



EMPLOYMENT TRIBUNALS

Claimant: Mr D Nowaczyk

Respondent: ARRA Distribution Limited

Heard at: Liverpool (remotely, by CVP)

On: 10 June and 8
September 2022

Before: Employment Judge McCarthy
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr Edwards (Respondent's Interim Finance Director)

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 claim for holiday pay is dismissed upon the claimant's withdrawal.
3. The respondent made an unauthorised deduction in the net sum of £145 from the claimant's wages by not paying the claimant all the wages due on 22 October 2021, although the amount due has subsequently been paid.
4. The respondent did not make unauthorised deductions from the claimant's wages on 1 October 2021, 8 October 2021, 15 October 2021, and 12 November 2021. These complaints are dismissed.
5. The claimant's complaint of breach of contract in terms of his notice is not well founded and is dismissed.
6. The tribunal does not have jurisdiction to consider his claim in relation to expenses and this complaint is dismissed.

REASONS

Introduction

1. By a claim form presented on 9 February 2022 (having entered early conciliation on 15 December 2021 and received a certificate against the respondent dated 19 January 2022), the claimant complained of unauthorised deductions from his wages and breach of contract.
2. By a response form dated 11 April 2022 together with an updated paragraph 6.1 of the response form submitted on 1 June 2022, the respondent resisted the complaints. It said that all payments due to the claimant had been paid in full.

Preliminary Issues

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

Respondent's Response

4. The respondent had submitted a completed response form within the relevant time limit. However, it asked for an extension of time for presenting a fuller paragraph 6.1 once it had been provided with the documents the claimant had referred to in his claim form (which provided details of the alleged deductions). These documents had not been attached to the claim form. On 4 May 2022, Employment Judge Buzzard had ordered that the claimant provide these documents and that the respondent present a full defence to the claims by 1 June 2022. The respondent provided this full defence on 1 June 2022 by email and copied the claimant into this email. The respondent's, in time, full response did not appear to have been formally accepted by the Employment Tribunal and so I accepted it on the first day of the hearing. I also discussed with the claimant whether he had received and had a reasonable opportunity to consider the respondent's full response in advance of the hearing. The claimant confirmed that he had been provided with a copy of the full response from the respondent some time in advance of the hearing and had read it. I was satisfied that the claimant was in a position to proceed with the hearing and that it was fair to do so.

Application to Amend

5. The claimant applied to amend his claim to add two further complaints of unauthorised deductions from wages which were not referred to in his claim form, The proposed amendments related to the alleged non payment of wages (including meal allowances) for 7 and 8 October 2021. The claimant alleged that he had worked a shift on both of these days. The claimant and respondent believed, until the hearing, that both these alleged unauthorised deductions from wages complaints formed part of the claimant's claim. The claimant explained that the situation had, at the time he submitted his ET1 form, not been clear. He subsequently sent a letter on

6 April 2022 (37) to the respondent and the Tribunal seeking to “correct” his claim form as he had now undertaken an “thorough analysis”. This letter alleged he had not been paid in respect of 7 and 8 October 2021. The claimant confirmed that this letter was an application to amend his claim. The claimant had sent this letter to the respondent before they had submitted their response. There was no record of the tribunal having responded to the claimant’s letter of 6 April 2022. The respondent’s representative, Mr Edwards confirmed that, following receipt of this letter, the respondent had understood the claimant’s claim to include these two further proposed unauthorised deduction from wages complaints and had prepared their response to the claimant’s claim and for the full hearing accordingly. The respondent did not oppose the claimant’s application to amend his claim.

6. 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.

7. 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. The respondent confirmed that throughout the proceedings (including in its full ET3 form) it had understood the two proposed unauthorised deductions from wages complaints to be part of the claimant’s claim and had prepared for the hearing on this basis. The agreed hearing bundle included documents relating to these alleged unauthorised deductions and the respondent’s witness, Mr Edwards, had addressed these potential complaints in his witness statement. Given the submissions of Mr Edwards, for the respondent, and the contents of the hearing bundle and respondent’s witness statement, I believed that the respondent was in a position to defend itself against these two additional complaints of unauthorised deductions from wages.

Claimant’s witness statement

8. Having regard to the overriding objective, at the end of the first day of the hearing (which had been listed for 2 hours), I made some case management orders in relation to preparation for the re-listed hearing. I ordered that the parties agree a schedule detailing the alleged unauthorised deductions following my discussion with the parties on the first day of the hearing regarding the claims and issues. I also ordered the parties agree a bundle of relevant documents and exchange witness statements in advance of the re-listed hearing as no witness statements had been prepared by either side and evidence had not yet commenced.

9. In advance of the re-listed hearing, the respondent had prepared and sent a copy of Mr Edwards’ witness statement to the claimant and Tribunal. The claimant confirmed that he had not prepared any witness statements. Having regard to the overriding objective to deal with cases fairly and justly, I discussed with the parties how to proceed and both parties agreed to proceed on the basis that the claimant’s evidence in chief was made up of paragraph 8.2 of his claim form and the claimant’s letter at page 75 and the schedules at page 1-7 of the agreed bundle.

