EMPLOYMENT TRIBUNALS

Claimant: Mr U Hussain

Respondent: Ignite Gas Limited

Heard at: Liverpool (remotely, by CVP) **On:** 13 January 2022 and 3 and 17 March 2022 (in chambers)

Before: Employment Judge McCarthy (sitting alone)

REPRESENTATION:

Claimant: Ms Ince (Lay Representative)
Respondent: Ms Kaur (Solicitor)

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant's application to amend his claim by adding two further complaints of unauthorised deductions from wages is granted.
2. The claimant's application to strike out the response on the grounds of the respondent's failure to comply with case management orders is refused.
3. The respondent has not made unauthorised deductions from the claimant's wages. The three claims are dismissed.
4. The tribunal does not have jurisdiction to hear the claimant's claim for automatic unfair dismissal. This claim is dismissed.

REASONS

Introduction

1. By a claim form presented on 7 September 2021 (having entered early conciliation and received a certificate against the respondent dated 12 August 2021), the claimant complained of unauthorised deductions from his wages and automatic unfair dismissal for alleging the respondent had infringed a statutory right.

2. By a response form dated 2 November 2021 the respondent resisted the complaint. It says that it had not made unauthorised deductions from the Claimant's wages, and it had not dismissed the claimant and section 104(1(b) Employment Rights Act 1996 (ERA) was not engaged.

Preliminary Issues

3. At the beginning of the hearing, before I heard any evidence, I had to deal with two preliminary issues.

Application to Amend

4. Ms Ince applied to amend the claimant's claim to add two further complaints of unauthorised deductions from wages. The first amendment related to a bus lane fine of £60 (which the claimant said should have been a deduction for £30). The second amendment related to a deduction of £194.34 for missing company van stock. Ms Ince had believed, until the day of the hearing, that both these complaints had been included in the ET1 form, which she had completed online. The claimant's schedule of loss, provided to the respondent in November 2021, had included these two further complaints of unauthorised deductions from wages alongside the unauthorised deduction claim for salary arrears. The respondent opposed the application on the basis that there was no justified reason for presenting these claims out of time and that the respondent had not had time to consider these new heads of clam.

5. Whether to allow an amendment is a matter for discretion and a balancing exercise. In deciding whether to grant the application to amend, I applied the principles in **Selkent Bus Company Limited v Moore** [1996] ICR 836 EAT and **Abercrombie & Ors v Aga Rangemaster Limited** [2014] ICR 209 CA. I considered all the relevant circumstances of the case, balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. I concluded, for the reasons given at the hearing, that the amendment should be granted.

6. In my view the balance of injustice and hardship fell on the claimant should the amendment not be allowed. The respondent was unlikely to suffer significant prejudice should the amendment be granted. I believe the respondent had been alerted to these two potential further complaints by their inclusion in the claimant's schedule of loss. The agreed bundle, prepared by the respondent, included documents relating to these additional complaints and the respondent witness, Mr Hallsworth had also made references to them in his witness statement. Given the contents of the bundle and respondent's witness statement I believed the respondent was in a position to defend these additional complaints but allowed Ms Kaur to ask

supplementary questions of the respondent's witness if the respondent wished to cover these complaints further.

Strike Out

7. Ms Ince applied to strike out the respondent's response under rule 37 of the Employment Tribunals Rules of Procedure on the ground that the respondent had failed to comply with the tribunal's case management orders. Ms Ince argued that the Respondent had failed to exchange witness statements until the day before the hearing and that the respondent had sent a bundle to the tribunal and the claimant on 6 January 2021, without it having first been discussed and agreed with the claimant. Ms Ince subsequently discussed and agreed a bundle with the respondent's solicitor (which now included additional documents from the claimant). However, the revised bundle sent to the tribunal and claimant the day before the hearing was the bundle they had agreed, plus 17 extra pages which had not been discussed or sent previously to Ms Ince (pages 120-137).

8. At the outset of the hearing Ms Ince raised the late provision of witness statements and the additional documents in the final bundle with me. Given the late exchange of the witness statement and additional documents and the fact Ms Ince was not legally qualified, I discussed this matter to establish whether I considered a fair hearing could still take place. I discussed with Ms Ince whether she had had an opportunity to consider the additional 17 pages and witness statement from the respondent prior to the hearing and to take the claimant's instructions. She confirmed that she had been able to read the statement and additional 17 pages. She also confirmed, that given she lived with the claimant, she had had an opportunity to discuss the respondent's witness statement and the additional pages in the bundle with him. She also confirmed that the revised bundle contained all the claimant's documents, and it was agreed. Given Ms Ince's representations and the fact the respondent had exchanged only one witness statement of six pages long, I concluded that a fair hearing could still take place and so we proceeded with the hearing.

9. Following this discussion, Ms Ince still wanted to make an application to strike out the response and so I heard her application. The respondent strongly opposed the application. For the reasons given at the hearing, I decided that the application should be refused. Having previously discussed the matter of the late provision of the final bundle, the additional documents and exchange of witness statements with Ms Ince, at the outset of the hearing, and heard from Ms Kaur, I believed a fair trial was still possible and the failure to comply with the tribunal's orders could be dealt with in less draconian ways. I also allowed Ms Ince to ask supplementary questions of the claimant, when he gave evidence, to cover anything in the 17 additional pages she had received the night before the hearing.

Claims and Issues

10. The claimant claimed unauthorised deductions from wages in relation to arrears of pay, part of a bus lane fine and a missing van stock. The claimant also claimed that he had been automatically unfairly dismissal having asserted a statutory right not to suffer unauthorised deductions from wages in relation to arrears of pay.

