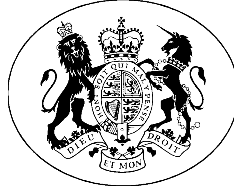

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Lewis**

Respondent: **Haulfryn Richard Davies Ltd**

Heard at: **Pontypridd County Court** **On: 20 May 2024**

Before: **Employment Judge R Harfield**

Representation:
Claimant: Mr W Cowley (CAB)
Respondent: Mr W Jones (non-legal representative)

JUDGMENT having been sent to the parties on 22 May 2024 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction and background to the proceedings

1. The claim form was presented on 26 June 2023 bringing complaints of constructive unfair dismissal and "other payments" relating to the Claimant's alleged share of a pot of money to the value of £1200. The Respondent filed their ET3 response form on 24 July 2023. The Respondent has been represented throughout by Mr Jones, a lay representative. At the outset of the case a final hearing was listed for 7 and 8 November 2023 by video and case management orders issued to get the case ready for that hearing. On 24 October 2024 the parties were told that unless they objected the case would instead be heard in person in Cardiff. On 31 October 2023 Mr Cowley from the CAB wrote to confirm he was now representing the Claimant. He asked to see the ET1 and any case management orders and said that on the basis of what he had seen he did not believe either side would be in a position to sensibly proceed

with a hearing the following week. On 31 October Mr Jones emailed to request a postponement saying he had an artificial limb and had major surgery to his spine. An adjournment was requested for a couple of months so that Mr Jones could attend. Employment Judge Brace postponed the final hearing and the Respondent was directed to write within 7 days to confirm when they would be able to attend following recuperation. Mr Jones replied to say they would be free to attend the tribunal from 5th to 6th February 2024 or whichever dates were available from there on. The final hearing was therefore relisted for 12 and 13 February 2024.

2. On 30 January 2024 the parties were asked to confirm that the case management orders had been complied with by 5th February. Mr Jones replied to say he did not understand and he was asking for the tribunal to be put back for a little longer as he was having difficulties with his leg and was also regularly going back and forth to hospital. On 31 January Mr Jones was told the hearing had been listed on 12 and 13 February because his previous indication was that he would be able to attend then. He was told if he was making an application to postpone on medical grounds he needed to provide medical evidence in accordance with the Presidential Guidance. An alternative suggestion was made for the hearing to take place by video. Mr Cowley replied to say that he could not trace ever having received the notice of hearing for 12 and 13 February and that he was away on pre-booked leave on those dates. The Tribunal records show the notice of hearing being sent to the correct email addresses.

3. The parties were told that Mr Cowley needed to provide proof of his holiday booking and Mr Jones needed to provide medical evidence in support of his own postponement application. On 6 February Mr Jones said that as he had been in severe pain he had forgotten to get the medial evidence but he had another medical appointment the coming Thursday. On 8 February Employment Judge Moore directed the postponement application was refused without medical evidence and a GP note would suffice. It was pointed out the offer of a video hearing had not been addressed. On 8 February Mr Jones provided medical evidence and the postponement application was granted on 9 February by EJ Brace. The parties were told to confirm within 7 days that they were ready for the final hearing and, if not, why not.

4. In views of the difficulties in the case EJ Brace directed that a case management hearing be listed for 22 February (a step the Tribunal does not ordinarily take in an unfair dismissal case as the parties (including litigants in person) are expected to comply with the standard case management orders.) Mr Jones said he could not attend as he was in

hospital on that date. On 14 February Mr Jones asked for a date somewhere nearer the end of March.

5. Due to administrative errors a notice of final hearing was sent for 22 and 23 February and on 14 February EJ Moore explained that the final hearing notice for those dates should be discarded as the case management hearing was to be listed instead on 22 February 2024 and that the Respondent could attend by telephone. It was pointed out that the Respondent had not provided the Tribunal with any dates to avoid such as his hospital appointment.

