it is said that the position is somewhat more nuanced than the importation of a contractual test might imply. As has been emphasised in a number of cases concerned with defining the effective date of termination for the purposes of section 97 ERA , that is a statutory and not a contractual concept — an approach that recognises the need for the protection and safeguarding of employee rights (see per Lord Hope in Barratt , above) — and that recognition of statutory purpose outweighs other factors including, in certain circumstances, that of certainty. This approach, the Claimant contends, should also inform this Court's construction of section 95(1)(a) . We have sought to bear that in mind in what follows.

28. Turning to the specific question raised by the appeal, to the extent the Claimant is saying that determining whether an employer has terminated a contract of employment for the purposes of section 95(1)(a) should allow that to be implied from an employer's conduct, we do not disagree. The real issue, however, seems to us to be one of communication .

29. Thus, referring to the authorities relied on by the Claimant as examples of cases where dismissal has been implied from the employer's conduct, we recognise that removing an employee from the payroll can amount to termination of the employment contract (see Kirklees Metropolitan Council v Radecki [2009] ICR 1244 CA), but we note that in that case the action in question was known to the employee (“ [Mr Radecki] was aware that his employment had been brought to an end ”, per Rix LJ at paragraph 48, and also see paragraph 55 and per Toulson LJ at paragraph 47). Similarly, removing a teacher from one post and offering him different terms on a reduced salary could amount to a summary dismissal (see *Hogg v Dover College*, supra), but, again, the conduct in question — that from which dismissal was to be implied — was communicated to the employee (per Garland J: “ He was being told that his former contract was from that moment gone ”).

30. Where there are no contraindications, the sending of a P45 can also be taken to communicate a dismissal, but it is the receipt of the P45 that is the crucial event (the communication of the employer's decision to treat the employment contract as at an end); see *Kelly v Riveroak Associates Ltd* UKEAT/0290/05/DM, per Burton J at paragraph 24. And, for completeness, we note that the receipt of a P45 may not be the relevant act that determines the question of dismissal: if the dismissal is communicated by some other means at an earlier time, that will be the effective date of termination of the employment contract, not the later receipt of the P45 (London Borough of Newham v Ward [1985] IRLR 509 CA).

31. Turning to the agency context with which we are concerned on this appeal, whether or not it reflects the position of the present case, we proceed on the basis that there may indeed be many agency workers who are “ less well paid and realistically have no power to negotiate their own terms ”, see per Langstaff J at paragraph 2 of Adecco Group UK & Ireland v Gregory and Anor UKEATS/0024/14/SM and UKEATS/0026/14/SM, a case that we have found helpful in addressing the issues raised by the current appeal.

32. In Gregory , Langstaff J returned to the question identified in Yeomans : who really ended the contract of employment? He observed:

> “14. … That is always going to be difficult in a situation in which there is agency work, where an employee may, for instance, have the services of a number of agencies by which to secure work. There may be many situations in which it is plain from looking at the relationship between agency and worker that it has ceased. That will largely be because over a period of time the one provides no work for the other and the other does no work for the first. If the situation is that the agency has simply withdrawn work which it might otherwise have been expected to provide, a factual conclusion might follow that the agency has by its actions deprived the

> employee of work and that could, in the relevant context, amount to a dismissal, though it may be very difficult to place a precise date upon it since no definite action will have been taken.
> 15. The converse is true too. If an employee simply drifts away, the agency will have them, as it were, on their books, but there will be no meaningful relationship between them. If the question arises for legal reasons when precisely the relationship ended, the difficulties of analysis are plain. If the question arises who ended it, again the difficulties may exist. Where it is the worker who simply drifts away, loses touch and makes no use of services which remain available, then she is in no position to prove, as prove she must if she is to make a claim in respect of her dismissal, that she has been dismissed because the circumstances are at least equally consistent with her having ceased to be an employee from her own wish. There is no formal resignation in such a case, but there can be no doubt to any objective observer that the relationship has ended.
> 16. These are all issues for a tribunal, as it seems to me, to determine. …"

> 33. In that case, the ET had found that there had been a direct dismissal communicated by the Respondent sending out the Claimant's P45 and a covering letter that stated that it would treat her as dismissed if she failed to make contact within two weeks. We note, however, that Langstaff J allowed that if the agency had simply withdrawn work that it might otherwise have been expected to provide it might be permissible to conclude that this constituted a dismissal. This might be characterised as an extension to the case law, allowing for communication of dismissal to be implied, applying an objective test and taking into account all of the circumstances from an employer's conduct. Certainly, it is a context specific example of that approach, which we respectfully adopt in the present case.

