EMPLOYMENT TRIBUNALS

Claimant: Mr L Conway

Respondent: Equans Fabricom UK Limited

Heard at: Teesside **On:** 17, 18, 19, 20 and 21 April 2023

Before: Employment Judge Loy

REPRESENTATION:

Claimant: In person
Respondent: Mr R Quickfall of Counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's claim for constructive unfair dismissal contrary to sections 94 and 98 Employment Rights Act 1996 is not well-founded and fails.

2. The claimant's claim for breach of contract and/or unlawful deduction from wages for unpaid entitlement to Offshore Allowance is not well-founded and fails.

3. The claimant's claim for unpaid holiday pay is not well-founded and fails.

4. The respondent's counterclaim for repayment of an overpayment of Offshore Allowance in the sum of £10,056.85 is well-founded and succeeds.

5. The claimant shall pay to the respondent the sum of £10,056.85.

REASONS

Introduction

1. By a claim form presented on 3 July 2022, the claimant complains of constructive unfair dismissal, unlawful deduction from wages/breach of contract and a failure to pay unused accrued holiday pay.

2. The respondent denied all liability to the claimant.

3. The respondent also made a contract claim against the claimant for an overpayment of Offshore Allowance to which it contended the claimant was not entitled.

Procedure and evidence

4. The Tribunal had before it an agreed bundle of documents comprising 537 pages. The Tribunal was also provided with enlarged and coloured copies of pages 418 to 420 due to the small font size of the of the copies in the main bundle. References in this judgment to page numbers are references to page numbers in the bundle.

5. The Tribunal also had a witness statement bundle comprising 50 pages to which was added on application by the respondent a second statement for Mr Dearing which was numbered pages 34A to 34M. References in this judgement to pages in the witness statement bundle are expressly referred to as search to avoid confusion with reference to the pages in the main bundle.

6. The Tribunal heard from the following witnesses:

   (a) The claimant, who produced the written statement at pages 2 to 10 of the witness statement bundle and who was cross-examined by Mr Quickfall;

   (b) Mr Mike McCabe, formerly Head of Renewables and the claimant's former line manager, who produced the written statement at pages 11- 15 of the witness statement bundle and who was cross-examined by Mr Quickfall;

   (c) Mr Craig Ward, who worked as a QA Engineer at the time relevant to these proceedings who produced the written statement at pages 16- 18 of the witness statement bundle and who was cross-examined by Mr Quickfall;

   (d) Mr Sam Dearing, the respondent's HR Director, who produced the two written statements at pages 19 to 34 and at 34A to 34M of the witness statement bundle and who was cross-examined by Mr Conway;

   (e) Mr Peter Clouston, the respondent's Chief Operating Officer at the time relevant to these proceedings, who produced the written statement at pages 35 - 42 of the witness statement bundle and who was cross-examined by Mr Conway;

   (f) Mr Scott Murtaugh, the respondent's Finance Director, who produced the written statement at pages 43 – 46 of the witness statement bundle and who was cross-examined by Mr Conway; and

(g) Mr Kevin Copley, the respondent's Health Safety Environment and Quality Director, who produced the written statement at pages 47-50 of the witness statement bundle and who was cross-examined by Mr Conway.

7. The claimant also produced a character reference in the form of a letter from Mr Liam Scott which is at page 434.

The Issues

8. The issues were identified at a preliminary hearing on 17 November 2022 before Employment Judge Sweeney. The issues so identified are set out in the written record of that preliminary hearing (pages 114-125). Specifically, the issues to be determined at the final hearing are set out at the internally numbered paragraphs 32 to 47 of the written record (pages 123-125). They are as follows:

Issue 1: The unlawful deduction claim

8.1. Was the total amount of wages paid on 25 March 2022 less than the total amount of the wages properly payable to the claimant on that occasion such that the amount of the deficiency must be treated for the purposes of Part 1 Employment Rights Act 1996 ("ERA") as a deduction from the claimant's wages on that occasion? The amount of the deduction was £9,513.15 [amended from £9,750 in Employment Judge Sweeney's Case Management Summary].

8.2. The respondent accepts that it did not pay the full amount of wages outstanding on 25 March 2022. The respondent says that it was lawfully entitled to make a deduction from the claimant's wages because of an overpayment of Offshore Allowance in the sum of £19,570 that had been made to the claimant during the course of the 2021 campaign. The respondent deducted from the claimant's final salary the sum of £9,513.15 in respect of overpaid Offshore Allowance leaving a balance of overpaid Offshore Allowance of £10,056.85 (i.e. £19,570 less £9.513.15 equals £10,056.35).

8.3. If so, was the deduction required or authorised to be made by virtue of a relevant provision of the claimant's contract of employment (within the meaning of section 13 (2) ERA?

8.4. This will require the Tribunal to determine the contractual entitlement of the claimant to be paid an Offshore Allowance (see section 4.1(a) of the respondent's case management agenda sent on 14 November 2022).

OR

8.5. Was the purpose of the deduction the reimbursement of the employer in respect of an overpayment of wages made by the employer to the worker, such that by virtue of section 14 ERA 1996, section 13 of that Act does not apply to the deduction? In other words: was this an excepted deduction such that section 13 ERA has not been contravened?

Issue 2: The holiday pay claim

8.6. What was the claimant's leave year?

8.7. How many days annual leave was the claimant is entitled to?

8.8. How many days leave had accrued by 18 March 2022?

8.9. How many days leave had the claimant taken?

8.10. How many days accrued leave remains untaken?

8.11. How much is claimed?

Issue 3: The claim for notice pay

8.12. Was the claimant paid for his four weeks' notice that he worked?

8.13. Was the claimant in repudiatory breach of contract?

NOTE: Upon clarification of the issues with the parties at the start of Day 2 of the hearing, the claimant accepted that he gave 4 weeks' notice of the termination of his employment when he resigned on 21 February 2022 all of which he worked and was paid for between 21 February 2022 and 21 March 2022. No claim for notice payment was therefore being made as is also confirmed by paragraphs 39 and 41 of the claimant's witness statement.

Issue 4: The claim for unfair dismissal

Was the claimant dismissed or did he resign?

8.13.1. Did the respondent, without reasonable or proper cause, behave in a way that was calculated or likely to destroy or seriously damage the relationship of confidence and trust on the basis set out in paragraphs 9 to 11 below?

8.13.2. If the respondent did so conduct itself in any or all of the above ways, did it repudiate the claimant's contract of employment such that the claimant was entitled to terminate the contract without notice?

8.13.3. What the repudiatory breach at least a substantial part of the claimant's reason for resigning?

8.13.4. Did the claimant affirm the contract before resigning?

If the claimant was dismissed:

8.13.5. what was the reason or principal reason for dismissal – that is, what was the reason for the breach of contract?

8.13.6. Was it a potentially fair reason? The respondent relies on conduct and/or some other substantial reason.

8.13.7. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

If the claimant was unfairly constructively dismissed:

8.13.8. Did the claimant unreasonably fail to comply with any provision of the ACAS code of Practice on discipline and grievances?

8.13.9. What adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? See: **Polkey v AE Dayton Services Ltd** [1987] UKHL 8; and paragraph 54 of **Software 2000 Ltd v Andrews** [2007] ICR 285.

8.13.10. Would it be just and equitable to reduce the amount of the claimant's basic award because of any conduct before the dismissal, pursuant to ERA section 122 (2); and, if so, to what extent?

8.13.11. Did the claimant by any action cause or contribute to his dismissal to any extent; and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA section 123 (6)?

Issue 5: The employer's contract claim

8.13.12. Was the claimant contractually entitled to payment of all or any of the amount claimed by the claimant in respect of Offshore Allowance, namely £19,570?

8.13.13. Can the respondent show that the claimant was in breach of contract by claiming payments for all or any of the Offshore Allowance payments that go to make up that amount?

8.13.14. Were any of the payments made by the respondent to the claimant an overpayment within the meaning of clause 15 of the claimant's contract of employment?

The conduct by the employer that the claimant relies upon to establish that he was constructively dismissed by the respondent

9. The claimant relies upon the conduct set out in paragraphs 3-11 of Employment Judge Sweeney's case Management summary of 17 November 2022 (pages 119 – 126). The claimant relies upon the following matters in support of his contention that the respondent breached the implied term of mutual trust and confidence in his contract of employment, which breach the claimant says he accepted by resigning on 21 February 2022. The Tribunal has also had regard to the greater detail contained in the claim form when considering the issue of the claimant's alleged constructive dismissal. The following conduct is relied upon by the claimant's:

10. **The first meeting where the matters relevant to unfair dismissal claims start**

10.1. In a meeting with Peter Clouston (Chief Operating Officer) and Sam Dearing (HR Director), in November/December 2021, the claimant was told by Mr Clouston that he would not be getting a bonus. Mr Clouston is then alleged to have changed his mind and said that he will indeed receive a bonus. Accordingly to the claimant Mr Clouston then said, "*we will have to look at the money that you are earning though as you are being paid a lot of money, in fact more than the CEO".*

10.2. In January 2022, the claimant received an email from Mr Dearing that he was being investigated for bringing the company into disrepute regarding some negative comments about the company following an internal management course held at Grimsby.

10.3. When the claimant went to the Middlesbrough office on 3 February 2022, Mr Clouston was aggressive and furious about the allegations wanting to know the claimant's side of the story, which he gave. The claimant says that Mr Clouston and Mr Dearing accepted his explanation, saying that there will be nothing further.

10.4. Mr Clouston and Mr Dearing then said they wanted to speak to the claimant about *"the earnings for the project"* and he went to get Mike McCabe, the claimant's line manager. They sat in a meeting room for about five hours during which Mr Clouston went through the claimant's timesheets. Mr Clouston and Mr Dearing raised issues regarding Lodge Money, Subsistence and hours that were being worked.

10.5. Mr Clouston asked the claimant and Mr McCabe to look at staff hours with a view to changing these going forward, insisting that no one could work more than 13 hours per day and no more than 12 days consecutively. Mr Clouston asked about staff working a 16-5 rotation, where staff were being paid basic pay for three days of their five days off that were week days. The claimant and Mr McCabe were challenged to come up with a new rota and plan to incorporate these changes.

10.6. Mr Clouston queried the Offshore Allowance payment of £10 per hour for every hour worked on a "working offshore day" as opposed to a non-working day. Mr Clouston questioned the "weather day" payment, maintaining that staff should not work overtime on "a weather day".

10.7. Mr Clouston and Mr Dearing projected some spreadsheets (prepared by Mr Scott Murtagh, Finance Director) onto a screen showing the claimants overtime sheets for the year. The spreadsheets showed some days where the claimant had apparently worked 16 hours, some where he had worked 21 hours and Mr Clouston asked for an explanation. The claimant said that he did not know where the information had come from as he had never worked 16 or 21 hours in a day.

10.8. The spreadsheets contained inaccurate information and formula, which was acknowledged by Mr Dearing, who changed the formula resulting in the sheet now showing 14 hours, the actual hours worked. Mr Clouston also suggested that the claimant had claimed offshore money on some weather days

(highlighted in blue). The claimant and Mr McCabe provided an explanation that (owing to the possibility that a weather day could be made up of two independent shifts) what was colour coded as a weather day could have been a working day and that they would need to go through all "compensation events" in the contract to get a true picture. The claimant and Mr McCabe sent information the following day and heard no more about the matter.

10.9. The claimant says that after this meeting it was clear that the mutual trust and confidence had gone.

11. **The second meeting**

11.1. There was a further meeting 1 week later. The date is not stated but at today's hearing the claimant confirmed that it was on 10 February 2022 **[in fact 17 February 2022]**. This was supposed to be a discussion of the actions "from each side" following the first meeting and "to get a resolve and a route forward" regarding the working hours. The claimant says that "from our side… we had reduced everybody's hours to 13 hours so as not to exceed the working time directive…" However, before Mr McCabe was able to explain, Mr Clouston abruptly said they had a mandate coming from Belgium, which is what the claimant refers to as the "non-negotiable mandate".

11.2. The claimant says this was sent out following that meeting, "changing the terms and conditions of my employment to such an extent that I felt I had no choice but to leave." The claimant sets out in 11 bullet points in his Details of Claim, what the mandate said.

11.3. Following the issue of the mandate, Mr McCabe met with the full board of directors. He reported to the claimant after this that they "had got a resolve" under which management were happy for them to work overtime and travel in work time but not exceed the working time directive but insinuated that the project could be carried out more efficiently.

11.4. The claimant says that the following Monday he met with Mr McCabe to say that, as his mental health was suffering the stress and anxiety was too much for him and he felt he had no choice but to resign. He agreed with Mr McCabe to work his four weeks' notice of resignation and would work the 4 days' holiday he was due to help out the company get the 2022 campaign started. Shortly after this, Mr McCabe also resigned.

11.5. On 21 February 2022, the claimant gave four weeks' written notice of resignation. His last day was 18 March 2022. His overtime was signed off by Mr Damon White, Head of Renewables.

Factual findings

Background

12. The respondent is a renewables company within a broader range of Equans companies. The claimant, Mr McCabe and Mr Ward, were at the material time all employees of the respondent working on the management of the Greater

Gabbard Grout Connection Remediation Project ("the GG Project"). This was an offshore project managed by the respondent onshore from the port of Lowestoft in Suffolk.

13. The dispute between the parties centred around the precise scope of the terms and conditions of employment that had been agreed between the claimant and the respondent in respect of the claimant's work as a directly employed member of the respondent's workforce on the GG at Project from 2019 until his employment terminated in March 2022. In particular, there was a dispute about the claimant's contractual entitlement to Offshore Allowance. Offshore Allowance is an allowance that the respondent pays to certain of its workers as part of their remuneration package in certain circumstances.

