EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Guice	**v**	**24/7 Plumbing & Gas (UK) Limited**

Heard at: Midlands (West) Employment Tribunal (partly remote)

On: 21 & 22 December 2022

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: Ms J Guice, parent

For the Respondent: Ms E Afriyie, employment consultant

JUDGMENT having been given orally on 22 December 2022 and written reasons having been requested by the respondent on 22 December 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

Reasons

Background and Issues

1. By a claim form dated 2 March 2022 the claimant brought complaints of unfair (constructive) dismissal and unlawful deduction from wages. The respondent entered a response denying all the claims.

2. This was a partly remote (hybrid) full merits hearing via CVP, with the claimant and his representative in the tribunal, and the Employment Judge, the respondent's representative and its witnesses joining by video. No party objected to the hearing being held in that format. Pursuant to Rule 46 of the Employment Tribunals Rules of Procedure 2013 I decided that it would be just and equitable to hold the hearing in that format.

3. At the start of the hearing, I clarified with the parties the issues in the case as follows:

    3.1 Did the respondent make unauthorised deductions from the claimant's wages by failing to pay to the claimant for his overtime work, and if so, how much was deducted?

    3.2 Was the claimant unfairly dismissed by the respondent? In particular:

        3.2.1 Was the respondent in a fundamental breach of contract entitling the claimant to resign and claim unfair dismissal?

        3.2.2 If so, did the claimant resign in response to the respondent's breach?

        3.2.3 Did the claimant affirm the contract before resigning?

    3.3 If it is found that the claimant was unfairly dismissed by the respondent, what remedy should the claimant be awarded for unfair dismissal?

4. The unlawful deduction from wages claim was run by the claimant both as a claim under section 13 of the Employment Rights Act 1996 ("**ERA**") and as a claim for breach of contract.

5. The claimant relied both on the express terms of his contract in relation to wages, normal working hours and overtime and the implied term of mutual trust and confidence for the purposes of his unfair (constructive) dismissal claim.

6. There was a delay in the start of the hearing because not all relevant documents had been sent to the Tribunal by the parties before the start of the hearing. I discussed with the parties a timetable for the hearing. Considering the volume of the pre-reading material and the number of witnesses the parties proposed to call, it was agreed that the hearing would be liability only, and if remedy issues become relevant a separate remedy hearing would be listed.

Evidence

7. I was referred to various documents in the bundle of 303 pages the parties introduced in evidence. The claimant submitted additional 10 documents which had not been included by the respondent in the bundle for the hearing. I accepted those additional documents in evidence. At the end of the hearing, the claimant also sent his schedule of loss. It was not necessary for me to consider it at the hearing. References to pages numbers in this judgment are references to the corresponding pages in the bundle.

8. Seven witness statements were submitted by the parties. For the claimant: the claimant's, Ms Karen Guice's, Ms Theresa Forbes', and Ms Lyndsey Horrocks'; and for the respondent: Mr Richard Brown's (the owner and the director of the respondent), Mrs Kerry Brown's (Mr Brown's wife, who also works for the respondent as Mr Brown's management assistant), and Mr Declan Whitmore's (a plumber who works for the respondent).

9. At the end only the claimant and Mr Brown were called and gave sworn evidence and were cross-examined. The respondent withdrew Mrs Brown's witness statement. Other witness statements were submitted as written statements for the Tribunal to consider and give such weight as it finds appropriate. None of those addition statements contain factual information relevant to the issues in the case.

10. At the end of the hearing, I gave an oral judgment finding for the claimant. I listed a remedy hearing and gave case management directions in preparation for the remedy hearing. These are recorded in the case management orders sent to the parties on 29 December 2022.

Fundings of Fact

11. The claimant joined the respondent, a firm providing plumbing and gas equipment services, as an "ad-hoc plumber" in 2018 on an hourly rate of £15. He was paid at that rate for his actual time worked, as recorded by the claimant in paper timesheets he was submitting to the respondent on a weekly basis.

12. On 1 January 2019, the respondent employed the claimant as a permanent employee. When the permanent position was discussed with the claimant, Mr Brown told the claimant that his rate of pay would be £10 per hour. That was agreed by the claimant. The claimant continued to submit his paper timesheets on a weekly basis recording his actual hours worked. No written contract or a statement of particulars of employment were given to the claimant at the start of his employment. The claimant was provided with a van. It was agreed that the claimant may use the van for reasonable personal use.

