# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr J Jones**

**Respondent:** **Trade Effluent Services Ltd**

**Heard at** **Wrexham** **On: 5 February 2018**

**Before:** **Employment Judge R McDonald**

**Appearances**

**For the Claimant:** in person
**For the Respondent:** Mr Richard Piggott (Respondent's Managing Director)

# JUDGMENT

The Judgment of the tribunal is as follows:

1. The claimant's claim that the respondent acted in breach of contract by failing to pay expenses at the agreed rate of 45p for the first 10,000 miles claimed in any tax year and only thereafter at 25p succeeds.

2. The claimant's claim that the respondent made unlawful deductions from his wages by failing to take into account his overtime and night out allowance in calculating his holiday pay succeeds in part:
    a. the claim relating to deductions before 31 May 2016 fails – it was brought out of time and the tribunal has no jurisdiction to hear it;
    b. the claim succeeds (both as to overtime and night out allowance) in relation to deductions on or after 31 May 2016 in relation only to the claimant's entitlement to 20 days leave under Regulation 13 of the Working Time Regulations 1998;
    c. the claim fails in relation to the remainder of the deductions on or after 31 May 2016, i.e. those relating to the claimant's entitlement to 8 days' leave under his contract or under regulation 13A of the Working Time Regulations 1998.

3. The claimant's unfair dismissal claim succeeds.

4. The claim that the respondent made unlawful deductions from or breached contract by failing to reflect overtime and the night out allowance in the claimant's notice pay fails.

5. The respondent shall pay the claimant the following by way of remedy for the successful claims:
    a. In relation to the expenses claim: £220.60 less any relevant deduction of tax or national insurance.
    b. In relation to the overtime element of the holiday pay claim: £1428.03 less any relevant deduction of tax or national insurance.
    c. In relation to the night out allowance element of the holiday pay claim: £664.86 to be paid free of any deduction of tax or national insurance and to be grossed up by the respondent to take into account tax and national insurance should it be found to be subject to such deductions.
    d. By way of compensation for the unfair dismissal:
        i. A basic award of £1467.00
        ii. A compensatory award of £1340 to be paid less any deduction of tax and national insurance.

# REASONS

1. The claimant in this case claims that the respondent company, which is his former employer, unfairly constructively dismissed him and also failed to make various payments due to him. Specifically, he claims that his holiday pay for the two years before dismissal and his notice pay did not take into account overtime payments and "night out allowances" which he says he was normally paid. He also claims that he was not paid mileage at the correct rate. I will set out the detail of each claim and the legal basis for it when I discuss each of them later in this judgment.

2. The claimant's ET1 form had also claimed that the respondent had failed to pass on pension contributions deducted from his pay to the respondent's pension fund. The respondent explained that the pension contributions had been passed on to the pension fund and produced bank statements to confirm that was the case. There had been a clerical error within the scheme which had meant the money wasn't allocated correctly but that had now been rectified. At the hearing the claimant confirmed he was not pursuing that claim.

3. The claimant represented himself at the hearing. The respondent had been represented by solicitors earlier in the proceedings. However, at the hearing it was represented by Richard Piggott, the respondent's managing director.

4. I'm grateful for the claimant's and Mr Richard Piggott's efforts at the hearing but it has to be said that the preparation for the hearing by both parties had not left the case in a very satisfactory state. There was no written statement for the claimant and the claimant had not been sent the respondent's witness statements. The respondent had asked the claimant for a further breakdown of his claims explaining how he had calculated what he said was owed. The claimant said he had provided it to ACAS but there was no such detailed calculation in the bundle. Both claimant and respondent had prepared bundles of documents but there'd been no real attempt to agree a single bundle. There were copies of emails relating to without prejudice discussions in the bundle of documents prepared by the Respondent (pp.205-260) and I had to explain to the parties that I would not read those.

5. The end result was that I did not start hearing the evidence in the case until the afternoon, having spent the morning sorting matters out with the claimant and Mr Piggott. Having gone through the documents in the claimant's bundle we confirmed that all of those relevant to the issues were already included in the respondent's 260 page bundle. We therefore used the respondent's bundle at the hearing. In this judgment I've referred to it as "the bundle" and references to page numbers in this judgment are to pages in it.

6. The claimant confirmed that he was happy for pages 14-15 of his ET1 claim form and his written comments on the grounds of resistance to stand (listed in the bundle as "Claimant's response to Brian Piggott's statement") as his witness statement. They were at pp.14-15 and 143-145. The respondent had seen those documents prior to the hearing.

7. The respondent had also seen the undated witness statement from Damian Thomas in support of the claimant's claim (p.142). I explained to the claimant that unless Mr Thomas attended the hearing to be cross examined by the respondent I could not give Mr Thomas's evidence much weight. The claimant did try to contact Mr Thomas to ask him to attend but he wasn't able to do so.

8. The claimant, however, had not seen the respondent's witness statements at pp. 193-204. There were statements from Richard Piggott; from Brian Piggott (Richard Piggott's father and the respondent's chairman); Jimmy

Glachan, the respondent's Depot Operation's Manager; and Neil Lloyd, a supervisor at the respondent.

9. I allowed the claimant time at the start of the hearing to read those statements and decide whether he felt able to cross examine the respondent's witnesses having only seen the statements for the first time at the hearing. I explained that although adjourning the hearing was not ideal for anyone, I would do so if necessary. The priority was to be certain that he was under no disadvantage in going ahead with the hearing on the day. Having read the statements the claimant confirmed he was happy to go ahead with the hearing. Nothing that happened during the hearing caused me to think that the claimant was disadvantaged in putting his case or cross examining the respondent's witnesses.

10. At the hearing I heard evidence from the claimant. For the respondent I heard evidence from Richard Piggott, Brian Piggott and Jimmy Glachan. Neil Lloyd did not attend to give evidence and I explained to the respondent that (as with Mr Thomas for the claimant) that meant that I could not give his written evidence much weight.

11. At the end of the evidence I heard brief oral submissions from the claimant and Richard Piggott. I then reserved my decision. To try and avoid the necessity for a remedies hearing I also directed that the respondent within 7 days provide details by tax year of the mileage expenses paid to the claimant. The claimant was to confirm within 7 days whether those figures for mileage actually paid were agreed.

## The issues in the case

12. There was no agreed list of issues. Having heard oral submissions and through discussions with the claimant and Mr Richard Piggott the issues I had to decide were as follows:
    a. Did the respondent fail to pay the claimant expenses at the correct rate when he used his own vehicle for work ("the mileage claim").
    b. Did the respondent fail to pay the claimant holiday pay at the correct rate ("the holiday pay claim") specifically by:
        i. failing to correctly take into account overtime pay in calculating holiday pay; and/or
        ii. failing to include the "night out allowance" of £30 per night in calculating holiday pay.
    c. Did the respondent constructively dismiss the claimant and, if so, was that dismissal unfair ("the unfair dismissal claim")?
    d. Did the respondent fail to pay the claimant notice pay at the correct rate ("the notice pay claim") specifically by:
        i. failing to correctly take into account overtime pay in calculating notice pay; and/or.

ii. failing to include the "night out allowance" of £30 per night in calculating notice pay.

e. Were the expenses claim, holiday pay claim or notice pay claim out of time?

**Introduction and background agreed facts**

13. I've decided the clearest way to structure this judgment is to deal with the law; findings of fact and decision about each claim in turn rather than deal with all the law and all the facts together. I then deal with calculation of any amounts due as a result of my conclusions in the section headed "Remedy" at the end of the judgment.

14. By way of background, the respondent is a waste management company which employs 50 people. The claimant worked for the respondent as an HGV driver from June 2015. The claimant said in his ET1 that he started work on 7 June 2015 but the respondent says it was 8 June 2015. The employment offer letter at p.91 is dated 8 June 2015. In practice, nothing turns on that one day difference.

15. The claimant resigned by an email dated 7 July 2017 (p.113 of the bundle). The claimant says this was a constructive dismissal, the respondent's actions having given him no option but to resign. The respondent denies this.

16. It is agreed that on 27th June 2017 there was an incident between the respondent and its drivers. The exact circumstances are disputed but it is agreed that the drivers temporarily stopped work because their wages for that month had not reached their bank accounts. It is also agreed that the claimant was in the yard for at least some of the time when that stoppage took place though the claimant and respondent don't agree what part he played and what happened after the stoppage. I'll come back to the details of that incident and its aftermath in the section of this judgment dealing with the unfair dismissal claim.

17. The respondent's Employee Handbook was at pp.33-90 ("the Handbook"). It included some general terms about pay and benefits including holiday pay. However, in many places the Handbook cross referred to the employee's specific terms and conditions. These were set out in the claimant's offer of employment letter at pp.91-92 ("the Offer Letter").

