Neutral Citation Number: [2025] EAT 53

Case No: EA-2024-000243-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 April 2025

Before :

THE HON. LORD FAIRLEY, PRESIDENT

- -

Between :

BRAKE BROS LTD

Appellant

- and –

MR S HUDEK

Respondent

- -
- -

Mr T Cordrey, of Counsel (instructed by **Addleshaw Goddard LLP**) for the **Appellant**
The Respondent, in person

Hearing date: 1 April 2025

- -

JUDGMENT

SUMMARY

Contracts of employment; whether sums "properly due" as wages

The claimant was employed by the appellant as a lorry driver. He presented a complaint under section 13 of the **Employment Rights Act, 1996** for unpaid wages. The basis of his complaint was that he had worked for more than his contracted weekly hours and was entitled to *pro rata* payments based upon his annual salary for the additional hours.

The contract of employment required the claimant to work 5 shifts per week. The intended average shift length was 9 hours (later varied to 9.4 hours) but the contract also provided that he was required to work such hours on each shift as were necessary for the proper performance of his duties. Overtime was contractually payable to drivers only if an additional half shift or shift was worked. The minimum length of a half shift was set at 4 ½ hours.

The employment tribunal held that the claimant's contract of employment provided for an averaging out of his working hours and that was an implied term that, if no such averaging out took place within a reasonable period, the claimant would be paid for all additional hours worked above the intended average.

Held:

(1) The tribunal had erred in implying such a term. Properly construed, the contract entitled the claimant to his basic salary for working 5 shifts per week of variable length.

(2) In any event, neither business efficacy nor the unexpressed intention of the parties justified the implication of a term that he would be paid for hours worked in excess of his intended normal working hours other than when the express overtime provisions applicable to drivers were engaged.

The tribunal's judgment was set aside and the claim was dismissed.

THE HON. LORD FAIRLEY, PRESIDENT:

1. This is an appeal by Brake Brothers Limited ("the appellant") from a judgment of an employment tribunal at Watford (Employment Judge Hunt sitting alone) dated 22 January 2024. For the sake of clarity, I will continue to refer to the respondent to the appeal, Mr Hudek, as "the claimant".

Introduction

2. The claimant was employed by the appellant as a lorry driver from 18 February 2019 until 31 December 2021. He continued in the employment of the appellant from and after 1 January 2022, in the different role of Training Support Driver and remains in the employment of the appellant at the date of this appeal.

3. On 14 February 2023, the claimant presented a claim form (ET1) in which he made a complaint under section 13 of the **Employment Rights Act, 1996** for unpaid wages. The complaint related to the period of his employment between 2021 and 2022. In summary, his position was that throughout that period he had worked for more than his contracted weekly hours and was entitled to *pro rata* payments based upon his annual salary for the additional hours he had worked.

4. Before the tribunal, the parties agreed a schedule showing the hours that the claimant had worked over the period in question. The only disputed issue was whether the terms of his contract entitled him to additional remuneration beyond his agreed basic annual salary. In terms of section 13 that required the tribunal to consider what was "properly due" under the contract.

The claimant's contract of employment

5. The claimant's contract was made up of "Specific Terms", "Standard Terms" and an "Addendum" which applied only to drivers whose place of work was specified as being the appellant's Reading depot.

6. Within the Specific Terms, the claimant's contract stated *inter alia*:

> "**Place of Work**
>
> D. Your normal place of work is at our premises in **Reading**.
>
> **Hours of Work**

> E. Your normal weekly working hours are 45 (to include breaks / not including breaks) competed within any shifts 5 from 7.
>
> **Basic pay**
>
> F. Your gross basic annual salary is £27,591
>
> **Holiday Entitlement**
>
> G. Your annual holiday entitlement is 31 days per year, increasing to 32 and 33 days (dependent on length of service)"

