EMPLOYMENT TRIBUNALS

Claimant: Mr A T Long

Respondent: Armstrong Logistics Ltd

Heard at: Midlands (East) Region in Leicester
On: Monday 4 September 2023
Before: Employment Judge R Broughton (sitting alone)

Representation
Claimant: In person
Respondent: Mr Randall, US Attorney

RESERVED JUDGMENT

The claim for unlawful deduction from wages/breach of contract for sums due for shifts the Claimant worked on 26 and 27 December 2022, the 2 January 2023 and 15 January 2023, having now been paid, are dismissed on withdrawal by the Claimant.

The claim for unlawful deduction from wages/breach of contract for sums due for the shifts the Claimant worked on 12 February and 19 February 2023, having now been paid, are dismissed on withdrawal by the Claimant.

By consent, the Claimant is entitled to payment for one days accrued annual leave and the Respondent is ordered to pay the Claimant the gross sum of **£160 gross**.

The claim for unlawful deduction from wages/breach of contract for the alleged shortfall in wages for working nightshifts for two weeks in February 2023 is not well founded and is dismissed.

The claim of constructive unfair dismissal is **not** well founded and is dismissed.

RESERVED REASONS

Background

1. The claim was presented on 23 April 2023 following ACAS early conciliation from 1 March 2023 to 12 April 2023.

2. The claim was presented as a claim of unfair (constructive) dismissal, a claim for unlawful deduction from wages and breach of contract.

3. The Claimant set out in his Claim Form at paragraphs 8.2 and 9.2 brief details of the claim.

Evidence

4. The Respondent produced a bundle running to 123 pages. At the outset of the hearing, the Claimant made reference to a number of emails that he wanted to refer to in his evidence, however on checking through the bundle it was established that those emails were already contained within the bundle produced by the Respondent. There was no application by either party to add any further documents to the bundle.

5. The Respondent had prepared a witness statement for Mrs Amanda Oddy, HR Manager for the Respondent, and she attended and gave evidence under oath and was cross-examined by the Claimant.

6. The Claimant had failed to comply with an order to prepare and exchange a witness statement. Following receipt of the Respondent's Response to the Claim the Claimant had produced and sent to the Tribunal and Respondent, a document headed "*Response to Grounds of Resistance*".

7. The Claimant confirmed that he wanted to rely both upon what was set out in the "*Response to Grounds of Resistance"* document and the particulars of his Claim Form as forming his evidence in chief. Mr Randall confirmed that he had no objection.

Issues

8. In terms of the issues to be determined by the Tribunal, the Claimant had set out in his Claim Form a number of payments that he said were due to him. Before starting to hear the evidence, the Tribunal went through those payments with the Claimant to clarify what they were and whether they remained unpaid.

26 and 27 December 2022 and 2 January 2023

9. The Claimant complains that on these three days he was ready and available to work but because his work vehicle was being repaired there was no work for him to do. He complains that he should have been paid for those days and claims that he is entitled to unpaid wages in the sum of £480 gross.

10. The Claimant confirmed, however, that on 28 April 2023, the Respondent paid that sum in full. The Claimant withdrew that part of his claim.

Holiday – 5 January 2023

11. The Claimant further complains that on 5 January 2023 he was ready and able to work but his vehicle was still being repaired, and he was forced to use to take a days' annual leave that day. During the course of the hearing and on taking further instructions, Mr Randall confirmed that the Respondent accepted that the Claimant should not have been forced to use part of his annual leave entitlement and withdrew their defence to this claim. The parties are in agreement that the sum due to the Claimant for 5 January was **£160 gross** (£124.27 net).

15 January 2023

12. The Claimant further contends that during January 2023 he worked an extra shift on 15 January for which he should have been paid £245 in the January payroll, however the Respondent paid this to him on 3 July 2023. The Claimant withdraws that complaint.

February – 2 weeks working nightshifts.

13. The Claimant further complains that in February 2023 he worked for two weeks on the nightshift and that he should have been paid the nightshift hourly rate of £16.50 per hour despite being salaried and that he is owed therefore a shortfall in his wages of £154. The Claimant's entitlement to this payment is disputed by the Respondent.

Additional shifts 12 February and 19 February 2023

14. The Claimant complains that he worked two additional shifts on 12 and 19 February 2023 (Sundays), a total of 20.25 hours and that he is owed £390.85 gross. The Respondent's position is that it made a payment for the days worked on 12 and 19 February 2023 in the sum of £245 after deductions, in July 2023. The Claimant confirmed in cross-examination that he had in fact received that payment and he accepted, that the £245 net sum represented the amount owed to him for the two Sundays that he worked.

15. The Claimant confirmed that he is not pursuing this complaint and it is withdrawn,

16. The only remaining claim therefore of an unlawful deduction/breach of contract (putting aside the constructive unfair dismissal) is the claim for the alleged shortfall in his wages in the sum of £154 for the two weeks that he worked the nightshift in February 2023.

Constructive Unfair Dismissal Claim

17. The Tribunal sought to clarify at the outset with the Claimant what conduct of the Respondent he says led to his constructive unfair dismissal because this was not clear from the Claim Form. Further, he had referred in the "*Response to Grounds of Resistance*" document, that during the period of his employment with the Respondent, he had had several issues with his pay and that he had highlighted those in the documents within the bundle. He referred to variety of issues; overtime not paid correctly, nights away missing, expenses not paid correctly and his salary being short on numerous occasions and referred to bank statements in the bundle. However, the Claimant accepted that in his claim form he had referred to resigning in response to specific dates from 26 December 2022.

18. In terms of his resignation emails, dated 27 January 2023 (p.60) and 21 February 2023 (p.61), he does not refer to resigning because of any alleged late payments which predate December 2022.

19. Mr Randall objected to the Claimant expanding his complaint at this stage of the proceedings. The bundle of documents had been prepared by the Respondent on the understanding that the claim only relates to those events set out in his Claim Form dated on and after 26 December 2022 and those are the only issues addressed in the evidence in chief of the Respondent's witness Mrs Oddy. Ms Oddy had not come to the hearing prepared to deal with any historic errors or late underpayments.

20. It was explained to the Claimant that if he now wants to rely, in support of his constructive unfair dismissal claim, on previous incidents of late payments, he would need to make an application to amend his claim which he could do at this hearing. The Claimant did not want to make an application to amend but instead wanted to proceed on the basis of the claim as it is set out in his Claim Form namely that his constructive unfair dismissal claim relates to the late payment of his wages for the days he was unable to work on 26 and 27 December and 2 January 2023 and not to previous late payments.

21. In terms of the reason for his resignation on 27 January 2023, the Claimant explained that it was all to do with the problem that he had with the lorry being off the road for repairs, that he was not paid and that the Respondent had incorrectly recorded him as being on sick leave.

22. The Tribunal enquired of the Claimant to confirm whether (in addition to the issue over not being paid for 26 December, 27 December 2022 and 2 January 2023) part of the reason for him resigning was his allegation that he had to use his annual leave on 5 January 2023, to which he said: "*No, would not say so*".