11. The issues to be determined by the tribunal were discussed and agreed at the outset of the hearing. The Issues were:

Unauthorised deductions from wages:

1) The claimant alleged that the respondent made the following unauthorised deductions from his wages:

    a. *Salary discrepancy*. The claimant contended that he should have been paid an hourly rate of £12.50 for each hour he worked during the entirety of his employment. It was not in dispute that he was paid an hourly rate of £10 per hour for each hour he worked during his employment.

    b. *Bus Lane Fine*. The respondent deducted £60 from the claimant's last salary payment in July 2021 in relation to a bus lane fine that the respondent had paid on his behalf. The claimant claimed only £30 should have been deducted.

    c. Van stock payment. The respondent deducted £194.34 in relation to missing company van stock from the claimant's last salary payment in July 2021.

2) In relation to each of the above alleged deductions:

    a. Were the claims presented in time?

    b. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

    c. Was any deduction required or authorised by statute?
    d. Was any deduction required or authorised by a written term of the contract?
    e. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
    f. Did the claimant agree in writing to the deduction before it was made? How much is the claimant owed?

Automatic unfair dismissal

3) Was the claimant dismissed?

4) Was the reason or principal reason for the Claimant's dismissal that the Claimant asserted a statutory right, namely an assertion that he should not have been subject to unauthorised deductions from his wages? (section 104(1)(b) (ERA))?

5) If so, the claimant will be regarded as unfairly dismissed.

Procedure/Documents and evidence heard

12. This was a hearing where the parties, their representatives and witnesses participated remotely via CVP. I heard oral evidence from the claimant on his own behalf. I also heard oral evidence from Mr Hallsworth, Director, on behalf of the Respondent.

13. During the hearing I was referred to documents within an agreed electronic bundle of documents which contained 137 pages and provided with written witness statements for both witnesses.

14. The hearing was originally listed for one day which was insufficient due to the preliminary issues that were dealt with in the morning. The hearing was re-listed for 3 March 2022 and the parties ordered to provided written closing submissions so they could be considered at the re-listed hearing. On 17 March 2022 I sat in chambers to finalise my decision and draft the Reserved Judgment.

Factfinding

15. The relevant facts are as follows. Where I have had to resolve any conflict of relevant evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

16. The claimant, Mr Hussain, was employed by the respondent, Ignite Gas Ltd from 20 July 2020 until 29 June 2021 as a Remedials Engineer.

17. The respondent is a small company providing plumbing services including dealing with gas boiler breakdowns, services and installations. The company's office manager, Ms Julie Oxley, provided human resources support as part of her role.

Contract of Employment

18. The claimant signed an employment contract (with the title "Principal Statement of Terms of Employment Contract 5000") dated 20 July 2020 (38-44). The last page of the contract (44) set out that the claimant's hourly rate was £12.50, and his weekly contracted hours were 40 hours.

19. The contract of employment includes a deduction from wages clause at clause 7 under the sub-title 'Deductions from Wages' and provides as follows:

> *"The Company may deduct from any salary or other payment due to you, any amount which you owe the company, including but not limited to the outstanding loans, advances, overpayments, excess holiday payments, repayment of training costs, relocation allowances, parking fines, speeding tickets and congestion charge fines, the cost of repairs to or replacement of company property (including company vehicles/insurance) damage or not returned by you or personal telephone calls made on the company mobile phones should your final payments be insufficient to repay these amounts, you will require to reimburse the company for any outstanding balance remaining." (39)*

20. Under the heading "Changes in Terms and Conditions", clause 19 of the claimant's contract of employment states the following:

> "*The Company reserves the right to make reasonable changes to any of the terms and conditions of the employment detailed in this statement. You will be notified of minor changes of detail by way of a general notice to all employees and any such changes will take effect from the date of notice. Such changes will be deemed and agreed by you unless you notify the company of any objection in writing within 30 days of the relevant change being implemented." (41)*

21. In Clause 11, the contract stated that the notice period for an employee was 1 week or statutory notice and that the company reserved the right to ask an employee, either on resignation or dismissal to leave immediately in which case he/she would receive payment in lieu of notice (39-40).

Claimant's recruitment

22. The claimant had been put forward for the respondent's vacancy by ATS Recruitment Agency. A form was sent by ATS recruitment agency to the respondent summarising the claimant's qualifications and previous experience (120-122). On the first page of the form, it stated that the claimant was an ACS Gas Engineer and included the following candidate summary.

> "Uwais is an *experienced Gas Engineer who is now looking for a permanent opportunity where he can grow and develop a career. Uwais finished in May with his last company due to Covid -19 and is now looking for a role where he can apply his current skills and also take on any further training that maybe necessary. Uwais has experience of installations, service and maintenance within the domestic sector*."

The form also said he had worked as a Gas Engineer from August 2019 – May 2020 for HG Engineers. In evidence, the claimant said that he believed that the front page of the form had been filled in by the agency but confirmed that the agency had been emailed the completed form to him.

23. The claimant attended an interview with Mr Hallsworth and another senior engineer. He was offered the role of Remedials Engineer and an hourly rate of £12.50 per hour, which was the respondent's hourly rate for a 'full engineer'. There was a conflict between the parties as to whether the claimant had exaggerated his level of experience in this interview, which had led to him being offered the role and the full engineer rate of £12.50 an hour.

24. Mr Hallsworth said that the claimant had exaggerated his experience and abilities at the interview, he had said he was a qualified gas engineer and had experience of installs and servicing but limited experience of breakdowns but was happy to learn as he went on with support. The claimant said he had never misled the respondent; he had told Mr Hallsworth that he had only just passed his ACS qualification and had minimal experience.