6. I conducted the case management hearing on 22 February 2024. Nobody attended for the Respondent. I relisted the final hearing for 20 to 22 May 2024 and made fresh case management orders. I set out in my order that the Respondent needed to read the document carefully to understand what they needed to do. Mr Jones was given permission to apply to attend the final hearing remotely by video if he so wished. The case management orders included a direction for the Claimant to provide a list of the alleged breaches of contract/breaches of trust and confidence he was relying on in the constructive unfair dismissal claim. Mr Cowley had already prepared a draft hearing file, so the parties were directed to consider whether they had any additional documents to be inserted. The parties were directed to exchange witness statements including any witness statements previously sent to ensure it was completely clear everybody had everything that was being relied upon. The parties were reminded of the need to bring their own copies of the hearing file and witness statements with them to the hearing for their own use.

7. On 1 May Mr Jones asked what the outcome would be if Mr Davies from the Respondent did not attend the final hearing. He said Mr Davies had recently been in a life changing accident. On 15 May Mr Jones said he could only attend on the Monday of the final hearing as he had hospital appointments and that Mr Davies would need to keep his leg raised during the hearing. EJ Jenkins directed the parties to attend on the 20 May as it could be discussed that day. We discussed the position at the start of the hearing and it was agreed to see how much of the claim could be completed that day when everyone was there. Arrangements were made for Mr Davies and Mr Jones to stay at the back of the room (including whilst giving evidence) so that Mr Davies could elevate his leg and to ensure Mr Davies and Mr Jones had to move around as little as possible. I also clarified with the parties what I had by way of a hearing file and witness statements. The Respondent attended without a copy of the hearing file but were given a further spare copy by Mr Cowley. Mr Cowley also confirmed that there was no claim for holiday pay.

8. I heard evidence from the Claimant, during the course of which it appeared that both parties might have additional documents. After the Claimant finished his evidence I gave both parties opportunity to reflect on this and whether they were making any application to rely on new documents. Both confirmed they were not. I then heard evidence from the Claimant's witness Mr Palmer before hearing evidence from Mr Davies for the Respondent. During Mr Davies' evidence he referred to written witness statements from other drivers he wanted to rely upon that were not in the hearing file or the witness statements for the hearing. As it happened I had the Tribunal paper file with me and therefore looked through it and found some documents that had been attached to the Respondent's ET3 that included, amongst other things, some statements. I could not be certain from the file whether they had been served on the Claimant when the ET3 was accepted and served (albeit the Respondent should have their own copy). Mr Cowley was not certain either. The Respondent had had the opportunity to review the draft hearing file to flag up if there was anything missing and had not done so (and to re-send all witness statements). But as I could not be certain what the Tribunal had done with these attachments when the ET3 was processed I asked the clerk to take photocopies for both parties so they could review them over lunch and make any application they wished to add any new documents in. There were only two statements and not the four to six statements mentioned by Mr Davies so I said to the Respondent if they thought there were more missing documents they needed to find them and show when they had been sent to the Tribunal/Claimant. I also said that if further written witness statements were permitted the fact that the witness would not be attending to confirm their statement and answer questions under oath would affect the weight that could be given to that witness's evidence. The Respondent was then permitted to rely on two additional witness statements of Mr Thomas and Mr Harris and some additional text messages relating to holidays.

9. The parties then made closing comments. I then took a period of time to consider my decision before returning to give my oral judgment. I had before me at the hearing a hearing bundle of 164 pages, and witness statements from the Claimant, Mr Palmer and two from Mr Davies. I had the two additional witness statements of Mr Harris and Mr Thomas. I had the additional WhatsApp messages about holidays.

<u>Findings of fact – Constructive Unfair Dismissal</u>

10. I resolve any factual disputes by applying the balance of probabilities.

11. The Claimant started working for the Respondent in March 2020 and at that time Mr Davies was working in Taffs Well. Mr Davies then started working with the Claimant from the Tredegar part of Tarmac and that is

when, on the Claimant's account, the relationship started to sour. The Claimant says Mr Davies behaved towards him in a way that was a fundamental breach of the duty of trust and confidence that is implied into every contract of employment, The Claimant relies upon 3 specific alleged breaches, the first of those being that Mr Davies allegedly asked him to steal 3 cubic metres of concrete for a job that Mr Davies had to do on 19 August. The Claimant says he did not like to say "no" to Mr Davies's face and so he agreed, but then when he got home he texted Mr Davies and said he could not do it. The Claimant says he felt that Mr Davies had turned on him more after that.

