EMPLOYMENT TRIBUNALS

Claimant: **Mr A Lewis**

Respondent: **BCA Logistics Limited**

Heard at: **Southampton, by video** **On: 4 April 2022**

Before: **Employment Judge Dawson**

Representation
Claimant: Representing himself
Respondent: Mr Crowe, solicitor

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background & Issues

1. Except where stated otherwise, references to page numbers below are references to the hearing bundle.

2. The case had been listed before me to determine two matters pursuant to a previous order of Employment Judge Roper made on 7 October 2021. In brief summary, they were, firstly, what were the claimant's normal contractual working hours in the context of section 11 of the Employment Rights Act 1996 (the Act) and depending upon the decision in that respect, whether the respondent has made unauthorised deductions from the claimant's wages.

3. The claim form, which was issued on 30 January 2021 claimed, as boxes ticked in section 8.1, discrimination on the grounds of disability, sums in respect of holiday pay, sums in respect of arrears of pay and other payments. It also alleged "Breach of contract – denial of contractual hours" and "Failure to amend Section 1 Statement of particulars of ERA".

4. No grounds were set out in box 8.2 and, in box 9.2 in respect of unlawful deductions from wages, the claimant simply stated that he would provide details later.

5. The matter came before Employment Judge Roper, as I have indicated, for a case management hearing and he set out at paragraph 49 of his Case Management Order the background and the issues. He stated that "in general terms this matter relates to a historical dispute about the claimant's normal and required working hours. In short, the claimant asserts that his weekly contractual hours are eight hours a day less half an hour for meals for each of three days. He asserts that the respondent refuses to accept this and knowingly requires him to undertake driving duties which might result in either a shortened shift or alternatively a very lengthy shift of up to 16 hours".

6. He goes on, at paragraph 51, to say the claimant's claims are limited to these: "(i) a declaration under Section 11 of the Act as to the claimant's correct statement of particulars of employment by reference to Sections 1 and 4 of the Act and in particular with regard to his working hours (ii) a claim for unlawful deduction from wages to the extent that the claimant has not been properly paid for what he argues are his normal contractual hours and (iii) a claim for disability discrimination consisting of claims for failure to make reasonable adjustments, harassment and possibly discrimination". Notwithstanding paragraph 8 of the Case Management Order, the claimant did not contact the tribunal to say that the list of issues was inaccurate.

7. In paragraph 53 Employment Judge Roper records that the "parties helpfully agreed to stay the potential claims for disability discrimination pending a one day hearing to determine the declaration under Section 11 of the Act and the claim for unlawful deductions from wages".

8. Employment Judge Roper then set out the issues to be determined at this hearing as set out at page 48 of the hearing bundle.

9. At the outset of this hearing the claimant confirmed that although paragraph 1.2 of that list of issues states that the claimant asserts there was an amendment in April 2020 and, on 14 August 2020, whilst suspended from work he requested a section 1 statement to show the amendment as required by section 4, what the claimant actually meant was that in April 2020 there was an amendment to the law to section 1(4)(c) of the Act. He was not asserting that there was an amendment to his contract of employment in April 2020.

10. The claimant also raised, at the start of this hearing, the question of non-payment whilst medically suspended. On reflection, he considered that that part of his claim was contingent on his disability discrimination claim and not part of the unlawful deductions claim and, therefore, asked for that matter to be left until the next hearing. I agreed to that without making any decisions as to whether such claim had been pleaded or was valid.

11. The claimant's witness statement, also, raised the question of holiday pay, which the claimant said he did want to be resolved at this hearing. It seemed to me that the holiday pay claim, as set out in the witness statement, fell into a number of different parts. Firstly, and straightforwardly, the claimant says he took holiday which he was not paid for. Secondly, he refers to not being

given an adequate holiday allowance and finally to not being allowed to take his proper holiday entitlement. The respondent objected to the claimant raising the latter two types of holiday pay claim and I indicated to the claimant that it seemed to me that an amendment of the claim form would be needed to bring the latter two parts of that claim, since ticking a box stating that the claimant was claiming "holiday pay" is insufficient without particularisation. That is particularly the case where a definitive list of issues has been created at a hearing. Further, I considered that on the current details of the claim set out in the witness statement it would be difficult to allow any amendment because the particulars were too vague to allow the respondent to respond to them. The claimant stated that that he would go away and think about that matter and did not proceed with any application for amendment.