Conclusions

120. We have found as facts that, prior to March 2020, the Claimant was working for 48 hours per week, 4 x 12 hour shifts at a rate of £11.25 per hour. A substantial proportion of that was 'off the books' as his 'on the books' hours were from December 2019 limited to 30 hours at national minimum wage. In March 2020, in response to the pandemic, the Claimant agreed to reduce his rate of pay to the minimum wage, and his shifts to an average of 2.5 x 12 hour shifts per week (i.e. still 30 hours). He also asked, and the Respondent agreed, to reduce his 'on the books' payslip wages to 16 hours per week at minimum wage. Although the Claimant was unhappy about these changes in March 2020, he nonetheless went along with those changes for April and May 2020 without suggesting that there had been a breach of contract, let alone a repudiation of the contract. We accept the Claimant's case, however, consistent with Mr Ahmad's WhatsApp message that the reduction in pay would be temporary, that there was an understanding the whole change in arrangements at this point was temporary. Nonetheless, we consider that what happened in March 2020 shows that the parties contemplated that it was within the scope of their contractual agreement that hours of work could be varied to the extent of reducing to two or three shifts a week or even changing pay, at least on a temporary basis. The fact that the Claimant had previously accepted a reduction of his shifts from five to four provides further support for our conclusion that reasonable changes in rates of pay and shifts were within the contemplation of the parties and formed part of the terms of their oral agreement.

121. When the Claimant was asked by the Respondent to return to work in October 2020 he was initially asked to return on 16 hours per week at minimum wage with no promise of any increases thereafter. Those terms were not in our judgment reasonable and therefore fell outside the scope of the parties' agreement. However, the Respondent rapidly adjusted his position so that by mid November the Respondent's requirement was for the Claimant to return to work on 24 hours per week at the minimum wage, but that this was 'temporary' and he would return to 40 hours per week when the Respondent had sufficient work available.

122. So far as the shifts offered by the Respondent as at November 2020 are concerned, we find that 24 hours (especially with a view to increasing to 40 hours) was within the scope of what the parties had agreed under their oral contract was a permissible variation and/or it was not such a significant change that it amounted to a fundamental and repudiatory breach. In terms of both hours and pay, it was essentially what the Claimant had agreed to in March 2020 on a temporary basis and there was therefore no reason in our judgment why he could not reasonably have been expected to return to working for the Respondent on those terms again on a temporary basis.

123. However, there was a big difference between what was agreed in March 2020 and what the Respondent offered in November 2020, and that was that the Respondent was maintaining that going forward he would only pay the minimum wage (£8.72) and there was no promise to increase the Claimant's wages back to £11.25 (as there had been in March 2020). The Respondent's apparent insistence that he would not in future pay more than the national minimum wage was a significant change in the Claimant's terms and conditions of employment and in principle was of an order to amount to a repudiatory breach of the contract.

124. However, we then have to consider the impact of public policy on this situation, and the Claimant's knowing participation in defrauding the revenue in respect of the amount of his pay that exceeded the national minimum wage. We have already set out our reasoning in relation to this aspect of the Claimant's case above. In short, to find that the Respondent repudiated the Claimant's contract by refusing to 'honour' the unlawful part of that contract would in our judgment be to condone and reward unlawful conduct in a way that is repugnant to public policy and we decline to do so.

125. It follows from that that the Respondent's requirement for the Claimant to return to work on the terms offered must be treated as one falling within the terms of the oral contract between the parties. It was a reasonable management instruction.

<u>Direct age discrimination</u>

The law

126. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by dismissing him, discriminated against the Claimant by treating him less favourably than it treats or would treat others because of a protected characteristic. The protected characteristic relied on by the Claimant is his age.

127. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated.

128. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] *per* Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (*cf Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (*cf King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

129. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863.

130. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] *per* Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at paragraph 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

Conclusions

131. The Claimant has adduced no evidence at all from which we could conclude that the Respondent's decision to dismiss him had anything to do with his age. The Claimant is not even the oldest employee. Further, on the facts as we find them to be, he had not been subjected to age discrimination or harassment on grounds of age by Mr Ali, nor had he made any complaint to that effect. In any event, it is clear for the reasons set out below that the sole reason for the Claimant's dismissal was his failure to follow a reasonable management instruction and return to work. His age had absolutely nothing to do with it. The Claimant has not discharged the initial burden of proof.

Victimisation

The law

132. Under ss 27(1) and s 39(2)(c)/(d) EA 2010 and s 39(2)(c)/(d), the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting him to a detriment because he did, or the Respondent believed he had done, or may do, a protected act.

133. A protected act includes (so far as relevant in this case) bringing proceedings under this Act or making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). In considering whether an act is a protected act, we must remember that merely referring to 'discrimination' in a complaint is not necessarily sufficient to constitute a protected act as defined. The EA 2010 does not prohibit all discrimination, it only prohibits discrimination on the basis of a proscribed list of protected characteristics. The Tribunal must determine whether, objectively, the employee has done enough to convey, by implication if not expressly, an allegation that the Act has been contravened. In *Durrani v London Borough of Ealing* UKEAT/0454/2012/RN, that was not the case where the employee, when questioned, explained that the 'discrimination' complaint was really a complaint of unfair treatment, not of less favourable treatment on grounds of race or ethnicity. The EAT, the then President, Langstaff P, observed as follows at paragraph 27:

> 27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act . All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally.

134. In deciding whether the reason for the treatment was the protected act, we apply the same approach as for discrimination set out above.

135. However, a claim of victimisation cannot succeed unless the alleged victimiser is at least either aware of the protected act, or believes that a protected act has been done (or may be done). In *South London Healthcare NHS Trust v Dr Bial-Rubeyi* (UKEAT/0269/09/SM), the EAT found that there was no evidence from which the Tribunal could have concluded that the alleged victimiser was aware that the claimant had made a complaint of discrimination. In those circumstances, the EAT (McMullen J) substituted a finding that the Respondent did not victimise the Claimant.

136. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

137. Again, the burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope.

Conclusions

138. The Claimant relies on his communications at pp 195-198 of the bundle, his alleged oral conversation with the Respondent of 30 October 2020 and his email of 31 October 2020 at 133 as his protected acts. However, on the basis of our findings of fact, none of those communications included any complaint that could be construed as amounting to an unlawful act under the EA 2010. Although the words discrimination and harassment are used, there is nothing to suggest that the matters complained of are by reference to age, and we accordingly found that the Claimant did not make any oral allegation of discrimination or harassment. As there is no protected act, this claim fails. However, we add that we would not in any event have found that the Respondent 'told the Claimant he would be put under the supervision of employee Sajjad Ali' because the Claimant had complained about Mr Ali. While the Respondent accepts he said that on 2 November, it was made clear in the Respondent's subsequent letter of 16 November 2020 that there is no hierarchy at the Respondent so the Claimant will not be working 'under' Mr Ali. Nor was the Claimant going to be working on the same shifts with Mr Ali

going forward, thus making clear that there was no element of retaliation in the way the shifts were arranged on 2 November. Further, the Claimant and Mr Ali had prior to lockdown worked on the same shifts, albeit in different roles with their desks 10 metres apart. The Respondent's understanding was that *status quo* was being maintained. This was not victimisation.

Unfair dismissal / Automatic Unfair dismissal

The law

139. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. conduct, capability, redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at paragraph 44). (There are exceptions to that approach, as identified in *Jhuti*, but it is not suggested they are relevant here.)

140. In this case, the Claimant must raise a *prima facie* case that the sole or principal reason for his dismissal was that he had done one of the matters in s 100(1)(d) and/or (e). In this case, that requires us to consider whether the Claimant refused to return to his place of work in circumstances of danger which he reasonably believed to be serious and imminent and which he could not have been expected to avert (s 100(1)(d)) and/or whether he took appropriate steps to protect himself from dange in circumstances of danger which he reasonably believed to be serious and imminent (s 100(1)(e)).