The Issues – constructive unfair dismissal

23. After taking some time with the Claimant to clarify his claim, he confirmed that the conduct he relies upon, in support of his claim of constructive unfair dismissal is limited to the following:

    23.1. Non-payment of his wages on 26 December 2022, 27 December 2022 and 2 January 2023 in the January payroll (payroll cut off is the 21st of each month with wages paid on the 28th of the month).

    23.2. That those three days were recorded as the Claimant being on sick when he was not sick.

    23.3. That he had had several conversations with the Operations Manager where he had said that he was not on sick.

    23.4. That he was told he would be paid the outstanding monies immediately at the 31 January 2023 meeting but it was not paid. He was then told that Ms Oddy would sort out the outstanding wages on 6 February 2023 but it was still not paid.

    23.5. The cumulative effect of the above conduct, he alleges breached the implied term of mutual trust and confidence and the failure to pay him his wages when they fell due for payment, was a breach of the express terms of his contract of employment.

Summary of the claim

24. The Claimant had resigned by email on 27 January 2023 but following a meeting on 31 January 2023 he was assured that the outstanding wages would be paid immediately. A week later he had still not received the monies due to him and he alleges that he approached Mrs Oddy again who told him that she had instructed payroll to make the payments and that she would get in contact with payroll to resolve it and let him know. He alleges that he had no further contact from anyone about the monies due to him and by 21 February 2023 (which is the cut off date for the payroll),

he resigned for a second time.

25. The payments that he alleges were due to him for the work he performed in February 2023, do not form part of his constructive unfair dismissal claim because they were not due for payment until 28 February (after he resigned).

26. The Claimant's case is that he lost all trust and confidence in the Respondent after the way he had been treated and the delays in remedying the situation. Further, the failure to pay him under the contract of employment was a breach of its contractual terms (clause 8) and further, the Respondent had agreed to remedy the situation *immediately* and gone on to breach that agreement. Mr Randall referred to their being an overlap to the alleged express and implied term and that he had 'assumed' that these alleged breaches would form the basis of his claim.

Findings of fact

27. The Tribunal now turn to the findings of fact. All findings are based on a balance of probabilities.

Contract of employment

28. The Claimant was employed by the Respondent from 18 September 2018 to 21 February 2023 as an HGV Class 1 driver. He reported into the Operations Manager, Mr Steggles .

29. On starting employment with the Respondent, the Claimant was issued with a contract of employment dated 10 May 2019 (p. 30) which was signed and dated by him on 14 May 2019. This contract includes the following relevant clauses:

> ***8. Salary***
>
> *8.1 Your **normal rate of pay is £12.50 per hour.***
>
> *8.2 If applicable, you will be paid a **premium rate** as follows:*
>
> *8.2.1 Store Rate of £…… per hour.*
>
> *8.2.2 **Night Rate of £…… per hour.***
>
> *8.3 Any premium work must receive prior authorisation from your Manager. …*
>
> *8.4 Your pay will accrue from day to day and **is payable on or around the 28th day of each month,** by BACS, in arrears. … (Tribunal stress)*
>
> ***11. Hours of Work***
>
> *11.1 You are employed to work on a shift system basis. Your hours of work are a minimum of 160 hour per month. The actual days and hours on which you will be required to work (which will include weekend working) will be as per the rota. The rota will be notified to you one month before the start of each shift or as soon as reasonably practicable thereafter…*
>
> ***13. Overtime***
>
> *13.1 The Company may require you on reasonable notice to perform work in addition to your normal hours of work, depending on the needs of the business. The*

Company does not guarantee that overtime will be available to you. You are entitled to receive your normally rate of pay for overtime worked…

16. Holiday Entitlement

*16.7 The **Company** may require you to take any holiday at any time, including during your notice period **by notifying you in writing**… (Tribunal stress)*

16.9 Further details relating to holiday entitlement are set out in the Employee Handbook

33. Changes to Terms of Employment

33.1 The Company reserves the right to make changes to any of your terms of employment .You will be notified in writing of any changes as soon as possible and in any event within one month of the change,

30. The Claimant normally worked normally Monday to Friday on a 7 day rota system. The contract of employment provided that he could be required to work at weekends.

31. It is common between the parties that the Claimant had to complete daily timesheets and hand those in to the Transport Office before the payment of wages were authorised.

Change to Salaried Work

32. The HGV drivers employed by the Respondent as 'Trampers' (which is an industry term for drivers who make long distance deliveries which may take place over a number of days and require them to be away from home) were moved from an hourly rate of pay to a salary arrangement in November 2019.

33. The Claimant was issued with a second contract of employment dated 8 November 2019 (**Contract**), which he signed and dated on 12 November 2019 (p. 4).The only substantive change was the move to being paid a fixed salary. The Contract provides that his job title was a HGV Tramper:

" ***2. Job Title***

2.1 You are employed as HGV Tramper Driver

*2.2 **Your job title does not define or limit your duties and you may be required to carry out other work from time to time as the Company may reasonable require.** The Company reserves the right to require you to carry out alternative droles so that of HGV driver on either a temporary or permanent basis…"Tribunal stress.*

34. The term relating to pay provides as follows:

"8. Salary

8.1 Your normal rate of pay is £800 per week."

35. There is no provision under the Contract for enhanced payments for weekend or nightshift work.

36. It is common between the parties that the Claimant was ready to perform his duties as an HGV driver on **26 and 27 December 2022 and 2 January 2023.** However, he

had no vehicle because it was being repaired and therefore he could not carry out his work. The Respondent recorded him as absent on those dates. It is common between the parties that the Claimant had been absent on sick leave on 28 December 2022. He worked on 29 and 30 December 2022 using the vehicle of a colleague who was absent on sick leave.

37. In her evidence under cross examination, Mrs Oddy confirmed that the Claimant had been recorded as absent on sick leave on those 3 dates (26 and 27 December 2022 and 2 January 2023) which was not correct. Mrs Oddy gave evidence that she was not aware why the Claimant had been recorded as absent on sick leave. Recording absences on the system are not part of Ms Oddy's role, however, she attempted to put forward a possible explanation. She explained that the payroll clerk obtains timesheets (or 'run sheets') from the Transport Managers and inputs the information into the payroll system and suggested that the Claimant may have been recorded as on sick leave simply because of a clerical error.

Return to work form: 3 January 2023

38. There was a management generated request to the payroll department for 'other leave' for the 2 January 2023 recorded in an email dated 10 January 2023 (p.58).

39. There is also within the bundle a document which appears to be a return to work document signed by the Claimant to confirm his return to work on 3 January 2023. The document is dated 10 January 2023 (p. 59). Mrs Oddy gave evidence that she believed that the signatures were those of the Claimant's Line Manager, Justin Steggles, and the Claimant. The Claimant, denies that he signed this document and refers to documents within the bundle (p. 24) which he says show that he was driving to Scotland that day. He therefore disputes that he would have been in a position to sign this return to work form. His bank statement dated 11 January 2023 appears to confirm that on 10 January he paid for parking at junction 74 Truck Stop in Glasgow.

40. There is no witness statement from Mr Steggles to explain why, given that the Claimant had **not** been off sick, the Claimant appears to have signed a return to work form on 10 January 2023 which records the reason for his absence as a 'family emergency'.

41. Mrs Oddy accepted that it made no sense that the Claimant would sign a form to say he had been off due to a family emergency when in fact that was not the case.