14. The dispute about the claimant's entitlement to Offshore Allowance gave rise directly to the claim by the claimant for unpaid Offshore Allowance; and the way in which the respondent went about addressing the claimant's entitlement to Offshore Allowance as well as other allowances and payments lay at the heart of the claimant's decision to resign his employment in circumstances in which he says that he was entitled to treat himself as having been dismissed.

15. As we refer to in more detail below, a dispute arose about the level of pay that the claimant had received during the 2021 campaign. That dispute had many facets including: the overall level of working hours apparently being undertaken by the claimant (and others) which caused the respondent to be concerned that it had been in ongoing breach of the Working Time Regulations 1998; the amounts claimed by the claimant for overtime payments (including on weather days) and the amounts claimed by the claimant by way of Offshore Allowance (again including weather days).

16. The respondent's commercial customer for the GG project was SSE, an energy company who owned and operated the Greater Gabbard offshore wind farm. A commercial agreement between the respondent and SSE, referred to in these proceedings as "the bid document", regulated the commercial terms on a business to business basis.

17. As part of the project, the respondent subcontracted certain offshore maintenance and remedial work to independent contract workers. The claimant had at earlier stages of his relationship with the company been both an independent contract worker and directly employed by the respondent. At all times material to these proceedings, the claimant was directly employed by the respondent.

18. The respondent's Head Office was at Immingham, near Grimsby in Lincolnshire. Mr Clouston, the Chief Operating Officer, and Mr Dearing, the HR Director, were both based at Immingham. The respondent also had an office at Middlesbrough in Teesside at which the claimant and Mr McCabe were based during the winter months when the offshore remediation work could not be undertaken from Lowestoft because of adverse weather conditions.

19. The GG Project was carried out during annual campaigns between 2017 and 2022. During those years the respondent provided its operational services

between the months of March and October. The project had a ramp up and a ramp down period at the start and end of the operational months. During 2020 the GG project was non-operational because of covid-19.

The written contractual documents relating to the claimant's employment

20. The claimant was an experienced and skilled individual. His period of employment relevant to these proceedings commenced on 1 April 2019 when Mr Craig Welford was the Managing Director of the respondent. The claimant was initially directly employed by the respondent as a Senior Construction Manager. On 6 January 2020, the claimant was promoted to Project Manager. Upon his promotion the claimant's annual base salary was increased to £69,500. Mr Welford had left the company before these proceedings began.

21. It follows that the terms and conditions of employment upon which the claimant was originally employed were agreed at a time when Mr Welford, and not Mr Clouston, was in operational charge of the respondent and the GG Project. This is material to this matter since it is the claimant's case that his terms and conditions of employment (including his entitlement to Offshore Allowance) were agreed by Mr Welford in 2019. It was not disputed that Mr Welford would at that time have had both actual and ostensible authority to enter into contracts (including contracts of employment and their terms and conditions) on behalf of the respondent.

22. The claimant's written contract of employment and the covering letter accompanying it are at pages 165-187. The contract of employment is a comprehensive document as one might expect for an employee whose starting salary was £64,000 per annum.

23. The written contract of employment runs to some 29 main clauses. It includes some relatively onerous provisions such as post-employment restrictive covenants.

24. The copy of the contract of employment in the bundle is unsigned. The signature sheet to the written contract envisages that the contract was to be signed by the claimant, Mr Welford and Mr Richard Webster who are all identified on the signature sheet as the Chief Executive Officer of the respondent

25. The covering letter refers to the claimant's eligibility to receive the following allowances:

    - Inconvenience allowance at a rate of £25.00 per day
    - Weekly Accommodation Allowance at a rate of £282.59 per week
    - Offshore Allowance at a rate of £10 per hour

26. The covering letter was sent by an HR Advisor, Miss Abbie Kitson, and an HR Assistant, Miss Leila Davidson. It refers to the claimant's eligibility to participate in a Bonus Scheme. The Bonus Scheme is stated to be non-contractual and to be "as agreed on an annual basis." The claimant's is also told that the Bonus Scheme is not guaranteed and may be made subject to the successful achievement of pre-set personal and/or business targets being achieved.

Although there is no claim in these proceedings for a bonus payment, the alleged background facts to the claim for constructive dismissal include the way in which the claimant says he was treated in relation to his eligibility for a bonus. If Neither the covering letter nor the written contract of employment describe the circumstances in which Offshore Allowance would be paid either to the claimant or to anyone else.

27. The contract of employment provides for other allowances and benefits over and above those referred to in the covering letter. Clause 6.5 and 6.6 provide that:

> "*6.5 You will be entitled to receive remuneration for any hours worked over your normal contracted hours at such rates as the Company may specify from time to time. This provision of overtime will only usually be available on major projects, and must have the pre-approval of your Business Unit Director. The decision to allow time will be at the sole discretion of your Business Unit Director.*
>
> *6.6 In exceptional circumstances the Company may pay you discretionary payments or bonuses. Under no circumstances will these be considered contractual entitlement."*

28. Clauses 6.7 to 6.9 reiterates the claimant's entitlement to a non-contractual bonus at the company's absolute discretion.

29. Clause 7 addresses Hours of Work. In so far as is material to these proceedings, it provides as follows:

> *"7.1 The standard working full time hours are 39 per week. Your hours are flexible dependent upon Project requirements and are exclusive of a half hour unpaid lunch break each day. You will be expected to work such hours as are reasonably necessary to fulfil the duties and responsibilities of the post.*
>
> *7.2 You acknowledge that the limit in Regulation 4(1) of The Working Time Regulations 1998 do not apply to you, and accordingly you agree that your working time (including overtime) may exceed an average of 48 hours for each seven day period in the Reference Period whenever necessary for the proper discharge your duties or in any event as may be required by the Company. You shall be entitled to withdraw such agreement by giving three months' prior written notice to the Company.*
>
> *…*
>
> *7.4 The nature of our business means that you may be required to work such additional hours as the Company may reasonably require from time to time.*
>
> *7.5 Where necessary in accordance with the needs of the business and after consultation the Company is entitled to vary your days or hours of work and/or introduce new or vary existing work patterns.*

30. Clause 14 of the contract of employment is in the following terms:

Deductions from Pay

> *"14.1 Sums owed by you to the Company's (for example outstanding travel advances or other advances on expenses, payment in respect of excess holiday taken, all payments relating to car allowance, pension contributions or overpayments under clause 15 below) can be deducted from any payment of salary or any other sums payable to you by the Company, for example overtime payments, accrued holiday pay, bonus and notice pay. Any schedules relating to repayments will be made with your agreement.*
>
> *14.2 You consent to the deduction from your salary and bonus (or from any other sum due from the Company to you which falls within the definition of "**Wages"** in the Act) of any sums owing by you to the Company at any time, and also agree to make payments to the Company of any sums owed by you to the Company upon demand by the Company at any time.*
>
> *This sub clause is without prejudice to the right of the Company to recover any sums or balance of sums owed by you to the Company by legal proceedings.*

31. Clause 15 of the contract of employment is in the following terms:

Overpayments

> *"15.1 Any overpayments made to you by the Company regarding salary, bonus, or other payments whilst you are an employee of the Company or after your employment has terminated must be repaid on request of the Company.*
>
> *If repayment is not made it will be treated as a civil debt*.

32. Neither party produced any additional document whether in the form of a policy or other written document which set out the terms upon which allowances and benefits were paid to the respondent's employees. In particular, no written document was put before the Tribunal which purported to set out the circumstances and parameters within which the respondent operated Offshore Allowance. In the circumstances, we proceeded on the basis of the oral evidence that we heard from various witnesses about how Offshore Allowance operated in practice.

The analysis of the Renewables Team working hours and payments during the 2021 campaign

33. Towards the end of the 2021 GG Project, members of the respondents' senior management team began to notice that the employees within the Renewables Team (Mr Mike McCabe, Mr Leigh Conway (the claimant), Mr Steve Smith (Construction Manager), Mr Craig Ward (Quality Engineer) and Mr Jake Conway (the claimant's son)) had been working what appeared to be excessive hours.

34. In November 2021, Mr McCabe as the Head of Renewables, was asked by Mr Peter Clouston (Chief Operating Officer) to produce a proposal to mitigate the hours to be worked in the forthcoming 2022 campaign. This was not progressed by Mr McCabe, as a result of which members of the senior management team,

including Mr Sam Dearing (HR Director), analysed the overtime sheets for the Renewables Team during the 2021 campaign. The data analysed was for the 37 weeks (259 days) of the 2021 campaign.

35. The findings of that analysis are summarised on page 383. Page 383 is part of a larger document (382-426) which is an Ethics Report prepared by Mr Dearing and which incorporates the core management documents relevant to these proceedings. The principal findings in relation to the claimant were that during the 2021 campaign:

    35.1. he had claimed an average of 41 hours per week of overtime over and above his normal working hours of 39 hours per week;

    35.2. he had worked an average of 80 hours per week;

    35.3. he had spent an average of 53 hours per week offshore for which he was claiming Offshore Allowance;

    35.4. he had on 127 days of the 2021 campaign (49% of the total days worked) not had a daily rest break of 11 consecutive unbroken hours between shifts;

    35.5. he had on 24 of the 37 weeks of the campaign (65% of the total weeks worked) not had a weekly rest break of 24 consecutive, unbroken hours per week/or 48 per fortnight.

36. The outcome of this analysis caused serious concern to the senior management team. Three matters of particular concern were identified by the respondent:

    36.1. apparent breach of the Working Time Regulations 1998;

    36.2. significant claims for overtime throughout the 2021 campaign;

    36.3. significant claims for overtime on “weather days”;

    36.4. significant claims for Offshore Allowance throughout the 2021 campaign;

    36.5. significant claims for Offshore Allowance on “weather days”

Working time during the 2021 campaign

37. The claimant’s working pattern appeared to be in breach of the Working Time Regulations 1998 in that both daily and weekly rest breaks were not being taken. On page 384, the Ethics Report notes:

    that “[I]t is not possible to opt out of these legal requirements, and although exemptions may be applicable to some offshore work, there are no exemptions that applied to this project”.

38. The risk to health and safety and the ramifications should there be an accident were also noted in the report.

Overtime during the 2021 campaign and on overtime on weather days

39. The claimant had claimed an average of 41 hours per week in overtime over and above his normal working hours of 39 hours per week. This was considered to be excessive and to require explanation. The claimant's overall overtime payments amounted to £16,068.78.

40. There had been 67 "weather days" during the 2021 campaign. The claimant had also claimed 381.5 hours of overtime on "weather days" during the 2021 campaign. This was considered anomalous because it was the understanding of senior management that no construction work takes place on weather days because the offshore workers cannot be transported to the offshore windfarm/turbine to carry out their work because of the adverse sea conditions. Where there is a significant sea swell (understood by senior management to be roughly 3 metres or more), the tradespeople are stood down, the vessels remain in the harbour and no offshore construction work is undertaken.

41. It was not the respondent's position that no work at all would need to be carried out on a weather day by the Renewables Team. What surprised Mr Dearing was the level of overtime over and above normal working hours that had been claimed. This was because the workload was, in the view of the senior management, likely to be lighter on weather days than on days when the boats sailed and construction work was undertaken by the various tradespeople.

Offshore Allowance during the 2021 campaign

42. During the 2021 campaign, the claimant had claimed an average of 53 hours per week Offshore Allowance. The claimant had made claims for 1,957 offshore hours at a rate of £10 per hour and had received payment for Offshore Allowance in the sum of £19,570. That appeared to the senior management to be excessive given that the claimant was employed as a Construction Manager and latterly as a Project Manager, both of which are predominantly onshore roles. At this stage, Mr Dearing had made the commonsense working assumption that if Mr Conway was claiming Offshore Allowance then he must have been working offshore in order to be entitled to it.

43. As matters unfolded, it became clear that the claimant had not been working offshore when he had been claiming Offshore Allowance. The Tribunal will deal with the basis upon which the claimant believed he was entitled to Offshore Allowance later in this judgement. However, at that stage when the analysis of the 2021 campaign working hours of the Renewables Team was undertaken, the number of offshore working hours per week was identified as an anomaly based on the working assumption that Offshore Allowance would be paid only when a worker was working offshore.

44. The combined total paid to the claimant during the 2021 campaign for overtime and Offshore Allowance was £35,638; (£16,068 in overtime payments and

£19,570 in Offshore Allowance).That was a sum in excess of 50% of the claimant annual salary.

45. The overtime hours being claimed by the claimant was reflected across the Renewables Team as a whole. During the 2021 campaign, the respondent paid an overall total of £208,891.04 in overtime to the five members of the Renewables Team. Plainly, that was a very significant expense to the company and one which the respondent explained it had not anticipated.

Offshore Allowance on weather days

46. There was also concern about the amount of Offshore Allowance claimed by the claimant on weather days. During the 2021 campaign, 270 hours of Offshore Allowance had been claimed by the claimant across 21 weather days. This amounted for £2,700 of the overall Offshore Allowance payments. This also appeared anomalous given that vessels were understood not to leave the harbour on weather days and accordingly claims for Offshore Allowance on those days were difficult to understand.