141. If the Claimant shows that he has done one of those things and establishes a *prima facie* case that those things were the sole or principal reason for his dismissal, then we assume that (as in whistle-blowing cases) the burden shifts to the Respondent to prove that the protected disclosures were not the sole or principal reason for the dismissal: *cf Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81. That is a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010), but unlike in discrimination claims if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at paras 115-116 and *Dahou* ibid at para 40.

142. Once the reason for dismissal is established, then (unless it is automatically unfair under s 100 ERA 1996), the Tribunal must go on to consider the

fairness of the dismissal in all the circumstances, taking into account the size and administrative resources of the employer, to dismiss the employee for that reason: s 98(4). Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at para 48. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily: it is a matter for assessment by the Tribunal on the facts of each case: *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17) at para 54 *per* HHJ Eady QC. We further consider that it follows from *OCS* that a fair appeal may remedy even wholesale unfairness at the first stage, but whether it does or not is a question of fact to be determined by the Tribunal in all the circumstances of the particular case.

143. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Conclusions

144. We found as a fact for the reasons set out above that the Claimant did not have a reasonable belief that there were any circumstances of danger in the Respondent's basement. It follows that his claim for automatic unfair dismissal under s 100 ERA 1996 fails.

145. We are satisfied that the reason that the Respondent issued the Claimant with notice of termination on 15 January 2021 was solely because the Claimant had refused to return to work. That is a conduct reason or some other substantial reason and potentially fair under s 98(2) ERA 1996. The Claimant's claims that other reasons were in play are not made out. It is clear from the way the Respondent treated the Claimant from October 2020 onwards that he would genuinely have accepted the Claimant back to work on the (reasonable) terms offered. The Claimant's professed concerns about health and safety in the basement were not genuine; the Respondent had addressed his concern about working with Mr Ali by making clear in the letter of 16 November 2020 that they would not be working the same shifts; the Respondent could not lawfully offer home-working for a controller under the terms of his TfL licence; the Respondent generously continued paying the Claimant furlough during November and December 2020 despite his refusal

to work; the Respondent gave him a total of seven chances to return to work, including a further chance even after determining his appeal. In the circumstances, it is clear that the only reason for the Claimant's dismissal was his refusal to follow a lawful and reasonable instruction to return to work. Moreover, it was in our judgment fair in all the circumstances of the case to dismiss the Claimant for that reason because he had been given multiple chances to return to work. We cannot imagine another employer doing differently in the circumstances.

146. We note that the Respondent did not follow the ACAS Code of Practice in inviting the Claimant to a meeting immediately prior to issuing notice of termination of employment on 15 January 2021. However, that is a technicality in this case. The Claimant and Respondent had had ample meetings concerning the issue in October and November 2020, the Respondent had issued a clear warning on 3 November 2020 that if the Claimant did not return to work he would be dismissed. The Claimant had been given multiple opportunities to return to employment and the parties had made their (entrenched) positions very clear in correspondence. There was no purpose to be served by a meeting prior to issuing notice of termination. On that basis there was little purpose in having an appeal procedure either, and of course what was offered was not an 'appeal' but a meeting with the Respondent who was the original decision-maker. However, this is a small business, in which the Respondent is a sole trader. We accept there was no one else who could reasonably have heard the appeal. Further, in substance, we find that the appeal meeting was a genuine and open one. The notes reflect full discussion between the parties and the Respondent gave the Claimant a yet further chance to reconsider and return to work even after the meeting. In those circumstances, we find that in this case what would in normal circumstances be very significant shortcomings in procedure did not render the dismissal unfair.

147. Finally, we note that as the Claimant's statutory notice entitlement was four weeks (based on our conclusion that his start date was 5 March 2016) the effective date of termination in this case was, by operation of law under s 97(2) ERA 1996, and based on the 15 January 2021 notice of termination, 13 February 2021. As such, as the Claimant commenced proceedings on 11 February 2021 before his effective date of termination the Tribunal did not in fact have jurisdiction to hear his unfair dismissal claim: *Rai v Somerfield Stores Ltd* [2004] IRLR 124, [2004] ICR 656.