42. The Claimant did not put it to Ms Oddy in cross examination that Mr Steggles (or indeed anyone else), had deliberately entered false information on the form.

43. The Claimant in his evidence in chief (p.22) gives undisputed evidence, which is accepted, that on 10 January Mr Steggles contacted the Claimant to inform him that sick leave had been submitted for 2 January 2023, the Claimant then spoke to him and explained he was not sick and his evidence is that Mr Steggles then changed this on the system to show that the Claimant had not been on sick and had confirmed to the Claimant that he would be paid for that day.

44. The Tribunal, accept on the balance of probabilities, that the Claimant had not signed the form on 10 January 2023. It would have made no sense for him to have recorded that the reason for his absence was a family emergency. The Tribunal do not find on the evidence however, that the Claimant has established, that the form was deliberately falsified rather than the reason being due to confusion over the reason

he was absent or how the reason should be recorded. The reason for his absence was however corrected when the Claimant pointed it out.

28 January 2023 payroll

45. The Claimant did not receive the wages due to him for the shifts he had not been able to work on **26 and 27 December 2022 and 2 January 2023**, on the 28th January 2023 payroll and he then resigned. He was owed £480. The Claimant gave evidence that this was a significant sum of money to him, equating to his monthly mortgage costs. He was also unhappy about being recorded as absent on sick leave.

46. His letter of resignation (p. 60) was sent it to his Line Manager, Justin Steggles. It states:

> "*…I am writing to confirm my resignation with immediate effect from 27/01/2023 please arrange for my final payslip and p45 along with outstanding funds to be available on 28/02/2023. You should be aware that I am resigning in response to a repudiatory breach of contract by my employer and I therefore consider myself constructively dismissed. I have been left with no option as I consider my position at Armstrong logistics ltd untenable. My working week is Monday to Friday* ***when my vehicle was off the road having repairs there was no effort to replace my vehicle so I could carry out my regular duties*** *the time my vehicle was off the road or Armstrongs wasn't open due to bank holidays even thou* [sic] *I wasn't planned to work* ***I was either put as sick or as like the 6th Jan requested to take leave*** *in which I wasn't given the legal time to take that day this is a breach of my employment in which has left me no choice but to resign …*" *Tribunal stress*

31 January 2023 meeting

47. The Claimant then attended a meeting with Mrs Oddy and Mr Whatton on 31 January 2023.

48. There were no minutes taken of that meeting.

49. The focus of that meeting was to discuss the three shifts which he had still not been paid for and being incorrectly recorded as absent due to sickness.

50. It is not in dispute that it was agreed at this meeting, that the Claimant should and would be paid for 26 and 27 December 2022 and 2 January 2023 and that the wages due to him would be paid *'immediately'*. The Claimant decided to withdraw his resignation and remain in the Respondent's employment, it was however the Tribunal find, clear that he did so on the condition that he would be paid as agreed for those days.

51. Mrs Oddy worked in the same office as the payroll clerk (Julie Mann) although Mrs Oddy had no direct involvement in administering the payroll. Mrs Oddy's alleges that she had immediately instructed Mrs Mann to make the payment to the Claimant for those 3 days but it was not actioned and she does not know why not.

52. The Claimant did not challenge the evidence of Ms Oddy on this point and the Tribunal accept on balance her evidence that she had given this instruction promptly to Mrs Mann, however Ms Oddy accepts that the Claimant was not told at the time that this instruction had been given.

6 February 2023 meeting

53. Not having received immediate payment, the Claimant's alleges that he went to see Mrs Oddy in her office on 6 February 2023 to ask her about those unpaid wages. His evidence is that Ms Oddy told him that she could not understand why the payment had not been made, she would go to payroll and ask why it had not been paid and would come back to him. He alleges however that Ms Oddy did not come back to update him. His evidence under cross examination was that he had expected from their conversation, that she intending to sort it out "*there and then*".

54. In cross-examination, Mrs Oddy had no recollection of a discussion with the Claimant on 6 February.

55. In cross-examination, the Claimant was adamant that a conversation had taken place on this date. He gave evidence is that he could recall specifics details about their conversation which included a discussion about family health issues. He alleges that after he left that meeting with Mrs Oddy he spoke to the Chairman who asked him if everything was now resolved, and the Claimant had said that he had spoken to with Mrs Oddy and it was being dealt with.

56. There is no contemporaneous record of that meeting. However, there is an email from the Claimant on 21 February at 3:01 pm (p. 63) where he states as follows:

> *"Afternoon Amanda when I came up to Lutterworth to see yourself and Neil it was said by Neil that the money has to be paid* ***now*** *as it was last months wages I then came* ***to see you the following week*** *asking where the money was* ***you were going to sort it <u>that day</u>*** *never was it agreed to go on this month's wages.*
>
> *Yes you have changed my shift the first 4 night shifts I had done was because my truck was going in for MOT and I didn't want to be put down as sick again so I done that to make things easier for Armstrongs." (*Tribunal stress).

57. Mrs Oddy replied to that email a few minutes later on 21 February at 3:06 pm (p. 64). She states:

> "*…Thank you for your prompt reply. I'm sorry that there has been a miscommunication between myself and our payroll department, not myself and you.* ***This is a genuine error,*** *for which I apologise. Can I ask what shifts you are currently doing? And do they suit your current position?*.."

58. Mrs Oddy does not deny in that email that there had been a further follow up discussion with her a week after the meeting on 31 January 2023.

59. The Tribunal find on the evidence, that there had been a follow up discussion between the Claimant and Mrs Oddy on 6 February 2023. While it was put to the Claimant under cross-examination that Mrs Mann was on leave on 6 February and therefore the payment could not have been actioned, the Tribunal accept that this was not communicated to the Claimant and this was not the explanation given in Mrs Oddy's email of 21 February 2023 (p. 64). Mrs Oddy refers to 'miscommunication' but does not assert that she was unable to resolve this on 6 February because Mrs Mann was on annual leave. The Claimant also makes the point that there are other people who work in accounts and the Finance Director could have arranged for him to have received the payment.

60. Mrs Oddy's evidence, however, is that as far as she was concerned after 31 January 2023, the payroll clerk (Julie Mann) had made the payment to the Claimant. Her evidence is that she had only become aware on 21 February when he resigned again

that there was an issue.

61. The Tribunal do not accept Mrs Oddy's evidence is reliable on this issue. The Tribunal accept that the Claimant had chased again for payment on 6 February 2023 and had been told that Mrs Oddy that she would address it that day. By 21 February (the end of the February payroll run) there had been no further communication from Mrs Oddy and the Claimant resigned.

62. Mrs Oddy does not assert that between 6 February and 21 February when the Claimant resigned, there was any further communication with him about the reason for any further delay in making good the payments that were owed to him from December 2022 and January 2023.

63. For whatever reason, the Tribunal find that Mrs Oddy took no steps to ensure that she made good on what she had told the Claimant on 6 February 2023, namely that the outstanding wages would be resolved that day or went back to him to explain why there would be a further delay.