25. After spending the first two days accompanying a senior engineer on their jobs, the claimant attended his first installation job with a more junior member of the team. This was an 'Improver' engineer – a junior engineer who was not yet paid the full engineer rate as they were still training. The job went badly wrong.

26. The claimant accepted in evidence that it would have become apparent to the respondent at this point that he had minimal experience and that he had no experience of installs or pipework. He also accepted in evidence that the Improver engineer was more experienced than him.

27. Given the summary of the claimant's experience provided to the respondent by ATS Recruitment Agency (referred to in paragraph 22 above), the references in the note of a meeting held on 10 August 2020 to what the claimant had said during his interview (which were not disputed) (64-66) and the fact the claimant admitted in evidence that he had no experience in installs or pipework, I prefer the evidence of the respondent that the claimant exaggerated his level of experience and abilities.

Meeting on 10 August 2020

28. It was not in dispute that the claimant continued to struggle with jobs allocated to him over the next couple of weeks and the respondent started receiving complaints from customers about the claimant's standard of work.

29. On 10 August 2020, the claimant attended a meeting Mr Hallsworth and Ms Oxley to discuss concerns with the standard of his work and abilities and how to move forward.

30. Notably, the claimant did not refer to this meeting in his claim form or witness statement. However, during cross examination, the claimant confirmed that such a meeting had taken place and that he recalled the details. The claimant had also added a note in the bundle dated 9 January 2022 (83) referring to the respondent's minutes of this meeting. He acknowledged there was a meeting but said he "never agreed to anything." In evidence, the claimant accepted that, during this meeting, the respondent had discussed with him the reduction of his hourly rate from £12.50 to £10 per hour.

31. The respondent took minutes of this meeting (65-66) dated 10 August 2020 (the "Minutes") and I accept the evidence of the respondent that a copy of these Minutes were given to the claimant following the meeting. The respondent said that the reference in the Minutes to the claimant's salary being reduced to "*£9 an hour*" was a typographical error and should have read "*£10 an hour*".

32. During the first part of the meeting, the claimant acknowledged he'd had a "*lot of recalls and complaints*". Mr Hallsworth explained how a customer had asked the claimant to leave the site the previous day "*as [he] had no idea what he was doing"* and they received other complaints. The respondent also confirmed that two of its business clients had now refused to use the claimant on their jobs which meant the respondent was restricted in what it could give the claimant in terms of work and would be unable to put him on call.

33. They then discussed what the claimant had said at his interview in terms of experience and what they had discovered his level of experience was. The respondent asked the claimant what ideas he had for moving forward. The claimant offered no ideas. Mr Hallsworth explained in evidence that the company could not continue paying the claimant at the full engineer rate of £12.50 as he couldn't do the job. He said, at that point the respondent had a choice whether to "*let [the claimant go" or "help him out*" by offering to train him. He said they liked the claimant so

decided to try and help him by offering to continue to employ him, but as an improver and on an hourly rate of £10. This is reflected in the Minutes:

> "*Julie [Ms Oxley]: The problem that we have is we can't afford as a company to pay you that rate if you can't do the job.*
>
> *R [Mr Hallsworth]: We think the only thing we can do is basically retrain you. What we want to do is put you out with someone and train you. The downside to this is we will have to drop your wage to [£10] an hour. We will take your van off you and see how it goes and review it.*
>
> *Uwais [claimant]: Ok*
>
> *Julie: So is that what you want to do stay on as an improver.*
>
> *Uwais: Yes*
>
> *Richard: Ok Well do you want to sort out your van and we can get that back and I'll get the office to sort out someone picking you up"*

34. The respondent explained the hourly rate for this role was set at £10 on the basis that the claimant would not be bringing any money into the business at the beginning, and it was felt to be unfair on other improvers, who had more experience than the claimant, for the claimant to remain on a full engineer' hourly rate of £12.50.

35. I prefer the evidence of the respondent that the Minutes are an accurate record of what was discussed and agreed at the meeting on 10 August 2020. During cross examination, Ms Kaur, took the claimant through each section of the minutes. The claimant did not dispute the contents of the Minutes, other than in relation to the outcome. He admitted that the reduction in his hourly rate from £12.50 to £10 had been discussed with him but said there had been no outcome, as he had not agreed to a reduction in his hourly rate at the meeting. He said he would never agree anything without first speaking to his family. However, when taken through the exchange at paragraph 33 above during cross examination, the claimant's initial response was to confirm that he had said *"ok*" and "*yes*".

36. The claimant also accepted that he was aware he was receiving an hourly rate of £10 when he received his payslip for August 2020 (45). The change in his hourly rate had immediate practical effect on the claimant and the claimant admitted in evidence that he continued to work without objection of protest until 28 June 2021 (some 10 months later).

37. I will return in my conclusions to whether the claimant had accepted the changed rate of pay.

Further conversations about pay

38. Following the meeting on 10 August 2020, the claimant started accompanying other engineers and the respondent informed its accounts department that the claimant's hourly rate was now £10. The claimant's hourly rate was set up on the respondent's accounting system as £10 per hour. The claimant had only started three weeks before and had not yet received his first salary payment. I find, and the respondent admits, that the system mistakenly applied an hourly rate of £10 to the

whole period covered by the claimant's first payslip. This meant that the calculation of the claimant's gross pay was wrong in relation to the first three weeks he had worked prior to 10 August 2020. During the first three weeks of his employment the claimant was contractually entitled to an hourly rate of £12.50 an hour not £10 for the hours he worked up to 10 August 2020. The claimant did not raise an issue regarding this error until 28 June 2021.

39. The claimant received a payslip at the end of every month of his employment. Each payslip showed that his gross hourly rate was £10 for the whole of his employment (45-56).