7. The Standard Terms contained a section headed "Normal Hours of work and Overtime". It stated, *inter alia*:

> "11. Subject to either clauses 12 to 17 or 24 to 27 below (as determined by your role), your normal hours of work are as per your specific terms.
>
> Drivers only
>
> *Normal Hours (Drivers)*
>
> 12. Subject to clause 17, you are required to work 5 shifts each week. These shifts may be rostered to take place on any day/night(s) (Sunday through Saturday) of the week at any time of the day and/or the night.
>
> 13. Your job role requires you to work such hours for each working shift as are necessary for the proper performance of your work duties on each shift.
>
> 14. Subject to clause 13, the average length of a shift will normally be 9 hours (inclusive of your paid break entitlement(s) under clause 23).
>
> 15. As a Driver your normal weekly working hours (as set out in your Specific Terms) are the intended average working hours per week for your role and thus your weekly working hours may fluctuate from week to week above and below your intended normal weekly working hours to meet business needs.
>
> 16. Your start times of work will be notified to you reasonably in advance to meet business needs from time to time.
>
> 17. You may be required to change your normal times, numbers of shifts or days of work either permanently or temporarily. Wherever possible we will give you reasonable notice of any such changes and will take account of personal circumstances raised by you.
>
> *Overtime and Night work (Drivers)*
>
> 18. Overtime is a requirement of your role should you be instructed to carry it out but is not guaranteed by the Company.
>
> 19. You may be required to work an additional shift(s) or half shift(s) to those set out in clause 12 in each working week. You are required to work such hours on any such shift as necessary for the proper performance of your duties. For the avoidance of doubt, an additional round(s) carried out within a shift following completion of

> the round(s) allocated to you at the beginning of the shift does not constitute an additional shift or half shift attracting overtime pay.
>
> 20. If you are a part-time employee in order to qualify for any overtime pay rates you must have worked the normal full time hours for your job role.
>
> 21. Where applicable under this Agreement overtime worked by you on an additional shift(s) or half shift(s) where approved by the Company will receive:
>
> > a. a fixed payment of 1.25 your normal daily rate for any full additional shift worked and
> >
> > b. a fixed payment of 1.25 of half your normal daily rate for any half of an additional shift worked.
>
> A half shift is a minimum of 4 ½ hours worked including paid break time ("Driver Half Shift").
>
> The normal daily rate shall be calculated using your gross basic annual salary (as set out in your Specific Terms) only.
>
> …
>
> *Breaks and Working Time (Drivers)*
>
> 23. You are entitled to a paid break in line with current legislation. You must also ensure that you take such other breaks as may be required by law (including without limitation breaks required under The Road Transport (Working Time) Regulations 2005 and the EU Drivers Regulations)."

8. An "Addendum" to the contract dated 1 October 2014 applied to drivers who operated from the Reading depot. This included the claimant. The addendum stated:

> "These details are provided in addition to your full terms and conditions of employment. If there is any conflict between the terms of this addendum and the Contract of Employment then this addendum will prevail.
>
> Introduction
>
> This addendum aims to clarify Brakes position with regard to Reading drivers working hours and provide clarity on the expectations behind the drivers contracted hours versus planned hours.
>
> In February 2013 there was a review of drivers working hours at Reading. It became apparent that several routes were planned in excess of 9 hours. By way of acknowledging this Reading drivers received an exclusive 4.4% salary adjustment. This represented payment for an additional 2 hours per week. This then allowed routes to be planned to 47 hours per week, albeit the contract remains stating 45. By signing this addendum you are agreeing to a planned 47 hour working week whilst understanding that your contract states 45 hours. Below are specific points to note:

> Working Hours
>
> - Drivers will be scheduled to work 5 out of any 7 days allowing the business to cover the changing demands of our customers.
> - The Company will endeavour to give one week's notice of shift patterns, however all shift patterns may be subject to short notice changes in line with business levels. In some instances, changes may be made with less than 24 hours notification.
> - Reading drivers received an exclusive 4.4% salary adjustment effective 1st April 2013 by way of acknowledging that their working week would be planned to 47 hours, albeit the contracts remained stating 45 hours.
>
> Overtime Payments
>
> - Overtime will only be paid to drivers when they work an additional full or half shift (6th shift)
> - A half shift means a minimum of 4 ½ hours worked
> - In the case of part time drivers they also need to have worked normal full time hours to qualify for pay overtime rates
> - Where the above criteria is met drivers will receive
>
> - A fixed payment of 1.25 x normal daily rate for any additional shift worked.
> - A fixed payment of 1.25 x half normal daily rate for any half of an additional shift worked
> - Night shift allowance is not included in this calculation, and is not included in any calculation when calculating overtime rates".

9. Paragraphs 24 to 36 of the Standard Terms applied only to warehouse / other operatives, administrators and non-graded employees. In two respects these were materially different to the terms which applied to drivers. First, shifts were defined as being of a fixed duration of 9 hours. Secondly, overtime was payable to warehouse workers "in respect of any hours worked by you (and approved by the Company) beyond your weekly normal hours of work as set out in the Specific Terms".

10. The claimant signed the Specific Terms and Standard Terms on 8 February 2019, and the Addendum on 18 February 2019.

Operation of the contract

11. The tribunal made findings of fact that when the claimant worked an additional full shift or half shift, he was paid for that as overtime. On occasion, however, he would accept additional delivery rounds during one of his regular shifts to assist the respondent in handling unanticipated difficulties in completing its delivery schedule (ET § 13). On those occasions, the respondent would typically provide an additional *ad hoc* payment for the extra work. On one occasion, time off *in lieu* had been given. If the claimant's allocated delivery rounds simply took longer than expected, no additional payment would be made to him. This latter point was the essence of the claimant's complaint.

12. Parties were agreed that the claimant had worked the following numbers of shifts during the periods to which his complaint related:

February to May 2021	65 shifts
June to December 2021	113 shifts
January to September 2022	148 shifts
October to December 2022	60 shifts

13. The tribunal did not make findings about the total number of hours worked in any particular week or weeks. It was agreed, however, that the average shift length over the entire period of the claim was 10 hours and 7 minutes. At ET § 36 to 40, the tribunal recorded the parties' agreement as to the rates of pay which applied to the appellant during each of the four periods.

The parties' positions before the tribunal

14. The appellant submitted that the claimant's only contractual entitlement was to his regular salary. Overtime could also be paid, but only in circumstances where an entire additional half shift or full shift was undertaken. Overtime was not payable under the contract where normal shifts simply took longer than expected.

15. The claimant submitted that he was entitled to be paid at the applicable contractual rate *pro rata* for all hours worked beyond his normal working week.

The tribunal's analysis of the contract

16. The tribunal concluded that the Addendum operated as a variation of the Specific and Standard Terms in relation to drivers based at Reading such that their "planned working week" was increased from 45 to 47 hours in exchange for a 4.4% salary increase. Since the number of basic / contracted shifts per week remained at 5, however, the tribunal also concluded that the Addendum had the effect of increasing the average shift length (subject to clause 13 of the Standard Terms) from 9 hours to 9.4 hours.

17. The tribunal reasoned (ET § 19) that clause 13 provided for flexibility in the claimant's working pattern such that he was expected to complete the deliveries allocated to him in each shift, regardless of how long that might take:

> "This caters for the vagaries of any given day or delivery schedule, such as traffic conditions. It is common sense that the claimant will not simply park his lorry wherever it may be when his 9.4 hours are up. The clear counterpart to this flexibility is that it will not be abused. For as many occasions when the claimant works in excess of his average shift length, there will be others when he will work a shorter shift. Matters will therefore 'balance out' with the contract focusing on 'averages', both in relation to individual shifts and weekly working hours (clauses 14-15). This principle is at the core of the parties' agreement. It appears to be a well-considered and balanced approach, taking account of the needs of the [appellant's] business, whilst respecting the working time committed to it by the claimant…Risks of too onerous a workload on, or unanticipated delays during, any shift are shared between the parties: the claimant will complete his duties on each occasion but will be compensated for the additional time spent on his shift by a shorter day or days subsequently."

18. The tribunal concluded that this core contractual principle (which it described as "averaging out") sat alongside the overtime provisions in the contract which were clearly directed only at "additional" shifts. The tribunal interpreted clause 19 of the Standard Terms as stating that the overtime rate would be payable only for "additional" shifts and not for occasions where any "normal" weekly shift might be extended:

> "On analysis, to consider time worked on any shift in excess of 9.4 hours as 'overtime' would be wholly inconsistent with the 'averaging out' principle at the heart of the agreement. Such additional time worked is not 'overtime' but is better described as work brought forward from a future occasion. In a sense, the additional hours are 'banked' to be offset against future shifts." (ET § 20)

19. At ET § 23, the tribunal then turned to consider the effect of the contract on how matters had apparently operated in practice:

> "…it is clear…that the contract is silent on what happens if the claimant's average working week ends up being longer than 47 hours (excluding additional shifts), or his average shift ends up being in excess of 9.4 hours, and the respondent fails to shorten subsequent shifts in return."

20. The tribunal noted that the contract was based upon a 47 hour working week and that he was not expected to work longer than that on a regular basis. It noted also that the contract did not allow the respondent unilaterally to increase the claimant's working hours. On the tribunal's interpretation of the overtime provisions, however, they were applicable only to "additional" shifts worked. At ET § 25, it reasoned:

> "Due to the 'averaging out' principle at the heart of the parties' agreement, they do not concern 'normal' shifts. Additional time worked as a 'normal' shift is not

> 'overtime' for the purposes of the contract. The overtime provisions are ultimately of limited relevance to the issue raised in this claim."