Second Resignation: 21 February 2023

64. The Claimant resigned for a second time on 21 February 2023 at 13:33, which was the cut-off date for the payroll run but before salaries were actually paid on 28 February (p. 61). His resignation states as follows:

> "…*Afternoon Vicki hope you are well I have made the decision today to not return to Armstrong logistics as I feel very let down I have carried out all my work as expected but the one thing I've requested gets forgotten about my resignation on the 27th Jan states I was resigning under the grounds of constructive dismissal plus unlawful deductions that still stands it's a pity it's come to this but I personally have hit rock bottom and coming to work is making me worse I wish you all the best and stay safe many thanks Andy..."*

65. Mrs Oddy replied on **21 February (**p. 62) as follows:

> "*…I've just been given your resignation email by Vicki. I would like to confirm that we had agreed to pay you for the missing 3 days which you had been deducted, I informed our payroll department* ***and they have set this up to go into your salary this month****. I'm sorry that there seems to have been a miss communication [sic], but I want to assure you that this has not been forgotten.*
>
> *I believe that we have also* ***changed your shift pattern*** *to nights rather than tramping to allow you to be at home more. I've tried to call you this afternoon on your mobile, but I got no answer and was unable to leave you a message.*
>
> *I would very much like to have a chat with you regarding this matter. …*" *Tribunal stress*

February 12 and 19 shifts

66. On the 28 February 2023, Vicki Wright from payroll, wrote to the Claimant (p. 65) informing him that she had his timesheets/run sheets for the Monday to Friday shifts but not the Sunday shifts on 12 and 19 February 2023. The Claimant in cross examination agreed that Ms Wright was following the Respondent procedures in requiring the timesheets and that it was reasonable not to pay him until the matter was resolved. He explains that he was using another lorry to carrying out the shifts.

67. The Claimant then replied later that same day (p. 66) confirming that he worked on 12 February and 19 February and what hours he had worked.

68. The Claimant also set out the hourly rate he expected to be paid for the February shifts he had worked namely the premium rate paid to hourly paid drivers.

69. Ms Wright replied stating that as a salaried employee he would not be paid an hourly rate for working a night shift (p. 67). There is a further email in reply from the Claimant where he states that he had not been paid night shift rates but he does not allege, in this email, that Mr Steggles had told him that he would be paid an hourly rate for those two weeks.

70. The Respondent was paid his salary on 28 February and he was paid for the shifts on 12 and 19 February 2023 but not at the premium hourly rate. The payment of £480 for the 3 outstanding days was not paid however in the February payroll, it was paid to the Claimant on 28 April 2023.

Nightshift work

71. The Claimant's mother had been unwell in early 2023 and the Claimant emailed Mr Steggles to ask to change to working night shifts for two weeks, rather than carrying out the journeys which would require him to stay away from home overnight, so that he could visit his mother before work. His request was granted and he started the daily night work in or around the first week of February 2023.

72. The Claimant gave evidence that he worked two weeks on the nightshift in February 2023 and that he should have been paid £16.50 per hour because he was performing the work of a day worker carrying out night shifts rather than a Tamper. He calculates the shortfall in his wages to have been **£154** for those two weeks.

73. The Respondent's position is that as the Claimant was paid a salary he was not entitled to any premium rate when he worked the nightshift, even though this was not the work of a Tamper.

74. There was no formal variation to the Contract however the Claimant alleges that he was entitled to be paid at the nightshift rate (even though he continued to be paid his salary) because he had asked the Mr Steggles what he would be paid and he had made the comment: "*What shift you work you get paid for*".

75. This alleged comment by Mr Steggles was not referred to in the particulars of claims or in the "*Response to Grounds of Resistance*" document.

76. When giving his evidence about this comment, the Claimant does not allege that he had asked for clarity about what Mr Steggles had meant and he does not identify when this comment is alleged to have been made, whether it was at the time he requested the change of shift or at some point thereafter.

77. The Claimant alleges that he was paid a salary of £800 on the basis of working 60 hours per week Monday to Friday. He alleges he worked 77 hours over the course of 2 weeks for which he should have received an additional £2 per hour = £154.

78. Mr Steggles was not present at the Tribunal to give evidence however, the Tribunal take into account that the alleged comment by Mr Steggles (which the Claimant alleges he understood to mean he would be paid based on an hourly rate), was only mentioned by the Claimant during cross examination. It is fundamental to this part of the Claimant's case, and yet he made no mention of it before today's hearing. There are no documents recording what had been said.

79. Further, the Claimant had not mentioned this alleged comment in the emails he sent to payroll in February when Ms Wright had stated that as a salaried employee he was not entitled to an hourly rate of pay. He offered not explanation for not raising the alleged statement from Mr Steggles at this point.

80. The burden of proof is on the Claimant to establish that this comment was made.

81. On weighing up the evidence, on balance the Tribunal is not persuaded that this comment was made. However, even if it were, it was vague and uncertain in that Mr Steggles had not actually said that the Claimant would be paid an hourly rate rather than receive a salary.

Remedy

82. The Claimant has produced a schedule of loss and he was cross-examined on it.

83. Although the Claimant stated that he started new employment on 6 March 2023, his contract of employment with his new employers (p. 80) states his employment started on 27 February 2023. The Claimant, however, gave evidence that he had an induction and driver assessment on 27 February and did not actually start work and start receiving any wages until 6 March 2023. His bank statements do not appear to record a payment from "*TDW Distribution Ltd"* (his new employer) until 31 March 2023.

84. On balance, the Tribunal accept the Claimant's evidence that he was paid received from his new employer from 6 March 2023.

85. The Claimant with his new employer, is paid an hourly rate of pay (£13 per hour). In cross examination, he is able to earn as much as he earned while working for the Respondent although it means working more shifts.

86. He works from Monday to Friday, and he may be asked to work additional shifts.

87. He was paid **£800 gross** per week for the Respondent. His payslips from his new employment show that he has earned consistently more than he did working for the Respondent for example:

    19 May 2023: £992 gross and £787.20 net.

    26 May 2023 : £ 920.50 and £730.16 net.

    2 June 2023: £1069.12 gross (before pension) and £835.80 net.

88. A salary of £800 gross per week equates, the Tribunal calculate, to circa £621 per week net.

89. The Claimant confirmed (in terms of the ACAS uplift he is seeking) that he did not raise a grievance in relation to the non-payments in January and February. The Claimant had raised a grievance back in 2020 but had not raised one after that date relevant to the reasons why he resigned.

Submissions

90. The parties gave oral submissions. The following is a summary of those submissions.

Respondent's submissions

91. Mr Randall submits that in terms of the constructive unfair dismissal, the Respondent 'held its hands up' at the meeting on 31 January 2023 and apologised and assured the Claimant that they would make payment of the 3 days that had been wrongly coded as sick leave. Mrs Oddy had gone back to the office and instructed the payment to be made. It is accepted that he was not in fact paid but the reason for this is because Mrs Mann, dealing with payroll, was then on leave from 6 February.

92. Mr Randall submits there is a small dispute over whether there was a conversation on 6 February, but this was of little relevance because Mrs Mann was not in the office to action the payment on 6 February in any event. There is no dispute there was no contact with the Claimant between 6 February and 21 February.

93. Mr Randall argues that the constructive unfair dismissal claim is based on a collateral agreement to the main agreement which is the contract of employment. The collateral agreement is the agreement to pay him the outstanding sums *immediately*.