40. The claimant confirmed in evidence that he enjoyed a good relationship with Mr Hallsworth. The claimant said that Mr Hallsworth was quite relaxed with his employees and had previously told Mr Hallsworth that "*he was very laid back with employees and doesn't get angry*". Mr Hallsworth considered the claimant a friend. Given the customer complaints, significant and ongoing issues with the claimant's capability, I find that Mr Hallsworth was a supportive and patient employer. The claimant did express concerns during the hearing that he did not get the training that Mr Hallsworth had promised him, but it was clear from the evidence that he had also felt able to raise these concerns with Mr Hallsworth.

41. Two further conversations about pay were referred to by the respondent. The first a conversation on 21 September 2020 when the respondent explained to the claimant that he required more training than they anticipated and said that they were willing to provide him with this training, but he would need to be paid £40 per day whilst such training took place. The claimant did not recall this meeting but acknowledge that there was a reference to a 'meeting' on this day in the records. There was also an (undated) instant message in the bundle which references this conversation (132) – "*Uwais is staying £40 a day and hold someone hand. Just need to work out who and how can get to work.*" I find that such a conversation did take place, but the Claimant's hourly rate remained £10 and was not reduced to £40 a day.

42. It is not disputed that there was another conversation regarding the Claimant's performance and his hourly rate which took place around three to four months after the claimant had commenced his employment. The respondent recalls having this conversation when the claimant was off work with a Covid-19 infection.

43. The claimant had told the respondent that he had been offered another job and was going to give his notice (which is not disputed). The respondent suggested that it may be more beneficial for the claimant to stay with the respondent and continue with his training. However, this would be conditional on him agreeing to a reduced hourly rate of £8.20. The Claimant did not agree to this new hourly rate during this conversation. He said the reduced wage may not be "worthwhile" for him but would go away and speak to this family. He also told Mr Hallsworth that with such a reduction he would struggle to live on this wage. There is a dispute as to whether the claimant subsequently agreed to accept an hourly rate of £8.20 but the claimant's hourly rate was never reduced from £10. It is clear from the claimant's evidence regarding this conversation, that he was able to discuss his pay with Mr Hallsworth and felt able to refuse a proposed reduction. The claimant did not allege during this conversation that he should be on an hourly rate of £12.50.

44. The claimant chose not to accept the other job offer and continued to work for the respondent.

45. The claimant had an appraisal on 1 February 2021, which recognised that he was improving and that the company was "overall very happy with him". However, it noted that there remained issues with his confidence, and he needed more training (59-63).

Claimant's email regarding alleged salary discrepancy

46. On 28 June 2021, the claimant and other staff attended a 'toolbox talk'. These were team training meetings with all engineers and office staff. Staff were given updates of company policies and procedures and had recently been issued with copies of new contracts of employment to review in advance of their upcoming reviews. Employees were informed of the new general pay bands, but individual's pay rates would be discussed at their upcoming review. The claimant was provided with a uniform. During the toolbox talk, engineers were reminded that, pursuant to their contract of employment, they were responsible for the van stock they were provided with (and signed for) for use on their jobs. If any van stock was missing, then they would be responsible for reimbursing the company for it. Therefore, they were reminded to make a note of what stock they used and on what jobs. This was to ensure that stock was only used on jobs for the respondent's customers and not on any personal jobs undertaken by the engineers.

47. After the toolbox talk, the claimant approached Mr Hallsworth to enquire about an increase in his hourly pay. Mr Hallsworth told the claimant that he could not make a decision "on the spot" and this would be dealt with at the review. One of Mr Hallsworth's senior engineers (Wesley Swindells) pointed out that whilst the claimant had improved, he was still not confident enough to attend jobs on his own and so the company was still paying two sets of wages for each job the claimant attended.

48. Later that night, at 23.36pm the claimant sent an email to Mr Hallsworth saying that he believed that he had been underpaid £4,643.75 based on the hours itemised on his payslips from August 2020 to May 2021 (70-71). He attached a copy of his signed contract of employment dated 20 July 2020. The claimant stated:

> " *In my contract (which we both signed), we agreed my hourly rate of £12,50 an hour. However, I have only ever received £10 per hour for hours itemised on my payslips. This £2.50 discrepancy was never discussed with myself, nor was a new contract drawn up to legalise the reduction of pay".*

At the end of his email the claimant said:

> *"Please could you respond to my claim within 5 working days? I wish to be paid the outstanding monies owed to me within 10 working days of this email.*
>
> *If you fail to respond, or come to any kind of agreement, I will be contacting ACAS. If you further fail to come to an arrangement with ACAS, the next step will be to take it to an employment tribunal."*

49. The claimant said in evidence that this was the first time he had raised concerns about receiving an hourly rate of £10 per hour, instead of £12.50 an hour.

He said that "*he never approached anyone with this issue as [he] wasn't sure anything could be done about it and also because [he] feared losing [his] job which was the case as when I did bring the issue forward to Richard, I was sacked".* Given the good and supportive relationship the claimant had with Mr Hallsworth, the fact that he had spoken with the respondent about pay on at least two other occasions and that he had previously been comfortable to push back on proposals to reduce his hourly rate (as his hourly rate was never reduced from £10), I do not find this explanation credible.

50. Mr Hallsworth admitted in evidence that he was angry and disappointed when he read the email the following morning and sent an instant message to the claimant on the company's 'whatsapp' saying *"@Uwais you sack of shit do you want to get your backside to the office."* (80)

51. Mr Hallsworth admitted "*it was not the nicest way to speak"* but he was *"so annoyed the claimant was trying to fleece [him]".* He said that the claimant was *"trying to fleece money from me that he knew he shouldn't have, thought he had found a loophole even though he was perfectly happy on that rate, as it was a chance to get experience".* He said he felt he had done his best for the claimant and now the claimant was threatening him with ACAS and the Employment tribunal.

