EMPLOYMENT TRIBUNALS

Claimant: **Mr Arsenijs Jevstafjevs**

Respondent: **Monolith (UK) Ltd**

Heard at: **East London Hearing Centre**

On: **1, 2 February 2024 (In person) & 22 February 2024 (CVP)**

Before **Employment Judge Sugarman**

Representation
Claimant Self-representing

Respondent Ms Patch, Solicitor

Judgment having been sent to the parties on 6 March 2024 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

INTRODUCTION

1. The Claimant was employed by the Respondent as a Sales Representative from 15.06.20 until his dismissal on 31.05.22.

2. By way of a Claim Form presented on 12.06.22 the Claimant brought claims in respect of unpaid car maintenance costs, a failure to pay the national minimum wage, holiday pay and claimed he had been forced to work more than 48 hours a week with no payment.

3. By way of a Claim Form presented on 26.07.22, he repeated the above claims and in addition sought to claim unfair dismissal and disability discrimination.

4. The Claimant contacted ACAS on 28.4.22. The certificate is dated 8.6.22. Prima facie, complaints about acts predating 29.1.22 are out of time.

5. All of the claims were denied by the Respondent and it advanced, in its first Grounds of Resistance, a counterclaim in respect of allegedly overclaimed

mileage and fuel costs by the Claimant and payments for unworked hours.

6. The case came before Employment Judge Gardiner on 01.12.22 when the complaints were identified, though the focus at that stage was on the disability discrimination claims. The case then came before Employment Judge Lewis on 03.11.23 when the claims of unfair dismissal and disability discrimination were struck out, the former because the Claimant did not have 2 years' service and was not relying on any automatically unfair reasons. He was ordered to provide further detail in respect of his remaining claims.

7. Thereafter, he served two separate Schedules of Loss setting out what he was claiming and how it was quantified.

8. Shortly before the hearing, on 19.01.24, he made an application to add in a claim of automatic unfair dismissal.

THE CLAIMS

9. There was a lengthy discussion at the outset of the hearing about what the claims and issues were, there unfortunately being no agreed List of Issues.

Unlawful Deduction from Wages

10. It was agreed the Claimant had advanced a claim in respect of car maintenance costs. These were not paid for the last 4 months of his employment when he was on sick leave. The Respondent's case is that there was no contractual right to such a sum when not working. The Claimant also complained this sum was taxed when it should not have been.

11. The Claimant also alleges that deductions have been made from his wages because of the failure to pay him the national minimum wage. He averred that failure persisted throughout his period of employment. His case was that he was only paid for 24 hours per week, yet he was working 48 hours a week. His Schedule of Loss claimed 24 hours per week x £8.72 x 96 weeks.

12. The Respondent contended that a proper construction of the Claimant's case was that he was only claiming that he had not been paid the national minimum wage on 2 occasions throughout his employment, on 20.6.20 and 28.02.21, not generally throughout. I rejected that submission and gave oral reasons for that decision on the first day of the hearing. The claim therefore covers the whole period of employment.

13. The Claimant confirmed he was not pursuing a separate complaint before the Tribunal in respect of being required to work in excess of 48 hours per week.

Holiday Pay

14. There are two aspects of the claim for holiday pay:

    a. A failure to pay for holiday taken in September 2021: this was pursued as an unlawful deduction from wages claim;

    b. A failure to pay for accrued but untaken holiday on termination. After some discussion, the Claimant accepts he received a payment but claims it was not enough as it failed to take account of the fact he did not take any holiday in his first year of employment, 2020. This was a claim brought under the Working Time Regulations 1998.

Wrongful Dismissal

15. It is agreed that the Respondent did not pay the Claimant any notice pay. The Respondent avers it was entitled to terminate without notice because the Claimant was guilty of gross misconduct. The Claimant initially said that he claimed "at least a month" though accepts that his contract provided for only the statutory minimum notice period of 1 week.

Amendment Application

16. At the hearing, the Claimant applied to amend his claim to include claims relating to unpaid commission and an unpaid Christmas bonus. He had mentioned parking expenses in his Schedule of Loss but confirmed he was not pursuing this as a separate claim.

17. I heard submissions from both parties on the application to amend to include these claims as well as the prior written application to add in claims of automatic unfair dismissal. I refused to grant permission to amend in any respect and provided oral reasons on the first day of the hearing for that decision.

Employer's Counterclaim

18. The Respondent brings a counterclaim for breach of contract against the Claimant in respect of:

    a. Hours it avers it has paid for but which the Claimant did not work between July 2020 and December 2021. In its Counter-Schedule, it alleges that he recorded work hours of 35.4 per week but only travelled for approximately 26.6 hour per week, therefore it has paid him for 8.8 hours per week that he did not work. The Respondent seeks to claim back from the Claimant 8.8 hours per week x the prevailing national minimum wage rate: a total claim of <u>£6,204.09.</u>

    b. Inappropriate use of the company fuel card because of overclaimed milage expenses. In the Counter-Schedule, it avers the Claimant overclaimed fuel of £210.41 for the 2 month period from 1.11.21 – 31.12.21. It says this was from a total claim of £640.65, which represents an overclaim of 32.8%. It then seeks to apply this % to the total fuel costs paid by the Respondent for the 18 month period from 1.9.20 – 28.2.22, which it says results in total claim of

£1,628.59.

THE ISSUES

19. The claims being those set out above, the issues I was required to determine were as follows:

1. **Time limits**

1.1 Given the date the Claim Form was presented and the dates of early conciliation, any complaint about something that happened before 29.1.22 may not have been brought in time.

1.2 Were the unauthorised deductions from wages complaints set out below made within the time limit in section 23 of the Employment Rights Act 1996:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

1.2.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a further reasonable period?

2. **Unauthorised Deductions from Wages: Vehicle Maintenance and Minimum Wage**

2.1 Did the Respondent make unauthorised deductions from the Claimants' wages by failing to pay the Claimant:

2.1.1 Vehicle maintenance costs of £156 per month net for the last 4 months of his employment;

2.1.2 The national minimum wage pursuant to the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015 for duration of his employment from 15.06.20 until 31.05.22?

2.2 In respect of the national minimum wage claims, is the Claimant entitled to additional remuneration under section 17 of the National Minimum Wage Act 1998 ("NMWA") in respect of any pay reference period because he was paid at a rate which was less that the national minimum wage rate?

2.2.1 What is the relevant pay reference period;

2.2.2 What was the Claimant paid in each pay reference period;

2.2.3 What hours did the Claimant work during each pay reference period;

a. What type of worker was the Claimant, within the meaning of Part 5 of the National Minimum Wage Regulations 2015;

b. How many hours did the Claimant work or is he deemed to have worked?

2.2.4 Has the Respondent established, the burden being on it under s28 of the NMWA, that the Claimant was not paid less that the national minimum wage?

3. **Holiday Pay**

3.1 Did the Respondent breach the Claimant's contract and/or make unlawful deductions from his wages by failing to pay the Claimant for holiday taken in September 2021?

3.2 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended, contrary to Regulation 14(2)/Regulation 30(1)(b) of the Working Time Regulations 1998?

