# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr I Diaw**

**Respondent:** **Dotcable Africa Ltd**

**Heard at:** London Central (CVP) **On:** **18 December 2023**

**Before:** EJ M Joyce

**Representation**
Claimant: Self-represented
Respondent: Ms S Harty (Counsel)

# JUDGMENT

The Judgment of the Tribunal is that:

(i) The Tribunal has jurisdiction to adjudicate upon the claimant's claims for unauthorised deductions from wages;

(ii) The claimant's claims are within time.

# REASONS

## Introduction, Claims and Issues

1. The matter was listed for a preliminary hearing in public in order to hear the respondent's application for dismissal of the claimant's claims for want of jurisdiction under Rule 53(1)(b) of the Rules of Procedure. The claimant had filed a claim for unauthorised deduction of wages and a national minimum wage claim totalling £35,060.60, updated to £46,176.60 in his witness statement. While the respondent had understood that the claimant was also pursuing a claim for breach of contract, his ET1 claim form did not include that claim and the claimant clarified at the hearing that he had not brought, nor did he intend to bring, that claim.

2. The issues for the preliminary hearing were set out in the previous case management order of 29 September 2023. The principal issue was: Whether the Tribunal has territorial jurisdiction to hear all or any of the claimant's claims? The respondent's

3. The other issues related to time limits for bringing the claim (5.2 to 5.3.4 of the

order of 29 September 2023).

## Procedure

4. There was an oral hearing at which one witness gave evidence for the respondent and the claimant also gave evidence. There was a bundle of documents of 72 pages. Both parties made closing submissions.

## Preliminary matters

5. In advance of the hearing, the claimant had made an application to strike out the respondent's response. Following submissions from both parties I denied the application. Reasons were provided at the hearing.

6. References in brackets below are to the bundle page number.

## Facts

7. On date unknown, the respondent was registered at the claimant's home address of 40-42 Uxbridge Road, London.

8. The claimant signed a contract of employment ("Contract") on 1 May 2019 as a consultant for the respondent. The respondent's managing director is Mr Emilia Kostrz and the claimant is also a director of the respondent in which he owns a 40% share.

9. The claimant also owns a 40% share in Dotcable Africa SARL, the Senegalese subsidiary of the respondent.

10. The respondent and Dotcable Ltd are companies under the overall umbrella of Netcable Sp. Z.o.o. which is located in Poland. Dotcable Ltd was established to develop a presence and business in the UK market, whereas Dotcable Africa Ltd (the respondent) was established to develop a presence and business in Senegal. The above companies, including the respondent, specialise in renewable energy.

11. Upon commencing employment, the claimant was assigned overseas to work in Senegal, the country of his birth. Although he signed the Contract on 1 May 2019 he moved to Senegal approximately 1 month later on 3 June 2019.

12. The claimant's salary ("Salary") was paid into a Halifax Bank Account in Great Britain every month. Tax and other social security deductions from the claimant's salary were made in Great Britain. The claimant does not own a property in Senegal and was/is renting while he was/is there.

13. The relevant terms of the Contract are as follows:

**2. SALARY**

**The Employer shall pay the Employee a salary of £1,400, payable by bank transfer at 10 of each month. (…)**

**3. HOURS OF EMPLOYMENT AND PLACE OF EMPLOYMENT**

**(…)**

**The Employee's normal place of work is Craven House, 40-44 Uxbridge road, London, United**

**Kingdom WF2BS or such other place within London which we may reasonably require for the proper performance and exercise of your duties. You agree to travel on our business (both within the United Kingdom or abroad) as may be required for the proper performance of your duties under the employment, especially to Senegal.**

**4. OVERSEAS ASSIGNMENT.**

**You shall also be required to work outside the United Kingdom (UK) in Dakar, Senegal from 1 May 2019 to 30 April 2021 (Overseas Assignment)**
**During the Overseas Assignment:**
**(a) your place of work shall be Villa No. 95, HLM Grand-Yoff, Dakar, Senegal**
**(b) your holiday entitlement shall remain the same as under this agreement but you shall be entitled to the public holidays in Senegal rather than the usual public holidays in England and Wales;**
**(c) you shall be paid the equivalent of your salary in the local currency. The equivalent to your salary in the local currency shall be determined by our bank at the rate of exchange applying when making the payment. You may be subject to tax and social security contributions in Senegal. We shall make whatever deductions for tax or other social security contributions as are necessary and which we may be advised to make, either in the UK or in Senegal;**
**(d) we will reimburse expenses to the Employee in the amount of £1100 a month. This is the budget of the Employee to be used on travel and other overnight expenses;**
**(e) The Employee is also entitled to the accommodation allowance in the amount of £300;**
**(f) The Employee will be granted company car for his use.**