13. In late August 2019, Mr Brown informed the claimant that starting from 1 September 2019 his hourly rate would increase to £12. The claimant was given a written contract of employment, which he signed.

14. The relevant terms of the contract state:

> **HOURS OF WORK**
> Your normal hours of work are 40 per week, 8.00 am to 5.00 pm, Monday to Friday. Breaks will be paid and in line with Working Time Regulations. Your normal hours of work are not variable however, you may be required to work overtime, as necessitated by the needs of the business including weekends, on public holidays or at other times outside your normal hours of work.

REMUNERATION

Your salary is currently £ 24,960.00 per annum payable monthly on or around the 27th in arrears by BACS as detailed on your pay statement. We will ensure that you always receive no less than the National Minimum Wage/National Living Wage. In your first year of employment your salary will be proportionate to the amount of time left in the year.

Any overtime worked will be paid at the following rates of pay:

Monday to Friday	Basic
Saturday	xl.25
Sunday	x2
Public/Bank Holiday	x2 or time off in lieu*

* The date when the time off in lieu is taken is to be mutually agreed and must be taken within the same pay period.

If you are overpaid for any reason, the total amount of the overpayment will normally be deducted from your next payment but if this would cause hardship, arrangements may be made for the overpayment to be recovered over a longer period.

15. In July 2021, Mr Brown informed the claimant that from 1 July 2021 his hourly rate would increase to £12.50.

16. Between July 2021 and December 2021, the claimant attended a gas safety training course in his own free time. He paid for the course himself. He claimant asked the respondent whether the respondent would be prepared to fund the course. Mr Brown said that he would check with his accountants, however, at the end, he did not agree to fund the claimant's gas training.

17. On his normal working day, the claimant would start at 8am. He would drive from home to his first job allocated to him by the respondent via the respondent's electronic rostering system. His working day would last until 5pm, and often longer. The claimant rarely had a lunch break and usually ate his lunch when driving from one job to another. Jobs were normally rostered with 30 minutes intervals between the jobs for travel time. There were no lunch breaks included in the roster. Jobs often required more time to finish than what had been planned in the roster. On occasions, the claimant had to drive long distances to attend to allocated jobs. Returning from his last job, before going home, the claimant sometimes had to bring back to the respondent's lockup copper "tat" collected from the customers.

18. Throughout the claimant's employment the respondent paid the claimant his base salary based on normal working hours of 45 hours a week. That meant that the claimant was not paid overtime for any hours worked before 5pm. The claimant was not paid overtime for returning home from the last job after 5pm, even if the claimant had to bring copper "tat" to the respondent's lockup first. The claimant was only paid overtime for returning home from the last job after 5pm if the customer had paid the respondent for the claimant's travel time. Usually that was when the customer was located at a long distance from the respondent's office.

19. The claimant was submitting his paper timesheets stating actual hours worked. With the increase in his salary in July 2021, the claimant noticed that despite his hourly rate going up and him working long hours his take home pay remained below the level he was anticipating.

20. On 25 October 2021, the claimant sent a WhatsApp message to Mr Brown asking him to provide a breakdown of his pay and his recorded overtime hours. Mr Brown responded by saying that his wife had sent an email to the respondent's payroll department.

21. Upon consulting its external payroll department, the respondent discovered that the claimant's overtime rate had been calculated based on his normal working hours being 40 hours a week, hence the overtime rate was £12.50 per hour. However, the respondent treated the claimant's normal hours of work as 45 hours a week (8am to 5pm) and only paid overtime for hours in excess of 45 hours a week, i.e., for work after 5pm.

22. On 1 November 2021, the claimant was asked to come to a meeting with Mr and Mrs Brown. At the meeting the claimant was told that he had been paid at an incorrect overtime rate, and as a result there was a large overpayment made to him by the respondent. He was told that the correct rate was £11.11, being his annual salary of £26,000 / 52 week / 45 hours. Mr Brown said that the respondent would not be deducting money from the claimant's pay for the past overpayments. He also said that they were awaiting further information from the payroll, which should be available within the next two weeks and would be discussed at the next meeting on 25 November 2021. The claimant disputed that, stating that he had always been told by Mr Brown what his hourly rate was, and his current hourly rate was £12.50.

23. On 8 November 2021, the claimant wrote to the respondent asking to confirm the status of the 1st November meeting and requesting the minutes. He said that he was very concerned about the pay issue, which remained unresolved. He said that he wanted to have everything documented before considering his next step. Later the same day the claimant submitted a data subject access request, requesting, *inter alia*, data related to calculation of his pay, his paper weekly timesheets, electronic data in the respondent's time recording system, and his payslips ("**the DSAR**").