4. **Wrongful Dismissal**

4.1 Was the Claimant guilty of gross misconduct thereby entitling the Respondent to dismiss without notice?

4.2 If not, what was the Claimant's notice period? [It is accepted the Claimant was not paid any notice pay].

5. **Employer's Counterclaim**

5.1 Did the Claimant:

5.1.1 Receive payment for hours he claimed to have worked but did not;

5.1.2 Use the fuel card provided to him by the Respondent for personal expenditure rather than business use?

5.2 If so, did that constitute a breach of contract on the Claimant's part?

5.3 If so, has the breach caused the Respondent to sustain loss?

5.4 If so, how much should the Respondent be awarded as damages?

THE HEARING

20. The Claimant represented himself and was accompanied by a translator, though he frequently did not need questions which were put to him to be translated before answering them or before asking questions and making submissions. The Respondent was represented by Ms Patch, a solicitor.

21. I was presented with an agreed bundle running to nearly 1000 pages plus an additional document, and a witness statement bundle running to 35 pages including statements from the Claimant and from Oleg Favafonov, Aine Brazinskiene, Vaclavs Beinarovics on his behalf, and one from Anastasiya Kuznetsova from the Respondent.

22. I only heard oral evidence from the Claimant and Ms Kuznetsova. The Claimant did not call the other witnesses to give oral evidence. Their evidence is contentious. The statements are not verified by a statement of truth. The Claimant said the reason for not calling the witnesses was that he believed, following an earlier Preliminary Hearing, that he did not need to. I am unable to place any significant weight on the aspects of their evidence that were contentious in light of the fact they have not been subject to cross examination and cannot be satisfied there is a good reason for them not being tendered for cross-examination.

23. The hearing was originally listed for 2 days. Unfortunately, I was only allocated the case on the morning of the hearing shortly before it started and so required some reading time before the evidence could be heard. The evidence was completed within the 2 days but not submissions. I listed the case for a further day to hear submissions and to give an oral judgment if I was able, which as it transpired I was. Both the Claimant and Ms Patch made oral submissions and relied upon written documents. I am grateful to them both for the clear, succinct and courteous way they put their cases.

FINDINGS OF FACT

Background

24. The following findings of fact are made on the balance of probabilities. I have not made findings on every aspect of the evidence presented, which I carefully considered where relevant and in the case of the documents, when drawn to my attention, but only the facts it has been necessary to resolve to make a determination of the issues.

25. The Respondent is a wholesaler and distributor of Eastern European Foods and Spirits. It employs circa 180 people, representing 17 nationalities, and whose primary common language of communication is Russian.

26. The Claimant commenced employment on 15th June 2020 as a Sales Representative.

27. Sales Representatives are required to travel within their designated geographical area to visit existing and potential customers (generally small and medium food retailers) with a view to assisting with, and generating, sales.

Contractual terms

28. The Claimant signed a written contract of employment on 15.06.20. It was a fixed term contract terminating on 14.06.21. He signed another contract in similar terms on 01.06.21.

29. The initial contract included Clause 7 which provided that after the first month, basic pay was to be £906.88 + commission of 1.5% of turnover from a customer if that turnover was in excess of the figures set out in the Claimant's sales plan. There were other provisions entitling deductions to be made if invoices were overdue or turnover was below the sales plan figure.

30. Although the contract did not specify it, the figure of £906.88 was based on a notional minimum working week of 24 hours x the relevant prevailing national minimum wage rate, which in 2020 was £8.72. The Claimant was unaware of that at the time. In reality, the routes the Claimant was expected to work required minimum hours in excess of this in any event. The later contract increased the basic figure to £926.64, with 1.5% commission on top as before.

31. Commission was generally paid the month after sales were agreed, on paid invoices. So, for orders placed in January, commission was usually paid in February (assuming customers had paid by then).

32. In addition to basic pay and commission, the Respondent paid a sum identified on the payslips as "Cost of Net Payments". This was in effect a grossing up sum on commission earned so that the 1.5% commission on sales was paid as a net sum.

33. The Claimant's payslips were set out at p638-661 of the bundle recording the sums he in fact received. Payments usually consisted of salary, the cost of net payments, commission and a "bonus payment" of £156. After the first month, between July 2020-December 2020, his monthly pay ranged from £1,492.04 to £2,043.50.

34. The £156 was not in fact a bonus. Clause 7 of the contract specified that the Respondent would pay "£156 (gross) monthly towards any possible personal car repairs which are needed". The Claimant used his own car to travel from his home to visit customers.

35. The Respondent contended it was custom and practice not to pay the £156 if employees needed to use their car to visit clients "very little or not at all for work purposes". Ms Kuznetsova pointed to four payslips where this payment

was not made, two she said were due to the employees being in the first month of employment undergoing training and induction and two she said were because employees were on long term sick leave. No further detail was provided about these situations and the two cases pertaining to sick leave were both after the Claimant's employment terminated. As such, he was the first person not to receive this payment because he was sick. The Claimant was not aware of this alleged custom and practice or the facts of the other cases.

36. The Claimant was issued with a company fuel card. The Respondent paid the invoices directly to the fuel providers. The Claimant's contract specified that the fuel card was "strictly for business use" and thus ought not to have been used to buy fuel for private mileage. The contract specified that using the fuel card for personal use may be treated as a disciplinary offence and could lead to dismissal. The Respondent accepts the Claimant's car could be used for private use. The Claimant was required to keep a log of work miles.

37. In practice, there was some lack of clarity about precisely how this would work. For example, if the Claimant did short trips for personal use amongst longer work trips, it was not specified how he was supposed to account for that in terms of fuel purchases. The Respondent's position in closing was that a degree of trust was required, it would not monitor down to the last mile and if he was using his car for personal use, the expectation was that he would top up the fuel occasionally using his own money to reflect a broad-brush estimate of the private mileage.

38. In February 2021, the Claimant was issued with a letter of concern in relation to his use of the fuel card as he had failed to declare a number of refills in his fuel report and was reporting mileage exceeding the average for his region.

39. The contract did not specify set hours of work. The hours required for the role were said, in Clause 12, to be those "necessary for the proper performance of your duties" and included weekends / evenings.

40. The Claimant was entitled to, and took, he accepted, a 60 minute lunch break which the contract stipulated would be "unpaid".

41. The Claimant's base was his home address but he was required to attend the Respondent's premises or any other location as requested. It was said the nature of his employment required him to travel within a 100-mile radius of his home to meet the needs of the business.

42. Finally, Clause 14 of the contract stipulated that the holiday year was 1 January – 31 December. The contractual entitlement was 5.6 weeks, inclusive of bank holidays, but subject to a maximum of 28 days. It also provided that:

> *"In the event of termination of employment, you will be entitled to holiday pay calculated on a pro-rata basis in respect of all annual holiday accrued <u>in the current holiday year</u> but not taken at the date of termination of*

employment" (emphasis added)

43. The contract refers the Claimant to the Employee Handbook for further details relating to holiday entitlement. That document provided that:

    "*You are not normally permitted to carry over accrued annual holiday from one holiday year to the next. Holidays not taken within the holiday year will be lost.*"

The Claimant's Work

44. Sales Representatives such as the Claimant were issued with a tablet and use the Monolith app to generate "orders" and "draft orders" when visiting customers and potential customers.