47. The analysis of the 2021 campaign hours and payments had revealed on its face that the respondent was in breach of the Working Time Regulations and appeared to be paying excessive amounts of overtime and Offshore Allowance. The Ethics Report (384), which had been a comprehensive analysis of the 2021 campaign, revealed that:

> *"[I]t is not beyond the realms of possibility that occasional errors are made when completing and/or processing overtime claim forms, which in turn would mean that records may not always be hundred percent accurate, although the scale of these anomalies could not feasibly be explained in that manner.*
>
> *The possibility of fraudulent claims having been made became very real, and it was decided that this should be investigated further.*
>
> *An initial, informal discussion took place with Mike McCabe and Lee (sic) Conway on 3 February 2022, which are summarised in appendix 1."*

48. The Tribunal can see why the respondent came to those findings. The Tribunal finds that the respondent had reasonable and proper cause to discuss those findings directly with the claimant and his line manager, Mr McCabe. Indeed, during cross examination the claimant accepted that the respondent acted reasonably when it convened the meeting of 3 February 2022 in the light of those findings.

49. Before looking more closely at the meeting of 3 February 2022, it is convenient to consider a matter raised by the claimant in support of its claim for constructive dismissal regarding a meeting which took place shortly before the meeting to discuss the payments that they had been made in respect of the 2021 campaign.

50. The claimant complained that he was asked to attend a meeting shortly before the 2021 campaign payments meeting. Mr Clouston wanted to speak to the claimant about how he had interacted with a newly recruited female member of the respondent's management team at a training course that they both recently

attended at Grimsby. The respondent had been alerted by the newly recruited female member of staff to some negative observations that the claimant was alleged to have made to her about the company after the training course they had both been attending. The respondent was concerned that the comments made by the claimant could have jeopardised the recruitment plans for the new member of staff. Put simply, the claimant was alleged to have said some negative and inappropriate things about the prospective new female member of staff's decision to leave her former employer to join the respondent.

51. The Tribunal does not accept the claimant's contention that the first meeting on 3 February 2022 was in some way a stage-managed precursor to the meeting on the 2021 campaign payments later that morning. The claimant suggested that the first meeting was held simply to intimidate him. Somewhat contradictorily, the claimant accepted in evidence that if the respondent had received reports of what the claimant had allegedly said to the new member of staff then it would have been entirely reasonable for the respondent to have spoken to him about it. He also accepted in evidence that there would have been nothing particularly irregular had the respondent received such reports in the respondent speaking to him about them before the meeting on the 2021 campaign payments.

52. It was also difficult to reconcile the claimant's perception that the discussion regarding the Grimsby training event took place only to undermine him before the main meeting with the fact that Mr Coulston immediately accepted the claimant's explanation for what had happened at Grimsby and decided to leave the matter there and take no further action. That is hardly the action of a COO looking to intimidate a support subordinate manager. The Tribunal concluded that there was simply nothing in the suspicions the claimant had read into that part of the discussions that took place on 3 February 2022.

53. The claimant was, of course, in no position to say whether or not the respondent senior management had in fact received the complaint that they said they had. The Tribunal accepts the evidence of Mr Clouston and Mr Dearing that they had indeed received the feedback that they said they had and that there had been no ulterior motive on their part for wanting to speak to the claimant about it. The Tribunal also notes that Mr Clouston and Mr Dearing were both in Teesside on 3 February 2022 in order, amongst other things, to speak to the claimant and Mr McCabe about the 2021 campaign payments. It seemed to the Tribunal to be unremarkable that they would have taken the opportunity the same day to speak to the claimant about the negative feedback they had received. and that they gave the claimant the opportunity to provide his version of events which they immediately accepted.

54. The claimant also took objection to being asked to wait outside a meeting room in Teesside until Mr Clouston and Mr Dearing were ready for the meeting to discuss the 2021 campaign payments. It was unclear to the Tribunal why this objection was taken. This was not a situation where the claimant had to travel from Lowestoft to Teesside. The project was not yet on stream for the 2022 campaign, since February was one of the months during which, for weather-related reasons, the project was not in operational effect. The Tribunal heard that Mr Clouston and Mr Dearing were based in Immingham near Grimsby in

Lincolnshire and that Mr Clouston and Mr Dearing had both travelled to the Teesside office for the purpose of the meeting to discuss the 2021 campaign allowances with McCabe and the claimant. It seemed to the Tribunal that the claimant and Mr McCabe would be able to get on with their normal work from their local office in the way that he would have done on any normal working day while they waited for the meeting with Mr Clouston and Mr Dearing. The claimant's precise objections to the way in which the meeting was arranged were unclear.

The claimant's entitlement to Offshore Allowance

55. The claimant bases his claim for breach of contract / unlawful deductions from wages on what he says was a contractual entitlement to be paid Offshore Allowance during the 2021 campaign. The claimant's case is that he had always been entitled to Offshore Allowance since he became directly employed by the respondent in 2019. That is based on the terms he says he agreed with Mr Welford at the outset of his employment. All this

56. The claimant says that in respect of the 2019 campaign he had accrued an entitlement to Offshore Allowance sum of £19,570. This was made up of 1,957 hours worked during the 2019 campaign attracting an hourly supplement at the rate of £10.00 an hour. The claimant had been paid by the respondent the full amount of £19,570 through the payroll.

57. The respondent's position is that the claimant was not entitled to Offshore Allowance at any stage of the 2021 campaign. The respondent says sum of £19,570 was never properly payable to the claimant. The respondent deducted from the claimant's final wages the sum of £9,513.15 which was the entirety of the claimant's final salary instalment. The respondent did so to recover as much of the overpayment of Offshore Allowance that it was able to in the circumstances. The claimant therefore brings a claim to recover the amount deducted: £9,513.15 by way of breach of contract and/or unlawful deduction from wages.

58. The respondent has brought its own contractual claim to recover the balance of the Offshore Allowance that it was unable to deduct from the claimant's final salary instalment. That balance was £10,056.85. The respondent says the claimant was in breach of contract in claiming Offshore Allowance in the first place and that it is able to recover the balance as a contract claim against the claimant.

59. The way the claimant frames his claim to be entitled as a matter of contract to Offshore Allowance might best be described as unusual. The claimant does not say that he was entitled to Offshore Allowance on the same basis that offshore workers (or anybody else employed by the respondent) was entitled to it. The claimant says that he reached a bespoke oral agreement with the respondent's former Managing Director, Mr Welford which was witnessed by Mr McCabe. The date on which this agreement was allegedly reached was never identified by the claimant (or Mr McCabe). It appeared to be during 2019 on or around the point at which the claimant became directly employed by the respondent. The claimant says that the arrangement was that he would be entitled to receive

Offshore Allowance not when *he* was working offshore (which the claimant accepted in cross-examination he rarely did), but when *the offshore workers* were working offshore.

60. The claimant accepted that this oral arrangement was not evidenced in writing and was not included in his unsigned contractual documentation. The claimant's unsigned contract of employment envisages signatures by three parties: the claimant, Mr Welford as Managing Director and Mr Richard Webster as Chief Executive Officer (page 186-187). It remained unclear why there was no reference to this valuable allowance in the claimant's contract of employment. It also remained unclear whether Mr Webster, the CEO of the material time, was aware of the alleged oral agreement between Mr Welford and the claimant.

61. If the claimant had reached the agreement he says he did with Mr Welford, the Tribunal considers it irregular for that valuable part of the agreement not to have been reduced to writing either at all or, more particularly, in the unsigned written contract of employment. The more unusual the arrangement, the greater the evidential advantage for there to be written evidence of it, not so much as a matter of contractual enforcement but as evidence of the agreement having been reached in the first place. That said, there is no formal or other requirement for the term contended for to have been reduced or evidenced in writing.

62. The Tribunal also noted (although it was not referred to by either party) that clause 26 of the written contract of employment is an "entire agreement clause". It is in the following terms:

> *"This agreement including any documents incorporated into this agreement constitutes the entire understanding between the parties with respect to its subject matter and supersedes all previous agreements and undertakings (if any) relating to the employment of you by the Company."*

63. Any potential relationship between this entire agreement clause and the alleged preceding oral agreement was never addressed. Suffice to say, its existence suggests that there was no collateral agreements on Offshore Allowance which was considered to be of very significant financial value to the claimant.

64. The Tribunal has therefore to make a key finding of fact in relation to the existence (or otherwise) of any oral agreement between Mr Welford and the claimant entitling the claimant to receive Offshore Allowance in the circumstances asserted by the claimant.

65. In his submissions, but not before, the claimant made an alternative claim: that Mr McCabe as the Head of Renewables Team also had ostensible and/or actual authority to enter into the agreement for which the claimant contends.

66. Dealing first with Mr McCabe. It was Mr McCabe's own evidence under cross-examination that he did not have contractual authority to enter into terms and conditions of employment with third parties on behalf of the company. The Tribunal accepted that evidence, not least because Mr McCabe was a witness called by the claimant. The scope of Mr McCabe's authority was limited to administrative matters such as working patterns and the Renewables Team

working arrangements for. That is why he was asked initially to come back with proposals in both November 2021 and February 2022 that would address the significant working hours and overtime/allowance payments that had been incurred on the GG Project during the 2021 campaign.

67. The direct evidence of the alleged oral agreement on Offshore Allowance between the claimant and Mr Welford comes from the claimant himself and Mr McCabe. The Tribunal did not hear from Mr Welford who the claimant says entered into the oral agreement on behalf of the respondent. Mr Welford was no longer employed by the respondent at the time of these proceedings. The fact that Mr Welford no longer works for the respondent does not have any bearing on his competence to give evidence to the Tribunal. The Tribunal was not told anything by either party about Mr Welford's current whereabouts or why he was not giving any oral or written evidence.

68. The only reference in any of the contractual documentation to Offshore Allowance is set out on page 1 of the covering letter (page 165). That provides simply:

> "Offshore Allowance £10 per hour."

69. A fair and objective reading of that provision would lead to the conclusion that the claimant's entitlement to Offshore Allowance would apply in a logical way i.e. it would be paid to the claimant when he worked offshore. There is nothing in the contractual documentation which even begins to suggest that there was any different arrangement for the claimant let alone the specific arrangement that the claimant asserts.

70. The difficulty that the Tribunal had in accepting the evidence of Mr McCabe and the claimant about the claimant's alleged spoke arrangement with Mr Welford was threefold.

71. First, there was the inherent unlikelihood that the claimant had agreed with Mr Welford that he should receive Offshore Allowance when he was employed in a role which did not ordinarily involve offshore working. The arrangement contended for by the claimant was plainly counterfactual and to that extent unusual. It makes little in the way of commonsense to pay Offshore Allowance to an onshore employee.

72. Secondly, the rationale offered by the claimant for Mr Welford agreeing that he should receive Offshore Allowance was difficult to reconcile with any notion of transparency in managerial remuneration. The claimant suggested that the rationale for him receiving Offshore Allowance was to supplement his base salary. The claimant regarded his salary as too low. This begs the question below in whose opinion? The unchallenged evidence from the meeting on 3 February 2022 was that the claimant received a salary above the benchmark for his role. He received £7,000.00 per year more in base salary and received a car allowance of £4,450. His comparator Construction Managers in the company earned £7,000 per year less and did not receive a car allowance.

73. It was never explained why the simple expedient of paying the claimant a higher salary was not used by Mr Welford if it was felt that the claimant's salary should have been higher. It remained unclear and unexplained why the company would prefer to enter into a counterfactual, opaque and administratively complicated arrangement rather than simply being transparent and paying him a higher base salary in the first place.

74. Thirdly, both the claimant and Mr McCabe conspicuously failed during the meeting on 3 February 2022 (and afterwards) to mention even the existence of an oral agreement between the claimant and Mr Welford which explained the basis on which the claimant had been receiving Offshore Allowance notwithstanding his onshore role. If there had been such an express oral agreement, the natural and obvious thing to do would be for the claimant and Mr McCabe to have explained it there and then to the senior management team. After all, the meeting of 3 February 2022 had been expressly convened by senior management for the sole purpose of understanding how the pay and allowances worked on the GG Project in the light of perceived anomalies in the payments that had been made for the 2021 campaign.

75. During his cross-examination, the claimant was asked by the Tribunal whether he agreed that the balance of knowledge about what was happening on the ground at Lowestoft was in his own hands and those of Mr McCabe rather than those of Mr Dearing and Mr Clouston. The claimant agreed that the balance of knowledge was with himself and Mr McCabe. The Tribunal then asked the claimant if the roles had been reversed and it had been the claimant who was looking to understand the pay arrangements for the GG Project, whether the claimant would have wanted to know about his alleged oral agreement with Mr Welford. The claimant immediately agreed that he would have wanted to know about. When asked why he didn't in those circumstances volunteer the information at the meeting of 3 February 2022, the claimant was unable to provide a credible answer.

76. The nearest the claimant got to explaining why he withheld this crucial information at the meeting of 3 February 2022 was that he considered that the questions being asked by Mr Dearing and Mr Clouston were in general rather than specific terms. The Tribunal did not accept that explanation for two main reasons: first, there was only a small number of direct employees engaged on the GG Project which meant that the distinction between the general and the particular was inevitably an artificial one; and, secondly, it was also the claimant's own evidence that he felt the meeting of 3 February 2022 was so personal and directed at him that it was one of the reasons he decided to resign his employment and claim to have been constructively dismissed. See, for example, the claimant's own witness statement at paragraph 33 where he says:

> "*Peter [Clouston] would repeatedly say this was not personal, that (sic) it was….trying to catch us out at every opportunity…".*

77. Plainly the meeting cannot have been both in the abstract and personal at one and the same time. The Tribunal found the claimant's evidence inconsistent on this point which undermined its reliability.