**At the conclusion of the period of your Overseas Assignment the provisions of this clause shall cease to apply in particular you shall return to your normal place of work as specified in clause 3.**

14. The claimant's Salary (as above, payable on the 10th day of each month) was paid in arrears, as evidenced by the claimant's bank statements [pp. 20-26].

15. The claimant's bank statements [pp. 20-26] show that expenses were paid on different dates each month, but were being paid monthly. I concluded that the claimant's expenses ("Expenses") and accommodation allowance ("Accommodation Allowance") were payable monthly.

16. The Expenses were payable, per the Contract terms, for "travel and other overnight expenses". No evidence of receipts being submitted in relation to Expenses was provided. On the basis of the available, limited bank statements, I concluded that the amount of £1,100 was paid in full regardless of the amount of Expenses actually incurred.

17. The claimant's first project in Senegal was to construct a solar power plant on a remote island for the Senegalese Agency for Renewable Energy. The project was concluded in August 2020, but the Senegalese Ministry of Oil and Energy did not grant an operating licence.

18. From May 2019 to October 2021, the claimant received his Salary, Expenses and Accommodation Allowance as per his contractual terms. At no time during this period or subsequently did the respondent require the claimant to return to the UK for work.

19. The terms of his Contract, as set out above, required the claimant to return to the UK to work as of April 2021 when his overseas assignment to Senegal was due to conclude.

20. In April 2021, the claimant and Mr Kostrz discussed the possibility of opening a shop in Dakar to sell and install solar products/systems while awaiting the above-mentioned operating licence, which the Ministry of Oil and Energy had not yet granted.

21. The lease for a new shop was signed at the end of June 2021. Due to Covid restrictions Mr Kostrz asked the claimant to send him a letter of invitation to enable him to visit Senegal. Mr Kostrz visited Senegal and stayed at the claimant's

residence from 12 July to 23 July 2021.

22. From October 2021 a dispute arose as to the payment of the claimant's Expenses and, also his Accommodation Allowance. It is unnecessary for me to make a finding as to whether the payment of those items occurred as of October 2021. This is because the claimant's claim under for Expenses and Accommodation Allowance is from March 2022 onwards.

23. On the evidence before me, I found that the respondent did not make any payments to the claimant for either Expenses or Accommodation Allowance from March 2022 onwards.

24. On 1 May 2022, 10 months after signing the lease, the claimant opened the aforementioned shop. From the end of May 2022, the respondent had been asking the claimant that dividends be sent to the respondent so that the funds could be used to pay the claimant's Expenses, Accommodation Allowance and Salary.

25. The claimant alleged that as of January 2023, the respondent ceased paying the claimant's salary. The claimant raised his concerns with Mr Kostrz as to the alleged non-payment of sums owed to him in the subsequent months. This included written communications on 3, 16 and 17 January 2023 [pp. 41, 47 and 48].

26. Salary payslips were issued for the claimant for January, February and March 2023, with the claimant's last payslip being issued on 5 March 2023 [pp. 17-19]. However, there was no evidence provided that the claimant was subsequently paid his salary on 10 March 2023, per clause 2 of his Contract.

27. On the evidence before me, I concluded that the respondent did not pay the claimant his salary from March 2023 onwards.

28. On 5 February 2023 the claimant sent the respondent a stock inventory and business report, in addition to a bank statement for January 2023.

29. On 23 February 2023, the respondent's legal representatives wrote to the claimant acknowledging his claims for Expenses and Accommodation Allowance stating "Your outstanding salary and expenses due from DOTCABLE AFRICA being unpaid due to failure of the SARL to make any distribution to DOTCABLE AFRICA" [p. 58].