24. On 11 November 2021, the respondent received from its payroll department calculations of the claimant's pay based on 45 hours a week as normal working hours.

25. On the same day the respondent wrote to the claimant stating that the meeting on 1 November was "*a general catch up*" and no minutes had been taken at the meeting. The respondent said that as a result of the claimant's DSAR the meeting scheduled for 25 November had been cancelled. In a separate latter of the same date, the respondent asked the claimant to clarify the DSAR.

26. On 15 November 2021, the claimant was called into the office for an informal meeting with Mrs Brown. Mrs Brown presented the claimant with a sheet of paper, which contained a record of his working hours during the four weeks in October 2021. The hours were recorded as total hours and overtime. The overtime hours were calculated as hours over 45 hours a week. She asked the claimant to sign the sheet. The claimant first signed it, however, having then spoken with his adviser, he returned to the office a few minutes later and said that he disagreed with the calculations because his normal working hours were 40 hours a week. He asked for the sheet to be destroyed, which Mrs Brown did.

27. On 15 November 2021, Mr Brown wrote to the claimant referring to the meeting with Mrs Brown and stating that it was agreed that any overtime done in October would not be submitted or paid until the claimant's DSAR had been completed and asking the claimant to confirm that.

28. On 18 November 2021, the claimant responded reiterating his position that the sheet he had been asked to sign had incorrect calculations of his overtime because his normal working hours were 40 hours a week. He said that he did not wish the respondent to hold back the payment for his October overtime, which should be paid in full by adding 5 hours per week. The claimant also said that there was a mismatch between the hours recorded in his manual timesheets and the data in the respondent's time recording system, because the system only recorded data when a plumber was on a customer site.

29. On 23 November 2021, Mr Brown wrote to the claimant saying that it was too late to submit his overtime data in the November payroll because it had already been processed and closed.

30. On 24 November 2021, Mr Brown wrote to the claimant inviting the claimant to an informal meeting on 7 December 2021 to discuss the claimant's overtime concerns.

31. On 6 December 2021, Mr Brown wrote to the claimant saying that due to the nature of the information requested and the period of time covered by the request, the respondent required additional two months to answer the DSAR.

32. At the meeting on 7 December 2021, the claimant was presented with a timesheet similar to the timesheet he had been given at the meeting on 15 November 2021, recording his overtime hours for November on the basis of 45 hours' normal working week. The claimant refused to sign the timesheet and disputed the respondent's calculations of his overtime.

33. On 20 December 2021, the claimant received his pay statement for December. His overtime was calculated at £11.11 hourly rate. The claimant wrote to the respondent complaining about that. He referred the respondent to his contract, which states that his normal weekly hours of work are 40 hours, and the fact that he had been paid at £12.50 since July 2021. He asked the respondent to confirm whether the use of £11.11 rate was a mistake, and said that if it was not, he wished to raise a formal grievance.

34. On 10 January 2022, Mr Brown wrote to the claimant saying that in light of the ongoing pay dispute, the respondent would pay to the claimant the difference in the overtime rate in the January payroll and would continue to pay his overtime at £12.50 rate until all data concerning the claimant pay had been collected.

35. On 20 January 2022, the respondent's solicitors sent a letter to the claimant with respect to the DSAR and his ongoing pay dispute. The letter said that the respondent was satisfied that all payments that had been made to the claimant since the start of his employment in January 2019 had been made in accordance with his employment contract. However, if it was discovered that there had been any underpayments, the respondent would pay those, and any overpayments would "*also be recovered as per page two of your Contract of Employment*".

36. Around the same time, Mr Brown sent a letter to the claimant confirming that the respondent was prepared to honour the £12.50 overtime rate until the payroll data had been finalised. The letter stated that the outcome of that exercise would be to decide whether the claimant had been overpaid or underpaid.

37. On 21 January 2022, the claimant wrote to the respondent requesting a formal grievance meeting and setting out his grievance related to the calculation of his overtime hours and pay.

38. On Friday, 28 January 2022, Mr Brown wrote to the claimant inviting him to a grievance meeting on Monday, 31 January 2021 at 4pm.

39. On Sunday, 30 January 2022, at 9:27pm the claimant emailed the respondent saying that he had just returned from a weekend away with his family and found the invitation letter for the grievance meeting. He confirmed that he would be attending, but in light of the short notice, he wanted to take Monday off to prepare for the meeting. Mr Brown replied a half an hour later refusing the claimant's request for time off and stating that the claimant was expected in the office at 8am the following morning.