21. Having already concluded that the contract was silent on what should happen in the scenario identified at ET § 23, the tribunal asked itself (ET § 27):

> "What is to happen then in this situation, when - for whatever reason(s) - the respondent fails to respect its primary obligation to ensure the claimant's working time averages out at 47 hours per week? I find that, had the parties considered this situation at the point of signing their contract, both would accept that the claimant would be paid for that additional work instead. An example the parties would likely have considered would be an extended period of exceptionally high trading, coupled perhaps with temporary driver shortages. It might not be possible to keep within the average working week over that period, nor to allow for significantly reduced shifts within a reasonable period thereafter. In such exceptional situations, the claimant would be paid a salary uplift instead of reduced hours. That is ultimately the term that I believe must be implied into the contract in this case. If the respondent fails to ensure the claimant's working hours average out over a reasonable period, the claimant will instead be paid for the hours he has worked above his contractual commitment of 47 hours. If the claim were analysed as one of breach of contract, the same outcome would be achieved: the respondent having breached its obligation, damages for the breach would be aimed at compensating the claimant for the extra hours he worked."

22. At ET § 28, the tribunal returned to its reasoning as to why this was not an issue provided for by the overtime conditions in the contract:

> "Overtime rates are addressed specifically in the contract and they refer to a very specific type of work being additional shifts undertaken. The contract expressly provides that overtime rates do not apply in any other situation, notably when normal shifts are extended…Accordingly, I find that the additional work undertaken by the claimant is properly payable only at his basic pay rate."

23. On this analysis, and using the agreed figures provided by the parties to reflect pay increases over the two years prior to presentation of the claim, the tribunal calculated that the underpayment of wages properly due was:

February to May 2021	£642.85
June to December 2021	£1,456.00
January to September 2022	£1,821.88
October to December 2022	£768,60
	£4,689.33

24. It accordingly ordered the appellant to pay the claimant that amount.

The ground of appeal / appellant submissions

25. The single ground of appeal advanced is that it was an error of law for the tribunal to imply the term it did at ET § 27.

26. The two alternative tests for implication of a term are (i) necessity to give business efficacy to the contract; and / or (ii) the obvious but unexpressed intention of the parties (*Chitty on Contracts* (35th edition) at para. 17-006; **Marks & Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd** [2016] AC 742; **Yoo Design Services v. Iliv Realty PTE** [2021] EWCA Civ 560). A term should not be implied into a detailed commercial contract merely because it appears fair, nor should a term be implied which conflicts with an express term (**Ali v. Petroleum Company of Trinidad and Tobago** [2017] ICR 531).

27. The question of obvious but unexpressed intention requires to be assessed at the time that the contract was made. It should not be approached with the benefit of hindsight in light of the particular issue that has arisen. As Bingham MR explained in **Philips Electronique Grand Public SA v. British Sky Broadcasting Limited** [1995] EMLR 421 at 482:

> "The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. …[I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred."

28. Counsel submitted that, on an objective basis, this contract had business efficacy, and commercial coherence without the need for the implied term. The express terms of this contract were detailed and clear and occupied the territory on both basic pay and overtime. Basic pay was dependent upon five shifts being worked per week, not upon the number of hours worked per shift. Overtime pay applied only when a driver agreed to work an additional full or half shift. To imply a term that provided additional payments for drivers based upon the length of time taken to complete the basic shifts per week was an innovation on the agreement and was inconsistent with the express terms of the contract.

29. It was an error of law to conclude that there was any basis here to conclude that if both parties had considered the scenario identified at ET § 23 at the point of signing the contract, both would have

accepted that the only solution would be for the claimant to be paid for any additional hours worked on a non-overtime shift.

30. If the intended average shift time was regularly exceeded, the solution was for parties to re-negotiate the contract, as had happened in 2014 when the Addendum was put in place.

Respondent submissions

31. The respondent relied upon the reasoning of the tribunal and submitted that it was correct to imply the term referred to at ET § 27.

Analysis and decision

32. As Lord Neuberger pointed out in **Marks & Spencer plc v BNP Paribas Securities Services** [2016 AC 757:

> "In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term…Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied."

33. The starting point in the construction of the contract with which this appeal is concerned is that the claimant agreed in the Specific Terms to undertake an amount of work in each week – referred to as his "normal working hours" – in exchange for an annual salary and holiday entitlement. The combined effect of the Specific Terms and the Addendum was that his agreed normal working hours figure was 47 per week over 5 shifts. As the claimant was a driver, however, the expression "normal working hours" was expressly made subject to clauses 12 to 17 of the Standard Terms.

34. Clause 13 of the Standard Terms stated that he would be required to work such hours as were necessary for the proper performance of his duties on each shift. Clause 15 provided that in the case of drivers, the expression "normal working hours" meant the "intended average working hours per week". The contract did not explain over what period of time the weekly hours would be averaged. The effect of these clauses, however, was that weekly hours for drivers were not fixed and might fluctuate from week to week. Whilst the intention was that the average shift length for drivers would

normally be 9.4 hours (Clause 14 read with the Addendum), that too was expressly subject to Clause 13.

35. By contrast, within a later section of the same Standard Terms document, the normal working hours for warehouse workers were fixed at 45 per week over 5 shifts of 9 hours, and overtime was payable for any hours worked "beyond…weekly normal hours". There were no equivalent averaging provisions for warehouse workers, and no suggestion that the normal working hours figure was an "intended average".

36. Construing the contract as a whole, the terms applicable to drivers provided for the payment of an agreed basic annual salary for 5 shifts per week of variable length. If the overtime provisions were engaged, the driver became entitled to be paid additional sums in terms of Clauses 18 to 21. Overtime would only arise, however, if an extra shift or half shift was required. In terms of the Addendum, the minimum length of a half shift was 4 ½ hours. If an entitlement to overtime arose, it would be paid as a full day or half day with the overtime enhancement referred to in Clause 21 of the Standard Terms.

37. Whilst the tribunal correctly concluded that the driver Standard Terms provided a mechanism for flexibility, it was not correct to elevate that flexibility into an enforceable contractual obligation which gave rise to an entitlement to additional pay. The tribunal did so through its conclusion that there was an "averaging out" principle (or obligation) which, in effect, created an enforceable form of flexi-time. Read as a whole, and having regard in particular to Clause 13 of the Standard Terms, the references in the contract to intended or average hours were not, in my view, intended to have the contractual effect attributed to them by the tribunal.

38. Even if I am wrong about that, the contractual mechanism for "averaging out" envisaged by the tribunal did not give rise to the need for an implied term. In that respect, there are parallels with **Vision Events (UK) Limited v. Patterson** UKEATS/0015/13 where, at paragraphs 44 and 47, the EAT held, by majority, that no term should be implied into a contract to allow an employee to be paid *in lieu* of unclaimed flexi-time on leaving his employment. In coming to that conclusion, the majority plainly considered and took into account the decision of the Court of Appeal in **Ali and others v. Christian Salvesen Food Services Limited** [1997] ICR 25.

39. **Ali** concerned a collective agreement under which there was "annualisation" of wages to provide workers with a regular guaranteed wage for a notional 40-hour week. This gave the

employees security and certainty whilst allowing the employer a degree of flexibility in appointing hours of work to accommodate fluctuations in seasonal demand. Overtime was payable only after an employee had worked for a total of 1,824 hours in the year. Some employees, including Mr Ali, were made redundant during the year having not, by that stage, reached their threshold for payment of overtime. They nevertheless claimed that it was an implied term of their contract that, in the event of their dismissal before the end of the year, they became entitled to be paid in full for all hours worked by them in excess of the notional 40 hours per week, and that the failure by the employer to do so was an unauthorised deduction.

40. The Court of Appeal (Waite, Saville and Otton L.JJ) disagreed. As Waite LJ noted:

> "[The contract] represented a carefully negotiated compromise between two potentially conflicting objectives – the desire on the one hand of the employees to have an assured rate of weekly pay spread over a long period to which they would be entitled regardless of hours actually worked; and the desire on the other hand of the employers to avoid the high cost of paying overtime rates for work done at periods of peak demand…Should there be any topic left uncovered by an agreement of that kind, the natural inference, in my judgment, is not that there has been an omission so obvious as to require judicial correction, but rather that the topic was omitted advisedly from the terms of the agreement on the ground that it was seen as too controversial or too complicated to justify any variation of the main terms of the agreement to take account of it."

41. No such inference required to be drawn in this case as it is clear that the differences between the terms applicable to warehouse employees and drivers respectively in the Standard Terms document were deliberate.

Conclusion and disposal

42. For these reasons, I consider that the contract, properly construed, entitled the claimant only to his basic salary for working 5 shifts per week of variable length. In any event, neither business efficacy nor the unexpressed intention of the parties justified the implication of a term that he would be paid for hours worked in excess of his intended normal working hours except where the express overtime provisions applicable to drivers as set out in the Standard Terms and the Addendum were engaged.

43. I will therefore set aside the employment tribunal's judgment of 22 January 2024 and substitute dismissal of the claim.