30. On 9 February 2023, ACAS received the early conciliation notification.

31. On 7 March 2023, the ACAS certificate was issued.

32. On 27 June 2023, the respondent's legal representatives sent the claimant a notice of a board meeting to take place on 7 July 2023 in which it was proposed to remove the claimant as a director of Dotcable Africa SARL, and to terminate his overseas assignment per clause 4 of the Contract [pp. 60-63].

33. On 17 July 2023, the claimant filed his ET1 claim form ("ET1") claiming unauthorised deductions in relation to his Salary, Expenses, and Accommodation Allowance. He also filed a national minimum wage claim.

## Law

34. Rule 53 (1) provides in relevant part:

> **Scope of preliminary hearings**
> **53.(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—**

**(a) (…)**

**(b) determine any preliminary issue; (…)**

35. I was referred to the following case law as regards the issue of territorial jurisdiction:

36. From *British Council v Jeffrey [2019] ICR 929* ('*Jeffrey*') I derive the following principles: (i) In the majority of cases those who live and work abroad will be subject to the employment law of that country as opposed to English employment law. This is referred to as the "territorial pull of the place of work" (see also *Duncombe v Secretary of State for Children Schools and Families (No 2) [2011] ICR 1312 ("Duncombe")* at paragraph 8); (ii) there will be exceptional cases where certain factors connect the employment to England and English employment law such that the territorial pull of the place of work is overcome ("sufficient connection question"); and (iii) where a worker lives and works abroad (as opposed to commuting) the factors connecting employment with England and, as such, English employment law will have to be particularly compelling in order to overcome the principle of the 'territorial pull of the place of work'.

37. *Jeffrey* also provides, at paragraph 62, that 'choice of law' clauses in contracts of employment are relevant, but rarely the deciding factor in determining where territorial jurisdiction lies: "(…) a choice of English law by itself would be incapable of overcoming the territorial pull of the place of work in the case of a true expatriate: "I suspect that the contracts of may or most such employees of British companies contain such provisions, but if that were to be treated as decisive the exception would overwhelm the rule, which is clearly contrary to the message of the authorities".

38. In *Ravisy v Simmons and Simmons LLP [2018] UKEAT/0085/18/OO*, the EAT divided cases into three broad categories: (i) Those in which the claimant worked in Great Britain, and where consequently, there will be territorial jurisdiction; (ii) cases where the claimant worked outside of Great Britain. In these cases there was a presumption against territorial jurisdiction unless there are factors that render the case exceptional; and (iii) cases where the claimant lived and worked at least some of the time in Great Britain. In these cases, there is no requirement of 'exceptionality' in order for territorial jurisdiction to be established and the comparative exercise set out in category (ii) is not required. There needs to be a sufficiently strong connection with Great Britain and British Law.

39. From *Lawson v Serco Ltd [2006] UKHL 3 paragraphs 37-38*, I derive the principle that the place of employment is generally decisive as to territorial jurisdiction: "First, I think that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary". This, 'something more', would include where, for example, an employee was posted to work abroad by a British employer as a representative of a business conducted in Great Britain, for example a foreign correspondent of a British newspaper, and also where, the employee worked within an extra-territorial enclave in a foreign country (for example, a military base). However, *Duncombe* made clear that the correct approach was not to treat these as fixed categories but rather as examples.

40. The following authorities are of relevance in considering where an employee 'ordinarily works': *Carver v Saudi Arabian Airlines (1999 ICR 991, CA)* provides

that where an employee ordinarily works is to be decided by reference to the contract of employment, having regard to the whole period of the contract. In *Lawson,* paragraph 27*,* however, the House of Lords held that attitudes had changed significantly since *Carver.* The key issue to be considered was whether the employee was working in Great Britain at the time of the relevant incident being considered by the Tribunal/Court and not what was contemplated when the contract was made.

41. *Todd v British Midland Airways Ltd [1978] ICR 959 at p. 964* states that "*As a rule there is no term in the contract about exactly where [the employee is to work] you have to go by the conduct of the parties and the way they have been operating the contract. You have to find at the material time where the [person] is based*".