78. There was never any adequate explanation why the arrangement remained oral and unevidenced in writing. It seemed unlikely that such a valuable entitlement to a contractual allowance would not find its way into the claimant's extensive written contract of employment. This was all the more so given what we have described as the counterfactual nature of the entitlement. There was also a striking contrast between the claimant's apparently relaxed attitude towards a valuable allowance remaining unevidenced in writing and the claimant's insistence that the orally agreed changes to the "mandate" (to which we refer below) were of such a concern to him while they remained unwritten he considered it a matter materially contributing towards a breach of trust and confidence. The Tribunal found the claimant's evidence inconsistent on this point which again undermined its reliability.

79. The best evidence of what was said at the time about the alleged oral agreement to Offshore Allowance, is in the contemporaneous notes of the meeting of 3 February 2022 (387 – 391). As has already been noted, that meeting was set up specifically to help Mr Clouston and Mr Dearing to understand how the allowances on the GG Project had operated in practice during the 2021 campaign. The claimant and Mr McCabe were both in attendance at that meeting. The accuracy of the notes of that meeting was not materially challenged during these proceedings other than in relation to a small number of points of detail.

80. When Mr McCabe was asked during the meeting of 3 February 2022 to explain the circumstances in which Offshore Allowance is payable, his first response was:

> *"The Offshore Allowance is paid at a pre-agreed rate of either £5.00 pounds per hour or £10.00 per hour depending on the role, and is only paid for hours spent offshore."*

81. Plainly, that explanation would not give rise to any entitlement (let alone an entitlement to c £19k in Offshore Allowance) on the part of the claimant who was on any view an onshore employee.

82. Mr McCabe was then asked to clarify what "offshore" meant. Mr McCabe replied:

> *"On a vessel at sea or on an offshore turbine".*

83. Plainly, that would also not explain why the claimant was receiving Offshore Allowance.

84. Mr McCabe went on to further refine the circumstances in which Offshore Allowance applied. He said that:

> *"In special circumstances, the Offshore Allowance may be paid to an employee or contractor who would usually work offshore but who has been temporarily required to work on land."*

85. Mr McCabe provided an example of this further refinement. He said that a Quality Assurance worker would fall into this special circumstances exception if they spent the vast majority of their time offshore – virtually every day – but were

then by asked by management to carry out their duties on land for a while then they would retain Offshore Allowance..

86. Plainly, this further refinement in the qualifying conditions for entitlement to Offshore Allowance would still not apply to the claimant. When Mr McCabe and the claimant were asked whether construction and project managers went offshore often, Mr McCabe and the claimant agreed that they did not. The claimant went further and said, *"I very rarely go offshore"… "virtually never*".

87. Pausing there, this was a meeting specifically convened by senior management to understand the payment of allowances on the GG Project. It was attended by two of the respondent's most senior managers. The claimant and Mr McCabe were aware that those two senior managers were unfamiliar with the details of the payment of allowances on the project. Of those present at the meeting, the claimant and Mr McCabe were aware that they alone knew anything about the alleged oral arrangement between the claimant and Mr Welford (who had by now left the company) entitling the claimant to Offshore Allowance in precisely none of the various circumstances identified by Mr McCabe when he was asked at the meeting to explain Offshore Allowance on the GG Project during the 2021 campaign.

88. The Tribunal found it impossible to understand why, if there had been a legitimate agreement entitling the claimant to claim Offshore Allowance while he worked onshore, neither the claimant nor Mr McCabe thought it appropriate to explain to Mr Clouston and Mr Dearing there and then in the clearest of terms that:

    88.1. there was a bespoke oral arrangement entered into between the claimant and Mr Welford entitling the claimant to Offshore Allowance;

    88.2. the claimant's entitlement did not require him to be personally working offshore but was rather derivative from the offshore workers patterns of work;

    88.3. this accounted for £19,570 of the payments received by the claimant over and above base salary at the rate of £10 an hour for 1957 hours (approximately 53 hours per week) when other employees were working offshore.

89. This was in contrast to the evidence by both Mr McCabe and the claimant at this Tribunal which focused directly on the alleged agreement with Mr Welford and the circumstances in which that agreement allegedly gave rise to an entitlement to receive Offshore Allowance on the part of the claimant.

90. If the evidence of Mr McCabe and the claimant is to be accepted, they are asking the Tribunal to believe that they unwittingly withheld this crucial information at the meeting on 3 February 2022 despite:

    90.1. their knowledge that neither Mr Clouston nor Mr Dearing were aware of the bespoke oral arrangement allegedly agreed with Mr Welford;

    90.2. their knowledge that Mr Welford had by then left the business;

90.3. their knowledge that the claimant's alleged entitlement to Offshore Allowance was triggered in entirely counterfactual circumstances i.e. for hours when he was working onshore;

90.4. their knowledge that the sole purpose of the meeting was to help Mr Clouston and Mr Dearing understand how the allowances on the GG Project worked in practice during the 2021 campaign;

90.5. their knowledge that both Mr Clouston and Mr Dearing would have wanted to know about the claimant's entitlement to Offshore Allowance and the circumstances in which it was allegedly triggered; and

90.6. their knowledge that in respect of the 2021 campaign, the claimant had earned over £19K in Offshore Allowance as an onshore worker, which was something in the region of one third of his base salary.

91. The Tribunal rejects the evidence of the claimant and Mr McCabe about the alleged oral agreement with Mr Welford. The Tribunal found that evidence to be neither credible nor reliable for the reasons referred to above. The Tribunal finds that there was no such agreement with Mr Welford at any time. Any agreement to the effect contended for was an agreement between the claimant and Mr McCabe only. The Tribunal finds that both the claimant and Mr McCabe were fully aware that Mr McCabe had no actual or therefore ostensible authority to enter into any such agreement. The Tribunal finds that it was because Mr McCabe and the claimant were aware that Mr McCabe had no such authority that the claimant and Mr McCabe identified Mr Welford as the source of the alleged oral agreement. The Tribunal has come to the conclusion that the basis on which the claimant contends he was entitled to Offshore Allowances was withheld from the meeting of 3 February 2022 because the payments were being operated in a secretive and unmanaged manner by Mr McCabe in such a way as to maximise the income of (amongst others) the claimant in the hope that it would not be notice by more senior management.

92. It is also material to this finding that neither Mr McCabe nor the claimant made any substantial challenge to the accuracy of the notes of the meeting on 3 February 2022 as they appear at 387 – 391. There were some matters of detail to which objection was taken, but none that would have led either the claimant or Mr McCabe to mistake the importance of the information that they withheld from the meeting. The claimant and Mr McCabe were under no similar misapprehension about the relevance of the alleged agreement with Mr Welford to these proceedings since it was expressly referred to in both witness statements and in oral evidence and cross-examination.

93. The claimant also gave an account which the Tribunal did not accept of a discussion towards the end of 2021 between himself and Mr Clouston about the claimant's bonus entitlement for that year. The claimant says that Mr Clouston initially told him that he would not be getting a bonus for 2021 only to immediately change his mind and tell him that he had only been joking and that the claimant would be getting a 2021 bonus after all. This evidence was very difficult to reconcile with the evidence of the respondent's witnesses, in particular that of Mr Dearing. Mr Dearing explained that bonuses beneath a certain level (a level

not extending down to the claimant) were not being paid at all. The account that the claimant gives of Mr Clouston's apparent volte face not only contradicts the corporate position that no bonuses were being paid to anybody at the claimant's level but was also difficult to reconcile with the concerns held at that time by the senior managers about the significant levels of overtime and Offshore Allowance that had been paid to the claimant.

94. In the circumstances, the Tribunal does not accept the claimant's evidence that he was told at any stage that he would be receiving a bonus for the 2021 campaign. The Tribunal accepts the evidence of Mr Dearing that the reason that the claimant was not going to receive a bonus in respect of the 2021 campaign was that a corporate decision had been taken that bonuses were not being paid to anyone at the claimant's level in respect of that bonus year. It was common ground that the claimant's entitlement to bonus was discretionary.

95. The claimant said during his cross-examination that it was not unusual for the levels of pay that he was receiving to be paid to workers engaged in this type of work in the offshore industry. That might very well be so, but when a question was put to the claimant by the Tribunal as to whether it was normal for someone at a middle management level to be earning more than the CEO in certain months, the claimant accepted that would not be a routine situation. The claimant's payslips in the bundle show that in certain months he was earning what equated to a gross annual remuneration in the region of £200,000 per annum. It could not sensibly be said that it was commonplace for a mid-level manager to receive more by way of monthly remuneration than the very highest level of executive management.

Overtime on weather days

96. The meeting of 3 February 2022 went on to consider a number of the payments made to the claimant which while not directly in issue in these proceedings did provide the Tribunal with a further insight into the reliability of the claimant's evidence. One of these matters was the claims the claimant made for overtime on weather days.

97. The concern of the respondent's senior management was the amount of overtime incurred by the claimant (amongst others) on weather days. During the course of meeting, the claimant confirmed that on weather days:

> *"We have our daily meeting but it's a looser shift, with no changes or preparatory work, we can get cool downs but 90% of the time it's quiet."*

98. This was against a background of the claimant having claimed for 381.5 hours of overtime on 67 weather days during the 2021 campaign. At no time during the meeting did either Mr McCabe or the claimant attempt to offer any meaningful explanation for the considerable difference between the amount that had been paid to the claimant by way of overtime on weather days and the claimant's own description of a typical working day on weather days. The only logical inference to be drawn was that overtime was very unlikely to be incurred on a weather day because in the claimant's own words it was quiet 90% of the time.

99. The issue of whether the claimant was making a claim for overtime on weather days was the subject of extensive cross-examination by Mr Quickfall both the claimant and Mr McCabe. The cross-examination, particularly of the claimant, did not reflect well on his evidence.

100. It was a concern on the part of the respondent that weather days should not attract as much overtime as appear to be the case since the trade labour could not reach the wind farm/turbine on those days. Equally, the respondent was concerned about the claims for Offshore Allowance on weather days when it was the claimant's case that he had reached a bespoke agreement with Mr Welford entitling him to Offshore Allowance but only when the trade labour were able to work offshore themselves.

101. The cross-examination of the claimant on the entries for his Overtime Claim Form (Salaried Staff) on page 446 is a good illustration of how the claimant's expectations for his claims for overtime and Offshore Allowance simply did not correlate with reality.

102. It was the claimant's position that he never claimed 22 hours on a particular days. However, taking Thursday, 8 April 2021 as an example (413, 446). On that day, the claimant's normal working hours were 8.25. The claimant also claims that day 14 hours of overtime bringing the total claimed hours of work for the day to 22.25 hours. That that the claimant was claiming 14 hours overtime on 8 April 2021 is also shown from the document at page 469. In short, the claimant was signing timesheets which showed that he was working more than 22 hours in a single day; getting his timesheets signed Mr McCabe and forwarding them to Mr Dearing. All It was the claimant's own position that he never worked 22 hours a day and playing that is understandable. However, is it is also at odds with a timesheets he signed, was Simon Mr McCabe and I lay in respect of remuneration that he received for work on that day. Hours of 24 on the day and claiming overtime Offshore Allowance for doing so.

103. The cross-examination of the claimant's claims for overtime allowance on weather days follow similar patterns. The claimant kept on refining the circumstances in which he claimed he was entitled to claim Offshore Allowance. However, it was common ground that in principle a weather day would lead to much reduced working by the project team including the claimant. This was the simple reason that the boats were unable to sale. The claimant was cross examined about a number of the days on which he was claiming overtime and Offshore Allowance despite the weather day sheet provided by his own showing that day as a full weather day. This claimant's sons spreadsheet identified several days as full weather. It had been agreed on 3 February 2023 that Mr Conway's son, Jake Conway, would carry out an analysis identifying each of the days where that had been called as either a full weather day or a half weather day during the 2021 campaign.

104. First, the claimant drew a distinction between "full weather days" and "sale return days". A sale and return day was when the boat taking the trade labour offshore started on their outward journey to the wind farm but had to turn back due to adverse weather conditions. On those days, the claimant said that the

trade labour was entitled to Offshore Allowance and that by virtue of its agreement with Mr Welford, so was he.

105. Secondly, when the claimant was cross examined about days for which he had claimed overtime/Offshore Allowance but which fell on days identified on the spreadsheet as full weather days throughout, the claimant refined his position. It was the claimant's own evidence that on full weather days 90% of the time it was quiet.

106. To explain this apparent anomaly, the claimant said that those occasions must have been "Big Boat days". A Big Boat day was according to the claimant today upon which a big boat could take the trade labour to the wind farm but the usual size boat not be able to do so. The concept of Big Boat days have not played any part in either the management phase or the litigation phase of this matter. There had been no mention of Big Boat days in either the claimant's witness statement or that of Mr McCabe. There was no reference to Big Boat days in any of the somewhat extensive tribunal documents in the bundle. The claimant said that he would be able to produce disclosure of documents which correlated Big Boat days to the days upon which he was making claims for allowances on full weather days. The Tribunal explained that the claimant would need to make an application to include additional documents and that the respondent may wish to object. In the event, the claimant made no application to introduce any additional documents.

107. Suffice to say, that it was only when Mr Quickfall pointed out that no boats had left the harbour since 26 April 2021 with a batch of full weather days coming after that date, that the claimant made his spontaneous reference to the possibility of it being a Big Boat day. The effect of the hitherto unmentioned Big Boats sailing was that the trade labour would be able to work on the windfarm/turbine, the trade labour would be entitled to Offshore Allowance while working offshore and this in turn would trigger the claimant's own entitlement to Offshore Allowance despite the fact that the claimant would be working onshore, such entitlement being based on the alleged bespoke, counterfactual, oral agreement the claimant says he reached with Mr Welford, the now departed former Managing Director, on a date the claimant was unable to specify. The Tribunal did not find that account at all persuasive.