40. On 31 January 2021, the claimant wanted to take an hour lunch break to go and see his adviser to prepare for the grievance meeting. However, he telephoned by the respondent and told that he must immediately go to Birmingham city centre to attend a job.

41. The grievance meeting was held on 31 January 2021. The meeting was attended by the claimant, Declan Whitmore (as the claimant's companion), Mr Brown and Dawn Cheetham (a notetaker). The meeting was delayed by 29 minutes due to the claimant's late arrival caused by bad traffic on the way back to the office from his last job. Before the meeting the claimant had prepared a detailed written statement of his grievance, which he read out at the meeting. Mr Brown did not comment on the claimant's grievance. He

only intervened when the claimant wanted to raise the issue of the gas safety training course, by saying that the issue was not relevant to the claimant's grievance. When the claimant finished reading his statement, Mr Brown said: "*Is that it?*", "*OK, thanks for your time, thanks for bringing that up*". The claimant was asked to sign the notes, which he refused to do without first reviewing them at home.

42. On 2 February 2022, the claimant submitted his letter of resignation. In the letter he said that he was resigning with one month's notice because he felt that he had no other option in light of the respondent's conduct in not paying him in accordance with his contracted hours and the way the respondent handled his complaint.

43. On 4 February 2022, the respondent wrote back accepting the claimant's resignation and stating that his last day at work would be 2 March 2021. The respondent continued to pay the claimant until the end of his employment on the basis of 45 hours a week being normal hours of work.

44. There was further correspondence between the parties concerning the claimant's data subject access request and scheduling the grievance outcome meeting.

45. On 25 February 2022, the respondent held the grievance outcome meeting with the claimant, at which the respondent gave its decision to reject the claimant's grievance. In rejecting the claimant's grievance, the respondent stated:

> "*No breach of contract has been broken, your salary based on 9hrs a day mon-Fri 8am-5pm which is 45 hrs per week is correct, however your overtime rate has been based on a 40 hour week, as far as we could see in Dec your overtime rate was put through at the correct rate.*"

46. Following the meeting the claimant went off sick. On 28 February 2022, he was signed off work by his GP with "stress at work" from 25 February to 6 March 2022.

47. On 25 February 2022, the respondent wrote to the claimant inviting him to a disciplinary hearing on 2 March 2022 for unexplained absence, disruptive and unprofessional behaviour, and not speaking to Mr Whitmore before confirming him as a companion for the grievance outcome meeting on 14 February 2022 (which caused the meeting to be postponed). The claimant did not attend the disciplinary meeting.

The Law

Unlawful deduction from wages

48. Section 13 of the ERA states:

"*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 of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

49. "Wages" are defined in section 27 ERA. Section 27(1) provides that "wages" means "*any sums payable to the worker in connection with his employment*" and then sets out a non-exhaustive list of what is included. Overtime pay is included in the definition of wages (see *(Bruce and ors v Wiggins Teape (Stationery) Ltd* 1994 IRLR 536, EAT).

50. Section 13(3) ERA provides:

"*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*."

51. Therefore, a deduction is a complete or partial failure to pay what was properly payable on a particular occasion.

Unfair (constructive) dismissal

52. Section 95 of the ERA states:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if) –

[…]

(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

53. This is known as constructive dismissal.

54. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR put it as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

55. The component parts of a constructive dismissal which need to be considered are as follows:

    (i) A repudiatory or fundamental breach of the contract of employment by the employer.
    (ii) A termination of the contract by the employee because of that breach.
    (iii) The employee must not have lost the right to resign by affirming the contract after the breach. Delay resigning might indicate such affirmation.

56. The implied term of trust and confidence most authoritatively formulated by the House of Lords in *Malik and Mahmud v BCCI* [1997] ICR 606 as being an obligation that the employer shall not:

    "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

57. Where an employer breaches the implied term of trust and confidence, the breach is 'inevitably' fundamental — see *Morrow v Safeway Stores plc* 2002 IRLR 9, EAT.

58. It makes no difference to the question of whether or not there has been a fundamental breach that the employer did not intend to end the contract — see *Bliss v South East Thames Regional Health Authority* 1987 ICR 700, CA.

59. Similarly, the circumstances that induced the employer to act in breach of contract are irrelevant to the issue of whether a fundamental breach has occurred — see *Wadham Stringer Commercials (London) Ltd v Brown* 1983 IRLR 46, EAT.

60. The right to be paid correct wages is central to the employment relationship and therefore a deliberate failure to pay wages on the part of the employer will not only be a fundamental breach of express term of the contract, but also the implied term of trust and confidence.

Analysis and Conclusions

Credibility

61. Ms Afriyie argued that the claimant was not a credible witness, and his evidence were unreliable because he kept changing his story and would not even agree that hours between 8am and 5pm times 5 working days equate to 45 hours a week. She also drew my attention to the fact that the claimant included in his statement what he wanted Declan Whitmore to say in evidence despite Mr Whitmore being unwilling to give such evidence to the Tribunal. She said that in contrast Mr Brown was a reliable witness, who gave

consistent evidence and said that he did not know when he did not know the answer.

62. I reject her submissions. I found the claimant a credible witness, who gave consistent and plausible evidence. The fact that he did not wish to admit that on one reading of his contract his normal working hours equated to 45 hours a week is a simple matter of him not wishing to compromise his case that his normal hours of work were always 40 hours a week.

63. With respect to the claimant including in his witness statement what he claims Mr Whitmore was willing to say at the hearing before, on the claimant's case, the respondent intervened and told Mr Whitmore not to be a witness, this is the claimant's evidence, which he was cross-examined on. I found his answers clear, consistent and credible. In any event, Mr Whitmore's unmade statement included in the claimant's witness statement related to what happened at the grievance outcome meeting on 25 February 2022, and therefore is of marginal, if any, relevance to the issues in the case.

64. I have more doubts about the veracity and plausibility of the respondent's evidence. Mr Brown's witness statement appears to be almost a carbon copy of his wife's statement, with some paragraphs in his statement containing references to Mr Brown as a third person (e.g. "Richard and I" at [3], "he never called Richard" at [45], "in an email to Richard" at [60]). It also contains a great deal of wholly irrelevant evidence attacking the claimant's professionalism, conduct and performance.

65. In any event, this case does not turn on which of the conflicting evidence I should prefer. The documentary evidence are key in this case and they resolutely support the claimant's case.

Unlawful deduction from wages

66. It is no criticism of the claimant (he is a litigant in person ably supported by his mother, who has done a really good job representing him at the hearing), but it appears that the claimant has inadvertently overcomplicated his case by focusing too much on not having an hour for lunch and on his travel time from work. The latter will still be relevant for the remedy hearing, as it will need to be determined which of those return trips qualify as the claimant working.

67. His unauthorised deductions from wages claim essentially boils down to the question of what the claimant's normal working hours were: 40 hours a week, as he claims, or 45 hours a week, as maintained by the respondent.

68. Based on all the evidence in front of me, I find that the oral employment contract concluded between the parties in January 2019 was that with effect from 1 January 2019 the claimant's salary would be based on an hourly rate of £10/hour and his normal working hours would be 40 hours a week. The payslips at pp.220- 227 show his monthly salary as £1,733.33 and the normal overtime rate as £10/hour. £1,733.33 x 12 month / 52 weeks = £400 a week,

which if divided by 40 gives £10, the basic overtime rate. If his normal hours were £45 the basic overtime rate would have been £8.88. That is also consistent with the written contract signed by the parties in September 2019.

69. In September 2019, the claimant signed a contract with a new higher salary of £24,960. The contract states:

> "*Your normal hours of work are 40 per week, 8.00 am to 5.00 pm, Monday to Friday. Breaks will be paid and in line with Working Time Regulations. Your normal hours of work are not variable however, you may be required to work overtime, as necessitated by the needs of the business including weekends, on public holidays or at other times outside your normal hours of work.*
>
> *Any overtime worked will be paid at the following rates of pay:*
>
Monday to Friday	*Basic*
Saturday	*x 1.25*
Sunday	*x2*
Public/Bank Holiday	*x2 or time off in lieu**

70. The contract does not say that the hours of 8am to 5pm include a one hour paid lunch break. It limits paid breaks to those provided in the Working Time Regulations, i.e., 20 minutes when the daily working time is more than six hours. In contrast, Declan Whitmore's contract states: "*Your normal hours of work are 45 per week, 8.00 am to 5.00 pm, Monday to Friday with 1 hour paid lunch break*". (see claimant's additional documents – "Declan Whitmore contract" document).

71. I do not accept the respondent's evidence that there was a formal policy to provide for an hour paid lunch break, and that the claimant was told and accepted that. If that was the case, I would have expected that to be stated somewhere in a comprehensive suite of policies the respondent maintains (pages 50 – 102), or at least in some written communication to the respondent's employees.

72. In any event, even if there were a policy of some sort and even if the claimant were told that he could take a lunch break for up to an hour, this does not override the terms of his employment contract, so as to extend his normal hours to 45 hours. All that would have meant is that instead of a rest break of 20 minutes pursuant to the Working Time Regulations, the claimant would have been entitled to take up to an hour for lunch within his normal 8-hours' working day.

73. I also accept the claimant's evidence, supported by contemporaneous documents (pages 280 – 296), that the way his daily working schedule was structured, there were 30 minutes intervals between the jobs, sufficient only for travel time between the jobs, especially with the jobs often taking longer than the time allocated to them in the schedule. There were no hour-long lunch breaks scheduled by the respondent in the roster. In fact, the claimant never took an hour lunch break. The only time he tried to take an hour break to consult his adviser on 31 January 2021 in preparation for his grievance

meeting, he was told by the respondent that he had to attend to another job instead.

74. The claimant was paid overtime at £12/hour as the basic overtime rate (see payslips on pp.228-246). This is consistent with the claimant's normal working hours being 40 hours a week. £2,080 (monthly salary) x 12 months / 52 weeks = £480 a week, which if divided by 40 gives £12, but if divided by 45 gives £10.66. The claimant was never paid overtime at £10.66 basic rate.

75. This is also consistent with the claimant's evidence that he was told by Mr Brown in August 2019 that his new rate would be £12/hour. I accept his evidence on this. I reject Mr Brown's evidence that on that occasion he told the claimant his new annual salary and not the new hourly rate. Unlike the claimant, Mr Brown could not remember when the conversation took place, where, or who was present. He could not even remember the annual salary figure he told the claimant, without first checking it in the documents in the bundle.

76. On 1 July 2021, the claimant's annual salary was increased to £26,000. He did not sign any agreement to vary his normal working hours. In line with the increase in his base salary, his basic overtime rate was also increased to £12.5 (see payslip on p248).

77. Again, a simple calculation of his new base monthly salary £2,166.66 x 12 months / 52 weeks gives £500 a week, which if divided by 40 gives the basic overtime rate of £12.50, but if divided by 45 gives the basic overtime rate of £11.11. This shows that his normal working hours were always treated by the respondent as 40 and not 45 a week.

78. The claimant's contract states that "*normal hours of work are 40 per week, 8am to 5pm, Monday to Friday*", and therefore on one reading this may suggest there is an inconsistency, as 8am to 5pm, Mon to Fri gives 45 hours, and not 40 hours. However, there is an alternative possible reading. The normal hours of work are 40 hours per week (as stated in the contract), which lie between 8am to 5pm, giving the employee the option to start an hour later, or finish an hour earlier, or take an hour break from work within that time window (in addition to the 20 minutes break under the Working Time Regulations). However, if the employee worked from 8am to 5pm without taking an hour break, one hour of his work in that period must be counted as overtime.

79. Mr Brown in cross-examination said that the reference to 40 hours was a mistake and a typo. That was the first time the respondent has made such an admission. It appears it never told the claimant that there was a mistake in his contract.

80. In any event, even accepting that Mr Brown genuinely thought that the reference to 40 hours was a typo, this does not make it an invalid term of the contract. It is a contractual term, and it is not in the gift of one party to decide

which terms are correct and which are mistakes and typos. The claimant clearly did not think it was a mistake or a typo.

81. If the respondent thought there was a mistake in the written contract, at the term did not reflect the parties' true agreement, the proper cause of action for the respondent would have been either to seek to renegotiate the term with the claimant or apply to a court for an order of rectification. The respondent has not done either. It did not even raise mistake as a defence in these proceedings.

82. Instead, it sought to resolve the problem it had by asking the claimant to sign the overtime calculations sheets on 15 November 2021 and again on 7 December 2021, showing overtime calculations based on 45 hours a week as normal working hours, no doubt, to use the claimant's acceptance of such calculations as a proof of the contracted normal hours and/or as the claimant's agreement in writing to the respondent's deductions from his overtime pay.

83. Finally, it is the respondent's drafted contract, as was accepted by Mr Brown in cross-examination. To the extent something has gone wrong with the drafting pursuant to the contra *proferentem doctrine* of contractual interpretation, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.