42. As to time limits section 23 ERA provides, in relevant part:

**(1)A worker may present a complaint to an [F1employment tribunal]—**
**(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),**
**(…)**
**(2)Subject to subsection (4), an [F1employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—**

**(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or**
**(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.**

**(3)Where a complaint is brought under this section in respect of—**
**(a)a series of deductions or payments, or**
**(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,**
**the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.**

43. Per Langstaff P in *Bear Scotland v Fulton [2015] IRLR 15* ("*Bear Scotland*"), in order for a number of deductions to be a "series" there has to be *"*sufficient frequency of repetition*"*, that is a sufficient factual and temporal link.

44. It is unlikely to be necessary for all the deductions in a series to be unlawful provided that there is at least one in-time proven unlawful act (*Ekwelem v Excel Passenger Service Limited [2013] EAT 0438/12* and *Royal Mail Group limited v Jhuti [2018] EAT 0020/17 per Simler P*). However, *Bear Scotland* held that a gap of more than three months between any two deductions will break the 'series' of deductions.

45. As to the definition of wages under the ERA, I remind myself of the following provisions:

**27 Meaning of "wages" etc.**

**(1)In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—**

**(a)any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,**

**(b)statutory sick pay under Part XI of the M1Social Security Contributions and Benefits Act 1992,**

**(c)statutory maternity pay under Part XII of that Act,**

**[F1(ca)[F2statutory paternity pay] under Part 12ZA of that Act,**

**(cb)statutory adoption pay under Part 12ZB of that Act,]**

**[F3(cc)statutory shared parental pay under Part 12ZC of that Act,]**

**[F4(cd)statutory parental bereavement pay under Part 12ZD of that Act,]**

**[F5(ce)any amount of qualifying tips, gratuities and service charges allocated to the worker under Part 2B of this Act,]**

**(d)a guarantee payment (under section 28 of this Act),**

**(e)any payment for time off under Part VI of this Act or section 169 of the M2Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),**

**(f)remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,**

**[F6(fa)remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act.]**

**(g)any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,**

**(h)any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and**

**(j)remuneration under a protective award under section 189 of that Act,but excluding any payments within subsection (2).**

**(2)Those payments are—**

**(a)any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),**

**(b)any payment in respect of expenses incurred by the worker in carrying out his employment,**

**(c)any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,**

**(d)any payment referable to the worker's redundancy, and**

**(e)any payment to the worker otherwise than in his capacity as a worker**

46. I also take account of the following case law in determining whether the Expenses and Accommodation Allowance payable under the Contract were wages, or whether they were excluded under s. 27 (2)(b) ERA:

47. In *Southwark London Borough Council v O'Brien 1996 IRLR 420, EAT* ("*O'Brien*") the EAT held that the exclusion under section 27(2)(b) ERA applies to payments in respect of expenses and there is no need for them to amount to an exact reimbursement. The issue is whether the amount payable was 'in respect of' expenses. That phrase indicates that a payment may fall within S.27(2)(b) even though the amount does not exactly match the expense incurred. The payment of an expense (in that case a mileage allowance) did not cease to be 'in respect of expenses' simply because it was generous.

48. *O'Brien* was cited with approval by the EAT in *Qantas Cabin Crew (UK) Ltd v Lopez and anor 2013 IRLR 4, EAT* ("*Qantas*") concluded that a 'living away from home allowance', paid to cabin crew who were seconded from Australia to London, had to be regarded as a payment in respect of expenses. The allowance had been treated as such for the purpose of tax efficiency and there was a direct link between the higher cost of living in London and the payment of this allowance. The EAT made it clear that it was important to apply the guidance in *O'Brien*, which emphasised that payments 'in respect of' expenses fell within S.27(2)(b).

49. As to the exclusion applicable under s. 27(2)(b) ERA, relating only to expenses incurred by the worker 'in carrying out' his or her employment I take note of the principles set out in *Kosschuk and ors v Tilcon Ltd ET Case No.46224/95.* In that case, the travel expenses of workers in a remote area were held to constitute wages because they were not incurred by the employees in carrying out their work but were aimed at recompensing employees for the expense of getting to and from work.