<u>Holiday pay</u>

148. By virtue of reg 13(3) of the WTR 1998 the Claimant's leave year began on the anniversary of the date his employment begins, i.e. 5 March. The Claimant accepts he was paid holiday for the leave year 2020/21 on termination. He contends that, by virtue of reg 13(10) of the WTR 1998 (as amended) he should have been permitted to carry forward his whole annual leave entitlement for the year 6 March 2019 to 5 March 2020.

149. Regulation 13 of the Working Time Regulations 1998 (WTR 1998) provides, so far as relevant, as follows:-

> (10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).
>
> (11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

150. The only part of the 2019/2020 leave year for which the Claimant contends he could not have taken leave was February 2020 when the Respondent was away. However, the Coronavirus pandemic did not start until after 6 March 2020, so reg 13(10) does not apply as the reason that the Claimant could not take leave in February 2020 was not a result of the effects of coronavirus. In any event, the Claimant accepted he could have taken holiday at any point prior to February 2020 and that he did not actually ask to take holiday in February 2020. In the circumstances, we find that he had a reasonable opportunity to take all his annual leave for the year 2019/20 and that he was not entitled to carry any forward under reg 13(10).

Unlawful deductions from wages

151. Given our conclusion that the Claimant's continuous employment commenced on 5 March 2016, his statutory entitlement to notice pay under s 86 ERA 1996 was four weeks. However, as he was not 'ready and willing to work' during his notice period, by virtue of s 88(1)(a) ERA 1996 he was not entitled to be paid during his notice period.

152. For the avoidance of doubt, we find that the Claimant was not on holiday during his notice period either (see s 88(1)(d) ERA 1996). Although he had requested to take 56 days leave commencing on 13 January 2021, that was an unreasonable request wholly exceeding his statutory entitlement and which could not reasonably be regarded as being impliedly authorised by the Respondent's failure to reply to his emails of 24 December 2020 or 12 January 2021. If there was any doubt about that, it was put to rest by the notice of termination of employment sent by the Respondent on 15 January 2021. The Claimant therefore has no entitlement to pay for his notice period.

153. As to the Claimant's claim for unpaid furlough pay, this is based on him not having been paid furlough pay according to the level of wages and hours that he was paid 'off the books'. As we have found that the parties' agreement in respect of those wages was a fraud on the revenue, we consider that it would be contrary to public policy for the Claimant to be able to claim furlough pay in respect of those sums. To permit such a claim would bring the legal system into disrepute.

Right to be accompanied (ERA 1999, s 10)

154. By s 10(1)(b) of the Employment Relations Act 1999 (ERA 1999) the right to be accompanied to a disciplinary hearing only applies where the worker reasonably requests to be accompanied to that meeting. We found that the Claimant did not request to be accompanied to the appeal meeting. There has therefore been no breach of ERA 1999, s 10.

Employment Act 2002, s 38

155. Finally, the Claimant is not entitled to any award under s 38 of the Employment Act 2002 for failure to provide him with a written statement of terms and conditions as he has not succeeded on any of his claims.

Overall conclusion

156. The unanimous judgment of the Tribunal is:

(1) The Tribunal did not have jurisdiction to hear the Claimant's claim for unfair dismissal (including automatic unfair dismissal) under Part X of the ERA 1996 and in any event it is in substance not well-founded and is dismissed;
(2) The Respondent did not contravene ss 13 and 39 of the EA 2010 and the Claimant's claim for direct age discrimination is therefore dismissed;
(3) The Respondent did not contravene ss 27 and 39 of the EA 2010 and the Claimant's claim for victimisation is therefore dismissed;
(4) The Respondent did not breach the Claimant's contract and/or make any unlawful deduction from his wages in respect of notice pay, furlough pay or holiday pay;
(5) The Claimant's claim for holiday pay under the WTR 1998 is not well-founded and is dismissed.

_____

Employment Judge Stout
20/04/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

20/04/2022.

FOR THE TRIBUNAL OFFICE