12. The Claimant's evidence was that he understood he was being asked to take concrete for FCC based in the Heads of the Valleys from Tarmac and on his way to FCC drop off 3 cubic metres to a different private customer of Mr Davies who was located by the Nags Head. The Claimant's evidence is that he understood he was being asked to deliver 3 cubic metres of concrete to the private customer that was being paid for not by that customer but by FCC. He says he would also be using a vehicle that was contracted to and tracked by Tarmac. He says he only had one delivery ticket that day for FCC and to drop off to a separate customer needed to be charged for separately and on a separate lorry.

13. Mr Davies's version was different. He says he was not asking the Claimant to steal concrete; he was asking the Claimant to take one load from Tarmac to FCC and to then do a separate private trip from Cardiff Concrete to the private customer before picking back up the FCC trips. Mr Davies says he was always going to pay Cardiff Concrete for the concrete, Mr Davies says he did in fact did do so when he had to make separate arrangements to deliver the concrete to the customer and indeed he needed to make further deliveries. Mr Davies says the only infringement would have been that the vehicle was contracted to Tarmac that day but there was never an intention to get anyone to steal concrete and he would not risk his contract with Tarmac in that way.

14. It is therefore largely one person's word against the other although I do have the Claimant's WhatsApp exchange with Mr Davies that evening in which he said: "*listen I've been thinking about what you asked me to do and to be honest with you it's too big of a risk especially with being tracked. It's hard to say to someone's face no but it's too risky. I don't like saying no but there is no other way I don't mind trying to keep it on*". Mr Davies replied to say: "*it's ok, no worries I get 3 meter from plant I wish u say silly haha".*

15. Weighing all the evidence into account, I prefer the evidence of the Claimant. I think, and find on the balance of probabilities, the Claimant was being asked to take FCC's concrete to the private customer. I say that

in particular because of the Claimant's text messages where he says it is too much of a risk especially with the truck being tracked, which reads to me like the tracking is adding to the risk but not itself the totality of what it was that was troubling the Claimant. There is also the reference to "*I don't mind trying to keep it on*" which resonates with the idea of keeping concrete.

16. I appreciate that the Respondent told the Claimant not to worry about it when the Claimant said he did not want to do it. But I find, looking at it objectively, being asked to engage in that conduct in the first place was conduct that was without reasonable and proper cause that undermined trust and confidence in the employment relationship.

17. The next allegation is that the Respondent allegedly abused the Claimant when the Claimant requested annual leave on 15 November 2022 and when the Claimant had made sure other employees were not on leave.

18. The Claimant's evidence is that he found the Respondent to generally be unhappy with him taking holidays, and if they were busy he would be asked to change his day off. He says he would do so if he could so as not to upset Mr Davies. He says that in late 2022 he asked Darren, the other driver, if Darren was going to book time off and Darren said he was going to keep his days until after Christmas, so the Claimant sent an email request to the Respondent on 14 November 2022. The Claimant says the following day Mr Davies came up to him and called him a selfish fucker. The Claimant says he asked Mr Davies what he was going on about and Mr Davies said "*You booking them days. What if me or Darren wanted to book them off."* The Claimant says he replied in temper that he had fucking asked Darren about it who said he wasn't booking any and that Mr Davies himself can book days off if he wanted. The Claimant says he didn't speak to Mr Davies for the rest of the day and Mr Davies came and asked him what was up and the Claimant told him he was not happy with what Mr Davies had said. He says Mr Davies said the Claimant took things too seriously.