108. The claimant also made much of what he described as the approval of his timesheets throughout the 2021 campaign by Mr Dearing. The claimant was essentially saying that it was not now for Mr Dearing to reject the claimant's entitlement to Offshore Allowance and Overtime Payments because they had always been set out in a monthly overtime claim form sent to Mr Dearing for what the claimant described as Mr Dearing's approval. Superficially, there might have been something in this point. However, a bit like the claimant's ever-changing basis for his entitlement to Offshore Allowance, the contention did not bear close scrutiny. In reality, all that Mr Dearing did was to take on trust from Mr McCabe, who was the claimant's line manager on the ground at Lowestoft and who was (unlike Mr Dearing) in a position to know the hours that the claimant was or was not legitimately working.

109. The Tribunal accepted the evidence of Mr Dearing that he was, in his own words, “flabbergasted” when he learnt of the 14 hour flat day arrangements which were being operated by Mr McCabe at Lowestoft. This was a situation where all of the granular detail of the operational hours was in the hands of the Renewables Team under the management of Mr McCabe. The Tribunal does not accept that Mr Dearing was fixed with any form of actual or constructive knowledge of the basis upon which the hours being claimed. Mr Dearing was simply receiving information that he took on trust.

110. The Tribunal therefore concluded that Mr Dearing did nothing more than to take the overtime claim forms at their face value noting that they will have already been signed by the claimant and by his line manager Mr McCabe. It was Mr McCabe’s job and not that of Mr Dearing to make sure that the amounts being claimed in the claim form were valid. The fact that the claimant’s overtone claim forms were not picked up by Mr Dearing before November 2021 is no basis for inferring Mr Dearing’s implicit or explicit consent to the working arrangements for the simple reason that he was not previously aware of them.

111. It was difficult to avoid the conclusion that the claimant was simply refining the basis upon which he was entitled to claim allowances in response to being pinned down by Mr Quickfall in cross examination with examples of anomalies based on his own pleaded case where he ought not to be receiving any allowances even on his own evidence.

112. As an example: 2 April 2021. The claimant’s sons summary of all weather days during the 2021 campaign is at pages 351 – 353. Page 351 shows that on 2 April 2021, it was a full weather day meaning that no boats left the harbour throughout that day on either the day shift or the back shift. On the claimant’s own analysis, that meant he would not be entitled to any Offshore Allowances on that day. In cross examination, the claimant accepted that was correct in principle.

113. However, correlating the weather day document with the Overtime Claim Form Shows That the Claimant’s Entered a Signed Claim Form for Offshore Allowance for 14 hours on 2 April 2021. Not only does that 14 hours not correlate with the claimant’s own evidence, it also points to a practice whereby the claimant was claiming a flat day rate of 14 hours per day whether or not the claimant actually worked 14 hours on that day. This has asymmetry with the commercial bid document into which the company placed a working assumption of 40 hours per day in order to price the project. In so doing, the respondent was plainly not giving licence to its employees to claim the full amount of 14 hours was put in the bid whether or not they worked it. Any efficiencies (as was later pointed out by the senior management) would be savings and additional profit for the company. For present purposes, none of the 14 hours should have attracted Offshore Allowance at all on the basis that everyone agreed that this was a full weather day.

114. When this was put to the claimant in cross examination, he said that it must have been a mistake on his part. The Tribunal does not accept that explanation. Not only was this not an isolated example of the claimant claiming

Offshore Allowance on full weather days but there was a clear evidential correlation between the 14 hours claimed by the claimant for that day and

114.1. the written record in the notes of the meeting of 3 February 2022 in which Mr McCabe explained the concept of flat days in the presence of the claimant without the claimant expressing any disagreement; and

114.2. the spontaneous reference to Big Boat days in an attempt by the claimant to refine his alleged entitlement to Offshore Allowance.

115. The interpretation that the Tribunal places on the entry on the Overtime Claim Form for 2 April 2021 is that it is reliable evidence pointing to the claimant knowingly making claims for overtime hours that he had not in fact worked and for Offshore Allowance to which he knew he was not entitled.

116. Further examples of the claimant claiming Offshore Allowance for full weather days can be found for 28 April 2021 which is identified as a full weather day on page 351 but which also has a signed overtime claim form for 14 hours offshore allowance on page 447 and for 6 May 2021 which is identified as a full weather day on page 351 yet has a signed overtime claim form for 14 hours of Offshore Allowance on page 447.

Flat days and overtime on flat days

117. Mr Dearing pointed out that consecutive 14 hour working days were incompatible with the mandatory rest breaks required by the Working Time Regulations 1998 as well as being considerably in excess of the claimant's normal working hours.

118. The notes of the meeting on 3 February 2022 record the claimant explaining the frequency of 14-hour working days in the following terms:

"Leigh Conway replied, "We get 14 hours for a flat day, and I claim the overtime because my base salary is so low, so this makes up the difference to what I should be on. It was all agreed when I started." Sam Dearing asked, "Agreed by who?" Leigh Conway did not answer, and Mike McCabe said, "We would prefer not to say."

119. The discussion went on as follows:

"Peter Clouston asked for clarity on the "14-hour flat day", and Mike McCabe replied, "We put 14-hour days in the bid, so that is what I paid the men". Peter Clouston: "Do you mean that you pay the men 14 hours per day even if they work less?" To which Mike McCabe replied "Yes, that's how the rate was built up."

120. By the time that the claimant gave evidence, his position had shifted significantly. His position in evidence was that there were no flat days at all. The claimant's evidence was that if he had claimed 14 hours for a particular day (a significant number of which hours would be overtime) that was because

he had worked 14 hours that day. That evidence completely contradicted what both the claimant and Mr McCabe are recorded as having said in the notes of the meeting of 3 February 2022. The Tribunal prefers the contemporaneous record and concluded that flat days were being paid in the circumstances described in the notes.

121. At no stage did the claimant or Mr McCabe seek to suggest in their witness statements or oral evidence under cross-examination that the notes of the meeting were inaccurate to the extent of being fictitious in material parts. It would have been impossible to make sense of the notes of the meeting if there had been no discussion about flat days at all during the meeting and the answers are recorded in the notes that Mr McCabe and the claimant gave would likewise have to be entirely fictitious. The Tribunal did not consider that to be at all likely costs.

122. Indeed, had there been no such discussion then entire paragraphs of the notes would have been sheer invention. The hard data plainly shows that there were a significant number of 14 hour days being claimed and it follows from that that it was highly likely that the notes accurately reflected that this issue was raised by senior management and responded to by the claimant and Mr McCabe. The Tribunal was satisfied that this issue was raised and that it was responded to by the claimant and Mr McCabe in precisely the way that the notes record. In other words, the denial by the claimant and Mr McCabe that there had been flat payments for 14 hours per day whether or not the claimant had worked 14 hours was simply not credible.

Paid days off to return home to Middlesbrough from Lowestoft

123. There was also a discussion about the fact that the claimant (amongst others) was being paid for three of his five days off during his shift pattern without taking annual leave for travel to and from his home on Teesside to Lowestoft. Mr Clouston was concerned that paid time off which was not annual leave should not be given for that purpose and asked for that practice to cease.

124. The upshot of the meeting was that Mr McCabe was asked to speak to the Renewables Team to get an agreement with the renewables team for the 2022 campaign which did not involve the same amount of working hours, overtime or Offshore Allowance payments that had been incurred or during the 2021 campaign.

The Mandate

125. As an interim measure, the respondent 's issued what it termed as *"a mandate to be implemented with immediate effect, and until further notice is issued in writing:".* The mandate is set out in the email from Mr Dearing to Mr McCabe of 11 February 2022 and is to be found at pages 356 – 358 of the bundle. It was in the following terms*:*

    1. *All employees must have a minimum of 11 hours of consecutive, uninterrupted rest between any two shifts*

2. *All employees must have a minimum of 24 hours of consecutive, uninterrupted rest per week or 48 hours of consecutive, uninterrupted rest per fortnight*

3. *With Steve Smith working full-time as a Construction Manager on the project in 2022, the Company expects that overtime worked by Construction Managers on the project will be minimal, and will be the exception rather than the rule*

4. *No overtime shall be claimed on weather days*

5. *No overtime shall be claimed for travel*

6. *There should be no requirement for the QS to work overtime*

7. *All claims for overtime and allowances are to be approved by the HR Director on a weekly basis*

8. *No paid days off should be granted other than for annual leave*

9. *Offshore Allowances shall be paid for hours where an employee is at sea on a vessel, or on an offshore turbine, and must not be claimed by Construction Managers, except where they must work offshore. It is expected that this will only happen on a rare occasion/in exceptional circumstances*

10. *There will be no "flat" days of 14 hours – or any other duration – employees will work their contractual hours, plus any additional hours of overtime that are necessary. Although the job may have bid/rates made up on 14 hours, any saving on this is margin for the Company – not additional revenue for the employees on the project.*

11. *If staffing issues make any of the above mandates difficult to achieve, the Head of Renewables must propose alternative and/or the additional resourcing requirements on or before 18 February 2022.*

The above measures are mandated by the Board and shall be immediately implemented in. These measures will remain in force until further written notice is issued from the Board, via Fabricom UK's Senior Management Team

` *If any of this is unclear, please talk to Sam Dearing or Peter Clouston.*

126. The claimant identified the mandate and its "non-negotiable" status as part of the reason that he considered he was felt he had no choice but to resign and claim to have been constructively dismissed by the respondent. It is convenient to go through each of the 11 points of the mandate to consider the claimant's specific position in his evidence on each of these points and any effect of those terms on the claimant's contract of employment.

127. The claimant's own evidence was that he did not have a problem with point 1 or point 2 i.e. the length of the shifts being amended to ensure the minimum period of 11 hours consecutive, uninterrupted rest between any two shifts; and for employees to have the minimum of 24 hours consecutive, uninterrupted rest per week/or 48 hours of consecutive, uninterrupted rest per fortnight. It was difficult to see how requiring rest breaks required by statutory regulations could amount to a breach of any of the implied or express terms of the claimant's contract of employment. Plainly it could not.

128. The claimant had no objection to point 3 i.e. the recruitment of a second Construction Manager to work full-time on the project with the effect that overtime levels would reduce. It had already been pointed out to the claimant that it made no economic sense to have one Construction Manager working 80 hours per week with 40 of those hours at an overtime rate rather than have two Construction Managers working 80 hours between them at a plain rate.

129. The claimant had no objection to point 4 i.e. that no overtime should be claimed on weather days. Again, in cross examination the claimant accepted the common sense of that position.

130. The claimant did have an objection to point 5 i.e. that working time should not be used to travel between Lowestoft and his home on Teesside. This was the high watermark of the claimant's case on constructive dismissal. If that requirement had been imposed, the claimant would have had little time to spend with his family since he would be being required to travel between Teesside and Lowestoft in his own time. This would mean travelling home after the end of his Friday shift and returning in advance of the commencement of the Monday shift. A journey of over 250 miles taking some five hours as a minimum each way. The Tribunal returns to this point below.

131. The claimant had no objection to point 6 i.e. the expectation that the QS would not work overtime except in exceptional circumstances. The claimant was not employed as a QS, so this part of the mandate did not affect him.

132. The claimant had no objection to point 7 i.e. the requirement for overtime and allowances to be approved by the respondent's HR Director on a weekly basis.

133. The claimant had no objection to point 8 i.e. that paid days off would not be granted for travel time between the site and the employee's home unless the employee use his/her entitlement to paid annual leave.

134. The claimant's position in respect of point 9 has to be put in context. The claimant agreed in cross examination that he did not tell Mr Dearing during the meeting on 3 February 2022 anything about his bespoke personal arrangement with Mr Welford to the effect that the claimant would receive Offshore Allowance whenever the trade labour was working offshore. It follows that Mr Dearing could not have had in mind any adverse effect on the claimant when in presenting the mandate he stipulated that Offshore Allowance would only be paid where an employee is at sea on a vessel, or

on an offshore turbine, and must not be claimed by Construction Managers except when they must work offshore. For all Mr Dearing knew after the meeting on 3 February 2022, the claimant had no basis at all on which to justify the £16K he had received by way of Offshore Allowance for the 2021 campaign.

135. The claimant's position in respect of point 10 of the mandate is somewhat difficulty to assess due to his inconsistent evidence. The mandate stipulates that there will be no "flat days" of 14 hours or any other duration. Any additional hours above the Monday to Thursday requirement of 8.25 hours and 6 hours on a Friday would need to be worked in order to attract overtime, but only when it was absolutely necessary for such overtime to be worked. The mandate goes on to say that 14 hour hours per day in the commercial bid had nothing to do with the remuneration of the employees and that any saving should translate into profit margin for the company and not additional remuneration for employees or contractors engaged on the GG Project.

136. The claimant's position in relation to flat days was, at least by the time of these proceedings, that there was no such thing as a flat day. His evidence to the Tribunal was that he had only been paid for the hours he had actually worked. If that was so, then the claimant could hardly object to the removal of flat days of 14 hours. Alternatively, on the basis that flat days were being paid at 14 hours per day regardless of the actual hours worked (which was the position of the claimant and Mr McCabe at the meeting on 3 February 2022) the claimant could hardly complain that the mandate forbid any such practice in future. The claimant cannot claim that his contract of employment was being breached by virtue of the fact that the respondent no longer wished to pay him for hours that he was not actually working. For the avoidance of doubt, the Tribunal came to the conclusion that the claimant was in the habit of claiming 14 hour flat days without having worked those hours and the claimant was not entitled to be remunerated on that basis.

137. The claimant objected to point 11 of the mandate. This indicated that in the event that any of points 1 to 10 the mandate were difficult to achieve, that Mr McCabe, as the Head of Renewables, was to propose alternative and/or additional resource requirements by 18 February 22. The claimant said that he understood point 11 as essentially forcing him out of employment.

138. However, at paragraph 34 of his witness statement the claimant says that:

"all points in the mandate was scrapped even though, as stated in the mandate, these conditions would remain until we got written confirmation they had changed from the board of directors."

139. This is a problematical position for the claimant to adopt. He wants to rely at one of the same time on what he says were "non-negotiable changes to his contract of employment" in the mandate as well as maintaining the position that all points in the mandate were abandoned by the company. Nevertheless, it was clear enough that it was points 5 and 11 of the mandate which were most troubling to the claimant prior to his resignation.

140. Taking point 5 first. The issue of travel time had been resolved between Mr McCabe and senior management before the claimant resigned his employment. The company relented on the issue of travel time. By the time of these proceedings, the claimant's position had become a more subtle. His position was that he had resigned despite the company agreeing to change the mandate to allow for travel time during working hours because the revised travel arrangements had not by then been reduced to writing. The claimant said that he could have no confidence that the orally agreed changes were something upon which he could rely on because the mandate said any changes to the mandate had to be in writing.

141. A second meeting took place on 17 February 2022. Mr McCabe was in attendance on behalf of the Renewables Team. Mr Clouston, Mr Dearing, Mr Copley (Health Safety Environment and Quality Director) and Mr Murtagh (Finance Director) were in attendance on behalf of the respondent. The purpose of this meeting was to find "A way forward of making the mandate work".

142. The notes of the meeting (392-395) expressly record the concession that was made at that meeting. It says as follows:

"*The following concessions were agreed by the Senior Management Team:*

Travel can take place in work time, although overtime cannot be used. Employees will start the final working day of their rotation at work, and be allowed five hours of driving time from their contractual hours for travel. On the first day of their rotation, they will arrive for work five hours into their working day."

143. This concession addressed the concern that the employees and Mr McCabe had raised about the provision in the mandate requiring travel to be done in an employee's own time. Having listened to what Mr McCabe had had to say, the respondent agreed to carve out five hours of working time to allow the employees to travel from Middlesbrough to Lowestoft and a further five hours of working time to allow the employees to travel from Lowestoft back to Middlesbrough to ensure that they could spend quality time with their families during their non-working time. Having agreed to carve out working time for travel in the company did not agree for that travel time to attract overtime.

144. The claimant accepted in his evidence that he knew that the respondent had made this concession to Mr McCabe in the meeting of 17 February 2022. The claimant's point was that because it was not in writing (and that the mandate had said that any changes had to be in writing) he did not have confidence that he could rely on that concession.

145. The Tribunal did not accept that contention. The claimant appeared to be cherry picking when he was content to rely on matters that had not been reduced to writing. He was content on his own case to rely upon an oral agreement entitling him to some £16k during the 2021 campaign but unwilling at the same time to rely upon a clear concession that had been made to Mr McCabe by the respondent regarding travelling time when

discussing the mandate. Moreover, the claimant did not seek assurances before he resigned that the concession agreed verbally at the meeting on 17 February 2022 would be honoured. Nor did the claimant refer to travel time (or any other particular issue) in his resignation letter of 21 February 2022 as an explanation for the reason for his resignation.

146. This left the claimant's objection to point 11. The Tribunal does not agree with the claimant's interpretation of that provision of the mandate. The claimant says at paragraph 37 of his witness statement:

> *"The final statement in the mandate…made me feel threatened and if we didn't adhere to the mandate in full we would be replaced without question.*

147. The fundamental difficulty with that interpretation is that this is not what point 11 says. The Tribunal accepts that the mandate is not expressed in conciliatory terms and that it may have shortcomings as a matter of good industrial relations. However, the context in which the mandate was put forward was one of genuine and significant concern that the 2021 campaign had involved unlawful working hours at Lowestoft and that there had been payments of a very significant amount of money paid in respect of allowances and overtime for which there was no little in the way of legitimate explanation. Against that background, the Tribunal considers point 11 more in the nature of a statement of managerial resolve to correct working practices and payments on the GG Project going forward for the 2022 campaign than anything more sinister.

148. On the issue of the how the payments had been made during the 2021 campaign (including overtime and Offshore Allowance) and how those payments should be arranged for the imminent 2022 campaign, Mr McCabe's initial position on 17 February 2022 is set out on page 392. He asked:

> *"We wouldn't do it like this again if we had another year but it's the last year, can't we leave everything the same?"*

149. Essentially this was a plea for the status quo. Mr Clouston responded by saying that things had to change immediately.

150. Mr Clouston then asked to be talked through one of the claimant's working days so that he could understand what the employees were doing during the extensive periods of time that they had been working. Mr McCabe responded sarcastically, asking Mr Clouston, *"Are you really asking what the Construction Manager is doing on a £16 million project?"*. Mr Clouston responded that that was precisely what he was asking. The Tribunal noted that rather than talk Mr Clouston through one of the claimant's typical working days, Mr McCabe appeared to be avoiding doing so by asking an unhelpful rhetorical question rather than providing the information sought by one of the company's directors.

151. Mr Clouston went on to say that he simply did not understand what the claimant would be doing for such an extended working day such as a weather day when no construction is happening. Again, Mr McCabe did not directly engage with Mr Clouston's question. Rather, he responded in the following equally unhelpful terms:

> "you lot want to get off your arses and come and see the project."

152. Mr McCabe then went on to say that during weather days even if no construction was being undertaken that:

> *"The trackers have to be updated, and the daily meeting still takes place on weather days." Mr Dean responded by saying that no overtime is to be claimed on a weather day other than in exceptional circumstances.*

153. Offshore Allowance was then discussed once again. Mr McCabe agreed in principle that Offshore Allowance would not be paid where people were not offshore, but went on to make a special pleading in the cases of the claimant and Mr Ward. His rationale for making exceptions in these two cases was that they

> *"used to go offshore a lot".*

154. Mr Dearing did not accept this rationale. He asked Mr McCabe to tell him when the claimant used to go offshore a lot. The claimant's direct employment by the respondent had started in 2019. Mr McCabe confirmed in 2019 the claimant did not go offshore a lot. It was common ground that the project did not take place in 2020 because of covid. The claimant had confirmed at the previous meeting on 3 February 2022 that he did not go offshore a lot in 2021. Mr Dearing pressed Mr McCabe to explain when the claimant used to go offshore a lot. Mr McCabe responded:

> "*He's been with us on and off as a contractor before 2019."*

155. Mr Dearing again did not accept that was any sort of meaningful explanation for why the claimant should continue to receive offshore allowance when he was not required to work offshore. Mr Copley made the telling comment:

> *"if you're just trying to get extra pay for people, then it must be done through approved salary increases or bonuses, and not dressed-up as allowances for things they are not actually doing, which raises a big ethical question* (393).

156. There was then a further discussion about "flat days". Mr Dearing stated that the concept of a flat day had no place in the working arrangements. He explained the obvious: that employees should work their contractual hours each day only claiming overtime in exceptional circumstances when it needed to be worked. It was put to Mr McCabe by Mr Clouston that Mr McCabe had said at the meeting on 3 February 2022 that the men were paid 14 hours whether they worked it or not. Mr McCabe does not deny saying that in the notes of the second meeting on 17 February 2022. What Mr McCabe says by way of response is:

"Yes, but it balances out… They never work more than 14 hours."

157. Mr Dearing made the obvious point again, that the employees should only be paid for the hours they actually work. The meeting ended with Mr McCabe agreeing to come back to the respondent's senior management team with a proposal as to how the mandate could be achieved in full.

The claimant's resignation and the resignation of other members of the Renewables Team

158. On 21 February 2022, the claimant resigned his employment giving four weeks' all notice ending on 21 March 2022.

159. The claimant's letter of resignation (365) is in the following terms:

> *" Dear Michael McCabe,*
>
> *I am writing to formally inform you of my resignation from my position as project manager at Engie Fabricom. In accordance with the period of notice agreed within my contract my last day will be 21.03.20 22.*
>
> *I would like to take this opportunity to thank you for all the opportunities presented to me within the period of employment.*
>
> *Yours sincerely,"*
>
> *Signed by the claimant*

160. By a letter dated 25 February 2022, Mr Stephen Smith resigned his position as Construction Manager. By a letter dated 7 March 2022, Mr Craig Ward resigned his position as Quality Engineer. By a letter dated 24 March 2022, Mr Jacob Conway (the claimant's son) resigned his position as a QS.

The Relevant Law

Unlawful deduction from wages

161. Section 13 Employment Rights Act 1996 sets out the circumstances in which an employer will have made an unlawful deduction from the employee's wages. It provides:

> *13 Right not to suffer unauthorised deductions.*
>
> *(1) 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy 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 to the worker in writing on such an occasion.

(3) 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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

162. Section 14 Employment Rights Act 1996 sets out the circumstances where a deduction is excepted from the general principle of unlawful deductions provided for in section 13. Insofar as is relevant to these proceedings the applicable exceptions in section 14 provide:

14 Excepted deductions.

> *(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—*
>
> *(a) an overpayment of wages, or*
>
> *(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker…*
>
> *(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—*
>
> *(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or*
>
> *(b) otherwise with the prior agreement or consent of the worker signified in writing, and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.*

The contractual jurisdiction of the employment tribunal

163. The employment Tribunal has jurisdiction under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 to hear a contractual claim by an employee where the claim arises or is outstanding on termination of employment and relates to:

    163.1. a claim for damages for breach of the employment contract or other contracts connected with employment;

    163.2. a claim for a sum due under the contract.

164. The order also allows a contract claim by an employer if it is presented at a time where the employee has a contract claim against the employer before the employment Tribunal (articles 4(d) and 8(a)). If the employee's claim is subsequently withdrawn, settled or dismissed, the employer's claim can still proceed.

165. Certain breach of contract claims are specifically excluded from the Tribunal's jurisdiction under article 4, but none of those exclusions are of application in the present case.

166. The amount recoverable (whether by an employee or employer) in the employment Tribunal under a contract claim is £25,000. That is a total for all contractual claims relating to the same contract.

Constructive dismissal

167. Section 95 Employment Rights Act 1996 (ERA) sets out the circumstances in which an employee is dismissed:

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –*
>
> *a. the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *b. he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract,*
> *or*
> *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."*

168. Plainly, if an employee has been expressly dismissed by his employer then section 95(1)(a) applies, and there is no need for the employee to show that he has been constructively dismissed. The test of whether an employee has been constructively dismissal is set out in section 95(1)(c) ERA and is the statutory version of a principle originally established at common law. However, where there has been no express dismissal and there has been no termination by virtue of a limiting event under section 95(1)(b), it will be for the employee to show that the provisions of section 95(1)(c) have been satisfied and that he has been constructively dismissed .

169. If an employee who has resigned his employment is unable to show that the provisions of section 95 (1)(c) have been satisfied, that employee will not be treated as having been dismissed. It follows that if an employee has resigned and not been dismissed he cannot assert a right not to have been unfairly dismissed. If an employee does satisfy the provisions of section 95(1)(c) then his resignation would be treated as a dismissal for the purposes of the law of unfair dismissal set out in Part X ERA.

170. Importantly, satisfying section 95(1)(c) establishes only that a claimant has been dismissed. Provided that the employee satisfies the other qualifying conditions to bringing a claim of unfair dismissal (such as any requirement for a qualifying period of service), that employee has the right not to be unfairly dismissed and the right to bring proceedings in the employment Tribunal complaining of unfair dismissal. An employment Tribunal might nevertheless find in appropriate circumstances that a constructive dismissal is fair where that dismissal is for a potentially fair reason under section 98 (1) or (2) ERA and that the claimant's constructive dismissal for that reason meets the requirements of fairness under section 98(4) ERA.

171. In order to establish that the requirements of the subsection are met, the employee must show:

171.1. there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment;

171.2. the employer's breach caused During the 2021 campaign, the claimant had made claims for 1,957 offshore hours at a rate of £10 per hour and had received payment in the sum of £19,570. the employee to resign; and

171.3. the employee did not delay too long before resigning, thereby affirming the contract.

Breach of contract

172. The first step is to identify the term which is said to have been breached by the employer, and to consider whether there has been a breach of that term. The breach relied upon may be of either an express or implied or, if the breach is not yet occurred, anticipatory.

173. The term relied upon by the claimant is the implied term of trust and confidence. Breach of the implied term of mutual trust and confidence is the breach most frequently relied on in constructive dismissal cases. The term provides that employers (and employees) will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties – Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.

174. In cases where a breach of the implied term is alleged, the Tribunal's function is not the same as the range of reasonable responses test. That applies in relation to the statutory test for unfair dismissal, not the contractual test for constructive dismissal.

175. If there is a determination that there has been a constructive dismissal, the Tribunal may need to consider whether the employer has a potentially fair reason for that constructive dismissal and, if so, then move on to consider the test of fairness under section 98 (4) ERA.

176. An example given by the EAT to illustrate the reasonable and proper cause element of the test is that in any employer who proposes to discipline an employee for misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process, but if the employer had reasonable and proper cause for taking the disciplinary action, the employer cannot be said to be in breach of the term of trust and confidence - Hilton v Shiner Ltd Builders Merchants 2001 IRLR 727, EAT.