12. However, insofar as the claimant stated that he had taken holiday and not been paid for it, that issue was dealt with in the witness statement of Mr Atkins and the respondent's solicitor indicated that he could deal with that matter. It seemed to me that no amendment was needed in that respect since it was agreed that it would be dealt with as part of the unauthorised deduction from wages claim.

13. All parties agreed that I would deal, firstly, with the first issue laid down by Employment Judge Roper (declaration under section 11/12 of the Act) and then move to the 2nd issue (unauthorised deductions). In fact due to the length of time spent dealing with the preliminary issues and then in hearing the evidence in respect of the first issue, there was no time to move to the 2nd issue.

14. This judgment, therefore, is only dealing with the first issue namely what were the normal contractual hours of the claimant and what order I should make under Section 12 of the Employment Rights Act 1996.

15. The claimant only suggested that his statement of terms was wrong in respect of his working hours. Although his rate of pay and place of work had changed, he had been notified of those changes and did not raise them as an issue.

The Relevant Law

16. Section 1(4)(c) of the Employment Rights Act 1996 provides that the statement of initial employment particulars must state any terms and conditions relating to hours of work including any terms and conditions relating to (1) normal working hours (2) days of the week the worker is required to work (3) whether or not such hours or days may be variable and if they may be, how they vary or how that variation is to be determined. Prior to April 2020 section 1(4)(c) of the Act simply required a statement of any terms and conditions relating to hours of work, including any terms and conditions relating to normal working hours.

17. Section 4 of the Act provides that a statement of changes must be provided if after the material date there was a change in any of the matters about which particulars are required.

18. Section 11(2) of the Act provides that where a statement purporting to be a statement under Section 1 or 4 has been given to a worker and a question arises as to the particulars which ought to have been included or referred in

the statement so as to comply with the requirements of the Act, either the employer or the worker may require the question to be referred to and determined by an Employment Tribunal.

19. Section 12 provides that on determining a reference under section 11(2) the tribunal may either confirm the particulars as included in the statement given by the employer, amend the particulars or substitute other particulars.

20. I was referred to two cases by the parties, the respondent referred to the case of *Arnold v Britton* [2015] AC 1619 and the claimant referred to an ECJ case the name of which he was not sure about but which dealt with the entitlement to have on call time taking into account when considering Working Time Directive. I am not aware of the particular case that the claimant was referring to but am aware of the principle which has been considered in numerous cases in the English courts. I did not find *Arnold* to be of much assistance on the issue which I have to determine nor, given my findings of fact, the question of whether on call time should be taken into account when considering the claimant's terms and conditions.

Findings of Fact

21. Much of the evidence is not in dispute. Most of it is in documentary form and, except in respect of one email, where there are documents the parties did not dispute that they were genuine documents. I will return to the disputed email in due course.

An overview of the claimant's role

22. It is not disputed that the claimant worked as a driver of vehicles for the respondent. He told me, and it was not challenged, that he would be told where to pick vehicles up from and where to take them to. It was not disputed that on a Wednesday of each week the claimant would complete a form known as "the chorus" in which he would state what days he was available for work on the following week. Generally (and subject to what is said below about "call ins") on the evening before a day when the claimant had indicated that he was available for work, the respondent would send him an email stating how many jobs he was required to do that day and where those jobs were so that he could plan his route. Sometimes he was not given work.