84. On that basis, I conclude that the claimant's contract shall be interpreted as saying that his normal hours of work are 40 per week, and the reference to "*8am to 5pm, Monday to Friday*" shall be read down, to the extent inconsistent with the 40 hours per week provision.

85. Therefore, I find that the claimant's normal working hours during the entire period of his employment with the respondent was 40 hours a week, which translates to 8 hours a day. This means that pursuant to the terms of his contract of employment the claimant was entitled to be paid for any extra hours worked over 40 hours at the relevant overtime rate specified in his contract.

86. The claimant never authorised any deductions from his overtime pay. The respondent tried to get the claimant to sign off on his overtime pay calculated on the 45 hour a week basis on 15 November 2021 and again on 7 December 2021. However, the claimant clearly did not accept that. He, therefore, never signify in writing his agreement or consent to the respondent's making deductions from his overtime pay.

87. It follows, that by not paying the claimant his overtime in full over 40 hours a week, the respondent has made unauthorised deductions from the claimant's wages. Failure to pay the correct amount of overtime pay was also a breach of contract by the respondent.

88. Accordingly, the respondent is liable to compensate the claimant for unauthorised deduction, and in the alternative pay damages for breach of contract. The exact amount will be determined by the Tribunal at a remedy hearing, if not agreed by the parties.

Unfair (constructive) dismissal

89. Based on the evidence in front of me I find that the respondent:
    a. having discovered that the claimant had been paid overtime based on the hourly rate corresponding to his normal working hours as being 40 hours a week, and
    b. having realised that it had failed to pay to the claimant the correct overtime for hours worked in excess of 40 hours a week going back to the start of his employment,

    instead of correcting the mistake and paying the claimant the sums due for his past overtime or trying to negotiate in good faith an acceptable solution with the claimant, it unilaterally attempted to change the claimant's contracted hours and the overtime rate to match those with the respondent's view of the claimant's normal hours of work as being 45 hours a week.

90. The respondent knew that its view that the claimant's normal working hours were 45 hours a week was contrary to the express term of the claimant's contract. The respondent tried to get around the problem it had by asking the claimant on 15 November 2021 to sign the spreadsheet showing its overtime calculations based on 45 hours a week being normal working hours. The respondent never before asked the claimant to sign such a document. Clearly it was an attempt to make the claimant to agree in writing to the calculations which show that his normal hours were 45 hours a week, with a view to then use that document to resist the claimant's arguments that his normal working hours were 40 hours a week. That move by the respondent was conduct that was likely to seriously damage trust and confidence in the relationship between the parties. The respondent then repeated that attempt on 7 December 2021 thus further undermining the relationship of trust and confidence.

91. Even if the respondent might have operated under misapprehension that the claimant's normal working hours were 45 hours a week, in late October – early November 2021 it would have become clear to the respondent that the claimant's contracted working hours were in fact 40 hours a week, as recorded in his contract.

92. Therefore, even if one were to be generous to the respondent and consider that up until early November 2021 the respondent's breach of contract in not paying the claimant the correct overtime was inadvertent (which in law does not make it less of a breach), the respondent's continuing failure to pay the claimant correct overtime after November 2021, and indeed reducing his overtime rate to £11.11, was a deliberate breach of the claimant's contract.

93. The respondent cannot escape liability by blaming the payroll company. The payroll company was acting on the respondent's instructions as an agent of the respondent, for which actions the respondent is liable as the principal vis-à-vis the claimant. Even if the payroll company had not followed the respondent's instructions when reducing the overtime rate to £11.11 (for which no evidence was presented by the respondent) that would be a matter between the respondent and the payroll company, and not a defence for the respondent's failure to pay the correct wages to the claimant. In any event, the respondent always maintained its position that the claimant was not entitled to overtime pay for hours before he worked 45 hours a week.

94. The deliberate non-payments by the respondent of the claimant's correct wages was clearly a fundamental breach of the express term of the contract (Hours of Work and Remuneration clauses).

95. It was also a breach of the implied term of trust and confidence. This is also evidenced by the respondent's subsequent conduct of attempting to force the change in normal weekly hours upon the claimant in a non-transparent way by asking him to sign incorrectly calculated overtime sheets.

96. I reject Ms Afriyie's submission that the respondent was simply "rectifying a mistake", and therefore this could not have been a fundamental breach of contract. I asked Ms Afriyie to point to me any authority which suggests that a party to a contract can unilaterally rectify what it considers to be a mistake in the contract. Unsurprisingly, she did not have any she could refer me to. As I stated earlier, even if the respondent genuinely believed that the reference to 40 hours was a mistake, it did not make it less of a binding contractual obligation on the respondent to pay the claimant in accordance with the agreed contract terms.