177. The second element of the test is whether the conduct was calculated or likely to destroy or seriously damaged trust and confidence. This requires the Tribunal to consider the circumstances objectively, from the perspective

of a reasonable person in the claimant's position Tullett Prebon plc v BGC Brokers LLP 2011 IRLR 420, CA. The test is met where the employer's intention is to destroy or seriously damaged trust and confidence, or whether employer's conduct was likely to have that effect.

178. A breach of the implied term of trust and confidence can be caused by one act, or by the cumulative effect of a number of acts or a course of conduct. A last straw incident which triggered the resignation must contribute something to the breach of trust and confidence itself - Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA. There is no need for there to be proximity in time or in nature between the last straw and previous acts - Logan v Commissioners of Customs and Excise 2004 ICR 1, CA.

Fundamental breach

179. If there has been a breach of contract, the breach must be fundamental. This requires considering whether the conduct is:

> *"a significant breach going to the root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract."* Western Excavating (ECC) Ltd v Sharp 1998 ICR 221, CA.

180. Fundamental breach is probably synonymous with repudiatory breach, that is a breach which is a repudiation of the whole contract - Photo Production Ltd v Securicor Transport Ltd 1980 ACA 27, HL.

181. The stage is not needed where the Tribunal has found that there was a breach of the implied term of trust and confidence: any breach of that term is a fundamental breach necessarily going to the root of the contract – Morrow v Safeway Stores plc 2002 IRLR, EAT.

182. Whether a breach of a term is a fundamental breach is a question of fact and degree. Some points about this:

182.1. the effect on the employee is relevant;

182.2. the employer's subjective intention is not a key part of the test. It may be relevant, but the intention must be judged objectively - Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT.

183. Some cases have considered whether an employer can remedy a fundamental breach of contract before the employee accepts it. Other than an anticipatory breach of contract, which may be withdrawn up to the moment of acceptance, a fundamental breach of contract cannot be remedied by the wrongdoer. After a fundamental breach has occurred, it remains open to the employee to agree to affirm the contract, or to accept the fundamental breach once it has occurred, whatever action the employer takes. This means that the only option available to the employer who wants to correct their action is to invite the employee to affirm the contract - Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA.

184. However, there is a distinction between a fundamental breach of contract that cannot be remedied, and action taken by an employer that prevents the breach of contract occurring or becoming a fundamental breach – Assamoi v Spirit Pub Company (Services) Ltd *EAT 0059/11.*

Resignation

185. If the employer fundamentally breaches the contract of employment, the employee may accept the repudiation and terminate the contract by resigning, either with or without notice. The contract comes to an end at the time of the communication of the resignation to the employer. If the employer is in continuing breach of contract, the employee can resign at any point to while it is continuing – Reid v Camphill Engravers 1990 ICR, EAT.

186. The employee may resign by words or conduct. For example, an employee's failure to return to work following maternity leave was sufficient to communicate acceptance of the employer's fundamental breaches of contract.

187. There are some conflicting authorities as to the relevance of an earlier fundamental breach by the employee, with some authority suggesting that an employee cannot allege constructive dismissal if he is in breach of contract himself - RDF media group plc v Clements 2008 IRLR 207, QBD . However, there appears to be acceptance that if one party commits a fundamental or repeated breach that the other does not accepted as bringing the contract to an end, the contract and the obligations under it continue. The obligation of trust and confidence is not suspended when one party breaches the contract, and so it remains open to an employee who has committed a fundamental breach to accept a later repudiation by the employer and end the contract -Atkinson v Community Gateway Association 2015 ICR 1, EAT.

188. In Aberdeen City Council v McNeill 2015 ICR 27 the claimant committed acts of gross misconduct, including sexual harassment and being intoxicated at work. He claimed constructive dismissal in relation to the disciplinary investigation, which the employer carried out in a way which breached the implied term of trust and confidence. The Court of session rejected the employer's argument that the employees breaches prevented the employee from relying on a later breach of trust and confidence by the employer. However, the employee's own breach could be relevant to compensation For example, in a complaint of constructive unfair dismissal, breaches such as misconduct could be found to be contributory conduct resulting in a reduction to the basic and compensatory awards.

Resignation caused by breach of contract

189. The breach must have caused the resignation, but it need not be the only cause. The test is whether the employee resigned in response to the conduct which constituted the breach. This is a question of fact for the Tribunal.

190. Once an employer's fundamental breach has been established, the Tribunal should ask whether the employee has accepted the breach and treated the contract of employment as at an end. It does not matter if the employee also objected to other actions (or inactions) by the employer that were not a breach of contract. Constructive dismissal is made out if the employee resigned at least partly in response to the employer's fundamental breach of contract - Logan V Celyn House Ltd EAT 0069/12. The crucial question is whether the repudiatory breach played a part in the dismissal, that is whether it was one of the factors relied on Abby cars (West Hornden) Ltd v Ford EAT 0427/07.

Delay and affirmation

191. If the employee waits too long after becoming aware of the breach of contract before resigning, he may be taken to have affirmed the contract. The question is whether the employee has shown an intention to continue in employment, rather than an intention to resign. This will depend on the particular circumstances of the case. Factors relevant to this question include the employee's conduct, as well as the length of time which has passed since the breach.

192. In addition to affirmation by delaying, the employee may affirm the contract by taking action which is consistent with employment continuing, irrespective of the timeframe, for example, considering alternative roles, accepting a promotion or pay rise.

193. Where there is a continuing cumulative breach of the implied term, the employee is entitled to rely on the totality of the employer's acts even if she has previously affirmed the contract stop the effect of the last straw is to revive the employee's rights to resign.

194. In a case where a number of breaches of contract relied on by the claimant, the Tribunal is assisted by the step-by-step approach of Lord Justice Underhill in Kaur v Leeds Teaching Hospitals [2018] E WCA Civ 978:

194.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, the resignation?

194.2. Has the employee affirmed the contract since the act? If so, there cannot be a constructive dismissal in respect of that act or earlier acts.

194.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

194.4. If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation.

194.5. Did the employee resign in response (or partly in response) to that breach?

195. If the last straw was part of a course of conduct which punitively amounted to a breach of the implied term, affirmation of the earlier acts does not need to be considered: the last straw revives the right to resign even if there has been an earlier affirmation. However, if the last straw is not part of a course of conduct which breaches the implied term, the Tribunal will have to consider whether earlier acts have been affirmed. In that case, the claimant can succeed in establishing constructive dismissal if:

195.1. there has been no affirmation of the contract by the claimant;

195.2. the earlier act or course of conduct was repudiated; and

195.3. the earlier act or course of conduct at least contributed to the eventual decision to resign.

196. If the claimant establishes that he has been constructively dismissed, the Tribunal then needs to go on to consider (depending on what complaints the claimant is pursuing) whether dismissal was fair and/or whether dismissal was in breach of notice obligations.

Wrongful dismissal

197. Wrongful dismissal is dismissal where the employer is in breach of contract. Termination without notice (or with inadequate notice) will amount to a wrongful dismissal.

198. Dismissal without proper notice is not a wrongful dismissal if it follows a repudiatory breach of contract by the employee. In those cases, the employer is entitled to dismiss the employee summarily. The test in wrongful dismissal cases of summary dismissal is not the same as the test for unfair dismissal: the Tribunal does not consider the reasonableness of the employer's decision to dismiss. Instead, in the case of wrongful dismissal, the Tribunal must consider:

"Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?"

199. Conduct by the employee which amounts to a repudiatory breach is sufficient to justify summary dismissal. The employee

"must show a complete disregard of a condition essential to the contract" Laws v London Chronicle Ltd 1959 1 WLR, CA

or:

"must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be

required to retain the [employee] in his employment." Briscoe v Lubrizol Ltd 2002 IRLR 607.

200. Most frequently, the justification for summary dismissal relied on by the employer is misconduct by the employee or dishonesty, although this may be described as gross misconduct or gross negligence, the legal test is not whether the conduct can be labelled serious misconduct or gross misconduct. Instead, the question is whether the employee's behaviour amounts to a repudiation of the whole contract.

201. This is a question of fact for the Tribunal. The Tribunal must decide (on the balance of probabilities) what the employee did and whether it amounted to a repudiatory breach of the contract by the employee. This is not the same as assessing the reasonable belief of the employer is required in a complaint of unfair dismissal. Here, the employee's plea for mitigation is not relevant to the question of whether the employee's conduct amounts to a repudiation. For this reason, the employee can rely on a repudiatory breach by an employee to defend a claim for wrongful dismissal, even if it only discovers the breach after it has dismissed the employee - Boston Deep Sea Fishing and Ice Co- v Ansell 1888 39 ChD, CA.

202. A breach by the employer before the repudiatory conduct by the employee does not affect the employer's entitlement to rely on the later repudiatory action by the employee – Palmeri and ors v Charles Stanley and Co Ltd 2020 EWHC 2934, QBD.

203. The terms of the contract of employment may be relevant to the question of whether the employee is in repudiatory breach of the contract, for example whether the conduct falls within an express definition of misconduct justifying summary dismissal - Dietman v Brent London Borough Council 1988 ICR 842, CA.

204. Where there is a repudiatory breach by the employee, the employer can choose to waive the breach and affirm the contract. Inaction by the employer following a breach by the employee may be taken as affirmation, unless the employer has reserved its position in respect of the breach - Cook v MS HK Ltd EWCA Civ 624, CA.

Conclusions

Issue 1: The unlawful deductions claim

205. The Tribunal has found on the balance of probabilities that there was no prior agreement between Mr Welford and the claimant entitling him to Offshore Allowance for the 2021 campaign. The Tribunal's also found that there was no explicit or implicit consent to Offshore Allowance payments arising from Mr Dearing processing the claimant's Overtime Claim Forms for the 2021 campaign.

206. It follows from these findings that the claimant was not entitled to any of the payments he received for Offshore Allowance in respect of the 2021 campaign and it follows that the claimant had no accrued outstanding

entitlement to any payment in respect of Offshore Allowance on 25 March 2022 when his final termination payments were calculated. The amount that the claimant had claimed for Offshore Allowance in the year in which the claimant left the respondent's employment was £19,570.

207. The respondent accepts that it did not pay the full amount of wages outstanding on the termination of the claimant's employment. It accepts that it made no payment to the claimant's at all on 25 March 2022.

208. The respondent had paid to the claimant the sum of £19,570 to which he was not entitled. The outstanding wages payable to the claimant on 25 March 2022 was £9,513.15. That amount was not paid to the claimant and instead was deducted and treated as a part repayment of the wrongly claimed sum of £19,570. This left a balance of overpaid but unrecovered Offshore Allowance of £10,056.85.

209. Although it is not necessary in relation to an unlawful deductions claim to identify whether or not the overpayment was properly recoverable, the Tribunal has in effect had to make that decision because of the employer's contract claim in which it attempts to recover the balance of overpaid Overtime Allowance of £10,056.85. The conclusion of the Tribunal is that the deduction of £9,513.15 was a deduction in respect of an overpayment in the sense that all of the £19,570 paid to the claimant was money to which the Tribunal finds the claimant was not entitled under his contract of employment or otherwise.

210. The next question for the Tribunal is whether the deduction was authorised to be made by virtue of a relevant provision of the claimant's contract of employment within the meaning of section 13(2) ERA. The Tribunal's conclusion is that the deduction was authorised under clause 14.1 of the contract of employment. Clause 14 says in terms that sums owed by the claimant to the respondent can be deducted from any payment of salary or any other sums payable to the claimant by the respondent. Clause 14.2 of the contract of employment goes on to provide the claimant's consent to the deduction from his salary of any such sums as were owing by him to the respondent. Clause 15 of the contract of employment allows recovery by the company of any overpayment regarding *"salary, bonus or other payments whilst you are an employee of the company."*

211. In the circumstances, the Tribunal was satisfied that the payments in respect of Offshore Allowance were overpayments in the sense that they were not contractually due to the claimant and the Tribunal was also satisfied that the claimant had given his prior written consent to this deduction. It follows that the deduction of £9,513.15 from the claimant's final salary payments on 25 March 2022 was an authorised deduction for the purposes of section 13(2) ERA.

212. Alternatively, the Tribunal also concludes that the purpose of the deduction that was made was the reimbursement of the employer in respect of an overpayment of wages made by the employer to the worker. In those circumstances, by virtue of section 14 ERA section 13 ERA does not apply

to the deduction. The deduction was in other words an excepted deduction with the effect that section 13 ERA has not been contravened.

Issue 2: The holiday play claim

213. This issue can be dealt with relatively straightforwardly.

214. When the respondent calculated the amount properly payable to the claimant by way of wages on 25 March 2022 after the termination of his employment, the respondent included in that calculation a payment in respect of unused accrued holiday pay outstanding at that point in time £1,603.86). Accordingly, the sum of £9,513.15 that the respondent accepts was otherwise properly payable to the claimant included a sum in respect of accrued, untaken holiday pay. Since the Tribunal has already found that the amount of the overpayment of Offshore Allowance exceeded the amount otherwise properly payable to the claimant, it follows that there is no outstanding payments due to the claimant in respect of unpaid holiday pay.

Issue 3: The claim for notice pay

215. The Tribunal has already noted that the claimant gave four weeks' notice of the termination of his employment which he worked and was paid for between 21 February 22 and 21 March 2022. In the circumstances, no outstanding claim for notice payment arises. The claimant confirmed that he accepted all of the facts relevant to this conclusion at paragraphs 39 and 41 of his witness statement.

Issue 4: The claim for unfair dismissal

216. The first question is whether the respondent, without reasonable or proper cause, behaved in a way that was calculated or likely to destroy or seriously damage the relationship of confidence and trust on the basis set out in paragraphs 10-11 above.