94. Mr Randell submits that the failure to make payment is not a repudiatory breach.

95. It is submitted that it would be a repudiatory breach if the Claimant had waited until 28 February and had not been paid but the Claimant had 'gone too early'. He resigned on 21 February before the payroll date.

96. Mr Randall argues that at its highest the agreement to pay was a warranty, it is not a condition of the agreement. The contractual obligation is to make the payment on 28th of the month, i.e. 28 February.

97. The obligation on the part of the Company to pay enhanced payments for nightshift does not apply to salaried employees. While the Claimant remained as a 'Tramper' in name, he asked for a temporary change to his shift pattern and that was agreed but he continued to be paid his contractual salaried payment. He has no contractual right to be paid a premium rate for the nightshift he worked.

98. Mr Randall argues there is no fair reason pursuant to section 98(2) Employment Rights Act 1996 put forward by the Respondent if the Tribunal finds that there has been a dismissal. There is no argument put forward pursuant to Section 98(4). This is, Mr Randall submits, an all or nothing case.

99. If the Tribunal finds there has been a repudiatory breach in relation to events before the first resignation, it is argued that the Claimant returned to work and therefore affirmed the contract.

100. Returning to the schedule of loss, Mr Randall disputes the calculations of the basic award. He believes the correct figure should be £3,426 (£571 multiplied by 6).

101. He would argue loss of statutory rights at the conservative end of £250.

102. In terms of the compensatory award, there are two point; in terms of loss of earnings between the effective date of termination and the hearing, it is submitted that the evidence shows that the Claimant secured new employment within 6 days, i.e. he started his new employment on 27 February. He calculates that 6 x £106 gross salary **per day** would mean losses of £1,020 between the effective date of termination and the Claimant starting his job on 27 February 2023.

103. In terms of ongoing losses, the Claimant has found a job which pays roughly the

same. He has the opportunity to earn the same, if not more, than he earned working for the Respondent and it is submitted no compensatory award should therefore be made.

104. In terms of the ACAS uplift, he has confirmed that he did not raise any grievance and therefore the ACAS Code does not apply. Even if there was a dismissal, it is argued this is not a capability or conduct matter.

105. It is accepted that the unpaid amounts have all now been paid and the only outstanding claim is for the unlawful deduction in the sum of £154. It is argued that as a salaried employee, there is no basis to that claim.

106. Finally, it is submitted by Mr Randall that if he succeeds in his constructive unfair dismissal claim, it should be limited to the basic award of £3,426 and loss of statutory rights of £250.

Claimant's submissions

107. The Claimant gave brief submissions. He stated that he has brought his claim because he feels he has been wrongly treated. He refers to the Respondent putting him down as being sick; saying that he was off work sick when actually they had not provided him with a vehicle to do his job. He was very disappointed after the meeting on 31 January when he had still not received the payments due from December and by 21 February, the payroll cut-off date, he had still not received the payment or confirmation that it was going to be paid and he did not know how much longer he would have to wait to be paid for the work that he had done back in December. He had had two conversations about his outstanding payments and been assured it would be paid immediately nothing had been paid to him and he felt he had no option, that all trust had gone.

108. In terms of his losses, he refers to the fact that he did not actually earn any income from his new employment until 6 March 2023. As for earnings now with his new employer, his hourly rate is £12 an hour. It is £12 per hour up to 55 hours and then goes up to £13 per hour. If he works a Saturday or a Sunday, it is £13 per hour. He states:

"*I can earn the same as the Respondent but I was salaried at the Respondent with night allowance. I knew what I was earning on a monthly basis. With my current employer, I am paid for the hours that I work, if I am down on my hours if they ask me to work on a Sunday I have to work…*"

109. He refers to the fact that when he worked for the Respondent, he could start work at say 5 am in the morning and he could have finished his tasks by say 3 pm or 4 pm in the afternoon and he would still get his salary. With his new employer, he is only paid for the hours that he does.

Legal principles

Unauthorised deductions from wages

110. The applicable statutory provisions relevant to claims of unauthorised deductions from wages is set out in the Employment Rights Act 1996 (ERA):

"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…"

Breach of contract claim

111. The Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 provides at Article 3 as follows: Extension of jurisdiction.

*"**3.** Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*

(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b)the claim is not one to which article 5 applies; and

(c)the claim arises or is outstanding on the termination of the employee's employment."

Constructive unfair dismissal

112. Section 95(1)(c) of the ERA states that there is a dismissal when an employee terminates their contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. The leading case is ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA*** where the Court ruled that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR put it, if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.

113. Therefore, in order to claim constructive dismissal, the employee must establish:

113.1. There is a fundamental breach of contract on the part of the employer.

113.2. The employer's breach caused the employer to resign.

113.3. The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

114. Once the Tribunal has established the relevant contractual term exists and that a breach has occurred, it must then consider whether the breach is fundamental. Essentially, this is a question of fact and it makes no difference to the question of whether or not there has been a fundamental breach that the employer did not intend to end the contract. See ***Bliss v South East Thames Regional Health Authority [1987] ICR.***

115. In ***Western Excavating*** the Court of Appeal expressly rejected the argument that Section 95(1)(c) introduces a concept of reasonable behaviour by employers into contracts of employment.

116. ***Bournemouth University Higher Education Corporation v Buckland [2010] ICR 909 CA***, the court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

117. ***Cantor Fitzgerald International v Callahan and ors 1999 ICR 639, CA*****:** the Court of Appeal made clear that the question of whether non-payment of agreed wages was or was not fundamental to the continued existence of the contract depended on drawing a distinction between an employer's inadvertent failure or delay in paying on the one hand, and its deliberate refusal to do so on the other:

"*The relevant principle is summarised in Harvey on Industrial Relations and Employment Law , para. B[39]. It reads: "failure on the part of the employer to pay the agreed remuneration whilst a breach of contract is not necessarily a fundamental breach of contract." Expressed in this way, although accurate, the summary does not provide very much assistance.*

In reality it is difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms the employee offers his skills and efforts in exchange for his pay: that is the understanding at the heart of the contractual arrangement between him and his employer. The principle is most clearly expressed by Walton J., summarising the submission of counsel for the Inland Revenue, in ***Cresswell v. Board of Inland Revenue [1984] I.C.R. 508,522:***

…

"In fact direct authority can be found in ***R. F. Hill Ltd. v. Mooney [1981] I.R.L.R. 258 ,*** *260 where Browne-Wilkinson J. observed:*

"The obligation on an employer to pay remuneration is one of the fundamental terms of a contract. In our view, if an employer seeks to alter that contractual obligation in a fundamental way, such as he has sought to do in this case, such attempt is a breach going to the very root of the contract and is necessarily repudiation."

Two further authorities need specific attention. In Miles v. Wakefield Metropolitan District Council [1987] I.C.R. 368 the House of Lords linked the right to remuneration with the willingness of an employee to do the work he was employed to do. Lord Oliver of Aylmerton, at p. 401, referred to "the practical interdependence of the employee's willingness to perform on the one hand and the employer's obligation to pay wages on the other." In Rigby v. Feredo Ltd. [1988] I.C.R. 29, 33, in the House of Lords , it was common ground that:

"the unilateral imposition by an employer of a reduction in the agreed remuneration of an employee constitutes a fundamental and repudiatory breach of the contract of employment which, if accepted by the employee, would terminate the contract forthwith."