97. The respondent's subsequent steps only aggravated the situation. Despite the claimant clearly indicating his disagreement with the purported change to his normal working hours and overtime pay basic rate, the respondent went ahead and made the change. The claimant's overtime for November was paid at the wrong rate.

98. When on 20 December 2021 the claimant asked for a clarification whether it was deliberate or a mistake, the respondent, on the one hand agreed to pay back the difference, but on the other hand, chose to escalate the matter by sending a solicitors' letter making a veiled threat that it could come after the claimant for the past overpayment of overtime. That was reiterated in the undated letter from Mr Brown to the claimant in response to the claimant's email of 20 December 2021. All that was despite the respondent earlier promising to the claimant that there would be no deductions with respect to the past overtime payments.

99. Furthermore, the respondent continued to pay the claimant's overtime based on 45 hours a week as the claimant's normal working hours, when it clearly knew that it was a wrong basis to calculate hours of the claimant's overtime. Therefore, I do not accept Ms Afriyie's submission that the claimant was no

worse off. He continued to be underpaid by the respondent not recognising the 9th hour of his work as overtime.

100. The claimant's sought to get to the bottom of it by asking various information through the DSAR, but the respondent said that it would take it three months to gather the information. That made the claimant understandably more concerned that the matter would not be resolved any time soon.

101. Finally, the way the respondent approached and handled the claimant's grievance did not demonstrate that it was genuinely trying to resolve the matter. Mr Brown's conduct at the grievance meeting was essentially the last straw for the claimant.

102. The claimant resigned because of the respondent's fundamental breach of not paying him the correct wages and not showing the willingness to resolve the matter. That is clearly stated in his resignation letter. His oral evidence supported that. He lost faith in the respondent because of the way the respondent approached the matter and refused to accept that the claimant had been underpaid for his overtime.

103. I do not accept Ms Afriyie's submission that the claimant resigned because he felt upset with respondent not supporting him financially to undertake the gas training. Although he might have been upset about that it was not the reason for his resignation. His evidence, which I accept, is that he never intended to resign because of that, and he was relying on income from his work for the respondent to repay the loan he took for the gas training course. Furthermore, the gas course finished in December 2020, over year before the claimant's resignation.

104. The claimant never affirmed the breach. He did not know that he was being underpaid until October/November 2021. His first suspicions started to arise after July 2021 when he did not see any noticeable increase in his take home pay despite his new higher hourly rate and him continuingly working more than his normal 40 hours a week. He trusted the respondent to pay his wages at the right rate and in accordance with his contractual terms. He raised the issue with the respondent in late October 2021. He refused to sign the respondent's overtime calculations based on the wrong normal working hours figure on 15 November and 7 December 2021. He raised a formal grievance about his pay shortly after that. He sought further information by way the DSAR from the respondent.

105. Essentially, he continued to work under protest waiting for the matter to be resolved until he has finally lost the confidence that it would ever happen, given the respondent's conduct in the matter. Therefore, I do not accept that the gap between November 2021 and his resignation on 2 February 2022 can be said to show that the claimant has affirmed the contract by not resigning earlier. On the contrary, he was protesting the respondent's actions all along and insisting on his contract to be respected by the respondent. It was the

respondent's conduct of not being straight and forthcoming with the information and not dealing with the matter promptly that resulted in the delay.

106. The claimant resigned before awaiting the outcome of his grievance. However, by that time the respondent was in a repudiatory breach of the claimant's contract, and in law the claimant was entitled to act upon that breach without giving the respondent a chance to remedy it. In any event, the respondent had no intention of remedying the breach, as can be seen from the outcome of the claimant's grievance.

107. Therefore, I conclude that the claimant was constructively dismissed by the respondent.

108. Under s.98 ERA it is for the employer to show what the reason, or if more than one, the principal reason, for dismissal was, and that it was a potentially fair reason under section 98(2). If the employer fails to show what the reason for dismissal was, or if the reason for dismissal is not a potentially fair reason, the dismissal is unfair.

109. The respondent did not contend that it had dismissed the claimant for a potentially fair reason. It follows that the dismissal was unfair, and the respondent must pay compensation to the claimant for the unfairness of the dismissal to be determined at a remedy hearing, if not agreed by the parties.

Employment Judge Klimov

11 January 2023