45. The Respondent sent the Claimant, on a monthly basis, a list of customers and routes for each day of work within the month. There was some dispute about precisely how the work of visiting the customers was to be done.

46. Ms Kuznetsova said that the company intended the routes to be prescriptive and mandatory. She said that each customer was to be visited on the allocated (regular) day each week and in the order set out on the list. The list contained indicative times for the duration of each visit as well as overall route mileage if the route was followed.

47. At a visit, whilst a customer might place an order, that was not always the case. If they did not, she said a draft order was to be generated using the Monolith app, based on an assessment of current stock levels on site. This "draft order" was to be started on site. The time an order or draft order was started would be logged, recording the time the Claimant was on site.

48. Sales representatives duties include not just orders and draft orders but merchandising and promoting stock by delivering promotional materials at the premises. Also, they were to use the app to report to the Respondent's head office information about products on the shelves. All of this was to be done on site, Ms Kuznetsova said. The reason the routes were prescriptive was that it ensured the Respondent was able to effect next day deliveries in accordance with pre-planned delivery routes, which would otherwise be disrupted.

49. The Claimant understood and accepted that he was required to visit the customers set out on his route plans and not just, for example, to call them from home. He said he always did that, though that is not accepted by the Respondent. However, his evidence was that he was not required to visit customers in the precise order in which they appeared on the route plan or indeed to follow a route, he said it was indicative only. He said there may be reasons to depart from it, for example if a particular customer was not available at a particular time of the day or if he were to receive a call from a different customer requesting a visit at a particular time. He said that he was not trained to the effect he was not allowed to do this and there were no formal policy documents he was aware of which required him to visit customers in the stipulated order. As such, the mileage on the indicative

route plan was also indicative as exact mileage would depend on the order in which customers were visited.

50. The Claimant also did not accept that orders had to be generated on site. His evidence was that it may be the case that an order could not or would not be completed on site because, for example, there was no signal in the shop or because a customer said they would call after the visit to confirm their requirements. As such, he sometimes generated orders and draft orders from his home. The fact he did so, he said, did not necessarily mean he had not visited the customer. This would however generally be the exception rather than the rule and would not be likely to happen too frequently.

51. Ms Kuznetsova came across as a straightforward, honest witness seeking to do her best to help the Tribunal. However, as the HR Manager, her evidence was essentially about what she thought should be happening and what she believed the Claimant would or should have been trained to do. The Respondent was not able to adduce any evidence pertaining to what the Claimant's actual training was, whether witness or documentary, and the Tribunal was not taken to any written policies or procedures pertaining to the working practices in issue.

52. Although there were a number of aspects of the Claimant's evidence the Tribunal found problematic, his evidence about it being permissible to depart from a route or process orders away from a customer's premises on occasion, if there was a good reason to do so, is accepted. In support of that finding, Ms Kuznetsova said the Claimant would in fact frequently not follow the routes. However, there is no evidence he was disciplined or warned for such failures prior to his summary dismissal, which was on other grounds.

53. However, that is not to say he was permitted not to visit customer's premises at all. He was expected to visit all designated customers on the day that was scheduled and generally was required to open and complete orders at the premises unless there was a good reason not to.

Hours of Work and Visiting Customers

54. The evidence in relation to the Claimant's hours of work was inconsistent and difficult to reconcile.

55. In his Claim Form, the Claimant said he worked 48 hours per week. His grievance dated 23.02.22 said the same. His Schedule of Loss referred to being forced to work "48 as a minimum".

56. In his witness statement, he made the point that the route plans are based on a 48-hour week but his working hours far surpassed that and extended to approximately 60 hours. When giving evidence, he said he was pushed to work for 48 hours a week and regarded his pay as "too small" for that number of hours. In his closing submissions he said he often *exceeded* 60 hours a week of work, working late in the evening. That would equate to 10 hours every day.

57. The Claimant kept no record of the number of hours he worked and there is no documentary evidence to support the Claimant's assertions about working 60 hours a week or more.

58. The Claimant's evidence was that he visited all of the specified customers every day. I do not accept that is correct in light of the data generated by the Respondent during the disciplinary process showing many orders, not just occasional ones, were generated whilst the Claimant was at home, and the fact the Claimant's evidence has been inconsistent about the number of hours he worked. The app the Claimant used not only recorded the time an order or draft order was created but also the location of the Claimant at the time he did so. This further undermines the credibility of his assertions about his working time. Further, according to the Respondent's analysis of his mileage, he frequently did significantly fewer miles than were required had he followed the approved route.

59. Miss Kutznetsova said visiting customers and filling in draft / actual hours would take a minimum of 24 hours (hence the guaranteed minimum level of pay was based on that). She accepted however that the routes allocated to the Claimant would take longer than this to work but she did not accept they would generally take more than 48 hours per week.

60. The route plans provide evidence of the expected hours of work if followed. For example,

    a. the one at p221 budgets 350 minutes of in store time + 93 minutes of travel time (for a route of 49.5 miles) = 7 hours 23 minutes.
    b. The one at p219 has 385 minutes in store time + 38 minutes travel = 7 hours 3 minutes

61. However, the route plans do not provide evidence of hours actually worked. Ms Kuznetsova was aware that it is an employer's duty under the Working Time Regulations to keep records to ensure there is evidence of compliance. She said the Respondent sought to comply with this by having in place a system whereby orders and draft orders were created at the customers' premises on arrival, so that if the Claimant did what he ought, the time the first order of the day was opened would broadly reflect the arrival at the first customer and time of the last order being generated would reflect the end of the Claimant's work that day. Those times did not record the Claimant's travel to and from the first and last customer, where he was doing it.

62. The Claimant's duties outside of attending customer premises and generating orders were limited. He had to record his miles and submit a monthly report. In evidence he said he would also telephone each client to arrange the visit. However, the phone records from his work mobile in the bundle did not back that up. The Claimant said that clients did call him on his private phone number as they had his number and it was easier for them to call him on that number rather than his work number. It is unclear why that should be so. The routes were already set and generally involved seeing customers on the same day each week. To the extent he did make

calls to customers he was intending to visit, I do not accept it took much time at all and it could largely be done during the working day after the first order / draft order had been opened.

63. I was provided with a series of tables (p593 onwards) showing the times of the first / last order for the periods of time that the Respondent understood to be the period of the national minimum wage claim: June-July 2020 and Jan-Feb 2021 as well as December 2021. Other than the odd exceptions, the time between the first and last order was generally under 7.5 hours and often well under 7 hours. He generally worked 5 days a week though sometimes worked on Saturdays too, albeit seemingly only for short periods.

64. The Claimant's uncontested evidence, which I accept, was that he always took an hour for lunch too.

65. The analysis attached to Respondent's Schedule of Loss drawn from the app data, for the period November – December 2021 shows the time between first and last order to equate to hours of just over 35 per week. The Claimant did not challenge that data as accurate, though maintained he worked many more hours than that.

66. The journey distance to the first customer of the day and from the last customer of the day to home, if the route plan was followed, would inevitably vary. A sample of the route plans in the bundle shows the range was roughly between 0.5 - 25 miles.