50. I also have regard to *Brearley and ors v Lifetime Careers (Barnsley, Doncaster and Rotherham) Ltd ET Case No.2801296/98* ("*Brearley*") where a 'disturbance allowance' given to relocated employees to cover the extra expense of travelling to work constituted wages in *Brearley and ors v Lifetime Careers (Barnsley, Doncaster and Rotherham) Ltd ET Case No.2801296/98*.

## Conclusions

Territorial Jurisdiction

51. The respondent's principal arguments in respect of territorial jurisdiction are (i) that the claimant has never worked in the UK and his base for work purposes has always been Senegal and as such he is a 'truly expatriate employee'; (ii) As such, the claimant would need to demonstrate a "much stronger connection" with the UK than Senegal in order to establish that this Tribunal has jurisdiction; (iii) the facts that (a) the claimant was recruited by a UK company in the UK; (b) the law governing his Contract of employment is that of England and Wales and; (c) his salary and benefits were paid into a UK bank account, with tax deducted in the UK are all insufficient to amount to the "much stronger connection" required to overcome the 'territorial pull' of Senegal.

52. The claimant's principal contentions are that (i) the Contract makes clear that the governing law is that of England and Wales; (ii) Dotcable Africa Ltd (the respondent) is a subsidiary of Dotcable Ltd and any profits would have been returned from Senegal to the UK; (iii) his wages were paid in the UK, along with all taxes being deducted there and his pension is held in the UK; (iv) he did not decide to go to Senegal, the respondent sent him there; (v) his ties to the UK are more significant as he owns a property in the UK and solely rents in Senegal.

53. I note that there is little, if any, disagreement between the parties as to the relevant facts necessary for me to arrive at a decision. I note that the respondent accepts that the claimant was not dismissed and that he remains a director and shareholder of the respondent.

54. I consider that the claimant had only worked in the UK for approximately one month prior to relocating to Senegal in June 2019, and that he had worked from Senegal since then. He was not commuting back and over to the UK and, on his own evidence, was not required to return to the UK at any time during his Contract to work from there. As such, I consider that, applying the principles in *Lawson*, the 'territorial pull' is to Senegal.

55. Consequently, applying the principles in *Jeffrey*, *Ravisy* and *Lawson*, I need to consider whether there are any exceptional/compelling factors that would overcome that territorial pull such that this Tribunal would have jurisdiction. Per *Jeffrey*, the 'governing law' clause is but one factor and is not decisive. Indeed, it is commonly the case that Contracts concluded in Britain will contain such clauses.

56. However, I have considered all of other relevant factors. First, the nature of the business itself. It does seem to me that the business being conducted by the claimant in Senegal was akin to the circumstances envisaged as 'something more'

in *Lawson*. While I noted that *Lawson* provided the example of a foreign correspondent working abroad for a British newspaper, *Duncombe* confirmed that this was just one example.

57. I note that the claimant was responsible for developing business for Dotcable Africa Ltd in Senegal, which was inextricably linked to the development of business in Britain. As such, the claimant was, in essence, the representative of a British business abroad in Senegal. Furthermore, his pay has been received into a British bank account and in my view, significantly, his taxes have been paid in Britain. It is also of significance that the respondent is registered at the claimant's home address in Britain. This further underlines the connection of the business itself to Britain, not Senegal.

58. These factors demonstrate closer links to Britain than an employee who is working abroad, being paid into a local bank account and paying taxes in that country. These factors are further demonstrative of an intention that the claimant would return to Britain following his period of overseas assignment.

59. The intention for the claimant to return to Britain is also clearly set out in the Contract itself where it was envisaged that the claimant would return to Britain in April 2021. The fact that this did not occur cannot legitimately be held against the claimant simply because it was not followed through on by the respondent.

60. I therefore conclude that the factors relied upon by the claimant are on balance sufficient to override the territorial pull of the place of work, namely Senegal, and that this Tribunal has territorial jurisdiction to hear his claims.

'Wages', and Time Limits

61. The respondent contends that the claimant first contacted ACAS on 9 February 2023 but did not bring his claim until 17 July 2023, which was out of time. As to the national minimum wage claim, the claimant has been paid at the alleged lower rate since April 2021 and he knew from then that this was the case. As such the last relevant payment in the series was May 2021 and time should run from then. As to his Expenses and Accommodation Allowance claim, the respondent alleged the first time the claimant was not paid was July 2022 and so time should run from then.

62. The respondent maintains that in any event, the claimant's last payment was in March 2023 and so his claims both for national minimum wage and unauthorised deductions from wages, if the time limit runs from that date, would still be out of time. Further, the respondent contends that it would have been reasonably practicable for the claimant to bring his claim in time and he has not adduced any evidence as to why this would not have been possible.

63. The claimant maintains that his national minimum wage claim and claims for non-payment of Salary, Expenses and Accommodation Allowance are ongoing issues. He states that he was trying to find an amicable solution to this matter and that he sent a without prejudice letter to the respondent in order to resolve the dispute, but did not receive any response.

64. The positions in respect of the national minimum wage claim, Expenses, Accommodation Allowance, and Salary is different and will be addressed separately.

*Expenses*

65. The issue of whether or not the Expenses are wages within the meaning of the ERA (in particular sections 27(1) and (2)) was not raised by either party. However, it is a matter which I have considered in light of the statutory provisions of the ERA, and in particular sections 13 and 27.

66. The test is whether or not the payments are in 'respect of expenses incurred by the worker in carrying out his employment'.

67. As to being 'in respect of expenses', based on the principles as set out in *O Brien*, I conclude that the fact that the claimant received these amounts regardless of actual expenses incurred (bank statements at pages 22-25 show regular payments in excess of the £1100 allocated for Expenses), while not determinative is a relevant factor. Equally, the fact that the Expenses are for a significant amount when a comparison is drawn with his Salary is a factor to weigh in the balance.

68. While the wording of the Contract refers to the sum of £1100 per month for "travel and overnight expenses" no evidence was presented by either side that the monies payable were indeed used for this purpose. For example, there was no evidence of receipts being provided by the claimant. Indeed, as noted above, that the Expenses are not wages within the definition of the ERA was not an argument pursued by the respondent, and consequently no evidence on this issue was presented. In the absence of such evidence, it was not possible for me to conclude solely on the basis of the mere label 'travel expenses' that the amounts payable were indeed 'in respect of expenses'.

69. Furthermore, for the same reasons, no evidence was presented as to the Expenses being 'incurred by the [claimant] in carrying out his employment'. It is obvious that but for his employment the Expenses would not have been payable to the claimant. But that is, of course, not the same thing. On the basis of the limited evidence before me and having regard to the principles in the authorities cited above, including *Brearley*, I am unable to conclude that the sums payable as Expenses were incurred by the claimant in carrying out his employment.

70. Consequently, I find that the Tribunal does have jurisdiction to consider the claimant's claim for Expenses as an element of his wages.

71. As to the issue of time limits, I find as follows: The respondent accepts that, as of the date of the hearing, the claimant was still employed. The claimant alleged that the respondent ceased paying Expenses as of October 2021. However, his ET1 refers to non-payment of Expenses from "March 2022 to June 2023". On the evidence before me, these amounted to a series of deductions which has continued at least until June 2023.

72. I do not accept the respondent's position that the last deduction was in March 2023. This was when the last payment of the claimant's Salary was made, but based on the evidence before me, I find that the non-payment of Expenses has been ongoing since March 2022 and until June 2023.

73. There is no provision in the Contract by when Expenses are payable each month, and the claimant's bank statements [pp. 20-26] show that Expenses were paid on different dates each month. As such, while (as found in the 'Facts' section) I have concluded that Expenses were payable each month, it is not possible for me to define an exact date in June 2023, on which the alleged deduction was made.

74. However, regardless of when exactly Expenses were payable in June 2023, the latest date by which they were properly payable was 30 June 2023. They were not paid as of that date and so there was a deduction. Applying section 23(3) ERA and

the principles in *Bear Scotland*, the claimant's claim on 17 July 2023 are therefore clearly have been within time.

*Accommodation Allowance*

75. As to Accommodation Allowance, the ET1 states that the claimant's claim was from March 2022 to April 2023. However, his updated schedule of loss [70] provides that he seeks compensation for non-payment of Accommodation Allowance from March 2022 to September 2023.