19. Mr Palmer's evidence is that the Respondent told him that he was not entitled to holidays as a part time worker and that he had never had a proper family holiday. He says as time went on Mr Davies would threaten to replace him if he did. Mr Palmer said things came to a head for him when he was refused time off with full pay following the birth of Mr Palmer's daughter. Mr Palmer's evidence in that regard was not challenged in cross-examination other than it being put to him (which he denied) that he had left because if he was to work full time he wanted to be paid cash in hand and it would otherwise affect his benefits. On the other hand the statements from Mr Harris and Mr Thomas say they had no issues with requesting time off or holidays and indeed Mr Thomas says he

had paid time off following the passing of his mother and to see solicitors to sort things out with his home. Although as I have already stated, that evidence was not supported by evidence given under oath.

20. Mr Davies's evidence is that he did not call the Claimant a "selfish fucker" but said "*bloody hell, it is every week end up to Christmas. What if me and Darren want it off?"* Mr Davies says he did not see any harm in saying that. Mr Davies says that ultimately employees could take time off and he had to take it on the chin if it meant that one or more lorry was parked up, albeit that was not ideal. There are text messages, although they are about the Claimant taking holiday at different times, showing Mr Davies acknowledging the Claimant's request.

21. As to what was said on that specific day I have Mr Davies's and the Claimant's contradicting accounts. On the balance of probabilities I find it likely that Mr Davies did call the Claimant a selfish fucker rather than saying bloody hell. I took from the Claimant's evidence that he very much carried this with him, in terms of the harm it caused. I found the Claimant's evidence in that regard plausible.

22. Mr Cowley fairly acknowledged that swearing is common in the industry but made a point that there was a difference between swearing in the workplace and an employer directing swearing and abuse directly at an employee. I also take the point the Respondent may well have grounds on which to check whether others wanted to take leave in the run up to Christmas. But there were ways to do that without calling the Claimant a selfish fucker and insinuating and assuming the Claimant had undermined other peoples ability to take leave.

23. Looking at it objectively, and taking into account the nature of the industry and the language that may be used, I do find this was conduct likely to undermine trust and confidence and was without reasonable and proper cause.

24. The third complaint is that the Respondent allegedly attempted to prevent the Claimant from taking breaks he was legally required to have, and belittling him, particularly on 14 June which was the day the Claimant resigned. The Claimant says that in general the Respondent would insist they take breaks whilst on site on a slow job, and that if he stopped for a break he would be asked where he had been. He says that if he stopped for a break the Respondent would get angry and go red in the face. The Claimant says that on 14 June 2023 he was waiting on a part load and they had not started tipping a truck in front, so he knew he had time for a break. He says he told the batcher he was going on break and washed his truck out. He says that when the Respondent then arrived at the plant he told the Respondent he was going on a break and would not be long, the

Respondent had a bright red face and told him to leave the keys with Shaun and Shaun would load it if anything came on. The Claimant says he went for a break and then left because of how small he was made to feel.

25. The Claimant sent Mr Davies a message saying: "*don't ask Shaun to load the truck, I'm not going back to work. I've had it, one break in God knows how many months and I could tell you didn't like it. Sorry but I'm entitled to breaks by law*." Later on he sent a further message that said: "*look sorry, I'm unable to work with you any longer. You going funny over me having a break when I'm on hire, which is all the more reason to take a break, not only today but over a number of months you've had little digs over things like me taking holidays which is having a big impact on my mental health which is part of the reason I've been seeing a mental health practitioner which they have given me letters to give to you but I didn't want any grief over them so that's why I didn't give them to you knowing how funny you goes over things so please work out what's owing to me and hopefully we can end things tidy"*, The Respondent said: "*no worries, I'm selling the truck anyway.".*

26. Mr Palmer's evidence was that Mr Davies did not like workers taking breaks even though they were a legal requirement, He said he had to take them on site when delivering concrete and that if he could not do so and if he had to stop for one he tried to do it out of Mr Davies's way.

27. Mr Davies's evidence was that no-one was forced to take a break on site and it was purely at a driver's discretion as they were responsible for their own licence. He said that on the day in question the Claimant said he was going to the gym and that Mr Davies said he was not angry and just suggested the Claimant leave the keys as a helpful step. He says that he has no licencing infringements and a long clean record.