67. The Claimant tended to refuel in Maidstone where he lives, mostly after 10am, which is inconsistent with his claim that he would start his day at around 8am by going to see clients who would generally be in other locations. He said there was no policy on where to fuel which is right but that did not explain why he was generally still near his home at 10am. He said the petrol station he used could be on the way to see clients but if so, one would expect an earlier fill up time. This is suggestive in fact of the Claimant starting work later than alleged, which is consistent with the data generated by the app which more often than not shows the first order opened after 10am and not infrequently after 11am.

68. The Claimant referred to an email from the Respondent's owner in April 2023 referring to an expectation that those working 6 days a week would be working 54 hours per week. That email is approximately one year after the Claimant's dismissal and thus of limited relevance. Ms Kuznetsova said it was consistent with an expectation that employees will have to work no more than 48 hours a week, as 54 hours less an hour a day for lunch = a 48 hour week. The Claimant was not working 6 full days a week in any event.

69. In conclusion, there is no support for the Claimant working anything like 10 hours a day. Absent more reliable evidence, I conclude that the times which record when the first order was started and the last order was closed do broadly reflect the hours the Claimant was working on average at most. I say that because:

a. any breaks the Claimant had during the day would need to be taken off those figures, including the hour he said he took for lunch. If his travel to and from the first / last customers has to be factored in, I find in broad terms on average it was not more than the breaks he took;

b. if it is right the Claimant was frequently not visiting customers but rather generating orders remotely, as I find it is (see below), then he did not have some of the travel time between customers and so could have spent, and probably did spend, time doing non-work related activities at home.

70. On the latter point, the Claimant did not accept he would not visit customers and do orders remotely, from home, instead. He said that the system may show orders generated from his home because he had no reception at the customer's premises or the customer wanted to phone to update the order after he had left. However, I do not accept that can always have been the explanation. For example, on 29.11.21 and 09.12.21, all orders were generated from the Claimant's home.

71. Rather, I find there were occasions he would fail to visit customers at their premises but instead call them (seemingly from his private phone which he did not provide records for) and generate orders remotely, the evidence suggests from his home. It is not in issue that such a practice is contrary to his instructions.

72. Doing the best I can in the absence of more concrete evidence, I conclude the Claimant was generally working in the region of no more than 35-40 hours a week. That figure includes travel time to and from home to customer's premises and break time when he was not working.

Taking Holidays

73. The Claimant had a pro-rated holiday allowance in 2020 of 15.5 days, given his start date. He did not take any holiday in 2020.

74. The Claimant in his oral evidence for the first time said that he had requested to take holiday in 2020 but was asked by his line manager to postpone it as the company was busy. He said he was not concerned about that because he believed by law he could take it the following year. I do not accept that evidence for the following reasons.

75. The Claimant was taken to the handbook which said that he was not allowed to carry over holiday. He said he did not get the handbook until after the case started. That was not correct – it was sent to him at the latest on 9 February 2021.

76. The Claimant's payslips show his annual entitlement reset at the start of each year, including in 2021. At no stage did he question that.

77. The Claimant accepted he did not raise an apparent loss of holidays in his grievance or his grievance appeal. There is no mention of it in his Claim

Form. In his witness statement, he said that he had been employed since 15th June and had been granted and utilised 28 days of annual leave. His complaint was a different one, that he had been working 6 days a week and his holiday did not reflect that. Incidentally, even if that were right, neither statute or his contract provides a greater holiday entitlement than 28 days. In evidence he said his witness statement was a mistake.

78. He did not raise the alleged agreement for him to postpone his holiday until his oral evidence.

79. I take into account that on dismissal, the Claimant was purportedly paid for 16 days holiday from 2020 "as a gesture of goodwill". Whilst this evidences he did not in fact take all of his holiday from 2020, it is not evidence that the reason for that was because he was asked not to take it, still less that there was any agreement for holiday to be carried over into 2021, and there is no evidence of any further agreement for it to be carried over again into 2022.

Events Leading to Dismissal

80. On 26-27 November 2021, the Claimant was absent from work without notifying the Respondent or following its absence reporting procedure. It was discovered when the Claimant was spotted on a plane to Latvia by one of the Regional Managers. His location at 14:18 when putting through an order was discovered to be Stanstead airport. His first order that day was put through at 10:15.

81. He attended a disciplinary hearing on 21.12.21. His immediate response was that he was working and orders were made and he did not believe he had done anything wrong. He was given a written warning on 22.12.21 in relation to unauthorised absence.

82. He appealed by way of the grievance procedure, raising other points too in relation to his pay and working hours, and a grievance hearing took place on 24.01.22, heard by Saulius Musteikis. At the appeal hearing, the Claimant claimed he did not need to visit clients 100% of the time.

83. The Respondent says it discovered upon investigation of its records during that process that the Claimant was working less than he should have been. For example, on 20.11.21, the Respondent discovered he had refuelled at 09.38 near his home but no orders or draft orders were made that day. His route that day identified the first customer to be visited in Hastings. It also discovered that his recorded mileage on some days was lower than would have been expected.

84. This led to a wider investigation into the Claimant which started in April 22 and was done by Ms Kuznetsova. A report was produced concluding that the claimant had four allegations to answer:

    a. Unauthorised absence and persistent and unreasonable failure to comply with the absence reporting procedure, including failing to telephone his line manager on the first day of absence and keep the company informed;

b. Refusal to follow company procedures and management instructions, including failing to follow designated routes and not visiting all customers in person which had led to customer complaints;

c. Use of personal mobile phone for business, despite instructions not to do so;

d. Use of company fuel for personal mileage: this was on the basis that his stated mileage was frequently in excess of the mileage required by the routes. An analysis was done of mileage claimed in Nov-Dec 21.

85. The Claimant was invited to 2 disciplinary hearings but failed to attend and was dismissed for gross misconduct. Mr Musteikis, who chaired the hearing, upheld the 4 allegations and accepted the Claimant was guilty of gross misconduct.

86. The Claimant appealed and given his non-attendance, the appeal was dealt with as a full re-hearing. At the appeal hearing, the Claimant was unable to explain the various discrepancies. His position was that his contract did not state he had to visit clients 100% of the time. This was different to his position at the Tribunal, which was that he understood he did have to do so and in fact had done so.

87. The appeal was dealt with by Vija Berezina. She upheld the decision to dismiss, concluding that the Claimant had not provided a credible or satisfactory explanation in response to the disciplinary allegations.

88. The allegations included the following which I find established as a matter of fact on the balance of probabilities:

a. On 27.11.21, the Claimant was in Latvia though he alleged in his report to the Respondent that he had done 20 miles business use. The data from the app confirms this;

b. On 29.11.21, the Claimant was home when he put through the first order of the day at 11:39, though the customer was in Rochester. He remained in Maidstone when processing the 2nd at 11:45, 3rd at 12:05, 4th at 13:27, 5th at 14:22, 6th at 15:00, 7th at 15:12pm and for the last customer at 16:47. No credible explanation has been provided for why the Claimant would start every single order from home in Maidstone. There is no evidence of him being at any customer's premises at any stage that day. On the day, the Claimant reported he had done 29 miles business use;

c. On 29.12.21, after he had received the written warning, the Claimant went to Spain, as shown by the tracker, from where he placed orders. He said he had done 25 business miles that day. In evidence, the Claimant did not accept he was in Spain and alleged that the Respondent had deliberately changed the location to create false,

dishonest and misleading evidence about his whereabouts. I do not accept that:

i. That was an allegation he did not put to Ms Kuznetsova. It was made for the first time during his oral evidence;

ii. In the appeal meeting, the Claimant did not deny working from Spain (in the face of documents in the disciplinary pack purporting to show that is where he was). Rather, he said he was only being paid for 24 hours work and that having done that, he was entitled thereafter to spend the rest of the time on holiday;

iii. There was no evidence to corroborate the Claimant's allegation that the evidence had been tampered with in the way he suggested;

iv. It is likely he put down some mileage to hide the fact he was in Spain, putting orders through from there, which would have made it obvious he was not visiting customers, something he knew was not permitted;

d. On 4.12.21, all working activities were recorded as being at home in Maidstone, though the Claimant claimed to have done 20 miles business use.

89. I do not accept that the reason all orders were placed from Maidstone was because of reception difficulties at customer premises or that customers said they would ring him later in the day with their orders such as to justify him not starting an order or draft order. Rather, the Claimant put through orders from home without having visited customers, having likely called them instead.

90. The Claimant's reported mileage was sometimes above the expected mileage based on the stipulated routes, and sometimes it was below. The fuel card use is recorded in a fuel reports within the bundle.

91. On 26.1.22, he used the company fuel card to purchase fuel worth £16.67. This was during a period of lengthy absence from work as he was off all of January 2022 to the end of February 2022. This fuel cannot have been for work-related reasons.

Payment on Dismissal

92. On dismissal, the Claimant was paid holiday pay of 28 days pay x £38 = £1,064. It is not clear where the figure of £38 comes from. The 28 days was based on 12 accrued days from 2022 and 16 days "outstanding from 2020". As above, the Respondent says this was a gesture of goodwill.

93. The Respondent accepts it did not calculate holiday pay correctly. It ought to have used a 52-week reference period and calculated the pro rata element of the EU derived 4 weeks leave based on normal pay, which would

have included commission. However, it avers that he has not lost out as a result of the fact it paid him more than he was in fact entitled to by including the 16 days it was not in fact obliged to pay him for.

94. As the Claimant was dismissed on 31.5.22, he had accrued 5/12 of his annual leave, namely 11.66 days.

THE LAW

Unlawful Deductions

95. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

96. The time limit for such claims under s23(2)(a) is 3 months beginning with the date of payment of the wages from which the deduction was made (with an extension for the early conciliation provisions). If the complaint is about a series of deductions or payments, the 3-month time limit starts to run from the date of the last deduction or payment in the series: S.23(3) ERA.

97. If a Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the 3-month period it may consider the complaint if it is presented within such further period as a tribunal considers reasonable (s23(4)).

98. The onus of showing it was not reasonably practicable to bring the claim in time is on the Claimant (**Porter v Bandridge Ltd** [1978] IRLR 271, [1978] ICR 943, CA).

99. Judge LJ in **London Underground Ltd v Noel** [1999] IRLR 621 held that (in relation to a claim of unfair dismissal, which has the same test)

    "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, 'in all the circumstances', nor when it is 'just and reasonable', nor even where the tribunal, 'considers that there is good reason' for doing so."

100. Cavanagh J in **Cygnet Behavioural Health Ltd v Britton** [2022] EAT 108 emphasised that the test is a strict one and there is no valid basis for approaching the case on the basis that the ET should attempt to give the "not reasonably practicable" test a liberal construction in favour of the claimant.

101. If an employee is ignorant or mistaken about their right to claim or how it should be pursued, the circumstances of the ignorance or belief and the explanation for the same will be relevant as it is necessary to consider whether the ignorance or mistake is reasonable: "What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?" (**Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53, CA. If ignorance is not reasonable, then it is likely to have been reasonably practicable to get the

claim in on time (**Riley v Tesco and others** [1980] IRLR 103 and **Wall's Meat Co Ltd v Khan** [1978] IRLR 499].

102. In **Porter v Bandridge Ltd** [1978] ICR 943, the Court of Appeal held the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. In that case, the claimant took 11 months to present the claim (one of unfair dismissal) and the finding, upheld on appeal, was that he ought to have known of his rights earlier, even if in fact he did not.

Implied Terms – Custom and Practice

103. For a term to be implied by way of custom and practice, the custom must be "reasonable, notorious and certain" (**Devonald v Rosser and Sons** [1906] 2 KB 728, CA). The EAT in **Waine v R Oliver (Plant Hire) Ltd** [1977] IRLR 434 did not think a single incident or occurrence would be enough to establish an implied term on the basis of custom and practice.

Minimum Wage

104. The National Minimum Wage Act 1998 ("NMWA"), section 1 provides that:

> *(1) "A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.*
> *…*

105. Section 17 of the NMWA provides that a worker paid less than the minimum wage is entitled to "additional remuneration" calculated in accordance with s17:

> *(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of—*
>
> *a. the amount described in subsection (2) below, and*
>
> *b. the amount described in subsection (4) below.*
>
> *(2) The amount referred to in subsection (1)(a) above is the difference between—*
>
> *a. the relevant remuneration received by the worker for the pay reference period; and*
>
> *b. the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.*

> *(3) In subsection (2) above, "relevant remuneration" means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.*
>
> *(4) The amount referred to in subsection (1)(b) above is the amount determined by the formula—*
>
> *(A / R1) × R2*
>
> *where—*
>
> *A is the amount described in subsection (2) above,*
>
> *R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and*
>
> *R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.*

106. In short, a worker not paid in accordance with the NMWA is entitled to additional remuneration based on whatever is the higher, the relevant rate at the time of the reference period or the rate at the time of the determination.

107. Section 28 of the Act provides for a reversal of the burden of proof. It provides:

> *(1) Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.*
>
> *(2) Where—*
>
> *a. a complaint is made—*
>
> *i. to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages)…and*
>
> *b. the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above,*
>
> *it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.*

108. The National Minimum Wage Regulations 2015 (SI 2015/621) ("NMWR") set out the relevant minimum wage rates and explain how to identify the pay reference period and how to determine whether the NMW has in fact been paid.

109. The applicable hourly rate is set each year. The applicable hourly rates for those of the Claimant's age are:
    a. 1 April 2022 – 2023: £9.50
    b. 1 April 2021 – 2022: £8.91
    c. 1 April 2020 – 2021: £8.72

110. In order to determine whether an individual is being paid the national minimum wage, it is necessary to ascertain their hourly rate of pay. That necessitates findings about:
    a. the total pay received in the relevant pay reference period, and

    b. the total number of hours worked during that period.

111. Therefore, the first matter to be determined is what constitutes the 'pay reference period'. Regulation 6 of the NMWR states that the pay reference period is a month or, if the worker is paid by reference to a period shorter than a month, that shorter period. In this case, the pay reference period is a month.

112. Regulation 7 of the NMWR states that a worker's hourly rate in a pay reference period is to be determined by taking the remuneration (calculated in accordance with Part 4) and dividing it by the hours of work (calculated in accordance with Part 5).

113. Reg 9(1)(b) of the NMWR provides that any payments that are earned during one pay reference period (period A) but are received in the following period (period B) are to be allocated to the period in which they are earned (i.e. period A).

114. Not all elements of pay received by a worker count towards NMW pay. Similarly, not all deductions from a worker's pay made by the employer are taken into account when calculating whether a worker has been paid the NMW. The Regulations contain detailed provisions on how to calculate this. In general, NMW pay is gross pay, which includes inter alia basic salary and commission payments, less any elements of gross pay that are excluded. Payments in respect of expenditure in connection with the employment are excluded under Regulation 10(l).

115. Part 5 provides how the hours worked in the period are to be calculated. This depends on what category the worker falls into (salaried hours work, time work, output work or unmeasured work).

116. The Respondent contends that the Claimant undertook "time work" within the meaning of the Regulation 30. I disagree, the Claimant was not paid by reference to the time he worked nor by his output in a period of time. Neither was he engaged in salaried work as he was not paid a salary for a specified

number of hours work and his pay did entitle him to a payment in respect of basic hours other than annual salary or performance bonus. Rather, he was engaged in unmeasured work which is dealt with in Regulations 44-50. That is work that is not time work, salaried hours work or output work. The relevant part of Regulation 45 stipulates that:

> *The hours of unmeasured work in a pay reference period are the total number of hours—*
>
> *(a) which are worked (or treated as hours of unmeasured work in accordance with regulations 46 and 47) by the worker in that period.*

117. Regulation 47 provides that the hours when a worker is travelling for the purposes of unmeasured work are to be treated as hours of unmeasured work. Thus, unlike time work or salaried work which exclude travel to/from home to work, for this category of work it is to be included.

118. Lastly, Regulation 59 NMWR provides that an employer of a worker who qualifies for the NMW must keep, in respect of that worker, records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the NMW. The records must be in a form which enables information to be produced in a single document (Reg 59(2)).

119. A claim for failure to pay the national minimum wage can be brought as a claim for unlawful deductions from wages under section 13 of the Employment Rights Act 1996, as this claim is, since the worker is entitled to be paid the applicable hourly rate for each hour worked, and paying the worker less than this results in an unlawful deduction from the wages due. In other words, the sum properly payable under a worker's contract by way of wages is the national minimum wage rate and a failure to pay this is a breach of section 13 of the 1996 Act.

Wrongful Dismissal

120. The Respondent has referred me to a number of authorities dealing with the question of what type of conduct may constitute a repudiatory breach of contract entitling an employer to dismiss without notice, including **Laws v London Chronicle (Indicator Newspapers Ltd)** [1959] 2 All ER 285, **Neary v Dean of Westminster** [1999] IRLR 288) and **Adesokan v Sainsbury's Supermarkets** Ltd [2017] EWCA Civ 22, all of which I have had regard to. The Respondent points out that is trite law that implied into every contract will be a duty that the employee comply with the employer's lawful and reasonable instructions.

CONCLUSIONS

Unlawful Deductions from Wages

Contribution to Vehicle Repair Costs

121. The contract provided that the payment of £156 gross per month was "towards any possible car repairs that were needed." The parties expressly agreed this sum would be gross or taxed, so the Claimant's claim that the payment ought to be net is without merit. There is however no exception within the contract for when the car was used "very little or not at all" or stipulating that it would not be paid when an employee was off sick. No other sums were agreed, such as breakdown cover, insurance or other running costs.

122. The Respondent has not established that there is an implied term on the basis of custom and practice that this payment would not be made when the car was used "very little or not at all". Such a term needs to be reasonable, certain and notorious and Respondent has not established that here. There is no evidence of it being notorious. The Claimant was not aware of any such practice. There are no examples of this sum being withheld from sick employees prior to not paying the Claimant it. That there are 2 other examples of the Respondent not paying to 2 employees who were training is insufficient for there to be a notorious practice, whether related to sick employees or at all.

123. Further, the term is not certain either. "Very little" is poorly defined. It is also not clear whether the sum would be due or not if the employee worked part of a month or if it would be pro rated. In any event, an implied term cannot displace an express term and the express term here is clear that the sum is to be paid "monthly" and without exception.

124. I therefore conclude there was a contractual right to a monthly payment of £156 gross.

125. It is not in issue that this sum was not paid during the last 4 months of the Claimant's employment. There is no time limit issue. I therefore uphold the claim in the sum of (£156 x 4 =) £624 gross.

Holiday Pay

126. There is no general statutory right to carry over unused holiday from one year to the next. Some holiday can be carried over in limited circumstances which do not apply here. Was there a specific agreement entitling the Claimant to carry over leave from 2020, thus creating a contractual right to the leave? My findings of fact above are that there was not such agreement.

127. Even if there had been, the leave would have been carried over into 2021 only. The Claimant did not suggest there was a further agreement to carry over into 2022 and as such, it would have expired at the end of 2021.

128. The Claimant did not claim he was otherwise underpaid on termination but I have considered if he was because of the Respondent's admitted miscalculation.

129. The Claimant was entitled to be paid for 12 days on termination.

130. Using the last 12 months for which there are "normal" figures, his average monthly pay was £2,127.36 = £490.93 per week. The Claimant worked 6 days a week so his daily rate of pay was £81.82. He had accrued 12 days so should have been paid £981.84. The Claimant was paid more on termination than he was strictly entitled to.

131. The claim for in respect of accrued but untaken holiday on termination therefore fails.

132. There is a separate claim in relation to holiday pay allegedly not paid in September 2021. That claim is out of time, ACAS having been notified some 7 months after the alleged deduction. It cannot form part of a series as there were no deductions after that time. Even had I found a deduction on termination, I would not have regarded this deduction as forming part of a series with that deduction on termination, as it is of a different nature and the gap is very significant.

133. The Claimant has not established that it was not reasonably practicable to bring the claim in time. He has adduced no evidence to that effect or relied upon any argument that it was not reasonably practicable to bring a claim in time. He is clearly an intelligent and articulate man, with good English skills, and more than capable of using IT. He could easily have researched his ability to bring a claim, as he in fact did after his dismissal. I conclude that it was reasonably practicable for the claim to be brought in time and the Tribunal does not have jurisdiction to hear the claim.

134. Alternatively, if pursued as a breach of contract claim, I find that any breach was affirmed, the Claimant continuing in employment for some 8 months after the alleged deduction and not registering a complaint or grievance about it.

135. In any event, the Claimant has persistently failed to particularise the claim despite orders that he do so and it was still not clear to the Tribunal what the claim was, nor that he was underpaid. As such, he would not have succeeded on the merits.

136. As a result, all of the holiday pay claims are dismissed.

Unlawful Deductions: National Minimum Wage

137. I have concluded above that the Claimant was engaged in unmeasured work. He was based at home and travelled to different clients. His working time therefore included travel to and from home to the customers. That travel time and travel distance was built in to the daily route plans in seeming recognition of that fact.

138. The Claimant's Schedule of Loss, witness statement and closing argument are premised on a misunderstanding. He wishes to ignore the commission payments and contends instead his basic salary ought to reflect all of the hours he was working, not just the 24 it notionally represented. He said "*I was only paid for 24 hours, which I believe is a breach of employments laws*

in the UK". His Schedule of Loss is premised on him working 48 hours as a minimum and thus he claims another 24 hours per week x minimum wage rates, ignoring his commission payments.

139. However, that is the wrong approach. Commission is not to be ignored. It was part of his pay and can be taken into account. He is not entitled to the minimum wage hourly rate for all hours he worked and then commission on top, as he appears to believe. One must look at his total pay, which includes commission albeit without the payment in relation to vehicle expenses, and determine whether that fell below the national minimum wage.

140. The Claimant has not argued that if the correct approach is adopted, he was still underpaid. He has done no analysis of the figures and did not take issue with the Respondent's figures, summarised in Ms Kuznetsova's evidence and the table at p608, which show he was paid more than the minimum wage on the dates the Respondent understood the claim to relate to. That is enough to dismiss the claim as I reject the claim he has advanced and it is not the Tribunal's task to search for another way to put the claim.

141. However, if I am wrong about that, I have gone on to consider in the alternative whether on the basis of the findings I have made, he has been paid less than the minimum wage.

142. The Claimant was paid monthly and the claim is over the duration of his employment, so the relevant pay reference periods are each month of his employment.

143. What hours did the Claimant work each month? Based on my findings above, if the Claimant were working 37.5 hours a week on average from April 21 he would have been doing 162.50 hours per month. At national minimum wage rates, that would mean gross pay ought to have been at least £1447.88 per month.

144. What was the Claimant paid? He was paid more than that in every month after April 21 apart from after his absence in February 2022. He was not entitled to the minimum wage whilst absent as he was not doing any work. As such, for the last year of his employment he received more than the national minimum wage.

145. Any claim for period prior to that is well out of time and, for the same reasons as above relating to holiday pay, the Claimant has not established it was not reasonably practicable to bring the claim within time. In any event, I would have found he was paid more than the minimum wage in the 2020-21 year too, as he ought to have received at least £1,417 per month and he did.

146. I am conscious that pay for a particular month ought to be basic pay plus commission payments for the following month, given those payments were referable to work done in the previous month. However, correcting that calculation make little difference to the analysis outcome given the Claimant received the same basic salary each month and I am only able to make findings about his average number of working hours each month.

147. I am therefore satisfied that the Respondent has established that the Claimant was paid the national minimum wage throughout his employment and it is therefore dismissed.

Wrongful Dismissal

148. This is a claim for a week's pay. It was not paid because the Respondent avers the Claimant was guilty of gross misconduct.

149. I have found above that the Claimant was instructed to visit each customer but that he did not always do so. The instruction, which he understood, was a reasonable one. His failure to visit customers contrary to that reasonable instruction. A reasonable inference is that he took that decision consciously because to follow it would require a greater number of hours of work, which he was not prepared to put in given he felt he was paid too little for the work he did. He believed he was only paid for 24 hours work and he ought not to be required to work more than that.

150. For example, on 26.11.21, the route he was supposed to work was 100 miles yet he claimed only 20 and was at Stanstead airport by early afternoon, the first order having only put through at 10:15am. He had not been given permission to stop work early that day. On other days, such as 4.12.21, tracking data shows he did not leave Maidstone despite the fact that the customers he was required to visit were based in other locations. I find that he did not visit these customers despite knowing that he was supposed to. In other words, he deliberately and knowingly failed to follow a reasonable management instructions.

151. Moreover, it appears he sought to cover his tracks by noting down that he had done work miles when in fact he had not. There were occasions when the Claimant overstated or simply falsely claimed the number of miles he had travelled for work. For example:

    a. On 27.11.21, he was in Latvia, he still told the Respondent he had done 20 work miles;

    b. On 4.12.21, he told the Respondent he had done 20 miles yet the app data show all orders created were created at his home in Maidstone;

    c. On 29.12.21, he claimed he had done 25 miles business use to give the impression he had visited customers when in fact he was in Spain.

152. These overstated mileage claims gave the dishonest impression to the Respondent that he was visiting customers when he was not and also gave the Claimant the opportunity to do private miles at Respondent's expense, though whether he did not or not is a different question that is more difficult to determine, see further below.

153. As I have found, he did use the company fuel card to purchase fuel on 26.1.22 during a period of lengthy absence from work. Although only a small

sum, £16.67, there is no obvious justification for it and the Claimant failed to provide one. Misappropriating his employer's fuel in that way is a serious matter as it involves an element of dishonesty, as indeed do the mileage claims when he was not doing any mileage, such as those he made when in Spain. The fact the sum is only small is of only limited relevance.

154. In my judgment, these matters constitute acts of gross misconduct in respect of which the Respondent was entitled to dismiss the Claimant without notice. They are repudiatory breaches which go the heart of the contract.

155. I do not need to consider separately therefore whether the allegations pertaining to failing to comply with the sickness reporting procedure and use of personal mobile phone constitute gross misconduct and I do not do so.

Respondent's Counterclaim

156. The way the counterclaims are advanced, and the documents adduced in support, are quite difficult to understand and even Ms Patch had difficulty explaining the basis of the claims in her submissions.

Claim for Hours Not Worked

157. The Respondent contends that its analysis attached to the Schedule of Loss shows that in the period 1.11.21 – 31.12.21, the Claimant recorded 35.4 hours per week but only worked for 26.6 hours per week. The latter figure is said to be because "the data showing the Claimant's home location shows that the Claimant actually travelled for no more than an average of 26.6 hours per week". This is calculated in the period 1.11.21 - 31.12.21 and the Respondent then assumes this can be extrapolated across his entire period of employment, assuming the same average number of unworked hours.

158. In my judgment, there are a number of problems with this aspect of the counterclaim. First and perhaps most fundamental, the Claimant was not paid by the hour and there was no contractual minimum number of hours he was required to work. He was paid a salary, with monthly payments, plus commission, not an hourly rate. He has therefore not been paid specific sums referable to specific hours he "claims" to have worked but did not. He was paid a salary no matter how many hours he worked. That is in fact sufficient to dispose of the claim as pleaded.

159. However, there are other difficulties with the claim. The basic guaranteed part of the Claimant's salary was calculated on the basis of a notional 24 hours per week at minimum wage, with the rest in commission depending on the success or otherwise of his sales. The Respondent's own calculation is that he was doing more than 24 hours per week, and I have found that he was, yet it now seeks to counterclaim based on him not working the number of hours it required him to and it seems to do so by notionally claiming the minimum wage hourly rate.

160. Additionally, I do not consider the figures in the table attached to the Respondent's Counter Schedule to be reliable as an indicator of allegedly

overclaimed working hours. Attachment 1 has a column setting out the first and last order time and, based on that, the "Work Day Duration based on the activity records". It then records the "time at home based on location of order". That figure was not explained in Ms Kuznetsova's witness statement or the Respondent's closing submission. I understand this to be a record of when the Claimant first placed an order from home on the particular day in question so evidences the time he arrived at home. The final column "Work Day Duration out of home" appears to be the number of hours between time of the first order he made and the time in the "Time at home based on location of order" column.