Applying for the job and the contractual documents

23. On the 31 May 2016, the claimant was sent an email thanking him for his application for the role of Employed Vehicle Collection and Delivery Driver and asking for some information to allow the application to be progressed to the next stage. Within that email it stated "just some of the benefits of working for BCA Logistics:

> Flexible working (must work a minimum of three days a week including a Monday or Friday)" (page 127 of the bundle)".

24. The claimant accepted in his evidence (although initially he was somewhat reluctant to do so) that this was a pre-contract document and was simply part of his application process, but it is still relevant background information.

25. The claimant was offered the job on 6 June 2016 and on the second page of the email offering the job (which appears at page 131 of the bundle) are various bullet points under the statement "Please note the additional information regarding your employment conditions". They include the following:

> The claimant would be employed on a 150 day per year contract, 3 days a week.
>
> The holiday entitlement would be 17 days per calendar year based on a 150 day contract including bank holidays.
>
> Working on a Monday and Friday was mandatory so far as practicable plus another day.
>
> Start times could vary but were generally between 5.00am – 9.00am.
>
> Work was allocated to each driver the evening before around 5.00pm.

26. The claimant was then asked to complete a new starter form as per page 133 of the bundle. The actual form is at page 136. The form the claimant was sent was in blank and he inserted his relevant details into it. There was a section for the hours of work to be filled in. That section was blank when sent to the claimant and remained blank when he sent it back.

27. It can be seen from page 150 of the bundle that the respondent has entered onto the starter form, after it was received from the claimant, that the contracted hours were 22.5 hours per week. It was agreed by the claimant that the form, with the 22.5 hours entered, was never sent to him before he made a subject access request. According to the respondent the form was for use for internal purposes only. I will return to that in due course.

28. On 29 June 2016 the claimant was sent the statement of terms of employment which appear at page 139 of the bundle (hereafter the "statement of terms". The claimant asserts that document is not particular to him because it has been drafted for other drivers in other circumstances. I find that argument is incorrect. The claimant's name has been inserted, his job title is given and his date of the commencement of employment is given as he agreed. It may be that this contract is also used for other employees but that does not mean that it does not set out the terms and conditions which apply to the claimant.

29. Nevertheless, the claimant says that, as a matter of fact, the statement of terms does not reflect the terms of his employment.

30. It is necessary to look at what the statement says. At page 140 of the bundle, the statement gives the claimant's place of work, at page 141 the rate of pay is given as £7.20 per hour for any hours worked from Monday – Friday, it sets out when overtime pay will be given.

31. Underneath the heading "Hours of Work" the statement states "you are employed to work 150 days in each year, it is therefore anticipated that you will work on average 3 days per week, although the day of the week and the number of days will vary subject to business requirements". The statement goes on to say that the working times on these days will be variable and

subject to business requirements. The working times would be notified to the claimant by 4.00pm on the previous day and the claimant was to notify the company in advance on a Wednesday as to what hours he will be available.

32. The claimant is provided with an entitlement to a 30 minute break.

The claimant's employment in practice

33. In terms of how the system operated in practice, I have already dealt with that in part above at paragraph 22, and now do so in more detail.

34. From the documents which appear at pages 66 onwards of the bundle, it is evident that the claimant often worked more than eight hours per day and sometimes on more than three days per week. He also sometimes worked on less than three days a week. On the evidence I have heard, from both the claimant and the respondent, it is apparent that the system largely operated as set out in the statement of terms in that the claimant was told the night before what jobs he was doing the next day in accordance with the days that he had said he was available.

35. An issue does arise however, in relation to "call ins". The evidence in respect of this point is dealt with relatively briefly in the claimant's statement. There is evidence of a policy of "call ins" when drivers were not given any work for a particular day or only given a small amount of work on a particular day. They were then required to call in by telephone, either at a particular hour in the morning if they been given no work, or after their job had finished if they had been given a short day, to see if any other work had come in and was available for them. There is evidence of that at page 166 of the bundle which refers to "you guys are on call ins." I have been given no evidence of how often people were placed on "call ins".

36. Mr Atkins explained that the call ins operated on the 2 types of occasion that I have indicated. The claimant did not challenge that. Mr Atkins also said (and was not challenged during his evidence) that if employees were told at the point when they called in that there was no work, then they were not then "on call" but could do whatever they wanted to. They were simply not at work. They might then be called by the respondent if work became available but it was up to them, at that point, whether they did any work or not.

37. As I have indicated during Mr Atkins' evidence, the claimant did not challenge that evidence (which was given in answer to a question in examination in chief), but in his closing submissions the claimant stated that on occasion he had been called by the respondent after he had been told there was no work for him and he implied that he was required to take the work. Thereby he was, he argued, on "standby" or "on call". The claimant referred to the statement on top of a worksheet at page 269 of the bundle which states "All employed drivers please note if you have made yourself available to work you have made yourself to be available all day. This means your jobs can change on the day or be given extra jobs that need covering. Please do not make plans if you are going to be finishing early."

38. There is further documentary evidence in this respect. There is a chain of emails which goes backwards through the bundle from page 160. On 17 July 2018, the claimant wrote to his colleagues stating "I have just spoken with

Kim Mountain (wages) at head office who has just confirmed that drivers on call ins will get the basic 8 hours this is because they are on call as "availability" for work."

39. On the same day Mr Bloska, the respondent's Hub Coordinator replied to the recipients of the email saying "this is not correct and some clarification on the subject will be sent out shortly."

40. The claimant then replied to everyone stating "we are told to be on call which means we are being restricted on what we can actually do, we are on call and dressed in work uniform ready to be called out to our next job." Mr Atkins, the Southern Regional Hub Manager replied "please disregard Anthony Lewis' comments, he is not authorised to distribute comments of this type nor does he represent the company's position".

41. The respondent's case is that further clarification was given at page 311 where Ben Simms, the Compliance Team Leader wrote:

> "Please note on 17 July 2018… you received an email from an employed driver advising you get paid 8 hours even if you are not given work on a day you are available for. I can confirm that this information is totally incorrect and is to be ignored/disregarded. BCA will always aim to provide work where possible when drivers have made themselves available for work."

42. To the extent that it is necessary I find, on the balance of probabilities, that it is more likely that the email at page 311 was sent than it was not. The main evidence that the claimant relies upon to suggest that it was not sent is that page 311 shows an email within an email. However that does not suggest, as the claimant indicates, that the document is fraudulent. It is perfectly possible for an email to be copied and pasted into another email and then distributed. The respondent had indicated that it would distribute such an email and it is likely that it would have done so, given the emails which the claimant had sent. There is no substantial evidence upon which I could base a finding that the document was created for the purposes of this hearing. In fact, I do not need to make a final determination on that point because the emails which are accepted as having been sent, between pages 156 – 160, of the bundle clearly show that the respondent was disputing what the claimant was saying.

43. The claimant accepted on his evidence that Kim Mountain was a wages clerk administrator and he did not know whether she had authority to bind the respondent on matters of contract.

44. The claimant's statement gives no examples of an occasion when either he or anybody else was required to be available for 8 hours (or any other period) whilst in uniform.

45. I must decide whether I prefer the claimant's point in his closing submissions, namely that he did have to be available and was effectively "on call", to Mr Atkins' evidence on the point. There is little independent or objective evidence either way.

46. On the balance of probabilities, I find that if employees had been required to be on standby for 8 hours a day with no payment, as suggested by the

claimant, there would have been significant amounts of documentation available on the point, not least complaints from other employees. I have not been referred to any such evidence.

47. I do not find that the email at page 269 means that the claimant is correct, it is equally consistent with Mr Atkins, explanation that if a driver has been given a short day, drivers should not assume that it will remain as such. The driver will still be required to call in. The document does not say that if an employed driver has been told there is no work they must still be available on a standby basis for a period of 8 hours. That is why the drivers are referred to as being on "call ins" rather than "on call" in the document at page 166.

48. I prefer the evidence of Mr Atkins which was given confidently and spontaneously. He was able to give an explanation for his evidence which is to be contrasted with the somewhat non-specific nature of the claimant's evidence in this respect.

49. Thus, I do not find that the claimant was "on call" or on "standby" if he did not have work to do on a particular day or when he had finished for the day. Once he had called in and been told there was no further work, he was released from his duties for that day. Therefore, there was no basis for him being paid for such time. To the extent that he was told otherwise by Kim Mountain, that was immediately corrected by the respondent. There is no evidence that such a statement reflected existing practice and a one off statement which was immediately corrected by more senior officers of the respondent would not vary the contract of employment. Her statement had no effect in my view.

50. The claimant was dismissed for gross misconduct in September 2020, but reinstated on appeal. At around that time, he was suspended from employment but paid on the basis of 8 hours per day. I accept his evidence in this respect. He says that is consistent with his case that he had a contractual entitlement to be paid for 8 hours a day. The respondent's position is that it was a standard process to pay someone something while they were suspended but Mr Atkins could not say why the respondent had settled on 8 hours rather than another amount.

51. When the claimant was reinstated after his dismissal, along with his notice of reinstatement he was also sent a "Drivers Hours Memo" which appears at page 212 of the bundle. It was sent to all drivers and stated "**Claiming for hours:** your contract of employment clearly states the number of days per year you are contracted to work and sets out your *variable* working hours" (my emphasis).

52. In support of his argument that he had an express right to work 8 hours a day, the claimant makes 2 further points.

53. Firstly he says that the chorus form, before completion, refers to 8 hours. An example is at page 90 of the bundle. Whilst that is true, the form has to be considered in its entirety Having said that, I paste a snapshot of the relevant part of the form below

Working Days	150
Submission Days	Monday,Tuesday,Wednesday,Thursday,Friday
Job Start Time	09:00
Job Duration Time	8 hour(s)
Availability	Enabled

54. Firstly, it is to be noted that what is referred to as 8 hours is the job duration time, not the working day. Secondly it is to be noted that the job start time is given as 09:00 hours, when all parties agreed that the job could start at any time.

55. It seems to me that this document does not prove that the claimant has a contractual right to work for 8 hours on any particular day. Rather, it shows that when it is in its pro forma state, the chorus form has a default position of a job starting at 9 a.m and being for 8 hours. In practice that is not what happened. Moreover, the chorus not a document which formed part of the contract of employment.

56. Secondly the claimant relies upon the fact that on the starter form the respondent wrote in 22.5 hours per week. As I have already indicated that is an internal document and not one which the claimant saw before his subject access request. It was not a document which formed part of the contract of employment In my judgment both the chorus form and the new starter form are documents which were used for the purposes of administrative efficiency. Whilst they do give some support for the claimant's case, they are less significant than either the wording of the statement of terms which was given to the claimant or the way in which the parties operated the contract in practice.

Conclusion

57. I must determine the claimant's normal working hours and whether the respondent is right that the statement of the terms and conditions at page 139 is accurate.

58. A written statement of terms is persuasive evidence of the terms of the contract of employment but it is not conclusive.

59. On the evidence I have seen and heard, there is little basis for finding that the claimant was entitled to be paid for 8 hours work per day regardless of the number of hours that he worked. As a matter of practice the claimant was paid for the hours he worked and those hours varied. That is what the statement of terms says. Except while suspended, the claimant was never paid for 8 hours work per day unless he had actually worked for 8 hours. Those matters outweigh the chorus document and the new starter form, as well as the fact of being paid for 8 hours a day while suspended. On the balance of probabilities I conclude that there was no contractual entitlement to be paid for 8 hours work per day regardless of the number of hours that he worked. For the same reasons, I conclude that the claimant was not entitled to be provided with a minimum of 8 hours work per day. His hours were, in practice, variable and that is what his statement of terms said, as well as the document sent to him when he was reinstated.

60. I have also found that the claimant and his colleagues were not on standby or on call on the days when they were asked to "call in". The point when they called in was simply the point when the work for the day in question was finally confirmed. Thus I do not conclude that there was a term of the claimant's employment that he was required to be on call or on standby in any given situation.

61. Subject to what I say below, the way the contract was operated in practice was, in my judgment, much more consistent with the written statement of terms than with the assertion of the claimant that he was entitled to work for 8 hours per day or was on call on certain days. The evidence shows that, in respect of the claimant and employees who were doing the same role as the claimant, the number of hours work they were given varied according to their availability and the availability of work. That is what the statement of terms and conditions anticipates.

62. The practice of "call ins" was, however, a departure from the wording of the statement of terms, which state that the working times would be notified to the claimant by 4.00pm on the previous day. It is necessary to consider the consequences of that departure and whether or not there was a variation of the contract of employment in that respect (or the statement of terms was simply wrong).

63. Even if the statement of terms is wrong and should state that employees are required to "call in" if they have been given no work or a short day, that would not mean that the claimant was entitled to be paid for 8 hours on those days when he called in or should be treated as being on call or on standby. It would mean no more than the agreement was that the claimant's work would be notified on the working day in question, rather than by 4pm the previous day. Thus any amendment would be to the claimant's detriment, since he would be entitled to less notice in that respect than his statement of terms and conditions indicate.

64. Neither party sought to argue that the statement of terms was wrong only in respect of the time when work should be notified to the claimant and I should be slow to make a variation to the statement of terms which would be to claimant's detriment in such circumstances. The simple fact that the parties have acted in a way which is not in accordance with the statement of terms does not automatically mean that the statement is wrong; it could be that the respondent is acting in breach of contract insofar as it required employees to call in. Having regard to the issues which were listed for me to determine and the position of the parties in this hearing, I do not make a finding that the statement of terms is wrong in respect of the time when working hours are to be notified to the claimant. That is not an issue for me to determine, I am required to determine the claimant's normal working hours.

65. In his submissions the claimant stated that he had a grievance because other employees and self-employed people were being given more work than him and because coordinators had taken work off him. Those matters do not give him a contractual entitlement to work or be paid for 8 hours a day. The fact that he has a sense of grievance because he was not treated equally with others does not mean he is entitled to be guaranteed work of 8 hours a day. The question for me is what was agreed between the parties.

66. Subject to that point, in my judgment the statement of terms given at pages 139 – 142 do reflect and accurately set out what the agreement between the claimant and the respondent. They are consistent with the emailed offer of employment and with how the role operated in practice.

67. Further, they do, in my judgment, set out what is required by Section 1(4)(c) of the Employment Rights Act 1996 as amended. They set out any terms and conditions relating to the hours of work, the days of the week when the worker is required to work and whether or not such hours or days may be variable and if they may be, how they vary or how that variation is to be determined. The Act does not require the claimant to be told that he has normal working hours or to be told that he will work on particular days of the week. What the Act requires is that if there are terms of the contract which relate to normal working hours or which relate to the days of the week on which the worker is required to work, they are put into the statement. The Act also requires that the statement states whether or not such hours or days may be variable and if they may be, how they vary or how that variation is to be determined. In this case the statement of terms states that the hours are variable and set out the way in which they are varied namely by the employee setting out what day they are available on and the employer then stating what work will be required.

68. The statement of terms complied with the law before the change to section 1(4)(c) of the Act before April 2020 and also complied with the law thereafter. The respondent was not obliged to send out a fresh set of statement of terms simply because the law changed. The matters to which the particulars related did not change. Thus, I conclude that the statement of terms dated 29th of June 2016 is accurate (except in respect of rates of pay and place of work- in respect of which the claimant does not dispute that he was given notice of change).

69. I conclude that the claimant did not have normal working hours, he had variable hours. Under Section 12(2) Employment rights Act 1996 I confirm the particulars as referred to in the statement dated 29th of June 2016.

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Employment Judge Dawson

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Date 18 April 2022

REASONS SENT TO THE PARTIES ON
13 May 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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