28. On the balance of probabilities I accept the Claimant's and Mr Palmer's evidence that workers did come under pressure to take breaks whilst on site. The point being that they could do other work whilst on a break as they were not driving. So the break would show on their official tachograph records. But as the Claimant said in evidence it was still not a proper compliant break because the requirement is to have a break from all work; not just from driving. That requirement is there for important health and safety reasons on the industry. How the Claimant was feeling about this situation was clearly reflected in the WhatsApp messages he sent that day. I find that when the Claimant told Mr Davies on 14 June he was taking a break, Mr Davies did not react in a facilitating way but instead through his body language and expression and direction to give the keys to Sean, was expressing his dissatisfaction with the Claimant taking a break that the Claimant was entitled to take.

29. I do accept there probably were times when the Claimant did agree to take a break on site and there were advantages to workers doing so, such as finishing early. But that only goes so far and the Respondent ultimately had a responsibility to ensure his workers took proper compliant breaks and to not stand in the way of the Claimant taking them if the Claimant wished to do so. Indeed, it should have been the system to do so. I can see from the Claimant's WhatsApp messages that the Claimant was not happy to continue not taking proper breaks and it was taking its toll on the Claimant. So I therefore find the totality of that conduct was without reasonable and proper cause and it did undermine the trust and confidence.

Constructive Unfair Dismissal – The legal framework

30. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right for an employee not to be unfairly dismissed by his employer. Section 95 sets out the circumstances in which an employee is dismissed which include where:

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

31. In the field of constructive unfair dismissal, case law has established the following principles:

    (1) The employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.
    (2) A repudiatory breach can be a breach of the implied term in every contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 and Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.)
    (3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels or believes they have been unreasonably treated. Likewise the test does not require the tribunal to make a factual finding as to what the actual intention of

the employer was as the employer's subjective intention is irrelevant (when considering the test of likely to destroy or seriously damage).

(4) The employee must leave, in part at least, because of the breach. However, the breach does not have to be the sole cause. There can be a combination of causes; the breach must have played a part (see Nottingham County Council v Meikle [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).

(5) The employee must not waive the breach or affirm the contract by delaying resignation too long.

(6) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

(7) In appropriate cases, a "last straw" doctrine can apply. If the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial. Moreover, the concepts of a course of conduct or an act in a series are not used in a precise or technical sense; the act does not have to be of the same character as the earlier acts.

(8) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the court of appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

   a. What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?
   b. Has he or she affirmed the contract since that act?
   c. If not, was that act (or omission) by itself a repudiatory breach of contract?
   d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.
   e. Did the employee resign in response (or partly in response) to that breach?

32. If a constructive dismissal is found the tribunal must go on to consider the fairness of the dismissal. Section 98 ERA provides:

"(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do…,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

<u>Constructive Unfair Dismissal – Discussion and Conclusion</u>

33. I have to take a step back and reflect objectively about the conduct in the round. I acknowledge the threshold for a repudiatory breach of contract entitling someone to resign and treat themselves as dismissed is a high one. But I do find across the totality of those three incidents that the Respondent did behave in a way that was likely to destroy or seriously damage trust and confidence and did so without reasonable and proper cause. An instruction to give concrete to a customer paid for by another and in time tracked to Tarmac was a very serious matter, as was the Respondent's handling of statutory breaks in regulated industry where the need for breaks is of paramount importance for health and safety.

34. I accept the Claimant resigned in response to the breaches and he did not leave for any other reason. He did not have new employment at the time he left. He did not affirm the breach as the last breach happened on the day the Claimant resigned. The Claimant was dismissed because he resigned in circumstances where he was entitled to resign and treat himself as dismissed because the Respondent had committed a repudiatory breach of contract. There has been no potentially fair reason put forward and so I find that the Claimant was unfairly dismissed.

Constructive Unfair Dismissal – remedy

35. By way of remedy the Claimant is entitled to a basic award of £1,255.59. That is a figure calculated by Mr Cowley and I have double checked it.