18. The main terms in the Offer Letter relevant to the issues I'm deciding were:

a. The claimant was contracted to work 45 hours per week Monday-Saturday "between the daily spread of 6.00 a.m. – 6.00 p.m. Monday to Saturday.
b. His initial basic rate of £9.50 per hour. The claimant's payslips (pp.146-159) show that at least from April 2016 that had risen to £10 per hour.
c. The claimant would be paid a night out allowance of £30 per night "where [he] spen[t] a night out in the truck".
d. He would "on occasion" be asked to work overtime. Authorised overtime was paid at basic rate x 1.25 Monday to Friday; basic rate x 1.5 on Saturday and basic rate x 2 on Sunday.
e. The claimant's annual holiday entitlement was 28 days including statutory bank holidays.

19. The bundle also contained at pp.102-103 a Statement of Terms and Conditions ("the T & Cs"). These were unsigned and not referred to by either party. The statement is said to be issued "on Monday 6 November 2017" (i.e. after the claimant's employment came to an end).

**The Mileage Claim**

*The dispute*

20. There was no dispute that the claimant was entitled to claim expenses, based on actual mileage, when he used his own vehicle for work purposes. This might be, for example, when he drove himself and other drivers down to London for a job.

21. The disagreement was about the rate at which the mileage should be paid to the claimant. The respondent said it was paid at a flat rate 25p per mile throughout the tax year. The claimant said it should have been paid at 45p for the first 10,000 miles in any tax year and then at 25p until the end of that tax year. The start of a new tax year "reset the clock" so that the first 10,000 miles of that new tax year were paid at 45p per mile. As the summary of mileage document sent by the respondent after the hearing shows, at the start of the 2017-18 tax year the claimant's mileage was paid at 25p, having been paid at 45p for at least some of 2016-2017 tax year.

*The law*

22. There is no legislation which says that an employee is entitled to claim mileage nor the rate at which it is to be paid.

23. That means the claimant's entitlement to mileage expenses, and the rate at which they should be paid, depends on the terms of his contract of

employment with the respondent. If there is nothing in writing about this then I have to establish what was agreed between the parties based on the relevant evidence as to what was said, taking account of any supporting documents.

*Evidence and findings*

24. The claimant's entitlement to be paid expenses is confirmed in Section 7 of the Handbook (p.56). The respondent did not dispute that the claimant was entitled to be paid mileage when he used his own vehicle for work purposes.

25. Neither the Offer Letter nor the T & Cs mention expenses at all and it was not suggested that there was a written policy or other document setting out mileage rates.

26. Richard Piggott's evidence was that what he called "regular drivers", i.e. those drivers who used their own vehicles day in day out received mileage at 45p per mile for the first 10,000 miles in any tax year and 25p per mile for the rest of that tax year. However, he claimed that "ad hoc" drivers like the claimant who only used their own cars occasionally were paid mileage at a flat rate of 25p per mile throughout the tax year.

27. The claimant's evidence was that there was never any mention of different categories of drivers and that when he started working for the respondent it had been agreed with Richard Piggott that he was entitled to the rate Richard Piggott now described as that paid to regular drivers.

28. I preferred the claimant's evidence on this point. His own evidence was clear and unhesitating. It was also corroborated by the text message he sent to Jimmy Glachan, the Depot manager on 27 May 2017 (p.109). This says "just had pay slip paid 25p per mile even though we are in new tax year". That supports the claimant's evidence that his understanding was that the rate of mileage to which he was entitled was linked to mileage incurred in a particular tax year, with the clock "reset" at the start of a new tax year.

29. The claimant's evidence was also corroborated by the evidence Mr Glachan gave at the hearing. His unhesitating evidence was that the claimant was entitled to 45p per mile for the first 10,000 miles in a tax year. His response to the claimant's text message on 27 May 2017 is consistent with this. Mr Glachan's text in response to the claimant's text was "Tossers mate will sort" (p.109), i.e. Mr Glachan was accepting that since they were in a new tax year, the claimant's mileage rate should again be 45p per mile until he went over 10,000 in that new tax year.

30. The claimant's pay slip dated 31/1/17 (p.146) and the summary of mileage expenses paid to the claimant provided by the respondent at my direction after the hearing confirmed that the claimant had been paid mileage at 45p per mile in November and December 2016 and in January 2017. Richard Piggott suggested this was an error but I don't find that credible in light of Mr Glachan's evidence.

31. The witness statement provided by Neil Lloyd (p.195) supported the respondent's case. His evidence was that he had worked for the respondent for 10 years and that during that time the mileage rate of 25p per mile has been the same for "all drivers". The claimant's response to Mr Lloyd's evidence was that he was a tractor driver and rarely used his own car. He had no opportunity to cross examine Mr Lloyd on this point because the respondent did not call Mr Lloyd to give evidence at the hearing. In those circumstances I can't give his evidence much weight. In any event it contradicts the evidence of Mr Richard Piggott which was that not all drivers were paid the same – "regular" drivers did get paid 45p for the first 10,000 miles in a tax year.

*Discussion and conclusion on the mileage claim*

32. There is no written policy or contract document setting out the claimant's mileage entitlement.

33. However, based on the evidence I find that the agreement between the respondent and claimant was that he was entitled to payment of mileage at 45p per mile for the first 10,000 miles for which he used his own vehicle in any tax year with mileage for the rest of the tax year payable at 25p per mile.

34. Subject to any issues about time limits (discussed below) the claimant is entitled to be paid an extra 20p per mile for any mileage expenses relating to his first 10,000 miles in the 2017-18 tax year which were actually paid at 25p.

**The holiday pay claim**

*The dispute*

35. There was no dispute that the claimant was entitled to holiday pay of at least £450 a week, i.e. his 45 basic hours per week at his standard hourly rate of £10 per hour. This had been paid.

36. However, the claimant claimed that his holiday pay should be based on his "average earnings" which he puts at £775 per week ("p.w.")(para .19 on p.145). His schedule of loss therefore shows a shortfall of £325 p.w.

Unfortunately there was no document from the claimant setting out how this figure had been calculated.

37. The respondent's grounds of resistance (p.29) said that the claimant had been paid for all holiday taken. At the hearing, however, Richard Piggott confirmed that it was accepted that the claimant's holiday pay should have taken into account his overtime payments. The respondent's calculations (based on figures taken from the claimant's pay slips) were included in the bundle (p.160-161). Those calculations showed an average earnings figure of £647.80 p.w. giving a shortfall of £224.80 p.w.

38. In other words, when it came to the overtime element of holiday pay, the primary dispute between the parties was about how much it added to the weekly holiday pay, the difference between them being £100.20 p.w.

39. The claimant also claimed that his holiday pay should have included the "night out" allowance of £30 per night. This is an allowance paid to drivers who stay out overnight in their truck because they can't return home at the end of the day's driving. It is paid free of any deduction for tax or national insurance. The claimant argued this was part of his normal earnings and so should be included in his holiday pay. The respondent claimed that the allowance was intended to compensate a drier for expenses and inconvenience of staying away from home overnight. That expense and inconvenience didn't occur if the driver was on holiday so he should not be compensated for it in his holiday pay.

*The law*

40. Regulation 16(1) of the Working Time Regulations 1998 ("WTR") says that a worker must receive a week's pay for a week's holiday. A 'week's pay' for these purposes is to be calculated in accordance with Ss.221–224 Employment Rights Act 1996 ("ERA").

41. Read literally ss.221–224 ERA would mean that a worker who has 'normal working hours' will have his or her week's pay calculated by reference to their normal contracted hours disregarding any overtime unless such overtime is guaranteed by the employer and is compulsory. Voluntary overtime not required by the contract of employment would not count.

42. However, WTR are meant to give effect to the European Working Time Directive ("the Directive"). The Employment Appeal Tribunal (EAT) has accepted that EU law requires that normal (not contractual) pay has to be maintained in respect of the four-week period of annual leave guaranteed by Article 7 of the Directive (**Dudley Metropolitan Borough Council v**

**Willetts & Ors (Working Time Regulations) [2017] UKEAT 0334_16_3107, at para 37**).

43. The additional 8 days annual leave in WTR reg.13A is on top of the entitlement to 20 days holiday in the Directive. EU law does not apply to those 8 days so the EU law requirement to maintain "normal pay" during those 8 days does not apply.

44. The point and aim of Article 7 of the Directive is to maintain normal pay so that holiday pay corresponds to (and is not simply broadly comparable to) pay while working. The purpose of this is to make sure that a worker isn't put off exercising their right to take holiday leave because they'd lose out financially by doing so (**Dudley paras 37 and 39**).

45. For a payment to count as "normal" it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count for these purposes. But items that are usually paid and regular across time may do so (**Dudley para 40**).

46. In **Dudley**, the EAT confirmed that payment for voluntary overtime that is normally worked is within the scope of Article 7 of the Directive and so within the concept of "normal pay" for the purposes of calculating WTR reg. 13 holiday pay.

47. Whether "allowances" like the night out allowance in this case count as part of "normal pay" is a question of fact. Elements of pay intended exclusively to cover occasional or ancillary costs arising from the performance of work (such as costs connected with the time that pilots have to spend away from base) did not have to be included in the holiday payments as this was not part of "normal pay" (**Williams and ors v British Airways plc 2012 ICR 847, ECJ ("Williams"))**.