Complaints and Issues

10. The complaints and issues to be determined by the Tribunal were discussed and agreed prior to the parties presenting their evidence. The parties had set out their agreed summary of complaints which were still in dispute and a Schedule of alleged unauthorised deductions at pages 1-8 in the agreed hearing bundle. On the first day of the hearing, the claimant informed me that he was withdrawing his complaint regarding holiday pay as it had been paid. By consent, this complaint was dismissed upon the claimant's withdrawal.

11. The complaints and issues were:

11.1 *Unauthorised deductions from wages:*

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

Unpaid wages

- a. 7 and 8 October 2021 (processed on **15 October 2021**)- The claimant alleged that he had worked shifts on 7 and 8 October 2021 but had not been paid for them on 15 October 2021. The alleged deduction was a gross sum of £340.
- b. 5 November 2021 (processed on **12 November 2021**) – The claimant alleged that he had not been paid for his shift on 5 November 2021 when his wages for this week were processed on 12 November 2021. The alleged deduction was gross sum of £180.

Deductions from net wages

- c. **1 October 2021** and **8 October 2021** – The claimant alleged that the respondent had made two deductions from his net pay in the sum of £150 on 1 October 2021 and £280 on 8 October 2021 when he was entitled to salary arrears in the gross sum of £180 and £350 respectively on these dates.
- d. **22 October 2021** – The claimant alleged that £145 had been deducted from his net pay.

11.2 *Breach of Contract - Notice Pay*

The claimant alleged that the respondent had not paid him his full notice pay. He alleged that he had been received a payment in lieu of notice in the gross sum of £880 but was entitled to a gross notice payment of £1220.

11.3 *Alleged Expenses*

The claimant alleged that he was entitled to compensation of £380.51 for the expenses he alleged he had incurred collecting the hard copy of the termination letter the respondent had sent to his former address on 6 November 2021. During the discussion, it was discussed with the claimant whether he was making a claim for an unauthorised deduction from wages or breach of contract. The claimant was

unable to identify the basis for his claim for “*compensation*”. In the absence of an election, the presumption is that this complaint was being pleaded as a further complaint of unauthorised deduction from wages.

11.4 Issues

Unauthorised Deduction from wages

- a. In relation to each of the above alleged deductions, Did the respondent make unauthorised deductions from the claimant’s wages and, if so how much was deducted?

Breach of Contract -notice

- b. What was the claimant’s payment in lieu of notice?
- c. Was the claimant paid in full for that notice period?

Remedy- General

- d. How much should the claimant be awarded.

Procedure/Documents and evidence heard

12. This was a hearing where the parties participated remotely via CVP. The claimant was not represented, and English was not his first language. A foreign language (Polish) interpreter was present on 10 June 2022 and 8 September 2022, to assist the claimant in understanding questions, to put his case and to give evidence. I heard oral evidence from the claimant on his own behalf. I also heard oral evidence from Mr Edwards, the respondent’s Interim Financial Director, on behalf of the respondent and was provided with a copy of his witness statement. Mr Edwards was also the respondent’s lay representative. As set out above, it was agreed that the claimant’s evidence in chief would be made up of paragraph 8.2 of his claim form, his letter at page 75 in the bundle and the agreed schedules at pages 1-7 of the bundle.

13. During the hearing I was referred to documents within an agreed bundle of documents. I was also referred to some further documents provided by the claimant during the second day of the hearing. The claimant provided his contract of employment, two published reviews about the respondent on the “Indeed” recruitment website and a photo of two envelopes. One of these envelopes had contained the hard copy of the claimant’s termination letter.

14. Mr Edwards was provided with a copy of these additional documents and given an opportunity to consider them and ask the claimant questions regarding such documents. Mr Edwards agreed the contract of employment provided by the claimant was the contract in place during the claimant’s employment with the respondent. The contract of employment was given the pagination pages 84-87 in the bundle.

15. In accordance with the case management orders given at the end of the first day of the hearing, at the re-listed hearing, the parties referred me to an agreed schedule of deductions and claims which were still in dispute (1-7). I am grateful to

the parties for their efforts in producing this schedule and clarifying the alleged deductions in dispute.

Factfinding

16. 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.

17. It was not in dispute that the claimant, Mr Nowaczyk, was employed by the respondent, ARRA Distribution Limited from 20 July 2021 until 5 November 2021 as a LGV Driver. The claimant was also referred to as a HGV Driver.

18. The respondent operates a fleet of heavy goods vehicles and provides transport services to a range of customers from its depots in England and Wales. The claimant was based at the respondent's Knowsley depot.

Contract of Employment

19. The claimant signed an employment contract (entitled "Statement of Main Terms of Employment") dated 20 July 2021 (84-87). His contract set out his hours of work. It stated, "*your normal hours of work are variable each week dependant on the needs of the business, you are employed to work on a shift system basis based on a 5 on 3 off pattern*". It also stated that the claimant may be required to work overtime. His contract stated that "*any authorised additional hours will be paid at your basis [sic] rate of pay.*"

20. The claimant's weekly pay varied as he was only contractually entitled to pay for the shifts he worked. He was not entitled to pay for any "rest days". He was also entitled under his contract to various types of paid leave such as holiday pay. The claimant's contract stated that the claimant was "*required to complete the work required in each shift subject to the driving hours limitations and daily rest provisions being complied with, accordingly no shift shall be longer than 15 hours*".

21. The first page of the contract (84) set out the daily rate of pay the claimant would receive if he worked a shift. The rate of pay varied according to the day of the week that the claimant was working. There were three rates of pay set out in his contract:

- a. £165 per shift worked on a Monday – Friday (inclusive)
- b. £180 per shift worked on a Saturday
- c. £190 per shift worked on a Sunday.

22. The contract stated that the claimant's wages for shifts worked were payable weekly in arrears by Bacs. It was not in dispute that the working week ran from Sunday to Saturday with the payslip process date being the Friday following the end of the working week.

23. The claimant had been employed for less than four months when his employment was terminated. Within his contract was an express contractual term as to notice and it was agreed that the claimant was entitled to "1 week's" notice under

his contract (86). The notice clause did not set out how this would be calculated. There was no express term in the claimant's contract governing payments in lieu of notice.

24. The claimant's contract did not include any express term regarding deductions from wages and I was not referred to any other document or agreement (such as the respondent's Employee Handbook) with related to deductions.

25. There was no express contractual entitlement to expenses in the claimant's contract and I not referred to any other document (such as the Employee Handbook) which related to expenses. The claimant's contract expressly provided for a meal allowance of £5 per shift worked.

Issues with payroll

26. *The respondent's representative, Mr Edwards, accepted that there were errors with the claimant's pay during his employment, particularly early on, when the claimant was not being paid the correct shift rate. He said that these issues were "exceptional and unfortunate."* Mr Edwards accepted that the errors had taken longer than usual to rectify, but the respondent believed that all errors with the claimant's pay had been addressed and rectified by 5 November 2021.

27. The claimant was clearly frustrated by these various pay issues and on 24 September 2021, the claimant said that he had refused to work his shift "*because [he had] reported arrears in payments at the beginning of September 2021*". The claimant returned to work upon assurances that the issues with his pay would be rectified. The respondent argued that the claimant was not entitled to pay for 24 September 2021 as he had refused to work his shift, but, as a gesture of good will only, had later decided to pay the claimant for this shift.

7 and 8 October 2021- processed on 15 October 2021

28. The claimant alleged that he worked on 7 and 8 October 2021 in the week ending 9 October 2021 but had not been paid for these two shifts when his wages were processed on 15 October 2021. The claimant referred me to the top of the document at page 83 in bundle as evidence he had worked shifts on the 7 and 8 October 2021. The claimant explained that at the top of the document was a reproduced extract from a text he had received from the transport manager. I was not provided with a full copy of the text.

29. However, the claimant conceded in evidence that this document only showed that he had worked on 8 October 2021 and that it wrongly noted that he had had a "*day off*" on the 7 October 2021. In evidence to me, the claimant also conceded that the document at page 83 was not an "*accurate record*" as the claimant's days off were wrongly noted and it did not record that he had worked on the Sunday of the week ending 9 October 2021.

30. The respondent denied that the claimant had worked on 7 and 8 October 2021 or on 4, 5 and 6 October 2021. It argued that the claimant was on annual leave on 7 and 8 October 2021 (for which he was paid holiday pay) and on "*rest days*" for 4, 5 and 6 October 2021 – for which he was not entitled to be pay. The respondent relied on two documents to support its argument.

31. The first document was the “*Arra de-brief*” (60) which was a formal record of the shifts that each of the respondent’s drivers worked. Each of the respondent’s depots produced an Arra de-brief and they were used to calculate the wages for the respondent’s drivers. The second document was a tachograph report (62).

32. The extract from the Arra de-brief for the week ending 9 October 2021 (showing the entries for the claimant only) showed that the claimant had worked Sunday, 3 October, was on rest days from Monday 4 October to Wednesday 6 October 2021 (inclusive), was on “*holiday*” on Thursday, 7 October and Friday 8 October and returned to work on Saturday 9 October 2021 (60).

33. The claimant’s payslip for the week ending 9 October 2021 (processed on 15 October 2021) (53) reflected the Arra de-brief entry for the Claimant. The payslip recorded that the claimant had been paid for two days holiday, and for a Saturday and Sunday shift. The claimant was not contractually entitled to any pay for rest days.

34. It was not in dispute that the claimant had taken two days leave during the week ending 9 October 2021 and that he had received holiday pay for two days in his wages for that week. But the claimant argued that he had not taken this holiday on 7 and 8 October 2021 and was working on these days. The claimant provided no document that recorded that he had taken holiday on days other than 7 and 8 October 2021 and his payslip did not state the days that holiday was taken.

35. The respondent also relied on the claimant’s tachograph report to demonstrated that the claimant did not work on 7 and 8 October 2021 (or on 4, 5 and 6 October 2021) (62). I was referred by the respondent to the claimant’s personal tachograph report for the week ending 9 October 2021 (62).

36. Tachographs were fitted to the vehicles that the claimant had driven for the respondent. This piece of equipment was a legal requirement for drivers as individuals and the company in relation to its vehicles. As with all drivers, the claimant had his own card that he inserted into the tachograph at the start of his shift and removed at the end of his shift. The tachographs recorded the claimant’s movements during each of his shift (such as start and end location, driving time, speed, daily rest, start and finish times). The claimant accepted that it was a legal requirement that the tachograph was always in operation during his shift. Drivers are required to download the information on their cards onto a third party system and the resulting tachograph report showed information about what a particular driver had been doing during his shift in terms of driving.