…In my judgment the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment depends on the critical distinction to

be drawn between an employer's failure to pay, or delay in paying, agreed remuneration and his deliberate refusal to do so. ***Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see, for example, Adams v. Charles Zub Associates Ltd. [1978] I.R.L.R. 551). If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory.***

Where, however, an employer unilaterally reduces his employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined. ***Therefore an emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory****. To the extent that Gillies [1979] I.R.L.R. 457 suggests otherwise, it does not accurately reflect the relevant legal principles.*

I very much doubt whether de minimis has any relevance in this field. If the amount at stake is very small, and the circumstances justifying a minimal reduction are explained to the employee, then the likelihood is that he would be prepared to accept new terms by way of mutual variation of the original contract. However an apparently slight change imposed on a reluctant employee by economic pressure exercised by the employer should not be confused with a consensual variation, and in such circumstances an employee would be entitled to treat the contract of employment as discharged by the employer's breach" Tribunal stress.

118. The courts will not readily uphold alleged oral agreements where they contradict written terms in the absence of some corroborating evidence of the oral terms and the intention for them to be binding: ***Judge v Crown Leisure Ltd 2005 IRLR 823, CA*****:** director who stated his intention to bring the remuneration of all managers roughly into line 'in due course'. Court of Appeal agreed that there was no binding agreement. The words did not amount to a contractual promise as they were too vague and uncertain.

119. ***Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT*****, t**he EAT took the view that implying an agreement to a variation of contract is a 'course which should be adopted with great caution'. It went on to state that 'if the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where the variation has no immediate practical effect the position is not the same.'

120. The individual terms of a contract must be sufficiently clear and certain for the courts to be able to give them meaning: ***Polymer Products Ltd v Pover EAT 599/80*****'.**

121. A fundamental breach of contract by the employer may be an actual or an anticipatory breach.

122. The danger faced by employees who resign in the light of an anticipatory breach is that they may be held to have acted too hastily. In ***Sangarapillai v Scottish Homes EAT 420/91*****,** for example, the employee was given a different job title in a salary review and resigned before the completion of that review. The EAT upheld an

employment tribunal's finding that there had been no fundamental breach of contract at the time of the dismissal. Although the employee had been given a different job title, that did not amount to a clear indication from his employer that his salary or status was to be downgraded.

123. However, where the employer clearly indicates that an employee's contract is to be breached, the employee is not obliged to 'wait and see' whether the employer carries out the threat: ***Wellworthy Ltd v Ellis EAT 915/83*.**

124. In ***Gunton v. Richmond-upon-Thames London Borough Council [1980] I.C.R. 755* ,** in the course of his judgment, Buckley L.J. reviewed the history of the law of repudiation in the field of master and servant, and said, at pp. 770–771:

"…The basis of the doctrine is that ***where a party to a contract before the date for performance has arrived evinces an intention not to perform his part of the contract, he has committed no breach until the date for performance arrives. Nevertheless the innocent party will be relieved of his obligations under the contract, if he so chooses, so as to render him free to arrange his affairs unhampered by the continued existence of those obligations. It is for the innocent party to elect whether he wishes to be so relieved, which he does by accepting the repudiatory act of the guilty party as a repudiation of his, the guilty party's, obligations under*** *the contract. In those circumstances the innocent party may treat the guilty party as having committed an entire breach of the contract notwithstanding that the time for performance has not yet arrived. Where the time for performance of part of the guilty party's obligations has arrived but some of those obligations remain executory, the position is the same as regards those obligations which remain executory as it is in respect of all the guilty party's obligations where none of them has yet become due for performance. ..I can only conclude that the doctrine does apply to contracts of personal service as applies to the generality of contracts." Tribunal stress*

125. ***Whitney v Monster Worldwide Ltd 2010 EWCA Civ 1312, CA*:** The Court of Appeal thought it entirely acceptable to ascertain a date by which a contract had definitely arisen, even if it was not possible to establish with any certainty whether it had arisen before that date.

Implied term

126. There is a specific implied term that employers will not treat employees arbitrarily, capriciously or inequitably in matters of remuneration : ***FC Gardner Ltd v Beresford 1978 IRLR 63, EAT*** .More recent cases have treated this as part of the duty not to destroy or seriously damage the relationship of trust and confidence: ***Glendale Managed Services v Graham 2003 IRLR 465, CA*.**

127. ***Walker v Malletts Solicitors Ltd ET Case No.3400348/16*** an employment tribunal upheld claims of unfair constructive dismissal, wrongful dismissal and unauthorised deduction from wages brought by a paralegal whose firm of solicitors persistently failed to pay her salary on time owing to the firm's financial difficulties. The tribunal held that the employer's conduct constituted a breach of the Claimant's express terms and in addition seriously damaged trust and confidence for which there was no proper and reasonable cause.

Performance 'under protest'.

128. An employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract.

129. ***Novakovic v Tesco Stores Ltd EAT 0315/15*** EAT upheld the employee's argument that the tribunal had erred in disregarding clear and unchallenged evidence that she had been working under protest. She had expressly stated this when taking the job and had informed various layers of senior management that the situation was unacceptable and that she wanted to try and have the decision overturned. The case was remitted to the same tribunal to determine the issue of affirmation of the breach, having regard to all the material evidence.

130. ***WE Cox Toner (International) Ltd v Crook 1981 ICR 823, EAT*** Mere delay by itself did not constitute an affirmation of the contract but if the delay went on for too long it could be very persuasive evidence of an affirmation. The tribunal should have taken account of the fact that throughout the seven-month period the employee had continued to work and be paid under the contract. Even if it were arguable that he was working under protest for six months, the delay for a further month after the company had finally made its intentions clear was fatal to the employee's claim that he had not affirmed the contract.

Continuing breaches.

131. An employee can exercise his or her right to rely upon the breach at any time while it is continuing. In ***Reid v Camphill Engravers 1990 ICR 435, EAT*****,** employer had paid a lower salary than the statutory (and therefore contractual) minimum set by a Wages Council. The EAT overturned this decision. The employer had been in continuing breach of contract. Even if R had not reacted to the first breach, it was open to him to rely on it when his employer committed further breaches.

'Last straw' cases.

132. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract : ***Lewis v Motorworld Garages Ltd 1986 ICR 157, CA*****.**

133. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer :***Logan v Customs and Excise Commissioners 2004 ICR 1, CA*****.**

134. ***Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA*****,** the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test.

Affirmation of contract in 'last straw' cases.

135. **Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA*,** which held that, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign. The Court of Appeal in Kaur proceeded to offer guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

- what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- has he or she affirmed the contract since that act?
- if not, was that act (or omission) by itself a repudiatory breach of contract?
- if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
- did the employee resign in response (or partly in response) to that breach?

Warranty

136. A possible remedy for a breach of a condition in an agreement is to repudiate the contract and claim damages. The only possible remedy for a breach of a warranty is claiming damages.