48. The precise test I need to apply was set out by the Supreme Court in **British Airways plc v Williams & Ors [2012] UKSC 43 ("British Airways") (at para 31): "**What matters is whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs. It is on that the employment tribunal should…focus." However, it did not appear to the Supreme Court in **British Airways** that the Court of Justice in **Williams** contemplated any detailed evaluation of the precise need for or reasonableness of payments which were so intended.

49. Like in this case, the **British Airways** case involved an allowance which the employer argued merely covered costs which pilots incurred when spending time away from base (TAFB). The Supreme Court said that the

concept "intended exclusively to cover … costs" requires “attention to be focused on the real basis on which the TAFB payments were made. If they were payments that were made genuinely and exclusively to cover costs, that would, at least prima facie, be the end of the matter.” The pilots’ case in **British Airways** was that, although they were designated as being for the exclusive purpose of covering costs, TAFB payments were in fact more than some or all pilots might actually need for or spend on costs.

50. The Supreme Court accepted that “there could no doubt come a point at which it was obvious that payments nominally made to cover costs were not required, or were not going to be required, in their entirety, to match actual costs. An employer who in such circumstances continued to make such payments in their full amount could then no longer maintain that they were genuinely and exclusively intended to cover costs.”

51. Of relevance to this case, the Supreme Court in **British Airways** said that the view of HMRC about a payment was irrelevant and “amounts at best to a third party's view on an issue to be determined independently by the employment tribunal.” I am not bound to accept that the night out allowance just covered expenses because HMRC decided it should be tax free on that basis.

*The evidence and findings - overtime*

52. There was no dispute that the claimant’s contract (as set out in the Offer Letter and Handbook) says that his normal working hours are 45 hours per week.

53. The T & Cs say that “rate of pay for holidays is your normal rate of pay”. They do not define “normal rate of pay” (p.103). The Offer letter doesn’t say anything about the rate of holiday pay (p.91). The Handbook says that the respondent calculates holiday pay “using normal contractual hours at [the claimant’s] basic rate of pay”.

54. The Offer letter says that “on occasion the respondent “may ask [the claimant] to work additional hours to help with work fluctuations”. It sets out the hourly rates for overtime I’ve quoted in para.18 above. The T & Cs say that the claimant “May be required to undertake additional hours according to the requirements of the business” (p.102). The Handbook also says that the respondent “may require [the claimant] work extra hours over and above normal weekly hours” (p.58).

55. In practice, there was no dispute that the claimant had worked overtime on a regular basis throughout his employment by the respondent. That is

reflected in the claimant's payslips at pp.146-159. The only payslip not to show overtime is the one dated 31/8/2017, i.e. when he had given notice.

56. The respondent's holiday pay calculations (p.160) also show that the claimant's pay throughout his employment consistently included overtime in addition to the basic pay of £450 per week.

*Discussion and conclusion on the holiday pay claim – overtime*

57. As I've mentioned above the respondent did not dispute at the hearing that overtime was part of the claimant's "normal pay". I find it should have been taken into account in calculating his holiday pay entitlement under reg.13 of the WTR.

58. That conclusion only applies to the 20 days leave under WTR reg.13 which are governed by EU law relating to article 7 of the Directive. Pay relating to the additional 8 days leave guaranteed by WTR re.13A is not subject to those rules because they are additional to the entitlement under the Directive. In relation to holiday pay for those days, I find that the entitlement has to be calculated by reference to ERA ss.221-224 and so was limited to the claimant's basic pay because he had "normal working hours" under his contract.

59. I deal with calculation of the amount of overtime which should be taken into account in calculating holiday pay for the 20 days entitlement under WTR re.13 in the "Remedy" section below.

*The evidence – night out allowance*

60. The Offer Letter sets out the contractual entitlement to the night out allowance. It says that "[the claimant] may be required to stay out overnight through your working week and a truck with a sleeping facility will be provided to enable this. Where you spend a night out in the truck you will be paid a night out allowance of £30 per night" (p.91).

61. The Handbook does not refer to the night out allowance. Section 7 does include a section on "business expenses" and says that an employee will be reimbursed for authorised and legitimate expenditure and only on submission of an expenses claim form and receipts (p.56). There was no suggestion that the claimant had to provide receipts to claim the night out allowance nor that the allowance fell under this part of the Handbook.

62. In his written statement, Mr Richard Piggott explained that whilst working away the claimant was entitled to claim "subsistence payments" and that was normal for the haulage industry. His evidence was that there is an HMRC industry agreement in place which accepts that these payments

are genuine subsistence payments and allows for making this payment without lots of supporting information like receipts (para 30 at p.202). His statement confirmed that when the night out allowances were paid to the claimant they were paid free of tax under the HMRC scheme. I find that was the case – the claimant's payslips clearly show the £30 night out allowance being paid free of tax or national insurance deductions.

63. The respondent had included documentation about this scheme from various sources in the bundle (pp.162-183). The most authoritative of these was the extract from HMRC's "Employment Income Manual" at pp.162-164. The extract is headed "Tax treatment of lorry drivers: employer guidance: scale rate payments to drivers". It is marked as published 22 May 2014 and updated 3 January 2018.

64. It explains that an employer can reimburse either for the actual travel costs incurred while staying away from home or by way of a set rate. There are benchmark scale payments, for example a maximum amount of meal allowance of £10 for a 10 hour minimum journey time (p.162). The agreed haulage industry scale for overnight stays is £34.90 or 75% of that figure (£26.20) "where the driver uses a sleeper cab and incurs subsistence expenses after starting their journey". An employer is also allowed to pay up to £5 per night for overnight stays in the UK" (p.163).

65. In relation to overnight allowances, the extract says that the employer "will also need to have a checking system in place to ensure periodic checks are carried out on a sample of employees. This is to ensure employee are incurring expenses for meals and other subsistence costs while travelling, and that the payment remains a reasonable estimate of the costs usually incurred." I did not hear any evidence from the respondent about any checking system being in place.

66. The claimant's evidence at the hearing was that he had never had to provide receipts to claim the night out allowance. He accepted that he could only claim the allowance when he was actually overnighting in his lorry's cab, but other than that there was no link between payment of the allowance and the actual costs he incurred on an overnight stay.

67. The claimant's evidence in response to my question was that when he was interviewed by Mr Roberts and Richard Piggott when he was taken on it was agreed that he would be on 4 night out per week. This was the pattern he'd worked as an agency driver and he wanted this to continue once the respondent employed him.

68. The claimant's description of himself was a "tramper", i.e. a driver for whom the expectation was that he would stay out on the road overnight in

his cab. The way the claimant put it in his submissions was that the night out allowance was the reason you tramp.

69. The significance of the night out allowance is clear from the claimant's payslips. For example, the payslip dated 26/10/2016 (p. 147) shows 18 nights out in that month, accounting for £540 of the claimant's total pay. It was paid free of tax and so represented £540/£2826 or nearly 20% of his net pay that month. The figure per month fluctuates but was never lower than 12 nights out a month (£360 net) and could be as high as 22 nights out (£660).

*Conclusion on the holiday pay claim –night out allowance*

70. I have found this element of the claim very difficult. On the one hand, I can see the force of the respondent's argument that HMRC has accepted that night out allowances can be paid tax free because (so long as the figures are within the scale rates) they represent in HMRC's view a realistic estimate of expenses a driver is likely to incur when overnighting. That takes into account not only the actual costs incurred on the night (in terms of a meal) but also a proportion of the longer term costs of upkeep of bedding for the cab (see Croner's in-depth explanation of the allowance at p.175).

71. On the other hand, I accept the claimant's evidence that he viewed the night allowance as a significant part of his wages. He certainly did not see it only as a "cost-neutral" allowance which merely enabled him to cover the costs of overnighting. I think the reality was that the fixed amount nature of the allowance meant he could effectively increase his net pay by limiting the costs he actually incurred when overnighting. That was why, it seems to me, he was so keen to ensure that he would be entitled to a night out allowance, (rather that, for example, just being able to claim back any expenses based on costs actually incurred on overnight stays).

72. The central issue I am deciding is what should count as part of the claimant's "normal pay" in calculating his holiday pay under WTR reg.13. I am not deciding on the validity of HMRC's view of night out and associated allowances. The Supreme Court in **British Airways** make it clear that I am not bound by HMRC's view of the nature of the payment.

73. As I have said, according to the Supreme Court, the test I must apply is whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs. I heard no evidence about any pre-contract discussions leading to the fixing of the £30 figure. It is not the same as the scale payment set out by HMRC for someone sleeping overnight in their cab (£26.20). The respondent provided no evidence of how it had been calculated nor of steps taken to

check it reflected actual costs a driver was likely to incur. It seems to me the reality of the situation was that both respondent and claimant knew that the allowance was part of the claimant's pay rather than merely covering his overnight expenses – it was more of an "inconvenience allowance" than an expenses related payment.

74. On that basis I find that in the claimant's case the allowance was not "intended exclusively to cover costs" and was, therefore, part of the claimant's normal remuneration. It should therefore be taken into account in calculating the claimant's holiday pay for the purposes of WTR reg 13. As I said in relation to the overtime element of the holiday pay claim this only applies to the 20 days leave under WTR reg.13. I deal with calculation of the amount which should be taken into account in the Remedy section below.

75. I have based my decision on this element of the claim on the test set out in **British Airways**. However, my conclusion also seems to me to be consistent with the case-law about the purpose of the entitlement to holiday pay under the Working Time Directive. Given that the night out allowance amounted to something like 20% of the claimant's net pay (and did not reflect the actual costs of overnighting), failing to include it in holiday pay would amount to the sort of disincentive to take holiday referred to in the case-law.

**The unfair dismissal claim**

*The dispute*

76. Did the respondent constructively dismiss the claimant and, if so, was that dismissal unfair ("the unfair dismissal claim")?

*The law*

77. Where it is disputed that there has been a dismissal, the burden of proof is on the employee to show, on the balance of probabilities, that there was a dismissal.

78. Section 95(1)(c) of the ERA provides that it is a dismissal (known as a constructive dismissal) 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."

79. In order to claim constructive dismissal, the employee must establish that:
    - there was a fundamental breach of contract on the part of the employer

- the employer's breach caused the employee to resign
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

80. It is an implied term of any 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 confidence and trust between employer and employee: see, for example, **Malik v Bank of Credit and Commerce International SA [1998] AC 20.** This is usually called "the implied term of trust and confidence".

81. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A**. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

82. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in **Malik** at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

83. The claimant claims that he was suspended by Brian Piggott at a meeting on the 27 June 2017. In **Crawford v Suffolk Mental Health Partnership [2012] EWCA Civ 138** the Court of Appeal approved the point made by Lady Justice Hale, as she then was, in **Gogay v Herfordshire County Council [2000] IRLR 703** that even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. Suspension should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is.

84. In this case, the respondent argues that even if it did commit a repudiatory breach of contract the claimant waived that breach. This argument is not set out in detail in the ET3 but relies, I take it, on the delay between the alleged breach by suspension on the 27 June 2017 and the resignation on the 7 July 2017 and the fact that the claimant continued to work in the meantime.

85. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal (**Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA)**. However, the issue is essentially one of conduct, not simply passage of time. What matters is whether, in all the circumstances, the employee's conduct has

shown an intention to continue in employment rather than resign. The employee's own situation should be considered as part of the circumstances (**Chindove v William Morrison Supermarkets plc EAT 0201/13).** As Lord Justice Jacob said in **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA**, resigning from a job is a serious matter with potentially significant consequences for the employee. Another important factor, according to **Chindove v William Morrison Supermarkets plc EAT 0201/13** is whether the employee was actually at work in the interim, so that he or she could be seen as complying with the contract in a way that was consistent with a decision to terminate it.

86. The respondent also argues that the claimant's resignation was not in response to any breach on its part but was instead in response to an offer of a job with another employer. In **United First Partners Research v Carreras 2018 EWCA Civ 323, CA**, the Court of Appeal held that where an employee has mixed reasons for resigning, his or her resignation can still constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons. The existence of other reasons is not inconsistent with an employee having resigned in response to the employer's conduct.

87. The respondent does not claim that any constructive dismissal was for a potentially fair reason. If an employer does not attempt to show a potentially fair reason at all in a constructive dismissal case but instead simply relies on the argument that there was no dismissal, a tribunal will be under no obligation to investigate the reason for dismissal (or its reasonableness) for itself — **Derby City Council v Marshall 1979 ICR 731, EAT.** This essentially means that the dismissal, if shown, will be unfair because no potentially fair reason for dismissal has been given.

*The evidence*

88. It's not disputed that on the morning of the 27th June 2017 there was an incident where a number of the respondent's drivers did not leave the depot at Sandycroft to start their next jobs. As Richard Piggott explains in his statement (p.199-203 in particular at paras 5-13), the wages payable on the 27th were shown as leaving the respondent's account overnight but had not arrived in the drivers' bank accounts. This led to the drivers refusing to leave the yard for some 20-25 minutes.

89. The claimant was present when this happened. Richard Piggott's statement refers to him "[sitting] on a large agricultural wheel…and the [7] others [being] gathered around him" (p.200 para 9). That statement does seems to me (as the claimant suggested at the hearing) to paint the

claimant as the ringleader of the incident, referring to the claimant saying to Richard Piggott “we’re not moving until the money is in” (para 11).

90. The claimant’s denies being the ringleader. He said that he had come to the depot to pick up some pipes for a job he was doing. He claims the other drivers were already there and had already stopped work and were discussing the apparent non-payment of wages.

91. Again, there is no dispute that the incident soon came to an end with the drivers going off to their next job. It’s also not disputed that as the claimant left the yard in his lorry Richard Piggott said something like “we don’t mess around with people’s pay”; that the claimant responded by querying the expenses he had been paid; and that Richard Piggott agreed to look into it (ET1 at p.14 and Richard Piggott’s statement at p.200 paras 14-15).

92. It’s also not disputed that after he left the yard the claimant was called back to attend a meeting with Brian Piggott which was attended by the claimant, Brian Piggott, Brian Roberts (a Director of the respondent) and Damian Thomas, a colleague of the claimant’s. What is disputed is what the claimant was told about the meeting; what happened at it; and what happened at the end of it.

93. In his ET1 (p.14) the claimant says that he was called by the Transport Manager, Carey Deardon and told to come back to the yard. The claimant asked whether he was in trouble and was told by Carey that he would probably be emptying his truck, i.e. that he was going to be sacked. The claimant goes on to claim that he was later told by Carey Deardon that after everyone had left the yard, Brian Piggott had said that he “wanted the ringleader back here now”. The claimant said Carey told him during th tlter converstion that when she said he did not know who the ringleader was, she was told to call the claimant back. The claimant’s ET1 does not say when this later conversation happened. The evidence given by the claimant under cross examination was consistent with the version of events set out in the ET1. In particular he was adamant that he had been told by Carey that he had called back in because he was perceived by Brian Piggott to be the ringleader of events at the depot.

94. The respondent’s ET3 (p.27) accepts that Brian Piggott asked Carey Deardon to call the claimant back but says it was “to find out what [the claimant] felt was wrong with his expenses” (para 10). The ET3 suggests that it was felt that Brian Piggott was the best person to deal with the claimant’s query about his expenses because he “had had limited involvement with him over his period of employment” (para 9).

95. Brian Piggott in his statement (p.193 para 4) explained that "tension in the business was high due to a recent prosecution and the resulting press". He was aware that the accounts team were looking into a query with the claimant's expenses claim. As a result he wanted to investigate this matter quickly to "prevent any escalation of the unrest".

96. There was no evidence from Carey Deardon (who was working her notice at the respondent when the incidents occurred) so the only direct evidence of her conversation with the claimant came from the claimant. Even if his version of the conversation is accepted, there's no way of knowing whether Carey Deardon had accurately relayed what Brian Piggott actually said.

97. However, it does seem to me implausible that the chairman of the company would call a driver back to the depot to discuss a query about expenses. Even more so where, as Brian Piggott says in his statement (para 2) his involvement in the day to day running of the business had decreased significantly in the last 12 months. I think the terminology used by Brian Piggott in his statement ("unrest") and in his oral evidence ("wildcat strike") is indicative of his view of what had happened at the depot. Rather than seeking to stave off any escalation of unrest by resolving the claimant's query about expenses, it seems to me more plausible that he wanted to deal head on with the perceived ringleader of the "wildcat strike", i.e. the claimant. That also seems to me much more consistent with the evidence about what actually happened at the meeting on the 27th June.

98. There are no formal minutes of that meeting. The only written record is an email from Brian Roberts to Brian Piggott dated 22 September 2017, i.e. after the claimant had lodged his claim. He confirms that he has no notes of the meeting but then sets out his recollection of the meeting.

99. Mr Roberts records that Brian Piggott called him to say he had asked the claimant to come back to the yard to "talk about events earlier in the day". He says "you told me that you had heard that [the claimant] was saying to other staff that the company had not paid his expenses and that he had failed to start work that morning and stayed in the yard".

100. Mr Roberts's email then records him suggesting that the claimant be suspended on pay "pending the arrangement of a formal disciplinary" but that Brian Piggott had said "he didn't want to do that". Because we did not hear evidence from Mr Roberts it is not clear whether that means Brian Piggott did not want to suspend the claimant on pay; did not want to arrange formal disciplinary proceeding; or did not want to do either of those things.

101. The email then says that Brian Piggott opened the meeting by telling the claimant that he had heard he had been telling staff in the yard that morning that he had expenses claims outstanding which had not been paid. The claimant's response was that he had only spoken to Richard Piggott about the expenses issue that morning and that he had said it would be sorted out. The email then notes a discussion about the rates of mileage payable.

102. In the next paragraph of the email Mr Roberts records Brian Piggott as saying to the claimant that he had "refused to leave the yard that morning". It records the claimant as saying that he had been working already and had only come into the yard to pick up some hoses for his next job and Brian Piggott responding that the claimant had not left for his next job but had instead stayed in the yard. The claimant's response to that was to say he had been talking to other drivers in the yard about the wages not showing in his account and had stayed in the yard until his wages showed in the bank.

103. The penultimate paragraph of the email records the claimant as saying he did not understand why he was being treated the way he was and asking twice if his job was on the line. Mr Roberts records the response from Brian Piggott the second time of asking as being "you said yes it was".

104. The final paragraph of the email records that at the conclusion of the meeting Brian Piggott told the claimant that he would check the expenses details and that he should attend a further meeting at 9.00 a.m. the following morning at the Sandycroft office. "You then sent [the claimant] home for the day".

105. I have quoted that email note almost in full. Even though it was created for the respondent after the event and in knowledge of the claimant's unfair dismissal claim it seems to me to support the claimant's version of events on a number of points.

106. First, it seems to me to confirm that the meeting was not, as Brian Piggott portrayed it, an attempt to resolve an issue raised by the claimant about expenses. It was clearly also intended to address what Brian Piggott saw as the claimant's "refusal" to work. The reference to the possibility of a suspension or disciplinary action noted by Mr Roberts during the preliminary discussions clearly suggest that the meeting was intended to take the claimant to task for events at the depot. If it was merely to resolve a query about expenses there would be no reason for Mr Roberts to raise the possibility of suspension. The fact that Brian Piggott said that the claimant's job was on the line only makes sense if the meeting was a quasi-disciplinary one. It is difficult to see how his job

be on the line if the meeting was simply to resolve a query about his expenses entitlement?

107. Second, it seems to me consistent with his version of the conversation with Carey Deardon when he was called back, i.e. that he was told by Carey that his job was on the line. It is also consistent with his evidence in other respects, for example recording that he had only come to the yard to pick up some hoses/pipes before heading out on his next job which adds to the credibility of his evidence in general.

108. At p.142 there was a written, signed but undated statement from Darren Thomas, who attended the meeting on the 27th with the claimant. It is generally consistent with Mr Roberts's email note, though goes further by asserting that Brian Piggott said that the claimant was the ringleader in all the drivers going back to the yard; that he told the claimant "several times" that his job was on the line; and that he told the claimant he was suspended until 9.a.m the following day when the claimant would "find out whether he still has a job".

109. Mr Thomas did not attend to give evidence and the fact that the statement is undated means I can give it relatively little weight. Where there is inconsistency between his statement and Mr Roberts's' note I prefer that email note.

110. What adds to the credibility of that note to my mind is that though part of the respondent's evidence, aspects of it contradict the respondent's own case. For example, Brian Piggott's statement makes no mention of the meeting having any disciplinary aspect. He suggests that the claimant volunteered the reason why he was in the yard whereas the note makes clear that was in response to Brian Piggott raising the fact he had not left the yard.

111. Other aspects of Brian Piggott's statement are consistent with the note. For example, he confirms that Brian Roberts raised the possibility of suspension before the meeting and that he sent the claimant home. He also confirms that the claimant asked whether his job was on the line and that he replied "possibly". However, the explanation he gave as to why he said this doesn't seem to me to be consistent with Mr Roberts's note. In oral evidence he said that he answered in that way because at that point in the meting he did not know what the meeting was about and that once he knew it was about a mileage claim it was clear it was a trivial matter. That does not seem to me consistent with his portrayal of the meeting in his witness statement nor with Mr Roberts's note. That note records that the question about losing his job was raised by the claimant near the end of the meeting when Brian Piggott is recorded as having already discussed the issues in dispute.

112. On balance, taking into account Mr Roberts's note I prefer the claimant's version of what happened at the meeting. I accept that Brian Piggott had for whatever reason identified him as the ringleader of what he saw as a "wildcat strike" and that as a result, his job was indeed "on the line". I also accept that the claimant did not understand "why he was being treated that way" (to quote the note) because so far as he was aware all he had done was to arrive at the depot when the other drivers had already stopped work and then raise a query about his expenses with Richard Piggott which he had said he would sort out.

113. One key aspect where Mr Roberts's note differs from the claimant's version of events is what happened at the end. The note (and indeed Brian Piggott's evidence) confirms that Brian Piggott sent the claimant home. The explanation given by the respondent is that the claimant had been working since 4 a.m. and that he would only have been able to legally carry out another 1-1.5 hours driving that day so it made no sense for him to start another job. The claimant's version of events is that he was told he was suspended.

114. Brian Piggott in oral evidence denies that he suspended the claimant. Mr Roberts's note suggests that at the start of the meeting there was no intention to suspend. It could be described as "neutral" when it comes to the reasons why the claimant was sent home. It does not say that the claimant was told he was suspended but then neither does it say that he was sent home because he had been working since 4 a.m. so had nearly reached his maximum driving hours. I note that the suspension is not referred to in the exit interview note at p.114 nor in the grievance which the claimant lodged on 10 July 2017 (p.118-119). On the other hand, neither of those documents set out the detail of the claimant's allegations about his "mistreatment by management" (to quote the exit interview). On balance I find the reference in Mr Robert's note to being "sent" home more consistent with a suspension than an employee being allowed to go home. I find that the claimant was explicitly told that he was suspended at the end of the meeting on 27th June.

115. Even if I am wrong about the word "suspension" being used it seems to me that the claimant would have left the meeting on the 27th feeling that he was undergoing some kind of preliminary or informal disciplinary process. He was being accused of refusing to work and been told that his job was on the line. He was the only driver subjected to action, suggesting he'd been identified as the "ringleader" in some way. He was then sent home and told to come back for another meeting the following morning when he would find out if he still had a job.

116. The urgency with which the next meeting was held also seems to me more consistent with the claimant's version of events. If, as Brian Piggott suggests, he had identified the issue as a "trivial" one about expenses it seems strange to convene a further meeting the following morning to discuss it further, interrupting the claimant's day's work to do so.

117. The meeting on the following day, 28 June, was attended by the claimant, Brian Piggott, Damian Thomas and Jimmy Glachan (Mr Roberts not being available). There is a note of that meeting at p.112. It was made by Mr Glachan. The first thing which is apparent from the note is that the meeting lasted only 15 minutes.

118. The note records Brian Piggott as saying that he "had decided" that mileage for using private cars would be paid at 25p per mile and not at 45p "as John expected". I note in passing that this seems to me consistent with my finding that the agreement with the claimant was that he would be paid at 45p for the first 10,000 miles. It seems to me this records Brian Piggott changing that position rather than confirming what it had always been.

119. The note records the claimant saying that he was "Not happy with this and would agree to disagree with Brian's thoughts". It then says that "Brian Piggott advised [the claimant] that he would monitor [his] output over the coming months". When the claimant then asked whether his job was on the line Brian Piggott's response is recorded as being "he was not looking to sack anyone but wanted everyone to do a fair days work".

120. The note records the claimant being told to return to work and that "there would be no further action" and responding that "he felt it was rather petty to be brought in for it but also understood the reasons behind it".

121. The claimant's version of events set out in his ET1 (p.14-15) is largely consistent with that note, referring to the decision that expense would be paid at a flat rate 25p; his job was still at risk; and that he would be watched very closely from now on. He claims that his records had been checked and "no issues detected"). His evidence was that Brian Piggott said something like "what are you going to do about it" in relation to the disagreement about mileage.

122. Brian Piggott's version of events is slightly different from that note. It refers to the claimant "being entitled" to 25p only, i.e. suggesting that it was what had previously been agreed (p.194 para 15).

123. He also refers to raising another matter with the claimant, which is an allegation that he had in effect "engineered" a night out on 26 June 2017 when he could have made it back to the depot (p.194 para 16). Brian Piggott's evidence is that this had come to light when he and Richard Piggott had discussed this on the 27th June after the first meeting with the claimant.

124. In brief, according to Richard Piggott's statement (p.201-202 paras 25-27), the claimant had finished a job in Widnes then driven to a fuel depot in Frodsham. Rather than drive on from there to the depot he had turned back and driven back towards Widnes. That resulted in him staying out overnight and being able to claim the £30 night out allowance for that night. I heard a fair amount of discussion and evidence about this incident ("the Widnes incident"). On the one hand, the respondent argued that the claimant could clearly have made it back to the depot that night (as a similarly placed driver had actually done) staying within his legal driving hours as per his tacograph reading (p.141). The claimant argued that he had made a judgment call based on how heavy the traffic was and decided he would not have time to reach the depot and complete all the necessary post-driving checks and paperwork within the required hours limit.

125. Ultimately, I do not need to decide the wrongs and rights of this aspect of the case. I say that because the respondent did not take any disciplinary action based on the incident. What is relevant, it seems to me, is why it was raised at all. I accept that it was legitimate for the respondent to check whether a driver was "playing the system" to engineer night outs. From the evidence I heard, there was room for debate about whether the claimant could have got back to the depot but it was not a clear cut case of the claimant breaking the rules. I note that the respondent did not see the incident as serious enough (or conclusive enough) to actually justify taking disciplinary action of any kind. It does seem to me rather a coincidence that the respondent decided to raise the issue after what had happened on the 27th. There was no evidence that the respondent had ever raised any such issue with the claimant before.

126. To the extent the claimant's ET1 suggest the Wigan incident was not raised at the meeting at all ("no issue detected"), I don't accept it. I do accept that any discussion must have been very short and cursory given that the whole meeting lasted only 15 minutes.

127. As to the significance of the meeting I did find a comment by Mr Glachan in oral evidence to be illuminating. He said that he had told the claimant in discussion on a number of occasions to "keep his head down". The impression I formed from the evidence overall was that the respondent did not take kindly to any kind of challenge. I cannot escape

the suspicion that had the claimant not been seen as a "ringleader" of the "unrest" on the 27th, the respondent would not have raised this ""Widnes incident" with him. It seems to me the meetings on the 27th and 28th could be seen as a way of warning the claimant not to step out of line. That seems to me consistent with the record in Mr Glachan's note that the claimant's work would be "monitored".

128. The claimant's evidence was that after the meeting Mr Glachan had a conversation with him during which he told the claimant that he expected to be told to sack him because "that is how they do things" (p.144 para 16). Mr Glachan in oral evidence (and at para 4 of his witness statement on p.197) denied that was accurate. As I've indicated, I found him a credible witness and accept his evidence on that point. As I've mentioned, however, he did accept that he had on more than one occasion told the claimant to "keep his head down".

129. As to whether it was what happened on the 27 and 28th which led the claimant to resign, the exit interview record (at p.114) says the "factors which led you to decide to leave the company" were "refusal to pay expenses; not getting average earnings for holidays; mistreated by chairman and MD".

130. As I've said there is no specific mention of "suspension" and the MD (Richard Piggott) was not, of course, present at either of the meetings. In his grievance email (p.118-119) dated 10 July 2017 the claimant again does not specifically refer to "suspension". As well as non-payment of expenses and the calculation of holiday pay the grievances include "wholly unfounded allegations of poor performance (which have never been substantiated); disciplinary proceedings which were manifestly unreasonable; and deliberate harassment and threat of dismissal resulting in stress".

131. Mr Glachan's evidence was that the claimant had phoned him after the meeting on the 28th to ask him for a day off because he was going for an interview. Mr Glachan. There was no evidence from Mr Glachan or anyone else that the claimant was looking for another job before the incidents on the 27th and 28th.

132. Mr Glachan did give evidence that the claimant was due to start a job with a competitor, Enviroclear, which is why he was not required to work his notice (witness statement p.197 para 5 and 6). Mr Glachan's evidence is that the claimant was due to start with Enviroclear on or around the 17th July immediately after his notice expired but that he was taken to the truck on his first day but refused to drive it, which is why he was unemployed for two weeks. In re-examination, Mr Glachan said that he knew this to be the case because Carey had gone to work for

Enviroclear and she was very down when she spoke to him because she felt she had let the claimant down. The claimant's oral evidence was that he did have a chat with Enviroclear but that he didn't ultimately take the job.

*Conclusion on the unfair dismissal claim*

133. I have found that on the 27th and 28th June the claimant was subjected to what was in effect ad hoc disciplinary proceedings. He alone of the drivers involved in the incident on 27th was called back to the depot and then told his job was at risk. I have found the reason for this was that (for whatever reason) Brian Piggott thought he was the "ringleader". The respondent did not present any evidence to support that, certainly not at the meeting itself.

134. I have found that the claimant was then sent home having been told he was suspended and required to attend a further meeting the following day when he was told that the respondent would not be honouring what I have found to be the agreement as to expenses with the claimant. The respondent also raised the "Wigan incident" and told the claimant that his work would be monitored from then on.

135. Even if I am wrong that the word "suspension" was used, I have found that the claimant was entitled to see his being sent home on the 27th as in effect a disciplinary step pending a decision about his future on the 28th.

136. Viewed objectively, it seems to me that behaviour was sufficient to breach the implied term of trust and confidence between the claimant and the respondent. The action was exactly the kind of "knee jerk reaction" to an incident referred to in **Gogay**.

137. Since breach of that implied term is a fundamental breach of contract, I find that the claimant was entitled to resign in response to it and claim constructive dismissal.

138. I find that that is what he did. I accept that the claimant continued to work for nearly two weeks after the incident. I do not accept that showed he had waived the breach. He was looking for other work. The evidence is that after the 28th he attended a job interview. The case-law is clear that an employee is not expected to resign immediately in response to the employer's fundamental breach – they recognise the reality of the need to find another job.

139. I also reject the respondent's submission that the claimant did not resign in response to the breach but because he had found another job. There was no evidence that he had another job offer until after the breach occurred.

140. I therefore find that the claimant was constructively dismissed. The respondent has not suggested that if I find that there was a dismissal it was for a potentially fair reason. In those circumstances I find that the claimant was unfairly dismissed.

**The notice pay claim**

*The dispute*

141. It's not disputed that the claimant resigned by email on 7 July 2017 (p.113) claiming he'd been forced to do so by the respondent's actions. It's not disputed he was not required to wok his notice and was paid a week's notice pay. There is a dispute about the amount of pay the claimant should have received for that week. He was paid his basic contractual entitlement of £450. The claimant says that he was also entitled to be paid an amount equivalent to overtime for that week. In his schedule of loss at p.32 he puts that at £325. He also claims to be entitled to be paid for four nights of the £30 nights out allowance which he says he would have earned if he was working that week.

*The law*

142. Entitlement to pay during notice is governed by the employee's contract of employment. There is only a right to the pay and benefits set out in the contract. If there is no express clause in the contract setting out the entitlement during notice, there may be cases where a term can be implied.

143. The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement. In order to make such a presumption, the court must be satisfied that:

- the term is necessary in order to give the contract business efficacy, or
- it is the normal custom and practice to include such a term in contracts of that particular kind, or
- an intention to include the term is demonstrated by the way in which the contract has been performed, or

- the term is so obvious that the parties must have intended it.

144. The Supreme Court confirmed the tests of business efficacy and obviousness in **Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and anor 2015 UKSC 72, SC.**

*The evidence*

145. Neither the Handbook nor the Offer Letter set out the entitlement to pay during notice. The Handbook does give the respondent the right to require the employee not to "attend your normal place of work during your notice period. We may require you to not to perform your regular duties and may provide reasonable alternatives. This is at our absolute discretion" (Section 19 of the Handbook headed "Leaving with Notice" at p.88 of the bundle).

*Conclusion on the notice pay claim*

146. The argument in this case is not whether the claimant was entitled to his notice pay had he worked his week's notice. It is whether he is entitled to more than just his basic pay because the respondent exercised its right to require him not to work. The contract does not say what should happen in those circumstances.

147. The respondent is not in breach of contract by refusing to let the employee work because the contract gives it an absolute discretion to do so. I can see that from the claimant's point of view it seems unfair that he is deprived of the ability to earn overtime and night out allowance during his week's notice because the respondent decides not to let him work. The question, however, is not whether it is unfair but whether there are grounds for implying into the contract a term that in those circumstances the claimant will be paid the equivalent of his "normal pay", i.e. including overtime and night out allowances.

148. I have decided there are no such grounds. Although unfair, it cannot be said that the term is so obvious that the parties intended it. There is in this case no contractual right to overtime. There is an absolute discretion for the employer not to require the employee to work notice. The respondent's refusal to pay more than basic pay for notice demonstrates by performance what they intended. I am conscious this decision could result in unfairness but that does not, it seems to me, enable me to lower the threshold for implying terms into the contract.

149. I therefore find that the claimant's entitlement to notice pay was limited to his basic contractual pay.

**Time Limit issues**

*The dispute*

150. Are any of the expenses claim, holiday pay claim or notice pay claim out of time? Richard Piggott suggested that at least some parts of the holiday pay claim were made out of time because they were brought more than three months after the alleged underpayments had taken place. Although he did not refer to the case by name, I take that to be an argument based on the EAT's decision in **Bear Scotland Limited v Fulton [2015] ICR 221 ("Bear Scotland")**.

*The law – the expenses claim*

151. Section 23(1) of ERA gives workers the right to complain to an employment tribunal that an employer has made an unlawful deductions from wages.

152. However, certain payments by employers to workers are specifically excluded from the definition of "wages" meaning that a worker can't seek recovery of such payments by bringing an unlawful deduction from wages claim. These include any payment in respect of "expenses incurred by the worker in carrying out his or her employment" (S.27(2)(b) ERA). This means the claimant's expenses claim could not be brought under s.23 as a deduction from wages claim.

153. However, the employment tribunal has jurisdiction to hear a contractual claim brought by an employee, if it arises or is outstanding on the termination of the employee's employment; and seeks one of the following:

- damages for breach of a contract of employment or any other contract connected with employment
- the recovery of a sum due under such a contract
- the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

154. The expenses claim falls within this contractual jurisdiction because it is a claim for breach of contract and/or for recovery of a sum due under that contract. The time limit for bringing such claims is within three months of the effective date of termination of the employment.

*The law – the holiday pay claim*

155. The holiday pay claim does fall within s.23 ERA. In **Revenue and Customs Commissioners v Stringer 2009 ICR 985, HL**, the House of

Lords held that claims for statutory holiday pay can be brought under the provisions on unauthorised deductions from wages in s.23 ERA.

156. In terms of time limits, s.23(4) says that "an employment tribunal shall not consider a complaint under s.23 unless it is presented before the end of the period of three months beginning with – (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made….(3) Where a complaint is brought under this section in respect of – (a) a series of deductions or payments…….. the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

157. Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under s.23 to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable (s.23(4)).

158. In **Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372**, the Court of Appeal said 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07** explained it in the following words: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

159. In **Bear Scotland** the EAT held that if there is a gap of more than three months between any two deductions in a chain, the 'series' of deductions is broken. If that happens a claim can only be made in relation to the deductions after the gap (assuming the claim is brought within three months of the last of those post-gap deductions). That decision is binding on me.

160. "Month" means a calendar month. The rule is that in calculating a period of month or months the period ends one day before the corresponding date in the appropriate subsequent month, e.g. three months after 28 February is 27 May.

161. When calculating a time limit "beginning with" a date (in this case the date of deduction) the three months includes that date. So if a deduction is made on 28 February, three months beginning with that date would be 27 May.

162. In **Bear Scotland** (at para 82) the EAT considered whether in any particular holiday year the employee should be deemed to have taken his 20 days of leave under WTR reg. 13 leave first and then any additional leave under WTR reg 13A. It said the ET in that case was wrong to decide that the employee could choose which leave in a year counted as WTR reg. 13 leave. Given the reasons set out in that para of the EAT's judgment it seems to me that I am bound to find that in any holiday year, the claimant is deemed to have taken his 20 days WTR reg.13 leave first, followed by his additional leave under WTR reg. 13A. That is relevant to time limits because as I said above I find that the underpayment of holiday pay only relates to those 20 days of holiday under WTR reg.13.

*The law – the notice pay claim*

163. I do not need to consider the position in relation to the notice pay claim because I have already decided that that claim fails.

*The evidence*

164. The expenses claim was brought in the claimant's ET1, which was received by the tribunal on 21 August 2017. It was brought within three months of the effective date of termination of the claimant's employment.

165. The holiday pay claim was also brought in the claimant's ET1. The claim is for 2 years' worth of underpayments. However to be in time the claim must have been brought within three months of the last deduction/underpayment of holiday pay. The underpayment only applies to the first 20 days' holiday in any holiday year, i.e. WTR reg.13 holiday.

166. The Offer Letter (p.91) says that the claimant's holiday year runs from 1 April to 31 March. He is entitled to 28 days holiday including statutory bank holidays. The claimant's wage slips (barring his last one dated 25 July 2017) do not specify when he is being paid holiday pay. That makes it difficult to know when deductions (i.e. underpayment of holiday pay by failing to take into account overtime and the night out allowance) are being made.

167. However, the respondent had produced a record of holiday taken by the claimant between June 2015 and July 2017 (p.122) ("the holiday record"). The claimant did not dispute the accuracy of that record. What I need to establish is not when holiday was taken but when deductions were made. Doing the best I can with the evidence to hand, I have worked on the basis that any deduction would be made in the next pay packet after the holiday taken. Because the claimant was paid at the end of each month that means the deduction was made in the paypacket for the month in which the holiday was taken, e.g. holiday pay for holidays in

May would be paid in the May paypacket so the date of deduction by way of underpayment is the date of that May paypacket. I have also worked on the basis that the claimant took the bank holidays to which he was contractually entitled though these are not shown on the holiday record.

168. For the holiday year 1 April 2017 to 31 March 2018 the holiday record shows that the claimant had taken 2 days' holiday, on 9 May and 3 July 2017. He would also have taken bank holidays on14 and 17 April and 1 and 29 May 2017. The claimant's payslip for 25 July 2017 (p.152) shows payment of 27 hours' holiday pay at the basic rate of £10.00 per hour. All the days taken or due in that holiday year would be WTR Reg.13 holiday because they are within the first 20 days' holiday in that holiday year. The deductions relating to those holidays were made within three months' of each other (in the paypackets for 30 April 2017, 31 May 2017 and 25 July 2017) and the claimant's ET1 was lodged within 3 months of the last deduction in his paypacket for 25 July 2017.

169. In the holiday year 1 April 2016 to 31 March 2017 the holiday record shows the claimant as having taken 25 days leave. Adding in the bank holidays for that year (6) that would make a total of 31 days, 3 more than his annual leave entitlement. However, 18 November 2016 is marked as "compassionate leave" and 8-9 December 2016 as "bereavement leave". Those seem to me to be a form of "special leave" rather than annual leave so I have discounted them in my calculation. That leaves 22 days leave and 6 bank holidays in that annual leave year which seems to me consistent with the claimant's entitlement.

170. Applying the rule that the first 20 days taken are deemed to be WTR Reg.13 leave means the last day of WTR reg.13 leave was taken on the bank holiday on 2 January 2017. That takes into account the bank holidays on 2 and 30 May 2016; 29 August 2016; and 26-27 Decmeber 2016. The underpayment of holiday pay for that New Year's bank holiday would have been in the claimant's paypacket dated 31 January 2017. The remaining holiday taken in that year (on 22-24 February, 6 and 13 March 2017) would have been WTR reg.13A holiday in relation to which there was no underpayment. The gap between that deduction and the next is from 31 January 2017 to 30 April 2017 (when deduction for the bank holidays on 14 and 17 April would have been made). That gap is not more than three months.

171. There is an apparent three month gap in the holiday record in the holiday year 2016/17 between the holiday ending on 5 August and the next day's leave on 11 November 2016. In fact there would also have been a day's leave for the bank holiday on 29 August 2016. The relevant deductions would have been from the paypackets 31 August 2016 and 30 November 2016. The later deduction is within three months beginning on

the date of the earlier deduction. There is no gap of more than three months in the series of deductions for that holiday year.

172. The holiday record shows that in the holiday year 8 June 2015 to 31 March 2016 (his first working for the respondent) the claimant took 16 days holiday. The 20 days of WTR reg.13 entitlement would have been taken by 12 February 2016 (taking into account bank holidays on 31 August 2015; 25 and 28 December 2015 and 1 January 2016). The deduction relating to that would have been in the claimant's paypacket for February 2016. There was no wage slip for that month in the bundle but the wages history for the claimant (p.122) confirms he was paid on the 29 February 2016. The next WTR reg.13 deduction was the first of the following annual leave year, i.e. on 31 May 2016 relating to the May bank holidays. From 29 February 2016 to 31 May 2016 is more than a three months' gap. That's because applying the calculation rules, three months beginning on 29 February would end on 28 May 2016.

173. In light of the above I find that there was a series of deductions (consisting of underpayment of WTR reg.13 holiday pay) from 31 May 2016 to 25 July 2017. That part of the claim brought about deductions on 29 February 2016 and earlier were more than three months before the start of that series and were therefore brought out of time under the **Bear Scotland** rule.

174. I asked the claimant during his oral evidence why he would say it had not been "reasonably practicable" for him to make a tribunal claim for deductions relating to holiday pay sooner if I decided some or all of that claim was out of time. He said that he did not raise it because he did not want to get into trouble-previous colleagues who had raised similar issues had been got rid of. He did not suggest that he did not know he had a potential claim nor that he did not know about the relevant time limit for bringing a claim.

*Conclusion on the time limit issues*

175. I find the expenses claim was brought in time.

176. As I've indicated above, I find there was a series of deductions from WTR Reg 13 holiday pay from 31 May 2016 to 25 July 2017. The ET1 was lodged within 3 months of the last of those deductions so the claim relating that series of deductions are all in time.

177. I find it was reasonably practicable for the claimant to have lodged a claim for the deductions made before 31 May 2016. I can understand his reluctance to do so given my findings about the respondent's reaction to the incidents on the 27th and 28th June. However, that reluctance did

not mean it wasn't reasonably practicable to file claim about holiday pay while still working for the respondent. Added to which, in February 2016 when the claim would have had to be brought for the earlier deductions the incident on 27th and 28th was in the future.There was no evidence that this was a case where the claimant did not know of the possibility of making a claim or the relevant time limit. I find that the holiday pay claim relating to deductions before 31 May 2016 are out of time and I therefore have no jurisdiction to hear them.

## Remedy

*The expenses claim*

178. As directed by me at the hearing the respondent on 13 February emailed a summary of the mileage paid to the claimant in 2016-18. It showed that in the tax year 2017-18 the claimant had been paid a total of 1103 miles at 25p per mile (140 miles in April and 963 miles in May). On 27 March 2018 the claimant confirmed he was prepared to accept those figures. The shortfall against what I have found to be the agreed rate is 20p per mile. That gives a total figure of £220.60 (i.e. 1103 x 20p).

*The holiday pay claim – overtime element*

179. I have found that the claimant was entitled to have the overtime element of his "normal pay" taken into account in calculating his entitlement to holiday under WTR reg 13. Calculating this has not been straightforward. I have adopted what I consider to be a proportionate approach. I did not have the benefit of calculations from the claimant in support of this element of his claim (his schedule of loss used the round figure of £325 per week). The respondent had, however, prepared a calculation of the "Previous 3 month average daily rate" due to the claimant worked out by averaging his total taxable gross pay (i.e. less the untaxed "night out allowance" component each month) for the three months preceding the month when the holiday was taken and the deduction made (p.160). I have adopted a similar approach (see table at Annex A). My figures closely mirror those found by the respondent but I have not adopted the respondent's figures. The main reason for that is that the respondent's calculations only worked out the average daily rate for those months when the claimant had taken non-bank holiday leave. This meant there was, for example, no "average daily rate" for May 2016 when the claimant would have taken two bank holidays.

180. Using the information about gross taxable pay in the table at p.122 I calculated the average daily rate for each month; deducted the £90 per day basic pay which the respondent had paid the claimant and then

multiplying that by the number of WTR reg 13 days in that month I have reached a total figure of holiday underpayment relating to overtime of £1428.03 from which tax and national insurance would need to be deducted.

*Holiday pay – the night out allowance element*

181. I have adopted a similar approach in calculating the night out allowance element of holiday pay deducted. The claimant's suggested approach was to multiply his days holiday by the £30 net he received for each night out. It seems to me that could result in an overpayment because he would not necessarily have a night out if he had worked on each holiday day he took (e.g. if it was at the end of the week). In Annex B I have used the night out figures from the claimant's payslips at pp.146-159 where available. Based on those calculations I find the total night out allowance element of the holiday pay deducted from the claimant's WTR reg 13 payments to be: £664.86. That was the net figure which the claimant should have received (given that the £30 allowance was always paid net of tax).

*Unfair dismissal*

182. If a tribunal finds a dismissal was unfair the claimant is entitled to a basic award calculated by reference to his age at dismissal; length of service and gross weekly pay (capped at £489 at the relevant time). The claimant was 44 when dismissed and had 2 years' service. His gross pay was more than £489 per week and is capped at that amount. His basic award is therefore £489 x 2 (years' service) x 1.5 (because he was 41 or over for each year of service). That gives a total basic award of £1467.

183. If a tribunal finds that a dismissal was unfair the compensation it should award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal" (s.123(1) ERA).

184. In the claimant's schedule of loss (p.32) he claimed for two weeks' pay by way of compensation and accepted that he had started another job and had no losses as of 24 July 2017 when he started that other job. As I've recorded when dealing with liability for unfair dismissal, the respondent did suggest that he had caused his own loss to some extent because he had, it was alleged, turned down the offer of a job with Enviroclear the week after he resigned. I have already accepted the claimant's evidence that it was a chat about a job. If the respondent was seeking to argue that the claimant had by not taking that job failed to mitigate his loss I do not accept that argument. The onus is on the respondent to show he had acted unreasonably by failing to mitigate his

loss. It does not seem to me unreasonable to decide in the first week after resigning that a job is not the right one (especially when the claimant then went on to get another job within a week or so). I do not make any deduction from the two weeks' suggested compensation because of the alleged failure to take a job at Enviroclear.

185. In terms of calculation of the claimant's losses during those two weeks he suggested that would amount to £1550 plus £240 for two weeks' worth of night out allowance. Using the figures from Annex A, I make the average daily rate for the claimant in July (disregarding the night out allowance for now) as £130.93 for basic pay plus overtime. Over 10 working days that amounts to £1309.30. The average daily rate for night out allowance from my calculation in Annex B is £24.46. For 10 working days that works out at £244.60. On that basis the total loss for those two weeks amounts to £1553.90. There would also be the loss of a small employer's pension contribution which the payslips show to be around £20 per month. I would also make an award for loss of statutory rights which, given the relatively short length of service the claimant had, I set at £300. The position is complicated by the fact that the night out allowance should be paid net whereas tax and national insurance would need to be deducted from the basic and overtime pay compensation.

186. Putting all that together it seems to me that it would be just and equitable to award the claimant the sum of £1790 as suggested in his schedule of loss. That figure would be reduced by £450 to reflect the fact that he had by the time of the hearing been paid a week's notice at basic pay rate. That gives a final figure for the compensatory award of £1340 to be paid after deduction of tax and national insurance

_____

Employment Judge McDonald
Dated: 13 April 2018

JUDGMENT SENT TO THE PARTIES ON
20 May 2018

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

## Annex A: Overtime element of holiday pay

| Month deduction made | Total taxable gross pay in three months preceding deduction month | Working days in 3 months preceding deduction month | Average holiday daily rate required (less night out allowance) based on preceding three month average | Average daily rate less £90 basic rate paid per holiday day | Number of WTR reg.13 holiday days in month | Total deduction of overtime element from holiday pay in the month |
|---|---|---|---|---|---|---|
| May 2016 | £9189.38 | 65 | £141.38 | £51.38 | 2 | £102.76 |
| June 2016 | £9495.01 | 66 | £143.86 | £53.86 | 0 | £0.00 |
| July 2016 | £10104.39 | 65 | £155.45 | £65.45 | 5 | £327.25 |
| August 2016 | £8796.26 | 65 | £135.32 | £45.32 | 6 | £271.92 |
| September 2016 | £8892.51 | 66 | £134.74 | £44.74 | 0 | £0.00 |
| October 2016 | £8450.01 | 66 | £128.03 | £38.03 | 0 | £0.00 |
| November 2016 | £8918.76 | 66 | £135.13 | £45.13 | 1 | £45.13 |
| December 2016 | £9296.88 | 65 | £143.03 | £53.03 | 5 | £265.15 |
| January 2017 | £9079.01 | 65 | £139.68 | £49.68 | 1 (20 WTR reg. 13 days taken by 2 Jan 2017) | £49.68 |
| February 2017 | £8894.01 | 66 | £134.76 | £44.76 | 0 (20 WTR reg. 13 days already taken in holiday year) | £0.00 |
| March 2017 | £8686.51 | 64 | £135.73 | £45.73 | 0 (20 WTR reg. 13 days already taken in holiday year) | £0.00 |
| April 2017 | £8859.38 | 65 | £136.30 | £46.30 | 2 (new holiday year) | £92.60 |
| May 2017 | £8835.63 | 63 | £140.25 | £50.25 | 3 | £150.75 |
| June 2017 | £8790.01 | 66 | £133.18 | £43.18 | 0 | £0.00 |
| July 2017 | £8510.63 | 65 | £130.93 | £40.93 | 3 | £122.79 |
| | | | | | | |
| | | | | | **TOTAL** | **£1428.03** |

## Annex B: Night out allowance element of holiday pay

| Month deduction made | Total night allowance in three months preceding deduction month | Working days in 3 months preceding deduction month | Average daily rate of night out allowance based on preceding three month average | Number of WTR reg.13 holiday days in month | Night out allowance payable as holiday pay in the month |
|---|---|---|---|---|---|
| May 2016 | £1500 | 65 | £23.07 | 2 | £46.14 |
| June 2016 | £1470 | 66 | £22.27 | 0 | £0.00 |
| July 2016 | £1620 | 65 | £24.92 | 5 | £124.60 |
| August 2016 | £1410 | 65 | £21.69 | 6 | £130.14 |
| September 2016 | £1470 | 66 | £22.27 | 0 | £0.00 |
| October 2016 | £1290 | 66 | £19.54 | 0 | £0.00 |
| November 2016 | £1470 | 66 | £22.27 | 1 | £22.27 |
| December 2016 | £1650 | 65 | £25.38 | 5 | £126.90 |
| January 2017 | £1590 | 65 | £24.46 | 1 (20 WTR reg. 13 days taken by 2 Jan 2017) | £24.26 |
| February 2017 | £1500 | 66 | £22.72 | 0 (20 WTR reg. 13 days already taken in holiday year) | £0.00 |
| March 2017 | £1440 | 64 | £22.50 | 0 (20 WTR reg. 13 days already taken in holiday year) | £0.00 |
| April 2017 | £1440 | 65 | £21.15 | 2 (new holiday year) | £44.30 |
| May 2017 | £1530 | 63 | £24.29 | 3 | £72.87 |
| June 2017 | £1470 | 66 | £22.72 | 0 | £0.00 |
| July 2017 | £1590 | 65 | £24.46 | 3 | £73.38 |
| | | | | | |
| | | | | **TOTAL** | **£664.86** |