37. The respondent was required by law to monitor the tachograph reports for driver infringements and such records could be checked at any time by the respondent’s regulator.

38. I accepted Mr Edwards evidence that the tachograph report was an accurate and reliable record. Steps were taken to ensure it was accurate as the implications for the respondent and its drivers were very serious if it was found not to be accurate. Mr Edwards described the implications of such reports being inaccurate as “*catastrophic*.” The respondent would be in danger of losing its operating license and a driver, their driving license if the records were found not to accurate.

39. The claimant argued that on three or more occasions he had not been able to download the information from his driver's card onto the third party system. Whilst Mr Edward's accepted that there were issues from time to time with downloading information (eg internet issues), he argued the drivers records were not lost but updated the next time that the driver logged in. The claimant accepted this during cross examination. I therefore find that the claimant's tachograph data was not "lost" at any point during his employment.

40. The tachograph report reflected the claimant's payslip and the Arra-debrief. There was a full record of what the claimant did on his shift in the tachograph report (62) for Sunday, 3 October and Saturday, 9 October (such as start time and end time, average speed, total driving time). However, the entries on the tachograph for 4, 5, 6 7 and 8 October 2021 stated "*No Chart/Record found*".

41. I agree with the Mr Edward's submission that the tachograph records (62) show that the claimant did not undertake any work on 7 and 8 October 2021 (or on 4, 5 and 6 October 2021). If the claimant had been working on 7 and 8 October 2021, I find the tachograph report would have had some driving records for that day (such as driving time and speed).

42. I prefer the evidence of the respondent and find that the claimant did not work on 7 and 8 October 2021 and also did not work shifts on 4, 5 and 6 October 2021. I also find that he was paid holiday pay for the two days he was on "holiday". I find that in the week ending 9 October 2021, only worked two shifts - Sunday, 3 October and Saturday, 9 October. I accept the submissions of Mr Edwards that the tachograph report (62) was "*paramount*". On the claimant's own evidence, I find the evidence he relied on to demonstrate he worked on 7 and 8 October 2021, was not accurate or reliable and did not show that he worked on both of these days.

Deductions from net wages on 1 October, 8 October 2021 and 22 October 2021

1 October 2021

43. The claimant claimed that £150 had been wrongly deducted from his wages for the week ending 25 September 2021, which were processed on 1 October 2021 (51). It was not in dispute that the claimant was entitled to salary arrears of £180 gross on 1 October 2021.

44. The claimant's payslip for 1 October 2021 (51) showed that he had been paid salary arrears of £180 gross on 1 October 2021 and that £150 had been deducted from his net pay. The claimant argued that this meant that a deduction had been made to his salary arrears. The claimant raised no further concerns regarding the other payments he received on 1 October 2021.

45. I accept Mr Edward's evidence that, in addition to the salary arrears payment of £180 gross (paid to the claimant on 1 October 2021), the claimant had also been paid, on 24 September 2021, a net estimate payment for the salary arrears of £150. The claimant accepted, during cross examination, that he received the £150 net payment. I was also referred to a bank statement at page 65 in the bundle which showed that a transfer of £150 had been paid directly to the claimant from the respondent's bank account on 24 September 2021. Mr Edwards described this payment as an "*advance*" payment in relation to the salary arrears which were due to

be paid through payroll on 1 October 2021. I find that the claimant was paid both £180 gross and £150 net in relation to the £180 gross salary arrears to which he was entitled on 1 October 2021.

46. Mr Edwards explained in paragraph 14 of his witness statement that “*when an underpayment was identified, Arra pay an estimate net payment to the employee immediately and then process the underpayment through the payroll the following week, deducting the estimated payment from net wages for that week (which would include the underpayment)*”.

47. I accept that it was the estimated “advance” net payment of £150, paid to the claimant on 24 September 2021, that was deducted from the claimant’s net wages on 1 October 2021 once the respondent had paid the claimant the salary arrears payment of £180 gross in full via payroll. I agree with the respondent’s submission that had they not deducted the “advance” payment of £150 net, then the claimant would have been paid twice for the same set of salary arrears.

8 October 2021

48. The claimant also claimed that £280 had been wrongly deducted from his wages for the week ending 2 October 2021, which were processed on 8 October 2021 (51). It was not in dispute that the claimant was entitled to salary arrears of £350 gross on 1 October 2021.

49. The claimant’s payslip for 8 October 2021 (52) showed that he had been paid salary arrears of £350 gross on 8 October 2021 and that £280 had been deducted from his net pay. The claimant argued that this meant that a deduction had been made to his salary arrears. The claimant raised no further concerns regarding the other payments he received on 8 October 2021

50. I accept Mr Edward’s evidence that, in addition to the salary arrears payment of £350 gross, the claimant had also been paid, on 1 October 2021, a net estimate payment for the salary arrears of £280. The claimant accepted, during cross examination, that he had received the £280 net payment on 1 October 2021. I was also referred to a bank statement at page 66 in the bundle which showed that a transfer of £280 had been paid from the respondent’s bank account to the claimant’s bank account on 1 October 2021. Mr Edwards described this payment as an “*advance*” payment in relation to the salary arrears which were due to be paid through payroll on 8 October 2021. I find that the claimant was paid both £350 gross and £280 net in relation to the £350 gross salary arrears to which he was entitled on 8 October 2021.

51. Mr Edwards explained in paragraph 14 of his witness statement that “*when an underpayment was identified, Arra pay an estimate net payment to the employee immediately and then process the underpayment through the payroll the following week, deducting the estimated payment from net wages for that week (which would include the underpayment)*”.

52. I accept that it was the estimated “advance” net payment of £280 paid to the claimant on 1 October 2021 that was deducted from the claimant’s net wages on 8 October 2021, once the respondent had paid the claimant the salary arrears payment of £350 gross in full via payroll. I agree with the respondent’s submission

that had they not deducted the “advance” payment of £280 net, then the claimant would have been paid twice for the same set of salary arrears.

22 October 2021

53. The claimant claimed that £145 had been wrongly deducted from his wages for the week ending 16 October 2021, which were processed on 22 October 2021. The respondent accepted that the net sum of £145 had, in error, been deducted from the claimant’s wages on 22 October 2021. I find, based on the respondent’s admission and the claimant’s payslip for 22 October 2021 (54) that

- (a) the claimant was entitled to the gross sum of £900 for the week ending 16 October 2021;
- (b) The claimant was paid £900 subject to deductions of tax and employee national insurance payments of £209.58 and a deduction of £145. The claimant payslip (54) records that he was paid the net sum of £545.42 net; and;
- (c) The claimant was legally entitled to have been paid the net sum of £690.42.

54. I accept Mr Edward’s evidence that, after realising its error, the respondent repaid the net deduction of £145 to the claimant on 29 October 2021. I was referred to page 67 in the bundle which showed that a transfer of £145 had been paid directly to the claimant from the respondent’s bank account to on 29 October 2021. The Claimant accepted during cross examination that the net sum of £145 had been paid into his bank account on 29 October 2021. I find, based on this bank statement and the claimant’s admission that he received the payment of £145, that the claimant was repaid the net sum of £145 on 29 October 2021.

55. During cross examination, in relation to these three deductions, the claimant said “*everything is clear now- it is right*”. I asked the claimant what he meant by this and he said that there had been no deductions. He had not understood that he had been paid the three separate payments, referred to above, directly into his bank account. He now agreed that he had been properly paid on these three instances because he had received the payments directly into his bank account. In closing submissions, the claimant appeared to try and backtrack on this position and said that he was not “*completely agreed*” as he did not know why these separate payments were not on his payslip.

5 November 2021- processed on 12 November 2021

56. The claimant alleged that he had not been paid for his shift on 5 November 2021 and was due the gross sum of £180 for this shift. The respondent argued that the claimant was not entitled to pay for this shift as he had refused to work. They had previously explained this position to the claimant in correspondence (73-74). When the claimant had refused to work the respondent had been forced to find an alternative driver and pay them to undertake the claimant’s shift.

57. It was not in dispute that, on 5 November 2021, the claimant refused to work and was sent home by the respondent. In evidence to me, the claimant said that he

had turned up for his shift but refused to start work when he realised, he had only received £12.50 in salary arrears in his pay. In evidence the claimant, said he *“refused once again to perform the obligation until the issue of outstanding payments reported at the beginning of September [was] resolved”* (16). The claimant had also written to the respondent on 11 November 2021 complaining that he had not been paid for 5 November 2021. In this letter the claimant stated he had *“refused to work due to further arrears in payments.”* (75-76).

58. The respondent submitted that the claimant had no reasonable basis for refusing to work as the respondent’s payroll manager had, only the previous week, met with the respondent to discuss his salary concerns. The claimant accepted that the respondent had prepared a document setting out his salary history and any remaining salary arrears. He also accepted that he was taken through this calculation (34-36). This document records that outstanding salary arrears were £12.50 and that all other salary arrears had been paid already. I find that the circumstances under which the claimant refused to work were different than when he refused to work on 24 September 2021, as the respondent admitted that issues with the claimant’s pay were ongoing and had not been dealt with at this stage.

59. The claimant did not raise any further queries with the wage department or payroll manager on 5 November 2021 before refusing to work.

60. I find, based on the admissions of the claimant, that he was able to work on 5 November 2021 but was not willing or ready to work on this day.

Notice

63. The claimant’s employment was terminated, with immediate effect, on the afternoon of 5 November 2021. The claimant accepted that he had been informed of the termination of his employment firstly on the telephone and then by a letter which was emailed to him. The claimant accepted that he had received and read this emailed letter on 5 November 2021. The termination letter confirmed that the claimant would receive a payment in lieu of his one week’s notice and any accrued but untaken holiday. It also said that a hard copy of the termination letter had been sent to him by post.

61. A hard copy of the claimant’s termination letter was sent by special delivery post. The post mark on this envelope for this letter is 6 November 2021. Mr Edwards accepted in evidence that this letter had been sent to the claimant’s former address. He also accepted that the claimant had previously informed the respondent of his new address, but the respondent’s system had not been updated accordingly.

62. On 19 November 2021, the claimant received a payment in lieu of notice in the gross sum of £880, which was paid subject to normal deductions for tax and employee national insurance payments. The respondent argued that a payment in lieu of one week’s notice equated to £880, which had been calculated by finding the average shift rate and multiplying it by five (as the claimant worked a “5 on 3 off working pattern). The respondent calculated the claimant’s average shift rate (including a daily meal allowance of £5) by adding 5 x £170 (the claimant’s Monday-Friday shift rate) 1 x £187 (the claimant’s Saturday shift rate) and 1x £198 (the claimant’s Sunday shift rate) and dividing by five. Mr Edwards calculated the claimant’s average shift rate at £176 ($£1285/5 = £176$)

63. This was how the respondent usually calculated payments in lieu of notice. Mr Edward's confirmed that he had not considered what the claimant's average weekly pay was over his employment or considered, at the time, what shifts the claimant would have worked had he been required to work out his one week's notice. The claimant alleged that his notice payment should be calculate by adding what he would have been paid for seven days at his normal shift rate (i.e. 5 x £170 (Monday - Friday with meal allowance) plus 1x £185 (Saturday with meal allowance) plus £195 (Sunday with meal allowance) totalling £1220. The claimant did not provide any evidence of having worked 7 days in any week he had been employed by the respondent or that his notice should be calculated in this way. His contract only referred to "one weeks" notice, not how it would be calculated. Mr Edwards also submitted that the claimant, due to the legal restrictions on how many hours a HGV driver can undertake, the claimant was not permitted to drive 7 days a week.

64. I find, based on his contract, that the claimant was on "5 on 3 off" working pattern. I also accept Mr Edwards evidence to me that, on 5 November 2021, the claimant had just finished the last of "5 on" shifts (but had refused to work the fifth shift on 5 November 2021). This was not disputed by the claimant and his payslip for the week ending 6 November 2021 (57) shows he had worked four shifts in addition to the shift he refused to work.

65. I find, on the basis of the claimant's contract, that had the claimant been permitted to work his one week's notice he would not have worked the next three shifts (instead undertaking rest days on 6, 7 and 8 November) and then would have started another "5 on" shift pattern on 9 November 2021, finishing his notice period on 12 November 2021. The claimant would not have been paid for his rest days but would have been entitled to his normal weekday shift rate of £165 gross plus a meal allowance of £5 for the four working days between Tuesday, 9 November 2021 and Friday, 12 November. I find he would have earned the gross sum of £680 during his one week of notice (made up of 4 shifts x £165 (the applicable daily shift rate) plus 4 x meal allowances of £5 per day).

Alleged Expenses

66. The claimant alleged that he was entitled to compensation of £380.51 for the expenses he alleged he had incurred collecting the hard copy of the termination letter the respondent had sent to his former address on 6 November 2021.

67. The claimant alleged he had incurred expenses of £70.51 for fuel, £260 for loss of a working day and £50 for a meal). The claimant did not provide any evidence that he had incurred such expenses, or the amounts that he incurred. However, on the basis of the claimant's evidence, I find that if such expenses had been incurred, they would have been incurred after he had left the respondent's employment and would not have been incurred by the claimant in carrying out his employment.

68. The claimant's said that his mother (who lived at his former address) informed him that a letter had been sent to him at that address. Only the addressee of the letter could take delivery of the letter and so he had had to go and collect it and show his Identification. Having been referred by the claimant to a copy of the envelope, which contained his termination letter, I accept the claimant's evidence that the hard copy of the Termination letter was sent by special delivery to his former address and his mother was unable to take delivery of the letter.

69. In evidence to me, the claimant said that when he chose to collect the letter in person and travelled to his old address, he had no knowledge who the letter was from or what it related to. I accept the claimant's evidence that it did not occur to him that it was a letter from his former employer, as, at this stage, he did not realise his former employer did not have his new address.

70. There was no express clause in the claimant's contract entitling him to claim for expenses incurred.

The Law

Unlawful deduction from wages

71. 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."**

72. 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."**

73. 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."

74. 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...."**

but excludes any payment in respect of expenses, money in lieu of notice and any payment to the worker otherwise than in his capacity as a worker (section 27(2)) ERA). The definition of wages in section 27 includes weekly pay.

75. Sec 25(3) ERA provides that no order can be made to pay or repay to a worker any amount in respect of a deduction or payment in so far as it appears to the tribunal that the respondent has already paid or repaid any such amount to the worker.

76. 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.

Breach of Contract

77. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled. If an employee is paid a payment in lieu of notice and there is no express term in the contract governing PILON, an employee is entitled to a payment equivalent to what they would have earned had they been allowed to work out their notice.

78. The purpose of damages is to put the claimant in the position they would have been in, had both parties performed their contractual obligations.

79. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gave Employment Tribunals the power to deal with breach of contract claims but the jurisdiction under this Order is limited in a number of ways. It applies only to employees bringing claims against their employer and only applies to breaches of contract which arise or are outstanding on the termination of employment. Therefore, the Employment Tribunal cannot deal with breaches occurring after the termination of employment.

Implied contractual obligations

80. One of the most fundamental terms of an employment contract is that an employer will pay the employee wages for work done. However, implicit in this is

that the employee will be ready and willing to perform his/her contractual duties unless there is express provision to the contrary in the contract.

Discussion and Conclusions

Unauthorised deduction from wages:

81. 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 a number of unauthorised deductions from his weekly salary. Weekly salary falls within the definition of wages.

82. I had to determine whether the respondent had made deductions from the claimant's wages. As I explained to the parties a deduction is defined in section 13(3) ERA and the issue is simply whether the worker received less than the amount properly payable on the relevant occasion. (**Morgan v West Glamorgan County Council** [1995] IRLR 68 EAT). Taking each of the alleged unauthorised deductions in turn:

Alleged Unpaid wages: 7 and 8 October 2021- processed on 15 October 2021

83. I found that the claimant did not work on 7 and 8 October 2021 and was on annual leave. I also found that the claimant was paid holiday pay for these days. I found that the claimant had worked only two shifts during the week ending 9 October 2021. The claimant had worked Sunday, 3 October, was on rest days from Monday 4 October to Wednesday 6 October 2021 (inclusive), was on "holiday" on Thursday, 7 October and Friday 8 October and returned to work on Saturday 9 October 2021 (60).

84. I conclude that what was properly payable under the claimant's contract for the week ending 9 October 2021 was the gross sum of £710. This was made up of two days holiday (£330), one Saturday shift (£180), one Sunday shift (£190) and two meal allowances (£10).

85. I agree with Mr Edwards that even if the claimant had taken holiday on one of the rest days rather than 7 and 8 October 2021, as I have found that the claimant did not work on 7 and 8 October 2021, what was properly payable for the week ending 9 October 2021 would still be the gross sum of £710.

86. The claimant's payslip for the week ending 9 October 2021 (which was processed on 15 October 2021) shows that the claimant was paid the gross sum of £710 (53). I therefore conclude that the claimant did not receive less than what was properly payable for the week ending 9 October 2021 and so the respondent did not make a deduction from his wages on 15 October 2021. This complaint is not well founded and is dismissed.

Alleged Unpaid wages: 5 November 2021-processed on 12 November 2021

87. The claimant admitted that he had refused to work his shift on 5 November 2021 but claimed that he was still entitled to be paid for this shift. It was not in dispute that he had not been paid for this shift in his weekly pay processed on 12

November 2021. have found that the claimant was able to work but not ready or willing to work on 5 November 2021.

88. The claimant was contractually obliged to be ready and willing to work and complete the work required by the respondent during his shift. As the claimant was not ready and willing to perform his contractual obligations on 5 November 2021, I conclude that he was not contractually entitled to pay for this shift.

89. The claimant referred in evidence to having refused to work on a previous occasion (24 September 2021) but had later been paid by the respondent for this shift. The respondent accepted that, as a gesture of good will, it had made this payment. The claimant did not provide me with any submissions that, because of this, he was now contractually entitled to pay despite refusing to work. Had such an argument been put by the claimant, I would conclude that there was no such implied term. This could not be deduced from the conduct of the parties, the circumstances of the claimant's refusal to work were different on 5 November 2021 from 24 September 2021. There was no evidence of any custom and practice to pay for shifts where the driver had refused (for any reason) to work or that it was necessary to imply such a term.

90. I therefore conclude that the respondent did not make an unauthorised deduction of wages and this complaint is dismissed.

Alleged unauthorised deductions from net wages: 1 October 2021, 8 October 2021 and 22 October 2021.

1 October 2021

91. I found that the claimant was entitled to salary arrears in the gross sum of £180 in his weekly pay for the week ending 25 September 2021, which were processed on 1 October 2021. I also found that, the claimant was paid by the respondent, in relation to these salary arrears, the gross sum of £180 (on 1 October 2021) and an advance of the estimated net of £180 (i.e. £150). I found this £150 net "advance" payment was paid directly to the claimant's bank account on 24 September 2021. I therefore conclude that the claimant was in effect paid twice for the salary arrears. However, to ensure the claimant was not paid more than he was entitled to, I found the respondent deducted £150 net payment to recover the advance now that the claimant had been paid his salary arrears of £180 gross via payroll.

92. I conclude that the claimant was entitled to salary arrears of £180 gross when his pay was processed on 1 October 2021 and he did, in fact, still received £180 gross despite the deduction of £150, because the deduction related to the recovery of the advance net payment made to him on 24 September 2021.

93. I conclude that there was no deduction in relation to the salary arrears payable on 1 October 2021 as the claimant received the £180 gross that was properly payable. There was no shortfall. I therefore conclude that the respondent did not make an unauthorised deduction of wages and this complaint is dismissed.

8 October 2021

94. I found that the claimant was entitled to salary arrears in the gross sum of £350 in his pay for the week ending 2 October 2021, which were processed on 8 October 2021. I also found that, the claimant was paid by the respondent, in relation to these salary arrears the gross sum of £350 (on 1 October 2021) and an advance of the estimated net of £350 (i.e. £280). I found this £280 advance net payment was paid directly to the claimant's bank account on 1 October 2021. I therefore conclude that the claimant was in effect paid twice for the salary arrears. However, to ensure the claimant was not paid more than he was entitled to, I found the respondent deducted the £280 advance net payment to recover the advance, now that the claimant had been paid his salary arrears of £350 gross via payroll.

95. I conclude that the claimant was entitled to salary arrears of £350 gross when his pay was processed on 8 October 2021 and he did, in fact, still received £350 gross despite the deduction of £280, because the deduction related to the recovery of the advance net payment made to him on 1 October 2021.

96. I conclude that there was no deduction in relation to the salary arrears payable on 8 October 2021 as the claimant received the £350 gross that was properly payable. There was no shortfall. I therefore conclude that the respondent did not make an unauthorised deduction of wages and this complaint is dismissed.

22 October 2021

97. The claimant claimed that £145 had been wrongly deducted from his wages for the week ending 16 October 2021, which were processed on 22 October 2021. The respondent accepted that the net sum of £145 had, in error, been deducted from the claimant's wages on 22 October 2021. I found that on 22 October 2021 the claimant was paid £900 subject to deductions of tax and employee national insurance payments of £209.58 and a deduction of £145. He received the net sum of £545.42 on 22 October 2021.

98. I conclude that the claimant was entitled to a net payment of £690.42 on 22 October 2021 but only received a net payment of £545.42. There was a shortfall of £150 net in his wages on 22 October 2021. There was no evidence of any provision of the claimant's contract or previous agreement in writing to the making of the deduction. I therefore conclude that the respondent made an unauthorised deduction of the net sum of £150 on 22 October 2021.

99. However, I found that the respondent had already paid the claimant the net sum of £150 that had been deducted. I found that this had been paid to the claimant on 29 October 2021 (67). In accordance with section 25(3) ERA, I therefore make no order for the respondent to pay the claimant any amount in respect of this deduction.

Breach of Contract - Notice Pay

100. The claimant was entitled to receive one week's notice of termination of employment. The claimant's period of notice would have started on 5 November 2021, when he received and read his termination letter, and ended on 12 November 2021. It was accepted that the respondent had paid the claimant the gross sum of £880 as a payment in lieu of one week's notice (which was paid to the claimant subject to deductions for tax and national insurance). The claimant argued that the

respondent had not paid him his full notice pay as he believed that he was entitled to £1200 gross for one week's notice.

101. There was no express term in the contract allowing the claimant to make a payment in lieu of notice. Therefore, the respondent, by making a payment in lieu of notice in this case, was breaching the contractual notice obligation by not allowing the claimant to work out his or her notice. In these circumstances, the claimant was entitled to damages for the breach of contract. The purpose of damages is to put the claimant in the position they would have been in had both parties performed their contractual obligations. The payment in lieu of notice that the claimant was entitled to was what he would have earned had he been allowed to work out his notice.

102. Damages should take account of pay and contractual benefits that the claimant would have received during his notice period i.e. one week. I found that if the claimant had been permitted to work his one week's notice, he would have been on three rest days and worked four shifts (between Tuesday, 9 November 2021 and Friday, 12 November 2021). I found that he would have earned the gross sum of £680 during his one week's notice.

103. Although damages are calculated on a net basis, since the claimant would be liable for tax on any outstanding notice relating to pay, I use the gross figure in the calculation. I conclude that the claimant was entitled to be paid damages equivalent to the gross sum of £680 (made up of 4 shifts x £165 (the applicable daily shift rate for a week day shift) plus 4 x meal allowances of £5 per day).

104. The claimant received the gross sum of £880 as a payment in lieu of notice, which is more than what he would have earned had he been allowed to work his notice. I therefore conclude that the respondent was not in breach of contract, and this complaint is dismissed.

Alleged Expenses

105. I had to determine whether the Tribunal had jurisdiction to consider the claimant's unauthorised deduction from wages claim in relation to expenses he said he had incurred collecting a letter from his former address, which turned out to be the hard copy of his termination letter.

106. The claimant alleged he had incurred expenses of £70.51 for fuel, £260 for loss of a working day and £50 for a meal). The claimant did not provide any evidence that he had incurred such expenses, or the amounts that he incurred. However, on the basis of the claimant's evidence, I found that if such expenses had been incurred, they would have been incurred after he had left the respondent's employment and would not have been incurred by the claimant in carrying out his employment. They were not sums payable in connection with his employment.

107. I had to determine whether this was a claim in respect of wages. Wages are defined in section 27(1) ERA and means any sum payable to the worker in connection with his employment. Section 27(2) ERA expressly excludes any payment in respect of expenses and any payment to the worker otherwise than in his capacity as a worker (section 27(2)) ERA. I therefore conclude that the alleged expenses are not wages. As this is not a claim in respect of wages, the Tribunal has no jurisdiction to consider the claimant's complaint. This claim is dismissed.

108. Had the claimant brought his complaint as a breach of contract claim, I would have still concluded that the Tribunal did not have jurisdiction to consider the claimant's complaint. Pursuant to The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the Tribunal is only permitted to consider breaches of contract which arise or are outstanding on the termination of employment. The expenses the claimant alleged that he had incurred, were alleged to have occurred post the end of his employment and so did not arise or were outstanding on the termination of employment.

Employment Judge McCarthy

Date: 8 November 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

9 November 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2400855/2022**

Name of case: **Mr D Nowaczyk** v **ARRA Distribution Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 9 November 2022

the calculation day in this case is: 10 November 2022

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office