217. In those paragraphs, the claimant sets out the factual basis for contending that he was dismissed from his employment. The first matter relates to Mr Clouston allegedly changing his mind about whether or not the claimant would be receiving a bonus in respect of the 2021 campaign. The Tribunal prefers the evidence of Mr Clouston which is that he did not change his mind. He simply told the claimant that he would not be receiving a bonus and that no one at the claimant's level within the business would be receiving a bonus in respect of the 2021 campaign.

218. It seems inherently unlikely that at the same time that Mr Clouston was expressing his concern about the amount of money that the claimant was earning that he would have been intending to treat the claimant more favourably than anyone else at the claimant's level by paying the claimant a bonus. The Tribunal concludes that Mr Clouston's position was consistent. The claimant would not be receiving a bonus. The claimant had no contractual right to receive a bonus. Mr Clouston came to a conclusion which did not breach any implied or express term in the claimant's contract

of employment. The Tribunal can find no breach of contract at all in relation to this matter.

219. The second matter upon which the claimant relies in support of his contention that he has been constructively dismissed, is the investigation by Mr Dearing into the claimant for allegedly bringing the company into disrepute regarding some allegedly negative comments the claimant had made and that had been reported to the company following an internal management course held at Grimsby. Dealing with the first point, the claimant accepted under cross examination that the respondent had reasonable and proper cause to speak to the claimant about any matter where the respondent was concerned that the claimant may be representing the company negatively to a newly recruited employees. Given that concession, as well as the obvious managerial necessity in looking into such matters, the Tribunal can identify no breach of contract involved in raising this matter directly with the claimant. On the contrary, the Tribunal concludes that it was incumbent on the senior management of the company to raise this matter with him as a matter of effective employee relations and managing satisfactory levels of professional conduct.

220. The claimant alleges that Mr Clouston was "aggressive and furious" in the way in which he raised the matter with the claimant. The Tribunal prefers the evidence of Mr Clouston that he raised the matter in a professional way in order to get the claimant's version of events. It is also somewhat at odds with the claimant's case that when the claimant explained his side of the story to Mr Clouston, Mr Clouston and Mr Dearing immediately accepted his explanation and said that was the end of the matter. It was unclear to the Tribunal why, if Mr Clouston was somehow trying to undermine the claimant in advance of the meeting that was to follow later that day to discuss the hours and pay arrangements on the 2021 campaign, that Mr Clouston would so readily acquiesce in the claimant's explanation and draw a line under the matter. In the Tribunal's view this was nothing more than senior management making appropriate managerial enquiries into a matter that it caused it understandable concern and which it resolved in a timely manner without any detriment to the claimant.

221. The third matter upon which the claimant relies is the meeting to discuss the hours and pay arrangements in relation to the 2021 campaign on 3 February 2022. There was a difference of opinion about the length of the meeting but the length of the meeting simply reflected the level of detail that was being discussed; the need for senior management to obtain more information and the reticence of both the claimant and Mr McCabe in providing that information. To the extent that the meeting may have dragged on, the claimant and Mr McCabe were at least partly responsible for that because of their lack of candour and unwillingness to be forthcoming at the meeting.

222. The claimant also accepted in cross examination that it was entirely appropriate for senior management to raise concerns after they had looked into the hours and pay arrangements for the 2021 campaign and discovered amongst other things that the hours being spent on the project were in

breach of some fundamental provisions of the Working Time Regulations 1998 as well as giving rise to other causes for significant concern.

223. The Tribunal considers that it was simply incumbent upon Mr Clouston and Mr Dearing to raise with the claimant and Mr McCabe the following issues:

223.1. compliance with the Working Time Regulations;

223.2. the anomalous frequency of 14 hour days;

223.3. the significant amount of overtime being worked including on weather days;

223.4. the significant amount of Offshore Allowance being paid to the claimant despite the fact the claimant was an onshore worker; and

223.5. the amount of Offshore Allowance as well as overtime being paid on weather days.

224. In other words, there was not only reasonable and proper cause for Mr Clouston and Mr Dearing to raise these matters with the claimant, but it was incumbent on them to do so in order to discharge the duties that they owed to the company as senior managers.

225. The fourth matter raised by the claimant was that the claimant and Mr McCabe were challenged to come up with a new roster and plan to incorporate changes which did not involve unlawful working hours or disproportionate overtime and other allowances being paid to the Renewables Team. Having found that the claimant was not entitled to make any claim for Offshore Allowance, the Tribunal concludes that it was entirely appropriate for Mr Clouston and Mr Dearing to ask the claimant and Mr McCabe to look at more efficient ways to resource the project. Having also found that 14 hour flat days were being used as a way to bolster the claimant's salary, it is not so much a breach of the claimant's contract of employment by the respondent that was the context to this management action, but rather a breach of the claimant's contract of employment by the claimant himself. Plainly, the respondent had reasonable and proper cause to take corrective action when it found out that the Renewables Team was organising work in a way to benefit the team members financially by using the terms of the commercial bid as a lever to generate payment to the team members for 14 hours per day rather than simply reflecting the hours that were actually being worked, as well as manipulating Offshore Allowance to the financial benefit of the claimant and to the financial detriment of the company.

226. In any event, there was no breach of contract by the respondent when tasking Mr McCabe and the claimant with taking remedial measures in relation to the inefficiencies and largesse of the resourcing of the project during the 2021 campaign.

227. In the Tribunal's assessment, the truth of the situation is that Mr Clouston and Mr Dearing had uncovered an abuse by Mr McCabe and the claimant

of the overtime and Offshore Allowance payments which they quite properly took immediate steps to correct. Standing back, Mr Clouston and Mr Dearing dealt with what they discovered with a light managerial touch seeking to take corrective action for the year ahead and letting bygones be bygones rather than taking more proactive managerial steps which might have including potential disciplinary action against the claimant and Mr McCabe. In any event, the Tribunal concludes that the respondent had reasonable and proper cause both to convene the meeting on 3 February 2022 and in the way that they conducted it.

228. The fifth matter relied upon by the claimant in support of his contention that he was constructively dismissed related to Offshore Allowance and the overtime being claimed for weather days. For the reasons we have already referred to, it was perfectly proper for Mr Clouston and Mr Dearing to query both the payment of Offshore Allowance to the claimant when he was an onshore worker. It was also perfectly proper for the respondent to enquire why overtime was being worked on weather days and why so much overtime was being worked generally. It was the claimant's own case that neither Mr Clouston nor Mr Dearing were privy to the alleged bespoke oral agreement between the claimant and Mr Welford and, for reasons were never explained, both the claimant and Mr McCabe declined to explicitly refer to that agreement when they were being challenged to explain entitlements which on the face of things were anomalous. It was also never adequately explained why, if the agreement with Mr Welford ever existed, the claimant and Mr McCabe were so reticent. If there genuinely had been an agreement which they both witnessed and which entitled the claimant to Offshore Allowance when he was not working offshore, the plain and obvious thing to do was to explain that to Mr Clouston and Mr Dearing in short order at the meeting on 3 February 2022. It was telling that they chose not to do so.

229. Put simply, when it was the claimant's own case that neither Mr Clouston nor Mr Dearing were aware of the alleged bespoke agreement with Mr Welford, it was manifestly appropriate for Mr Clouston and Mr Dearing to ask why an onshore worker was receiving Offshore Allowance and it was obvious why the claimant's level of overtime payments on weather days required explanation. Again, the Tribunal considers that it was incumbent on Mr Clouston and Mr Dearing to raise these matters with the claimant and Mr McCabe at the risk of being in dereliction of their own duties to the company had they not done so. In any event, there was plainly both reasonable and proper cause to enquire about Offshore Allowance and overtime on weather days.

230. The sixth matter relied upon by the claimant to establish that he was constructively dismissed, is the spreadsheet which were put on a projector by Mr Dearing at the meeting on 3 February 2022 and the explanation that was required of Mr McCabe and the claimant as to why precisely 14 hour days were being regularly worked and why on some days the claimant had claimed payments for 21 hours in a single day.

231. The claimant during cross examination accepted that he had claimed for 22.25 hours on 8 April 2021 while at the same time saying that he had never worked 22 hours in a single day. Again, it is manifestly obvious why Mr Clouston and Mr Dearing were raising these matters with the claimant and Mr McCabe. Even setting aside the potential failure to comply with the Working Time Regulations, Mr Clouston and Mr Dearing can be forgiven for thinking that there was something awry with overtime claims which, if properly claimed, left the claimant with only two remaining hours to leave the workplace, get to bed and go to sleep before recommencing work the following day.

232. The seventh matter relied upon by the claimant was an extension of the sixth matter. The claimant criticises Mr Dearing for showing inaccurate information and formula resulting in the spreadsheet showing 14 hours of actual work. The claimant and Mr McCabe sought to suggest that this was attributable to errors on the part of Mr Dearing and Mr Clouston when analysing the data. The obvious difficulty with that interpretation is that the knowledge about how working hours and payments worked at Lowestoft on the GG Project lay in the hands of the claimant and Mr McCabe. Rather than being indignant that Mr Clouston and Mr Dearing were scrutinising payments, it was incumbent upon the claimant and Mr McCabe to explain the arrangements allegedly made with Mr Welford and how the system of allowances worked in practice. It was never adequately explained why the claimant and Mr McCabe chose not to enlighten Mr Clouston and Mr Dearing but rather to obfuscate matters in a defensive and unhelpful manner. If everything had been above board, the Tribunal concludes that Mr McCabe and the claimant would have adopted a transparent and helpful approach rather than one of diversion and obfuscation. In any event, the respondent had reasonable proper cause to question why 14 hours was been claimed so frequently.

233. The claimant then says that after this meeting it was clear that mutual trust and confidence had gone. The Tribunal rejects that assertion. Any failures to comply with contractual obligations at the meeting 3 February 2022 were on the part of the claimant and Mr McCabe and not on the part of Mr Clouston or Mr Dearing.

234. The eighth matter upon which the claimant relies is the meeting on 17 February 2022 and the mandate which was delivered at that meeting. The Tribunal has carefully considered the mandate and made factual findings in relation to it. The claimant only took objection to 2 of the 11 bullet points in the mandate. One of the two points related to travel time and it was common ground that the respondent had agreed to make provision for travel time to and from Lowestoft and Middlesbrough in working time to ensure that the claimant could spend time with his family. To the extent that there was ever any breach, anticipatory or otherwise, of an express or implied term in the original proposals regarding travelling in the claimant's own time, it had been remedied to the claimant's knowledge prior to the claimant's resignation.

235. The claimant's contention that he was entitled to resign because the concession had not been reduced to writing at the point at which he resigned is somewhat disingenuous. As we have said above, the claimant was content to have an oral arrangement entitling him to well over £16,000 per year left unevidenced in writing. The idea that the claimant resigned because the concession that Mr McCabe obtained at the meeting on 17 February 2022 had not by 21 February 2022 (the date of the claimant's resignation) been reduced to writing was wholly unconvincing. The Tribunal accordingly rejects the claimant's contention that this was a cause of his resignation. The Tribunal also finds that any failure to reduce the concession to writing within the short period of time prior to the claimant's resignation was not fundamental to the duty of mutual trust and confidence in the claimant's contract of employment.

236. The second matter in the mandate related to point 11 which the claimant said he considered this was some form of threat. The Tribunal has already found that it was no such thing and that it was simply a reflection of the fact that the senior management of the respondent had uncovered irregular working practices and payments during the 2021 campaign and had resolved to rectify the position going forward. The Tribunal can find no fault in the respondent for being adamant that it would no longer tolerate what were, for example, unlawful claims for Offshore Allowance, unjustified claims for flat 14 hour days and unjustified claims for overtime on weather days.

237. In the circumstances, the Tribunal concludes that the respondent was not in breach of any express or implied term of the claimant's contract of employment in respect of any of the eight matters referred to by the claimant or at all. The respondent had reasonable and proper cause to raise all of the issues and to convene all of the meetings and to adopt the tone it did in seeking to understand and then regularise the payments for the forthcoming 2022 campaign. Mr Clouston and Mr Dearing did nothing more than their duty under their own contracts of employment to discharge their own obligations to the company to ensure that corporate funds were not being abused and the employee costs were to be more tightly managed.

238. It follows that the Tribunal finds that the claimant voluntarily resigned his employment. In those circumstances, the claimant was not dismissed and the Tribunal has no jurisdiction to consider any further his claim for unfair dismissal.

Issue 5: The employers contract claim

239. For the reasons already given, the claimant was not entitled to be paid Offshore Allowance from the respondent. There was no agreement with Mr Welford and there is nothing to be inferred from Mr Dearing accepting the timesheets signed by Mr McCabe and the claimant during the course of the 2021 campaign. To the extent that Mr Dearing had any involvement it was simply administrative and was not conduct from which any agreement to

the claims being made in the overtime claim forms could be said to have arisen.

240. The Tribunal therefore finds that the claimant was in breach of contract by claiming the payments during the 2021 campaign that made up the amount of £19,570 for Offshore Allowances.

241. It follows that the balance of £10,056.85 was a payment to which the claimant was never entitled. The respondent's contract claim to recover that amount from the claimant is therefore well-founded and succeeds.

Summary conclusions

242. The Tribunal accordingly finds that:

242.1. the claimant was not dismissed;

242.2. the claimant has not suffered any unlawful deductions from his wages;

242.3. the claimant has no entitlement to unpaid holiday pay; and

242.4. the respondent's contract claim to recover the balance of overpaid Offshore Allowance in the sum of £10,056.85 is well-founded and succeeds**.**

Employment Judge Loy

Date: 20 September 2023