161. The Respondent's calculation then, I think, assumes the Claimant only worked up until the time he placed the order from home and the time thereafter until the last order reflect hours "overclaimed" because he was not out visiting customers. He may well not have been, but it does not follow that he was not doing any work. Indeed, the fact there are orders placed later in the day suggests he was working for the Respondent, just not in the way it wished him to. The Respondent has then calculated weekly averages, although it is not clear how. The Respondent then extrapolates these weekly figures across the period of employment, without testing that proposition in relation to other periods much earlier in the employment, when it is feasible the Claimant may have had a different approach to work and visiting customers, albeit there is no evidence of that either way. The burden in a counterclaim is on the Respondent. In short, the Respondent's assumptions are unsafe and its calculations unclear. I have made findings of fact above about the number of hours he was working which are greater than the figures assumed by the Respondent in its table.

162. Further and in any event, the Respondent overlooks the fact the Claimant did not "claim" to have worked any particular number of hours. The times in the table are extracted from the app, which record first and last orders and time orders were placed from his home. These were automatically generated and not "claimed" as working hours by the Claimant.

163. Overall, I am not satisfied the Respondent has established on the balance of probabilities that the Claimant breached his contract by claiming pay for hours not worked or that the Respondent has suffered the loss it claims as a result.

164. The Respondent's real gripe appears to be not that it has paid the Claimant for hours he was contractually obliged to work but did not but rather that if he had worked a greater number of hours and visited all customers as he ought, he would have made a greater profit for the Respondent (and in turn for himself). As Ms Patch accepted, that is a much harder claim to prove, but the fact it is difficult does not exempt the Respondent from the duty to prove loss and the extent of the loss. In any event, that is not the claim it has advanced. This aspect of the counterclaim is dismissed.

Fuel Usage

165. This aspect of the counterclaim is more difficult. However, it is premised at least in part on the Respondent's belief about what the Claimant ought to

have been doing, rather than what he was in fact doing. I have made findings above that there is no evidence he was trained or instructed to do the job in precisely the way Ms Kuznetsova believes it ought to have been done.

166. The Respondent in its Schedule of Loss avers that in the period Nov - Dec 2021, the Claimant overstated the number of miles he had done for work. As such, as I understand this aspect of the counterclaim, it claims a sum by seeking to identify the number of allegedly overclaimed miles, estimating out how many litres of fuel would have been used to do those excess miles and then applying a rate per litre. None of that is particularly clear from the Grounds of Resistance or Counter-Schedule of Loss, and the figures which have been used are not explained in Ms Kuznetsova's statement.

167. The Respondent says the loss to it in this period is £210.41, a figure which is the aggregate of the totals in the two tables set out at paragraph 22 of the Grounds of the Resistance. It was not clear why there were two tables. It avers this was 32.8% of the total claim for fuel. It then assumes that the Claimant consistently overclaimed fuel by 32.8% over the entire period of employment. It does so without testing that proposition against earlier periods when the Claimant's working practices may have differed, a point I made above in relation to the claim for hours.

168. Despite the fact I have found that the Claimant did not follow his instructions and did not visit all the customers he was required to, I do not accept the Respondent has established this aspect of its counterclaim claim on the balance of probabilities, for a number of reasons:

   a. The Claimant was not paid fuel expenditure per mile. Rather he used a fuel card and the Respondent paid the fuel bill. The fact he told the Respondent he was doing work mileage which he was not, which I accept he did on occasions as a matter of fact, largely because he was doing work from home when he was supposed to be out and about, is not the same thing as the Claimant then using fuel the Respondent had paid for to run his vehicle privately. Although it gave him an opportunity to do so, there is another reason he may have inflated his work mileage – to make it appear he was following the instruction to visit customers when he was not;

   b. It is not clear from the evidence and analysis I have been provided with that the Claimant was putting more fuel into his car than he can possibly have been using for his work for the Respondent, such that one can infer he was using the Respondent's fuel to pay for private mileage nor if he was, to what extent. The Respondent's case was not put on the basis that he spent X on fuel, which would have allowed him to travel Y but the evidence shows he only travelled Z, but rather in the way set out above;

   c. I do not follow the claim as pleaded at paragraph 22 of the Grounds of Resistance. The tables have been aggregated to show a combined "overclaim". I am still not sure why there are two tables. 08.11.21 and 09.12.21 appear in both tables, it is not clear why, and

09.12.21 has different figures in each, though 08.11.21 does not. They appear to have been counted twice. It is not clear where the figure of 8 miles per litre comes from. In the second table, the unit price per litre varies between 1.25 and 6.25 over the month and is said to be 1.28 in December 2021 in table 1 and 5.25 for the same month in table 2. It must be an error though it is not been explained or corrected by Respondent and I know not what the claim is supposed to be. It is not the Tribunal's job to do a full audit, pulling together different bits of raw data contained in the bundle;

d. As I understand it, the overclaimed mileage has been calculated by taking the difference between the mileage claimed by the Claimant and the expected mileage had he followed his route plan. However, as I set out above, the route plans are not a definitive guide to the number of miles the Claimant would have done even had he visited every client, given there were legitimate reasons to depart from the route plan. Further, to identify the "overclaim" in this period, the Respondent has cherry picked those occasions when the Claimant claimed more than the route plan suggested he ought to have done and it has ignored those occasions when the Claimant claimed less than route plan suggested was necessary. For example, on 13.11.21, he claimed 14 miles but the approved route suggested he ought to have done 88. That may be because he worked mainly from home but I cannot tell whether that is the case on each such occasion;

e. In any event, extrapolating in the way the Respondent has from a 2 month period towards the end of employment to the whole period is unsafe, without testing that proposition against earlier periods.

169. The suggestion that there was loss of £210.41 in the period November – December 2021 is clearly in error, given at least the double counting and apparent calculation errors in the price of fuel. Even on the Respondent's best case, were I to have upheld it, the true figure was likely to be a lot less.

170. I accept is possible that the Claimant was overstating his work miles in order to use fuel paid for by the Respondent for private purposes. However, the Respondent has not satisfactorily proven that he was doing so or if he was, to what extent and thus what its loss is.

171. The exception is the fuel payment claimed on 26.1.22. The Claimant was off work at that time and not working for Respondent, and was claiming to be too ill to drive. Yet on 26.1.22 he put 13.34 litres into his car at a cost of £16.67. There is no explanation for that other than it was used for personal use. He suggested he was attending a meeting with the Respondent but there is no evidence of any such meeting and it is denied. That use of fuel was in breach of contract and caused the Respondent loss. As such, to that limited extent, the counterclaim succeeds. I therefore uphold the counterclaim in the sum of £16.67 only.

Postscript

172. I would like to apologise to the parties for the amount of time it has taken for me to produce these written reasons. Although the request for written reasons was made the day after I delivered oral reasons, that request unfortunately was not relayed to me until 21 March 2024. Unfortunately, as I sit part time, by that point I had no sitting days listed and due to other professional commitments, I did not have the time to devote to writing up these reasons until now.

Employment Judge Sugarman
4 June 2024