137. In ***Bentsen v Taylor, Sons & Co [1893] 2 Q.B. 274, 281*** Bowen LJ remarked:

> *"… it is often very difficult to decide … whether a representation which contains a promise … amounts to a* condition *precedent, or is only a warranty. There is no way of deciding this question except by looking at the contract in the light of the surrounding circumstances;"* but he suggested that:
>
> "… *in order to decide this question of construction, one of the first things you would look to is to what extent* the *accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out."*

138. The reason why a breach of **a condition** entitles the innocent party to terminate further performance of the contract has been said to be that conditions*:"… go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all*." : ***Wallis, Son & Wells v Pratt & Haynes [1910] 2 K.B. 1003, 1012*,** per Fletcher Moulton J (dissenting): approved [1911] A.C. 394; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd [1974] A.C. 235, 264, 272*; *State Trading Corp of India Ltd v M. Golodetz Ltd [1989] 2 Lloyd's Rep. 277, 282*.

139. The use of the word warranty in this senser is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract, the breach of which by one party does not entitle the other to terminate further performance of the contract.

Intermediate terms

140. There is a third category, namely of "intermediate" terms where the entitlement to terminate further performance of the contract depends upon the nature and consequences of the breach. A termination remains available in an appropriate case.

141. **Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd***:

> "*The question whether a breach of an intermediate term is sufficiently serious to entitle the innocent party to terminate further performance of the contract is to be determined "by evaluating all the relevant circumstances". The bar which must be cleared before there is an entitlement in the innocent party to terminate the contract is a "high" one. Diplock LJ in Hongkong Fir in the following terms :"Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"*

Demonstrating causation

142. ***Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent [1999] ICR 425 CA***. The Court of Appeal held that it was not necessary for an employee to prove that a resignation was caused by a breach of contract to inform the employer immediately of the reasons for his or her resignation. It was for the Tribunal in each case to determine as a matter of fact that the employee resigned in response to an employer's breach.

Affirmation

143. If the employee worked too long after the employer's breach before resigning, he or she may be taken to have affirmed the contract. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a last straw incident. ***Lewis v Motorworld Garages Ltd [1986] ICR 157 CA*** where the employee resigns as a result of a last straw it must be questioned whether he or she has waived the breach and affirmed the contract by continuing to work after each incident. The Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, CA*** held that a last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence. It does not matter that employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

144. A key factor for the Tribunal to take into account is the effect that the breach had on the employee concerned.

145. The EAT held that where an employer breaches the implied term of trust and confidence, the breach is never to be fundamental – ***Morrow v Safeway Stores plc [2002] IRLR 9, EAT***.

146. The Court of Appeal in ***Bournemouth University Higher Education Corporation v Buckland [2010] ICR 909 CA*** ruled that the range of reasonable responses test is not relevant to the question of whether an employer had committed a repudiatory breach of contract entitling the employee to claim constructive dismissal.

Conclusions and Analysis

Unlawful Deduction from Wages/ Breach of Contract

147. The Claimant relies on a comment by Mr Steggles which the Claimant alleges he understood to be confirmation that he would be paid the hourly night rate while working for two weeks as a day driver doing night work and relieved of deliveries which would be classed as the work of a 'Tramper'.

148. The starting point is the Contract. The written terms make it clear that the bargain between the parties was that the Claimant was employed as an HGV 'Tramper' driver and received a fixed salary of £800. Further, clause 2 provides that the job title does not limit the duties he may be required to carry out, there is flexibility within the Contract around the duties the Claimant may be required to perform. The Contract does not, where alternative duties which are covered by clause 2 are carried out, provide for any alternative pay arrangement, rather the Claimant remains entitled to the salary of £800.

149. The temporary change of duties in February 2023 was at the request of the Claimant however, those same type of driving duties would be covered by the terms of the duties clause (clause 2).

150. The temporary change of duties and continued payment of salary was not therefore inconsistent with the express terms of the Contract. It is not necessary therefore to imply any term about what would happen if other driving (Non 'Tamper') duties were performed in order to give business efficacy to the Contract.

151. The Claimant however relies on the alleged comment by Mr Steggles as giving rise to a contractual variation or a collateral contract/agreement. The Respondent does not seek to argue that Mr Steggles was not acting in the capacity of an agent and did not have the authority to bind the Respondent should he have told the Claimant that he would be paid an hourly rate for this work,. However, as set out in the findings of fact, the burden is on the Claimant to establish that this comment was made and the Tribunal is not persuaded on a balance of probabilities, that it was made.

152. Further and in any event, the Tribunal is not persuaded that the alleged words are sufficiently clear to amount to a variation of the Contract, changing the Claimant from a salaried employee to one who is hourly paid. In the Tribunal's judgment any alleged comment would have been too vague and uncertain to amount to a contractual agreement.

153. Such a change may not have benefited the Claimant depending what shifts were available. It may have given rise to a detriment to the Claimant. The alleged variation was not, the Tribunal conclude, sufficiently clear and certain: **Polymer Products ltd v Pover EAT 599/80**

154. The Tribunal therefore conclude that the Claimant was paid what was properly payable to him under the express terms of his Contract. The alleged shortfall of £154 was not properly payable and there was no unlawful deduction pursuant to section 13 ERA and there was no breach of the Contract or any collateral contract or agreement.

155. The claim for £154 is not well founded and is dismissed.

Constructive unfair dismissal

156. The Claimant does not seek to rely on any events which pre date December 2022.

Was there a fundamental breach of contract?

157. The Claimant was incorrectly coded as sick. He was not sick on the relevant 3 days when his vehicle was in for repairs, and he was entitled to be paid his usual wage for those days. The failure to pay him his pay under the terms of his Contract on 28 January 2023 (including for the two dates worked in December which were worked after the cut-off date for payroll purposes for wages payable in in December 2022), was a breach of the express terms of his Contract. He was entitled to be paid under clause 8 and to be paid on or around 28th of each month pursuant to clause 8.4.

158. The Tribunal is not persuaded on the evidence and on a balance of probabilities, that information was falsified on the return to work form and in information supplied to payroll, to knowingly and unlawfully deprive the Claimant of wages for those 3 dates rather than because of an oversight or because it was not appreciated by his manager that he was entitled to be paid when there was no work for him to do. When this issue was raised with him, Mr Steggles agreed that the Claimant should not have been coded as sick, amended the record and agreed that the Claimant should be paid.

159. The Claimant did not receive the payments for those 3 days on 28 January 2023 and he resigned. The Claimant had however by this stage been told that he was entitled to be paid, he does not allege that he had been told that the Respondent did not intend to pay him.

160. It remains unclear why the payment was not made however, there was no emphatic denial by the Respondent of its obligation to pay the agreed wages, or a determined resolution not to comply with its contractual obligations in relation to pay. Quite the opposite, it acknowledged the Claimant's entitlement to the payment and agreed to pay it.

161. The Claimant did not make further enquiries about why the correct wages had not been paid before he resigned.

162. The Respondent was in breach of clause 8.4 which provides for payment of his salary by on or around 28th of each month, however, the Tribunal do not conclude that at this stage, in circumstances where the Respondent had agreed to pay, that the breach was fundamental. It would not, objectively, be reasonable to conclude at this point that the failure to pay was because of a deliberate decision not to pay, rather than for an innocent reason, such as a payroll error.