76. Although not raised by either party, I must consider whether the Accommodation Allowance falls within the definition of wages, or whether it is excluded as being in 'respect of' expenses under s. 27(2)(b) ERA. Again, this was not an argument pursued by the respondent and as such there was little evidence available on this matter. On the basis of the limited evidence available, and having regard to the principles in *O'Brien* and *Brearley*, I am unable to conclude that the Accommodation Allowance was payable 'in respect of expenses incurred by the [claimant] in carrying out his employment'.

77. I have also concluded that the position in respect of the claimant's Accommodation Allowance is distinguishable from that as set out in the authority of *Qantas*. First, there was no evidence this was an allowance, unlike in *Qantas,* in order to meet higher living costs incurred at the place of work (Senegal). Second, whereas in *Qantas* the payment was made for tax efficiency purposes, there is no such evidence that this is the position here. In light of these factors I have concluded that the Accommodation Allowance falls within the definition of wages and as such may form the basis for a claim for an unauthorised deduction.

78. Similar to the above position regarding Expenses, the Contract does not provide an exact date by when the claimant's Accommodation Allowance must be made, save to say that he is "entitled to the accommodation allowance in the amount of £300 per month". As found in the facts section, I concluded that it was properly payable monthly.

79. No evidence of payment in April 2023 was presented, and indeed the respondent's position was that no such payment was made. On the basis of the evidence before me, I find that no payment for Accommodation Allowance was made to the claimant between March 2022 and April 2023.

80. Taking the claim as set out in the ET1 (from March 2022 to April 2023), the latest date by when the claimant's Accommodation Allowance was properly payable by the respondent was 30 April 2023. The ET1, filed as it was on 17 July 2023, is therefore within the time limit of before the end of the period of three months from that deduction.

81. As to the claimant's claim for additional compensation as set out in the updated schedule of loss, from May to September 2023, these must be the subject of an application to amend by the claimant if he wishes to proceed with a claim in relation to those specific months. In terms of the requirements, the claimant should write without delay to the respondent and the Tribunal setting out the details of his application to amend his claim to include claims for unauthorised deductions from May to September 2023, including the factual basis for his claims.

*Salary*

82. The Contract provides that the claimant's Salary is due on the 10th day of each month. The ET1 alleges unauthorised deductions of wages in April 2022 and then from March 2023 to June 2023. The schedule of loss [70] seeks further compensation for unpaid Salary for April 2022 and March 2023 to September 2023.

83. As for payment in April 2022, applying the principles in *Bear Scotland*, this is not part of a series of deductions as there is significant gap between the deduction in April 2022 and the subsequent deduction in March 2023. Nor has the claimant provided any evidence as to why it was not reasonably practicable for him to file a claim in relation to the deduction in April 2022 in time. As such, this aspect of his claim, in relation to April 2022, is time-barred.

84. However, for the period from March 2023 to June 2023, I find, on the basis of the evidence before me, that there were deductions in each of these months and that these do form part of a series of deductions. The ET1 was clearly filed within the time limit of before the end of the period of three months from the deduction.

**85.** As to the deductions from July to September 2023, which are included in the updated schedule of loss, these must be subject to an application to amend if the claimant wishes to proceed with them. In terms of the requirements, the claimant should write without delay to the respondent and the Tribunal setting out the details of his application to amend his claim to include claims for unauthorised deductions from July to September 2023, including the factual basis for his claims.

*National Minimum Wage*

86. The ET1 makes a claim for non-payment of the national minimum wage from 1 April 2021 to date, which I interpret as an unpaid wages claim: the claimant is claiming that not only was he not paid his Salary (of £1400 per month), but that salary included an additional unauthorised deduction in that it did not correspond to an hourly rate in line with the national minimum wage.

87. This represents a claim for an unbroken series of alleged unauthorised deductions, with the last such alleged unauthorised deduction (prior to the ET1 being filed), being made on 10 July 2023: i.e. this is the last date on which the claimant's salary fell due prior to him filing his ET1. As such, this aspect of the claim is also clearly within the applicable time limit.

**Other Matters**

88. I will issue instructions to the Tribunal's administration to contact the parties with a date for a case progression hearing at which directions can be made in preparation for a final hearing in this matter.

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Employment Judge **M Joyce**

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Date 19 April 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 May 2024

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FOR THE TRIBUNAL OFFICE