52. . There was a dispute as to how angry Mr Hallsworth was during the conversation, Mr Hallsworth admitted he was annoyed and that he did swear, but this was part of the trade. However, he denied being aggressive or threatening as the claimant had alleged. Mr Hallsworth did not meet the claimant back at the office for two hours after sending the 'whatsapp' message, which I accept, allowed him time to calm down

53. Mr Hallsworth asked the Claimant why he had sent the email and whether it was a joke. Mr Hallsworth said that the claimant was perfectly aware that he was entitled to £10 an hour and why his salary had been reduced from £12.50 to £10 in August 2021. He therefore asked the claimant to confirm whether he was aware that his hourly rate was £10, that they had had a meeting where they had discussed the reduction in his hourly rate and why his hourly rate had been reduced from £12.50 to £10. The claimant confirmed that he was aware of the meeting, that he was being paid £10 per hour and why his hourly rate had been reduced from £12.50 to £10. However, he said that because his contract said his hourly rate was £12.50 and he had not been issued with a new contract he was still entitled to an hourly rate of £12.50.

54. Mr Hallsworth reminded the claimant that they had a record of the meeting and he had been given a copy of the Minutes. The claimant said he wanted an hourly rate of £12.50. Mr Hallsworth told the claimant that the company could not pay him £12.50 an hour as he was still not undertaking jobs on his own. Therefore, the company was paying two wages for each job. He told the claimant he had a choice, he could stay and the company would continue to pay him £10 per hour or, if he wanted a £2.50 per hour pay rise he could leave.

55. The claimant continued to say he wanted £12.50 per hour. In evidence, the claimant said that that Mr Hallsworth had told him to "*get your shit out of the van and F*ck off*". The claimant thought these words may amounted to a dismissal and asked whether he was being dismissed but did not get an answer. These were ambiguous

words and the claimant was clearly not sure whether Mr Hallsworth had expressly dismissed him as he sent an email to Mr Hallsworth that evening (72) asking for written confirmation by email of his dismissal- "*today all you did was tell me to empty the van of my belongings and to "F*ck off. That left things very ambiguous so therefore I just want clarification."* The claimant said he received no response from the respondent. The claimant did not check his van before he left. Mr Hallsworth did not recollect saying these words but, given the wording of the claimant's email that evening, and the lack of any response, I accept that he was told to empty the van of his belongings and to "*F*ck off".*

56. The claimant did not return to the office on 30 June 2021.

57. The claimant's company van and assigned stock was checked on 30 June 2021 by the parts department and a list of missing stock and its value (£194.34) was compiled (92).

58. The respondent denies that it dismissed the claimant but there is a termination letter in the bundle (73) dated 1 July 2021. Mr Hallsworth admitted in evidence that he drafted this letter, and it was typed up by the Human Resources Department. The letter was not signed, and the claimant said that he never received a copy of this letter. When asked whether he admitted letting go the claimant, Mr Hallsworth said he had sent a letter saying "*he was let go*". The respondent also paid the claimant one weeks' payment in lieu of notice in his July pay (56). The notice pay was £400 gross (40 hours x £10 per hour).

Bus Lane Fine and Van Stock

59. At the end of July 2021, the claimant received his final payslip (56) and pay. The payslip recorded that he had received a payment in lieu of one weeks' notice together with salary. His notice payment and salary payments had been calculated using an hourly rate of £10. The claimant's final payslip, for the month ending 31 July 2021, confirms that the claimant was entitled to £1126.60 (after deductions for tax and national insurance).

60. The payslip listed three deductions totalling £254.34 and so the claimant received £842.26 net. The claimant claimed that £224.34 of the deductions were unauthorised deductions from wages.

61. The first two deductions were for bus lane fines, one for £30 and one for £60. The claimant did not dispute that he has incurred both fines and was responsible for reimbursing the respondent for them. He had no issue with the first fine but claimed that only £30 (rather than £60) should have been deducted for the second fine dated 19 April 2021 (68-69) as he would have paid the fine straight away and would not have consented to any appeal.

62. In evidence, the respondent explained that the reason they had appealed the second bus lane fine was because they had not received the original charge certificate so had not been in a position to pay it straight away. The charge certificate they received was for £90 (68-69), but following the respondent's successful appeal had been reduced to £60. The respondent paid the £60 fine on behalf of the claimant. There are manuscript notes on the £90 charge certificate saying "not received". I find that the claimant owed the respondent £60 as that was

the amount the respondent was required to pay on his behalf, following its appeal. There was no financial benefit for the respondent in appealing, but by appealing, the claimant now only owed £60 to the respondent rather than £90.

63. The third deduction was for £194.34 for missing van stock. Engineers were regularly reminded that they were responsible for the van stock they had been assigned by the company and signed for. The last such reminder was at the toolbox talk on 28 June 2021. The claimant was familiar with his van stock being checked as there was a process and it had happened to him in February 2021 (85-86).

64. On 30 June 2021, the claimant's van was checked by the parts department and a note taken of the van stock that was missing from the van. The value of the missing company property was determined to be £194.34. The claimant alleged that as he was not present when the van stock was checked it was not an authorised deduction. When the claimant saw his payslip for July 2021 he saw that there was a deduction for "van stock down". The claimant queried the missing van stock with the respondent and asked for a breakdown of how the respondent had come to the amount of £194.34 and was provided with a list of what was missing and the value of each missing item (92). The claimant took no further action.

65. There was no requirement in the claimant's contract of employment for the employee to be present when company property was checked.

66. The claimant claimed that £224.34 of the deductions were unauthorised deductions from wages.

67. After receiving his final pay slip the claimant sent an updated email dated 30 July 2021 (79) regarding the salary discrepancy. It stated that the salary discrepancy was now £4,946.25 and that for the months of June and July the discrepancy was

"June 2021 63.5 Hours x £2.50 p/h

July 2021 57.50 Hours x 2.50 p/h."

The claimant did not dispute the number of hours the payslips recorded he had worked. The respondent did not respond to this letter.

Submissions

68. I considered written closing submissions from both parties, with the respondent agreeing to provide their closing submissions first.

69. Ms Kaur for the respondent submitted that the claimant had accepted the change to hourly rate (from £12.50 to £10) from 10 August 2020 verbally and by his conduct and referred me to the cases of **GAP Personnel Franchises Ltd v Robinson** UKEAT/0342/07**, Hepworth Heating Ltd v Akers EAT, Abrahall v Nottingham City Council** [2018] ICR 1425, paragraphs 83-89 and the principles in **Solectron Scotland Ltd v Roper and Ors** [2004] IRLR 4**.**

70. Ms Kaur submitted that the claimant had not been dismissed by the respondent. She also submitted that the claimant had not asserted a statutory right and section 104(1)(b) ERA required an assertion be made. I was referred to the case of **Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare)**

UKEAT/0142/18, *where the EAT held that the thrust of the allegation must be "you have infringed my right," not merely "you will infringe my right*".

71. Ms Ince for the Claimant submitted that the claimant had never agreed to the reduction of his hourly pay from £12.50 to £10 following the meeting of 10 August 2020. The claimant recalled the meeting but had not agreed to anything, nor signed anything. Ms Ince submitted that the Claimant had also ever agreed to a reduction in his hourly rate from £10 to £8.20 following a subsequent conversation. The claimant had not raised the deficiency in his pay before 28 June 2021 as he was young, it was his first proper job and he was afraid that he'd lose his job if he questioned it. Ms Ince submitted that the claimant had not received the training he had been promised.

72. Ms Ince submitted that the claimant had been dismissed and the reason for his dismissal was because he had asserted a statutory right by way of his email of 28 June 2021. She said that the claimant would never had 'walked out' of his job as he had too many commitments.

The Law

Unlawful deduction from wages

73. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless:

> **(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract; or**
>
> **(b) The worker has previously signified in writing his agreement or consent to the making of the deduction."**

74. A relevant provision in the worker's contract is defined by section 13(2) ERA as:

> **"(a) One or more written contractual terms of which the employer has given the worker a copy of on an occasion prior to the employer making the deduction in question; or**
>
> **(b) In one or more terms of the contract (whether express or implied) and, if express, whether oral or in writing, the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker in writing on such an occasion."**

75. A deduction is defined by section 13(3) ERA as follows:

> **"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**
>
> A 'deduction' under section 13(3) ERA does not include deductions that are the result of an error of computation. This is because section 13(4) ERA states that section 13(3) ERA

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

76. Wages are defined by section 27(1) ERA as follows:

"**any sums payable to the worker in connection with his employment including**

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract of employment or otherwise…."

77. Section 23 ERA provides that a worker has a right to complain to an employment tribunal of an unlawful deduction from wages. However, pursuant to section 23(2)ERA

"**Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-**

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) ….
(3) Where a complaint is brought under this section in respect of –
(a) A series of deductions or payments, or
(b) …..

The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

3A Section 207(B) (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it was presented within such further period as the tribunal considers reasonable.

78. In **Solectron Scotland Ltd v Roper and ors 2004 IRLR 4 EAT** Mr Justice Elias stated:

"**The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change, they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract containing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct."**

<u>Assertion of statutory right - Section 104 ERA</u>

79. **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—**

(a)….

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a)whether or not the employee has the right, or

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section-

(a) any right conferred by this Act for which the remedy for its infringement is by way of a *complaint or reference to an employment tribunal,*

(b)…

80. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: **Abernethy v, Mott, Hay and Anderson** [1974] ICR 323, CA**.**

81. **Mennell v Newell and Wright (Transport Contractors Ltd***)* . Mummery LJ said:

> "**28….. On this point I agree with the Employment Appeal Tribunal that the industrial tribunal were wrong to construe s.60A as confined to cases where the right under the Wages Act had been infringed. It is sufficient if the employee has alleged that his employer has infringed his statutory right and that the making of that allegation was the reason or the principal reason for his dismissal. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed. The allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided that the claim was made in good faith. The important point for present purposes is that the employee must have made an allegation of the kind protected by s.60A ; if he had not, the making of such an allegation could not have been the reason for his dismissal."**

Discussion and Conclusions

Unauthorised deduction from wages:

82. As an employee the Claimant had a right under section 13(1) ERA not to suffer unauthorised deductions from wages. The Claimant claimed that the respondent had made three types of unauthorised deductions from his monthly

salary. Salary falls within the definition of wages, as defined in section 27 ERA, so all three claims of unauthorised deductions were in respect of wages. Taking each of the alleged unauthorised deductions in turn:

Salary discrepancy.

83. The claimant claimed that he had suffered a series of deductions from his wages. He said that he had been paid an hourly rate of £10 for the whole of his employment, when he was entitled under his contract of employment, dated 20 July 2020, to an hourly rate of £12.50.

84. I had to determine whether the respondent had made a series of deductions from the claimant's wages. A deduction is defined in section 13(3) ERA and the issue is simply whether the worker received less that the amount properly payable on the relevant occasion. (**Morgan v West Glamorgan County Council** [1995] IRLR 68 EAT).

85. Reminding myself of the case law referred to in Ms Kaur's written submissions, I find that the Claimant did agree to a change in his hourly pay as specified in his contract of employment dated 20 July 2020 effective from 10 August 2020. He agreed to a reduction in his hourly rate from £12.50 to £10 verbally or by way of his conduct: **Solectron Scotland Ltd v Roper and Ors [**2004] IRLR 4 EAT. I also find that, due to the meeting on 10 August 2020, the claimant understood why his hourly rate was now £10.

86. The respondent was a small company, it could not afford to continue to pay the claimant the full engineer's rate when, as he accepted in evidence, the claimant was unable to do the job. The claimant had only been an employee for three weeks, there were significant concerns regarding his workmanship, abilities, and experience. The respondent had received several complaints and some business clients had refused to use him again. In those circumstances, I find it implausible that the respondent would have continued to employ the claimant had the claimant not verbally agreed to an hourly rate of £10 and to "stay on" as an Improver.

87. I prefer the evidence of the respondent that the claimant was provided with a copy of the minutes for the 10 August 2020 meeting. However, I do not find that the claimant was provided with an updated contract or variation letter. If a contract or variation letter had been signed or produced, I would have expected the respondent to have a record of this alongside the minutes of the 10 August 2020 meeting and the claimant's original contract of employment. No updated contract or variation letter (signed or unsigned) was produced by either party. Also, Mr Hallsworth referred in evidence to his belief that the claimant thought he had found a loophole as they had not issued him with a new contract. However, failure to give an employee a written statement of a change in employment terms does not make a valid contractual change ineffective: **Parkes Classic Confectionary Ltd v Ashcroft [**1973] ITR 43 Div CT**.** I find that the contractual change in the claimant's hourly rate from £12.50 per hour to £10 per hour was valid and effective from 10 August 2020.

88. I find that from 10 August 2020 until the end of the claimant's employment, the claimant was entitled to be paid an hourly rate of £10. It is accepted by the claimant, and I can see myself from the payslips in the bundle (45-56), that the claimant was paid an hourly rate of £10 throughout this period and in relation to his payment in lieu

of notice. There was no shortfall in his wages between 10 August 2020 and the end of his employment, he was paid the amount that was properly payable to him (applying common law and common principles). As there were no deductions for the purposes of section 13(3) ERA in relation to his hourly rate, the claimant's claim in respect of salary discrepancies during this period fails.

89. I find that from 20 July 2020 to 9 August 2020, the claimant was entitled to be paid £12.50 per hour. The respondent accepts that the claimant was entitled to £12.50 per hour for the first three weeks of his employment and so there was a shortfall in his wages. However, I find that this was not a deduction for the purposes of section 13(3) ERA as the shortfall was the result of an error of computation of gross wages (section 13(4) ERA). When the hourly rate of £10 was inputting into the respondent's accounting system after 10 August 2020, in error, it was applied to the entire pay period covered by the claimant's August pay slip. This affected the computation by the respondent of the gross amount of the wages properly payable by him to the claimant on that occasion.

90. If, I had concluded that the shortfall for the period 20 July 2020 to 9 August 2020 was a deduction, the tribunal would not have had jurisdiction to consider the claimant's claim for such a series of deductions as it was not brought within the relevant time limit. A claim for unauthorised deduction from wages would have needed to be presented to an employment tribunal within three months beginning with the date of payment of the wages from which the deduction form made, with an extension for early conciliation, unless it was not reasonably practicable to present it within that period and the tribunal considered it was presented with a reasonable period after that. In addition, a gap of more than three months between deductions between any two deductions will break the series of deductions (**Bear Scotland Ltd and Ors v Fulton and Ors and other cases** [2015] ICR 221 EAT).

91. As the claimant was aware from 31 August 2020 that he had, in error, been paid £10 per hour for the first three weeks of his employment, I find that it was reasonably practicable for him to bring his claim within the relevant time limit, and it was not presented in such further period as I consider reasonable. The claimant's claim in respect of salary discrepancies during this period fails.

Bus Lane Fine and Van stock

92. I find that the claimant was entitled to £1126.60 (after deductions for tax and national insurance) in wages for the month ending 31 July 2020. This amount was calculated using the hourly rate of £10, which I have already concluded was the hourly rate properly payable under the claimant's contract on this occasion. However, the claimant received £842.26 as three sums had been taken from his wages before he was paid. Two of the sums were Bus Lane Fines (£30 and £60) and the third a sum for missing van stock (£194.34). I have concluded that each of these three sums were deductions for the purposes of section 13(3) ERA. The claimant only claimed that two of these sums were unauthorised deductions from wages – (£30 in relation to the second bus lane fine of £60 and £194.34 for van stock.

93. Having found that these sums are deductions, I then considered whether they were authorised deductions. section 13(1) ERA creates three types of authorised

deductions. I find that these two deductions were deductions made under a relevant provision of the claimant's contract of employment (section 13(1)(a) ERA).

94. A relevant provision in relation to a worker's contract is defined under section 13(2) ERA. The claimant signed a contract of employment on 20 July 2020 which included, at clause 7, a deduction from wages clause (39). A copy of this contract was provided to the claimant prior to the making of the deductions in question as the claimant attached a copy of his signed contract to his email to the respondent dated 28 June 2021. In Clause 7 of his contract of employment the claimant agreed that

> *"The Company may deduct from any salary or other payment due to you, any amount which you owe the company, including but not limited to …..parking fines, speeding tickets and congestion charge fines, the cost of repairs to or replacement of company property (including company vehicles/insurance) damage or not returned by you …" .*

95. The missing van stock was company property not returned by the claimant and needed to be replaced. The claimant provided no evidence to suggest that the claimant had arbitrarily produced a figure or that it was incorrect. There was a standard process for checking van stock, the respondent had listed what was missing, the respondent had responded to the claimant's request for details of what was missing by sending a list (92) and the claimant had chosen not to raise any further queries or provide any reasons for why the check was incorrect. There was no entitlement under the clause 7 for the claimant to be present at the van stock check before such deductions could be made. I find that there was missing company van stock to the value of £194.34. Clause 7 of the claimant's contract of employment authorised the Company to deduct from any salary or other payment due to the claimant the cost of replacement of company property.

96. The claimant accepted that he was responsible for reimbursing the respondent for the cost of paying bus lane fines he had incurred. He accepted that the first bus lane fine for £30 was an authorised deduction and that the respondent was authorised to deduct £30 for the second bus lane fine. His issue was with the amount the respondent had deducted for the second bus fine, as he believed it had increased to £60 due to the unnecessary actions of the respondent (i.e. the appeal). During the respondent's evidence, I heard that the respondent's appeal had actually reduced the amount that the claimant would owe the company as, originally, the fine was £90. As £60 was the payment the respondent had made on the claimant's behalf, he owed the company £60 and he had previously agreed, under clause 7 of his contract of employment, that any sums that he owed the respondent could be deducted from any salary or other payments due to him.

97. The claims for unauthorised deductions from wages regarding the second bus lane fine and company van stock fail.

Automatic Unfair Dismissal

98. Under section 104(1)(b), an employee is treated as automatically unfairly dismissed if the reason or principal reason for the dismissal is that he alleged his employer had infringed a relevant statutory right.

99. The claimant claimed that he had been dismissed on 29 June 2021. There was a question as to whether the ambiguous words Mr Hallsworth's used, telling the claimant to take his belongings out of the van and "F*ck off", amounted to an express dismissal of the claimant. The test whether ostensibly ambiguous words amount to a dismissal is an objective one. I considered all the surrounding circumstances such as events both preceding and subsequent to the incident in question, took into account the nature of the workplace and asked how a reasonable employee would have understood them. I have concluded that the claimant was dismissed. The claimant was told to take his belongings out of the van by Mr Hallsworth, before being told to "F*ck off" (which would suggest he was not expected to return to work) and the respondent checked his van for missing van stock the next day. Mr Hallsworth admitted drafting a termination letter and sending it and the respondent made a payment in lieu of notice to the claimant.

100. The claimant claimed that the reason for his dismissal was because he had alleged, in an email dated 28 June 2021, that the respondent had infringed his right not to suffer unauthorised deductions from his wages. He claimed the respondent had been paying him an hourly rate of £10 rather than the hourly rate of £12.50 he was entitled to under his contract of employment.

101. I am not persuaded by Mr Kaur's submission that the claimant did not assert a statutory right in his email of 28 June 2021, and instead it was a request. In this email the claimant was alleging that the respondent had already infringed a relevant statutory right for the purposes of section 104(1)(b) ERA. The claimant listed the deductions that had been made, said that the reduction in hourly pay was not lawful and asked for repayment of the deductions from his salary within 10 days or he would contact ACAS and then the employment tribunal. The claimant made it reasonably clear to the respondent what the right claimed to have been infringed was.

102. The claimant admitted that the first time he had made this allegation was in his email of 28 June 2021.

103. The claimant did not have two years continuous employment and so it was for the claimant to prove that the tribunal he had jurisdiction to hear the claim. The claimant therefore had to prove that the reason, or principal reason, was the automatically unfair reason he relied on*:* **Maund v Penwith District Council** [1984] ICR 143 (Court of Appeal).

104. Whilst I have found that the claimant's right not to suffer unauthorised deductions from wages in relation to his hourly rate was not infringed, section 104(2) ERA makes clear that it is immaterial whether or not the claimant had the right and whether it was infringed. However, section 104(2) also goes on to state that the employee's claim to the right and that it has been infringed must be made in good faith.

105. I am not persuaded on the facts as found that the claimant's claim to the right and that it was infringed was made in good faith. I noted that the Claimant's claim form and witness evidence in chief contained no reference to the meeting of 10 August 2020. The claimant's email of 28 June 2021, which alleged that the

respondent had infringed a relevant statutory right included no reference to this meeting, in fact it stated that *"This £2.50 discrepancy was never discussed with myself".* Given the claimant's admission that, during the meeting of 10 August 2020, the respondent had discussed with him the reduction of his hourly rate from £12.50 to £10, this was blatantly untrue. Given what was discussed at the meeting of 10 August 2020 (as recorded in the minutes (64-66), the claimant knew why his hourly rate had been reduced, he had agreed to this reduction and continued to work without protest for the next 10 months. On the facts as found, I conclude that the claimant did not honestly and genuinely believe that he was entitled to an hourly rate of £12.50 when he sent the email of 28 June 2021. He did not genuinely believe his right not to suffer unauthorised deductions had been infringed.

106. Therefore, the claimant has not established the right to bring a claim under section 104(1)(b) ERA.

107. In any event, the claimant did not satisfy me that the principal reason for his dismissal was that he had asserted a statutory right (I find the principal reason was that the claimant was insisting that his hourly rate be increased to £12.50 but the respondent was not willing to pay him an hourly rate of £12.50 for legitimate business reasons) and so he failed to establish that the tribunal had jurisdiction to the consider his claim.

_____

Employment Judge McCarthy

Date: 19 April 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 May 2022

FOR THE TRIBUNAL OFFICE