163. By 28 January 2023, the failure to pay him what was owed to him was also not repeated or persistent. The Claimant himself perhaps recognised that because he met with the Respondent and on being assured the matter would be resolved, he retracted his resignation. Had the Claimant been paid what was owed and there been no further breach, then given the Claimant had agreed to return on those terms (and further, did not resign for another approximately 3 weeks), the Tribunal conclude that he would have affirmed the Contract . However, he had made it clear that he was withdrawing his resignation on the understanding that this pay issue would be promptly rectified and it was not.

164. Counsel for the Respondent submits that any agreement to make immediate payment could not be relied upon as a breach of contract which entitled the Claimant to terminate the Contract because it was not a condition of the Contract and was no more than a warranty.

165. An agreement to pay wages, is a term in an employment contract which goes directly to the substance of the Contract. The agreement to pay for those services is an essential term and its non-performance may fairly considered by the other party as a substantial failure: **R.F.Hill Ltd v Mooney [1981] I.R.L.R 258.** That must equally apply to terms regarding when that payment must be paid. Most employees arrange their finances (payment of mortgage and other household bills) around an agreed payment date and the consequences can be significant if payment is delayed.

166. However, whether or not it constitutes a fundamental breach which entitles the employee to accept the non-payment as a repudiation (either on the basis of the breach of the relevant express terms or as a breach of the implied term of trust and confidence) depends on the circumstances: ***Cantor Fitzgerald International v Callahan and ors 1999 ICR 639, CA*.** Therefore, given how fundamental the term as to payment of wages is but with repudiation dependent upon the circumstances, the Tribunal conclude that if not a condition then, as a minimum, a term as to the payment date, is an intermediate term. A breach of an agreement about when wages will be paid *may* therefore give rise to therefore to a repudiation of the agreement: **Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd***

167. 'Immediately' in common parlance means 'straight away' i.e. without any delay. The Claimant did not receive the payment 'immediately after the 31 January meeting. There was a further delay and thus an actual breach, however, he did not resign. The Claimant waited 6 days and then contacted Mrs Oddy again. The Claimant had made it clear how serious this non payment was for him, he had agreed to withdrew his resignation on the understanding the payment due to him would be paid straight away, and the Tribunal do not consider that waiting 6 days to see whether payment would be paid, amounts to affirmation of the Contract and waiver of the breach, in those circumstances.

168. The Claimant spoke to Ms Oddy again on 6 February 2023. He was reassured she would look into it and get back to him and he felt that it would now be sorted out, unfortunately it was not. Ms Oddy also did not communicate with him about what the reasons were.

169. The Claimant had a choice. He had a means of redress in that he could have remained employed and issued a claim for an unlawful deduction of wages in the Tribunal, he did not have to resign.

170. The Tribunal accept that the Claimant was frustrated, which is understandable not least given the lack of communication. He waited however until 21 February, which was the date payroll closed but because it had not been confirmed to him that the outstanding wages would be paid in his February payroll, he presumed they would not be paid and resigned.

171. The Claimant does not allege that he was told at any point that the Respondent was not intending to pay. He had been assured that they would. However, the delays were unexplained and he no longer trusted the Respondent, because of a combination of incorrectly recording him as on sick leave and not paying him for those.

172. It cannot be said however, that there was an empathic denial by the Respondent of its obligation to pay or objectively, that the Respondent demonstrated a determined resolution not to comply.

173. In terms of whether the breach, (namely the failure to pay) was persistent and

repeated; he was not paid on the on the 28th January (for the 3 days owed), it was not paid 'immediately' as the Respondent agreed to do on the 31 January and he had not been paid shortly after he chased Ms Oddy on the 6 February 2023. Ms Oddy does not allege that she had informed the Claimant that the monies would be paid in his February pay, she does not recall what she had said at all on 6 February however, the Tribunal find that she had told him she would deal with it and he understood she would do so on that same day. It was not actioned on that day and he was not told the reason for this. The breach was, by 6 February 2023, certainly repeated.

174. The Claimant could have waited until the date his next wages were due on 28th February before resigning. It was only 1 week away. When asked in cross examination about now waiting until pay date, he stated that he knew "*what was coming, been down this road many times*" and referred to it as a matter of trust.

175. The Claimant was assured at the meeting on 31st January that the payment would be made immediately, and it was reasonable for the Claimant to believe that this meant that he would be paid before the next payroll run. Ms Oddy does not dispute that she had given immediate instructions for the payment to be actioned and believed it had been. The failure to pay on the 31 January and 6 February 2023, amounted to breaches of the intermediate terms about payment and further would contribute to a breach of trust and confidence. The issue is whether as of 6 February, there was an actual breach of trust and confidence and/or repudiatory breach of the express terms around payment of wages under the Contract and the intermediate terms around payment date.

176. The Claimant resigned anticipating that he would not be paid on 28th February 2023. The Respondent did not intimate to the Claimant, by words, that it did not intend to honour the terms. However, did it intimate by its conduct that it did not intend to honour the terms? If it did, then he was not obliged to 'wait and see' whether the Respondent would fail to pay again: ***Wellworthy Ltd v Ellis EAT 915/83*.**

177. On the facts, the Tribunal do not accept objectively that the Respondent had by its conduct evinced an intention not to pay by 21 February 2023. The Respondent had emphatically agreed to pay the Claimant on 31 January and 6 February, so much so that the Claimant had informed the Chairman that the matter was being dealt with.

178. The Claimant assumed that, because he had not received any confirmation by 21 February that the money would be in his February payroll, that he would not be paid the monies owed to him at the end of the month. He did not email and ask for confirmation that it would be.

179. The Tribunal conclude that objectively, the Claimant was anticipating a breach but the Respondent had not by 21 February evinced by its conduct an intention not to pay him in his February payroll. Whether in the event it did not do so, is not relevant. The Tribunal can only consider objectively whether there was a breach as at the date he resigned.

180. On the facts of this case, the amount in issue was significant to the Claimant and objectively it was a fairly significant sum .The Respondent's refusal to pay was not deliberate and determined but the Tribunal conclude that it was repeated from the end of December through to 21 February 2023. The failure to pay was not however persistent as at the 21 February, in the sense of continuing over a prolonged period.

181. In summary, the Tribunal conclude that the Claimant resigned because of the issues

over his pay and did not delay too long in he circumstances before doing so ,however, the Claimant was premature in resigning rather than waiting to see whether the Respondent would rectify the payments in the February payroll. The Claimant anticipated a further breach and resigned in response to that but at that stage the failure to pay was not yet persistent and neither had the Respondent evinced by its words or conduct an intention not to pay. Had the payment not been made in the February payroll, the failure would by that stage have been repeated and persistent and further, such failure would objectively have demonstrated an intention not to pay, and would have given rise to a fundamental and repudiatory breach of the express terms of the Contract, of the agreements regarding payment and the implied term of trust and confidence.

182. In the circumstances the Tribunal conclude that the claim of constructive unfair dismissal is not well founded and is dismissed.

Employment Judge R Broughton

Date: 20 November 2023

JUDGMENT SENT TO THE PARTIES ON

...19 December 2023.....

FOR THE TRIBUNAL OFFICE

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