36. The Claimant is also entitled to 2 week's notice pay. Notice pay has to be awarded gross because it is taxable and which would total the sum of £837.06. However, the Claimant earned 4 days pay in that time when he was working at a factory. I do not have any documents about this (none provided by the Claimant and none requested by the Respondent in advance of the hearing). I have to proceed proportionately and on the best evidence I have available which is the Claimant's oral evidence that he earned about £200. That therefore makes the notice pay claim the gross sum of £637.06.

37. The Claimant then had another 4 weeks out of work but that figure needs to be calculated on the net figures because that element of the compensation will be tax free up to the £30,000 threshold because that is compensation for loss of office. So for that I take 4 weeks at £380 because that is the figure that is on cheques that the Claimant was given. 4 x £380 is £1,520 by way of loss of earnings for that additional 4 week period.

38. There is also a claim for loss of statutory rights i.e. the fact that the Claimant needs to spend time accruing his 2 years service to give him protection against unfair dismissal or redundancy from scratch. The sum claimed for that is £500. But I award the sum of £250 because the Claimant had only worked for the Respondent for 2 years as at the point his employment was terminated, so it is not the kind of case where he had built up a really long period of protected service.

Unauthorised deduction from wages – Findings of fact

39. I turn to the deduction from wages claim. The Claimant says that the Respondent introduced a system whereby he, Darren and Mr Davies would sell off unwanted concrete at the end of the day and put the funds into a pot to be divided between them and it would be paid out periodically. Darren looked after the figures. The Claimant says that when he resigned he asked for his share of this pot and Mr Davies did not respond to him. He says it has not been paid but he was contractually promised. He says he had asked for and had been paid money out of the pot in the past, including £1400 at Christmas in the first year and about £2000 later on to buy a greenhouse.

40. Mr Davies's evidence is that he knew nothing about this, and the concrete pot never existed. He says he would give the Claimant and other workers a £50 bonus that he paid for himself if they kept their lorries clean but that was nothing to do with a concrete pot and that he did not pay the claim (i.e. the £50 bonus claim) because the Claimant's long term lorry that the was not clean.

41. Here I prefer the account of the Claimant. In particular I have the WhatsApp messages he exchanged with Darren. I accept the Claimant's account that these were WhatsApp messages exchanged with Darren, where Darren says there was £1,211.00 each in the concrete pot and where the Claimant and Darren in their messages express their disbelief that Mr Davies is now saying that the bonus from the concrete pot was on condition that they keep their trucks clean. I also have as a way of support the WhatsApp messages sent by the Claimant to Mr Davies chasing the money and saying that he was going to go to ACAS.

Unauthorised deduction from wages – the legal principles

42. Section 13 of the Employment Rights Act 1996 states:-

"(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

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

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

(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) In one or more terms of the contact (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion."

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part

as a deduction made by the employer from the worker's wages on that occasion."

43. Section 27(1) defines "wages" and says, "*In this Part "wages", in relation to a worker, means any sum 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."* Under Section 27(3) the amount of any payment of a non contractual bonus is also to be treated as wages.

44. In New Century Cleaning Company Ltd v Church [2000] IRLR 27, CA the Court of Appeal held that for a sum to be "properly payable" to the claimant, the claimant had to have a legal (albeit not necessarily contractual) entitlement to the sum.

Unauthorised deduction from wages – Discussion and Conclusions

45. I find that the Claimant did have a contractual entitlement to be paid his share of the concrete pot. He was in a position to call for payment of this, he had done periodically in the past. I am not satisfied payment was dependent on the Claimant still being in appointment or that he had to keep his wagon clean and I do not find that cleanliness had anything to do with the concrete pot agreement.

46. The Claimant was entitled to be paid his share on termination and when he called for payment. To not pay the sum to was an unauthorised deduction from wages. It appears to me that it is a taxable sum and I award the gross sum of £1,200 for the deduction from wages claim.

Employment Judge R Harfield
Dated: 26 September 2024

REASONS SENT TO THE PARTIES ON 30 September 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche