EMPLOYMENT TRIBUNALS

Claimant: Mr M Coatsworth

Respondent: Nattrav Ltd

Heard at: Newcastle Hearing Centre
North Shields
By Cloud Video Platform (CVP)

On: 2-.. November 2019
1-3 February 2021
17 February 2021 and
.. March 2021
(in Chambers)

Before: Employment Judge M T Martin
Miss B G Kirby
Mr D Morgan

REPRESENTATION:

Claimant: Mrs L Coatsworth (Claimant's wife)
Respondent: Initially: Mr Futimi (Employment Consultant)
Subsequently: Mr A Williams (Solicitor)

Part of this case was heard by way of Cloud Video Platform (CVP) in February 2021 due to ongoing issues around COVID-19. The parties agreed to the hearing being heard by CVP.

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of race discrimination is not well-founded and is hereby dismissed.

2. The claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.

3. The claimant's complaint of unfair dismissal for making a protected disclosure is also not well-founded and is hereby dismissed.

4. The claimant's complaint of detriment for making a protected interest disclosure is well-founded. A separate remedy hearing will be arranged with a time estimate of three hours.

5. The claimant's complaint of unlawful deduction from wages is also well-founded and the claimant is awarded the sum of £4114.36.

REASONS

Introduction

1. This case was originally heard in November 2019. It went part-heard and was relisted for a further three days in February 2020. However, Mr Futimi, the respondent's representative at the time, requested an adjournment due to a medical condition on his part. The case was relisted for April 2020, but unfortunately it then had to be re-listed due to the coronavirus pandemic. It was relisted for a remote hearing in November 2020, but Mr Futimi was unable for medical reasons to do a three day hearing at that time. It was then relisted in February 2021. A different representative from the same firm took over the conduct of the proceedings on behalf of the respondent.

2. The claimant, his wife, Mr Paul Trotter and Mr Martin Hill, both former employees and colleagues of the claimant, gave evidence on behalf of the claimant. Mr Colin Eastwick, an ex-employee and former colleague of the claimant, filed a witness statement but did not attend to give evidence.

3. Mr and Mrs Wilson, both directors of the respondent; Mr Alan Lindsay, an employee and the claimant's cousin; Mr Darren Dallas, an employee of the respondent company; Mr David Sheldon, ex-employee of the respondent company; Mrs Valerie Winter, an employee of the respondent company; Mr Cris Herworth, an employee of the respondent company; Mr Neil Gardner, an employee of the respondent company; and Mr Gary McCluskey, an ex-employee of the respondent company, all gave evidence on behalf of the respondent. Mr David Spraggan, a former employee and mechanic for the respondent company, filed a witness statement but did not attend to give evidence at the hearing.

4. The Tribunal did not pay much attention to those statements where the witnesses did not attend to be cross examined.

5. The Tribunal was provided with a bundle of documents marked "Exhibit A" at the outset of the hearing to which a few additional documents were added. At the end of the first hearing the claimant was ordered to provide documentation regarding his claim for the main element of his Wages Act claim as referred to at paragraph 15.2 of the List of Issues. A Scott Schedule was produced. The claimant added his comments to that Scott Schedule subsequently. The claimant also subsequently produced a number of timesheets relating to that claim in July 2021 (marked Exhibit B). The documentation supporting those timesheets was produced during the course of the hearing in February 2021 (marked Exhibit C). The respondent was given the opportunity to review those documents (marked Exhibit C) and confirmed that they were content to proceed with that aspect of the case, despite the late service of those documents.

The Law

The Tribunal considered the following law:-

6. Section 13(3) of the Employment Rights Act 1996:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated…as a deduction made by the employer from the worker's wages on that occasion."

7. Section 95(1) of the Employment Rights Act 1996:

> "For the purposes of this part an employee is dismissed by his employer if:-
>
> (c) 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."

8. Section 43A of the Employment Rights Act 1996:

> "A 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

9. Section 43B of the Employment Rights Act 1996:

> "Qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:-
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
>
> (c) That a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) That the health or safety or any individual has been, is being or is likely to be endangered;
>
> (e) That the environment has been, is being or is likely to be damaged; or
>
> (f) That information tending to show any matter falling within any of the preceding paragraphs has been, or is likely to be deliberately concealed."

10. Section 43C(1) Employment Rights Act 1996:

"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) To his employer."

11. Section 47B of the Employment Rights Act 1996:

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the grounds that the worker has made a protected disclosure."

12. Section 103A of the Employment Rights Act 1996:

"An employee who is dismissed shall be treated for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

13. Section 48(1) of the Employment Rights Act 1996 (section 48(1)A):

"A worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of section 47B."

14. Section 48(3) of the Employment Rights Act 1996:

"An Employment Tribunal shall not consider a complaint under this section unless it is presented –

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, where that act or failure is part of a series of similar acts or failures, the last of them; or

(b) Within such further period as the Tribunal considers reasonable in a case where it is satisfied it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

15. Section 26(1) of the Equality Act 2010:

"A person (A) harasses another (B) if:-

(a) A engages in unwanted conduct related to a relevant protected characteristic; and

(b) The conduct has the purpose or effect of:

(i) violating B's dignity; or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

16. Section 26(4) of the Equality Act 2010:

"In deciding whether the conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account:-

(a) The perception of B;

(b) The other circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect.

17. The relevant protected characteristics include race.

18. Section 123(1) of the Equality Act 2010:

"Proceedings on a complaint may not be brought after the end of:

(a) the period of three months starting with the date of the act to which the complaint relates; or

(b) Such other period as the Employment Tribunal thinks just and equitable."

19. The well-known case of **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27** where the Court of Appeal held, as cited by Lord Denning:

> "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once."

20. The case of **Woods v WM Car Services (Peterborough) [1981] IRLR 347** where the EAT held that:

> "It is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

21. The case of **Nottinghamshire County Council v Meikle [2004] IRLR 703** where the Court of Appeal held:

> "Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end."

22. The case of **WE Cox Toner (International) Limited v Crook [1981] IRLR 443** where the EAT held that if one party commits a repudiatory breach of contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an

end. The innocent party must at some stage elect between these two possible scenarios:

> "If he affirms the contract, his right to accept the repudiation is at an end. The employee who accepts his next pay packet (i.e. further performance of the contract by the guilty party) runs the risk of being held to affirm the contract. That risk usually involves further performance of the contract by both parties. The employee must make clear his objection to what is being done otherwise he is potentially taken to affirm the contract by continuing to work and/or draw pay for a limited period of time, even if the purpose is merely to enable him to find another job. The employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will lose his right to treat himself as discharged."

Issues

23. At the outset of the hearing in November 2019 the parties had agreed a proposed list of legal and factual issues which were discussed at the outset of the hearing and slightly amended, and are as follows:

Whistleblowing (detriment)

(1) Did the claimant disclose information to the respondent by making the following complaints?

  (a) In 2017, that the claimant told Mr Ian Wilson that he could not pick a Tiguan car with his truck as it would be overweight. The respondent denies the allegation.

  (b) On 26 June 2018 notifying Ian Wilson that the radiator in his truck was leaking, and Ian Wilson stating he would send another truck.

  (c) Texting Ian Wilson on 28 June 2018 about the claimant's truck swerving left and right. The respondent denies the allegation.

(2) Did the claimant have a reasonable belief that the disclosure was made in the public interest and tended to show one or more of the failures set out at section 43B(1) of the Employment Rights Act 1996?

(3) What are the detriments allegedly suffered by the claimant? The claimant relies on the following detriments:

  (a) Firstly, that he was forced to carry on driving the truck in each case and was not provided with an alternative truck;

  (b) Secondly, that he was threatened with dismissal; and

  (c) Thirdly, that his sick pay was withheld.

(3A) Were the complaint(s) lodged in time?

Harassment – section 26 Equality Act 2010

(4) Did any of the detriments or other acts complained of amount to unwanted conduct relating to race?

(a) That in or around March 2016 Trudi Wilson, in response to the claimant's query about the pronunciation of a customer's name, stated "…it's because it's a fucking Muslim name", then she said, "I can't stand Muslims or Pakis". The respondent denies the allegation.

(b) That in or around March 2016 Ian Wilson (who was also present) said, "neither can I, but blacks are ok". The respondent denies the allegation.

(c) That in or around August 2017, on their way back from delivering a car to a customer, David Young, a junior colleague, shouted in the claimant's presence, "f...ing black cunts, "f…ing niggers", "F the black bastards", "them niggers and the f…ing police". The respondent denies the allegation.

(d) That the next day, in or around August 2017, David Young, on leaving the garage, shouted "look at this f…ing black bastard" at an African man getting out of his car. The respondent denies the allegation.

(5) Did any such conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

(6) In all the circumstances and having regard to the claimant's perception, was it reasonable for the conduct to have that effect?

(7) Does the Tribunal have jurisdiction to hear complaints arising out of the claimant's earlier employment with the respondent which ended in June 2016, or are the events in August 2017 out of time and/or would it be just and equitable to extend time?

<u>Unfair Dismissal (Constructive)</u>

(8) Did the respondent, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the respondent and the claimant in any of the following ways as alleged:

(a) That the respondent did not pay the claimant the correct rate for his training during the claimant's first employment with the respondent that ended in June 2016;

(b) That the claimant did not receive monthly bonuses;

(c) That the claimant was regularly given long run shifts;

(d) That the respondent made deductions from the claimant's wages as listed at paragraph 23 (17) (a) – (l) below;

(e) That the respondent allegedly harassed the claimant in March 2016 and August 2017 as set out above, which the respondent denies;

(f) That in June 2017, the respondent failed, upon a complaint, to address the bullying behaviour of Neil Dallas, namely that on their way back from Scotland Neil Dallas slapped the claimant twice and called the claimant a "f…ing amateur. The respondent denies the allegation.

(g) That in or around August 2017, Ian Wilson failed to deal with a complaint of racism by another colleague, David Young and Ian Wilson responded by stating, "he could not do anything about it" and stated, "let's see what he [David Young] is like tomorrow". The respondent denies the allegation.

(h) By dismissing David Young, in or around August 2017, for his leg injury but not for being allegedly racist. The respondent denies any knowledge of racism and denies dismissing Mr Young.

(i) That in or around February 2018, the respondent failed to address another bullying from Nail Dallas, during which Neil had allegedly stated that he would choke the claimant and that he had "f'd" the claimant's wife. The claimant contends that upon complaint Ian's response was "tell Neil to come and fight me instead". The respondent denies the allegation.

(j) That on another occasion, Trudi Wilson humiliated the claimant in the presence of other staff by saying, "you f…ing drivers are never happy, you either want f…ing long runs or you don't. I can easily put you on f…ing short runs if you want". The respondent denies the allegation.

(k) That Trudi Wilson (date unknown) treated the claimant unfairly by telling the claimant he had to shave, while others including Mr Wilson had a beard.

(l) Being forced in 2017 to take a truck that was overweight for delivery following a threat to his employment and a threat that the claimant's truck would be squashed by Ian Wilson. The respondent denies the allegation.

(m) By being deliberately sent a replacement defective truck which pulled from left to right by Ian Wilson on 26 June 2018. The respondent denies the allegation.

(n) By being told by Ian Wilson in a telephone call on 26 June 2018 to deliver a vehicle with a truck that was shifting left to right and not safe. The respondent denies the allegation.

(o) By being given the same truck on 27 June 2018, which again pulled from left to right, and being told by Ian Wilson to deliver the vehicle in that truck anyway. The respondent denies the allegation.

(p) By being required to take a defective truck again to do a delivery on 28 June 2018, which was the last straw that led to the claimant's resignation on 23 January 2019. The respondent denies this allegation.

(q) By not allowing the claimant to take time off for dependent leave (date unspecified).

(r) That the respondent in June 2018 said he would withhold the claimant's wages until the claimant had provided a sick note in support of his absence. The respondent denies this allegation.

(s) That the respondent, Ian Wilson, in June 2018 attended the claimant's home without invitation and harassed the claimant and the claimant's wife by entering the claimant's property and proceeding to take a folder that did not belong to the respondent. The respondent denies the allegation.

(t) By not being permitted to take rest breaks.

(9) Did the alleged breaches, individually or cumulatively, amount to a fundamental breach of contract?

(10) If so, did the claimant resign because of the alleged breach or breaches of contract?

(11) If so, did the claimant, by conduct, affirm the alleged breaches?

(12) If no, was the claimant unfairly dismissed? It is noted that the respondent does not rely on a fair reason for dismissal.

(13) Does the Tribunal have jurisdiction to hear complaints arising out of the claimant's earlier employment with the respondent in June 2016?

Unfair Dismissal – Protected Interest Disclosure

(14) Did the claimant disclose the information referred to at paragraphs 23 (1) (a) – (c) referred to above?

(15) Did the claimant have a reasonable belief that the disclosures were in the public interest and tended to show one of the matters set out at section 43B of the Employment Rights Act 1996, namely that a criminal offence had been committed; and/or that the respondent was not complying with a legal obligation; and/or that the health and safety of an individual has been, is being or is likely to be endangered; and/or that information tending to show any matter falling within any one of these paragraphs has been or is likely to be deliberately concealed?

(16) Was the making of the protected interest disclosure the principal reason for the claimant's resignation/the reason why he resigned, and was he thereby dismissed for making a protected interest disclosure? Did he resign because he had made one or more of these disclosures?

Unlawful Deduction from Wages

(17) Did the respondent make the following deductions from the claimant's wages?

(a) Underpayment of £5,890.78 from July 2015 – June 2016;

(b) Underpayment of £10,013.70 from November 2016 – April 2018; following disclosure of additional documents by the claimant in April 2020 he amended that figure to £9443.36 and then in July 2020 / February 2021 to a total of 771.42 hours totalling £6171.36.

(c) Car damage of £727.21 (presumed to be April 2017 – June 2017 from payslip);

(d) Model fine of £100 (date unknown);

(e) Toll bridge fine of £22 (date unknown);

(f) Charge for uniform (date unknown);

(g) Personal phone calls to customers £620 (date unknown);

(h) Unpaid holiday of £2,500 (date unknown);

(i) Timesheet not handed in £20 (presumed to be June 2018 from payslip);

(j) Phone charge of £14.36 (presumed to be June 2018 from payslip);

(k) Leather folder taken from claimant's home £20 (presumed June 2018);

(l) Charge of £500 for car crash in January 2019.

(18) Does the Tribunal have jurisdiction to hear any of the alleged deductions of wages claims, in that most of the complaints appear to be out of time?

(19) If the complaints are out of time, was it reasonable practicable for the claimant to have brought the claims in time? Were they brought within a reasonable time period thereafter?

(20) Does the Tribunal have jurisdiction to hear complaints arising out of the claimant's earlier employment with the respondent which ended in June 2016?

(21) How much, if any, is owed to the claimant as regards the alleged unlawful deduction from wages?

Limitation Generally

(22) Was there conduct extending over a period which is to be treated as done at the end of that period, and if so is such conduct in time?

(23) In respect of conduct complained of which is not in time as regards the discrimination complaints, is it just and equitable to grant an extension of time?

(24) In respect of conduct complained of which is not in time as regards any detriment complaints under section 47B and unlawful deductions from wages complaints, was it reasonably practicable for the allegations to have been lodged in time?

Findings of Fact

24. The respondent is a small company based in the north east of England which collects and delivers cars around the country. The directors of the respondent company are Mr and Mrs Wilson. They employ a few staff in the office and a number of drivers, which has now increased such that they have approximately 30 drivers working for them.

25. The claimant was employed as a driver. He initially worked for the respondent for a period between 2015 and 2016. At that time the respondent company was much smaller. In his claim to this Tribunal, the claimant has raised claims relating to training fees and unlawful deductions relating to that period of employment which ended in 2016. Those claims are substantially out of time.

26. The claimant first left the respondent company in July 2016.

27. In his evidence to the Tribunal, the claimant refers to a number of incidents of alleged racial discrimination and harassment. He said that an incident arose in March 2016 when he said he had returned to the respondent's offices to pick up his paperwork and was unable to pronounce a customer's name. He said he asked Mrs Wilson as he had to call customers the day before to arrange a delivery time. He said that she took the worksheet from him and said that "because it's a f…ing Muslim name" and said that she could not stand "Muslims or Pakis". The claimant asserts that Mr Wilson was also present in the office and also said, "Neither can I, but blacks are ok".

28. The claimant's wife is black. Both Mr and Mrs Wilson had met the claimant's wife. The claimant's children are of mixed race. Both Mr and Mrs Wilson deny making any such comments. Mr Wilson suggests that he has a daughter of mixed race. Mrs Wilson suggests that she, like her husband, comes from a military background, and mixed with people of different races. She said has a good friend who is Muslim.

29. The claimant did not raise any concerns about this matter in writing or consequent to the incident.

30. The respondent suggests that it was not clear whether the claimant resigned or was dismissed after his first period of employment.

31. The claimant recommenced employment with the respondent a few months later in November 2016. The contract of employment is at pages 65-74 of the bundle. It appears that, during the first period of employment, the respondent was paying at a lower training rate. Mrs Wilson says that they have now ceased that

practice and the claimant did not undertake any further training period of employment with the respondent when he returned. The claimant's contract is at pages 65-74 of the bundle. It was a zero hour's contract.

32. At page 66 the contract deals with deductions from wages and states that "employees are responsible for any damages to customer vehicles and company vehicles in their charge and will be expected to pay for repairs – payment to be deducted from pay". It goes to state that "if an employee fails to carry out his/her duties correctly, they may be fined – manager's discretion". It further states that "employees are responsible for all traffic and vehicle condition offences and fines incurred". It also states that uniforms are to be returned before the employee leaves the company or that uniform costs/cleaning fees will be deducted from pay. It states that all fines, damages or money owed to the company are to be paid back to the company in full, or will be deducted from the last pay or otherwise before the employee leaves the company.

33. The claimant's basic rate of pay was stated to be £8 per hour (page 67).

34. The claimant's statement of main terms of employment is at pages 75-77 of the bundle. It states that his rate of pay is £8 per hour. It also suggests that there is a performance related bonus. It refers to capability, disciplinary, and grievance procedures. It refers to them being the in the employer handbook. The contract appears to have been signed in August 2017. The claimant signed an opt-out agreement under the Working Time Regulations (page 79 of the bundle).

35. The employee handbook is at pages 83-125 of the bundle.

36. At page 89, it refers to salaries and wages. It refer at paragraph 2 thereof to the calculation of tracker hours, and states "the company pays on transit time by tracker from designated postcode to postcode plus handover time and return. When driving customer vehicles, transit hours are worked out from Google maps from postcode to postcode and handover time".

37. At page 89 it also states that "employees are required to complete and submit timesheets as directed" and indicates that "incorrectly completed or late submission of timesheets may result in incorrect or delayed payment of wages".

38. At page 104 it refers to the policy on company mobile phones/tablets. It states, "Company mobile phones are to be used for business purposes only except in the case of an emergency". Unauthorised personal use may be repayable by the employee and may result in disciplinary action in accordance with their procedures. It states that "the company reserves the right to deduct the appropriate sums from your salary in the event that repayments are not made".

39. There is a grievance policy at page 115; a personal harassment policy and procedure at pages 116; and an equal opportunities policy at pages 117-118.

40. At page 121 it states that "the company will not be held responsible for any fines (e.g. parking, speeding, etc) incurred by you whilst working for us. If we receive a summons on your behalf we may pay the fine and deduct the cost from any monies owing to you".

41. It also states at pages 121 that "if the employee is the driver of any vehicle and it is in an accident which causes damage to the company vehicle or another vehicle or injury to any person or animal, that the driver must notify ……". It goes on to state at page 123 that "where any damage done to one of the vehicles is due to negligence or lack of care the company reserves the right to insist on the employee rectifying the damage at their own expense or paying the excess part of any claim on the insurance". A number of drivers, including Mr Lindsay referred to deductions being made from wages for damage to vehicles or company property. Mr Lindsay, who occasionally acted as a mechanic, referred to an incident when his wages were deducted following for a repair which he wrongly carried out. Mrs Wilson denied that had occurred.

42. At page 125 the handbook is signed. The claimant says that he was not given any time to read the document and could not recall signing it.

43. The Tribunal was directed to various different notices which were put up at the respondent company, for example at page 128 – It suggests employees should be starting their day early ……. start their day late and they may hit traffic and may cost the company… deliver as early as possible - 8.00am or 9.00am being the latest.. It also refers to a 15 minutes customer handover time. The notice refers to the impact on bonus. At page 129, there is a notice referring to loss of bonus being at the manager's discretion. At page 130, a notice refers to complaints. At the bottom of that notice it states that if an employee cannot do what they are supposed to do then it is time to leave, with lots of inverted commas. It states that an employee should never collect a damaged or dirty vehicle and should never deliver a damaged or dirty vehicle and if they do so they will pay. At page 132, another notice refers to repeat offenders. It goes on to state that if an employee has already broken the rules, had their bonus reduced and then reoffended, it is up to management as to what further fines, deductions or punishment will be applied.

44. It appears that most of these notices were put up by Mr Wilson.

45. Many of those notices are set out with rules and instructions in a somewhat dictatorial manner which may be consistent with the military background to which we were referred relating to both of the directors of the respondent company.

46. The claimant, on his own evidence, did not suggest that he raised any issue with the respondent about the alleged racist incident in his first period of employment or when he returned to work for the respondent again. We consider it unlikely that the claimant would have returned to work with the respondent a few months after leaving the respondent if he had concerns about racial harassment in the workplace. The incident occurred in March 2016 and yet he continued to work for the respondent until July 2016 and then returned to work for them in a few months later in November 2016 and never raised the matter with them at any stage. On his own evidence does not appear to have raised any issues about the matter. It seems unlikely that he could have felt that his dignity was violated or that the respondent had created an intimidating, hostile, degrading or humiliating atmosphere for him, if he was prepared to return to work for them only a few months after having left the respondent.

47. In his evidence to the Tribunal the claimant refers to another incident of racial harassment in regard to another driver, Mr David Young. It is not clear from the

claimant's evidence when this incident occurred, but it appears to have occurred sometime during 2017. In relation to that incident, the claimant says that David Young made disparaging comments about black people. Both Mr and Mrs Wilson deny being told anything about such an incident. The claimant says that the respondent subsequently dismissed Mr Young because he had a bad leg but not for being racist. The respondent said that they did not dismiss Mr Young.

48. The claimant did not raise this matter by way of any grievance or in writing during the course of his employment. On his own evidence, the claimant did not raise the matter at the time and continued to work for the respondent for at least another year to year and a half.

49. The claimant also raises concerns about issues between him and Mr Dallas. He says that he was bullied and harassed by Mr Dallas on a number of occasions. He refers initially to an incident in June 2017 when a number of drivers went up to Scotland on a job. This included the claimant and Mr Dallas. He refers to some verbal abuse and says that he was slapped by Mr Dallas. He says that he reported the incident to the respondent.

50. The claimant also says that there were further conduct issues concerning Mr Dallas in January and February 2018, which again involved verbal and some physical abuse.

51. The claimant says that he discussed these matters with Alan Lindsay at the time. Mr Lindsay, who is still employed by the respondent and gave evidence on their behalf, said that he did not recall whether he was present at the time, but said he did not recall the incident.

52. The respondent says that there was always a bit of banter between drivers. The two directors said that they could not recall the incident being raised. They said it was just a bit of banter between the drivers.

53. Mrs Wilson produced a supplemental witness statement in these proceedings in which she purports to address some of the further incidents/matters raised by the claimant. It is clear that she contacted some of the witnesses referred to in those incidents, who are ex- employees. She indicates that Mr Young had subsequently died. She also, in her supplemental witness statement, refers to the incidents concerning Mr Dallas. At times she comments on those matters as if there are within her own knowledge, yet it is clear that her comments on what she was told or what she surmised. She also corrects in that witness statement some of comments made by her and Mr Wilson in the earlier witness statements for example she comments on some inconsistencies in relation to the incidents concerning Mr Dallas and Mr Young in her and Mr Wilson's statement.

54. Mr Wilson refers to an incident with Mr Dallas concerning Mrs Wilson's daughter which appears to involve Mr Martin Hill, another driver who gave evidence to this Tribunal on behalf of the claimant. The incident which Mr Wilson refers to relates to some allegations which were apparently made on social media relating to somewhat disparaging remarks about an alleged sexual relationship between Mr Hill and Mrs Wilson's daughter.

55. In her evidence, Mrs Wilson said that Mr Dallas had upset quite a few people at the respondent, not just the claimant, but she described his behaviour as him just being a bit of a young lad and larking about. She said Mr Dallas was subsequently dismissed for swearing at a customer and also for swearing at her. She referred in her evidence to Mr Dallas' letter of dismissal at page 136 of the bundle. It suggests that he was dismissed in February 2018 for inappropriate language and behaviour towards a customer and inappropriate language to her, and refers to other matters relating to texting on mobile phones. Her evidence was that he was dismissed effectively because he swore at her, but also because he had sworn at customers as well.

56. In her evidence to the Tribunal, Mrs Wilson indicated that Mr Dallas was disciplined for the incident concerned her daughter and Mr Hill in relation to the social media post. However, there is no reference to that in her witness statement. She suggested that he was given a warning although there is no reference to that either in the letter of dismissal at page 136 of the bundle.

57. Indeed in witness statement relating to Mr Dallas, Mrs Wilson seems at times to giving evidence about what she thinks happened with regard to Mr Dallas and the claimant, yet it appears that, after she was questioned about the matter in the Tribunal, she accepted that her evidence was simply what she says she was told by Mr Dallas.

58. The claimant also refers to other incidents concerning Mrs Wilson; namely he refers to her telling him to shave his bread but not telling others including Mr Wilson to do the same. He was unable to indicate when this alleged incident happened. Mrs Wilson denied it occurred.

59. The Tribunal heard evidence from a number of drivers, both former and current drivers working for the respondent company, on behalf of both the claimant and the respondent.

60. From the claimant's witnesses we heard about a sort of culture of bad language being used by the directors involving a lot of swearing from the directors. The claimant referred to an incident when he says Mrs Wilson swore at him using the f word when she says he complained about long runs. He was unable to indicate when this incident occurred or indeed which year it occurred. Mrs Wilson denied swearing at the claimant in those terms. The respondent's witnesses suggested that there was no swearing at all on the part of the directors. Mrs Winter said she sat in the same office as Mrs Wilson and never heard her use bad language.

61. The impression that the Tribunal took of the culture in the organisation was of a sort of a laddish type culture. There seemed to be a lot of larking about and verbal abuse and swearing. There was no suggestion by any of the witnesses that there was not any swearing on the part of the drivers. We had the impression that Mr Wilson, who was working more closely with the mechanics and drivers on the day to day running of operations would have joined in this laddish type culture. There is reference by the claimant to Mr Wilson offering to "sort out" Mr Dallas, which we tend to find potentially quite believable. It was noted by the Tribunal that both directors were forceful in their communication. This is exhibited in some of the notices put up by Mr Wilson and indeed in Mrs Wilson's own evidence to the Tribunal. We consider that they would have both have sworn at times. Mrs Wilson was working alongside

the drivers in a laddish type culture which she seemed to accept as is noted in her comments in evidence about Mr Dallas' behaviour being a bit of laddish/larking about. That type of swearing would be consistent with that type of laddish type culture. Our impression is based on the evidence given by many of the witnesses referring to such a culture existing and that kind of behaviour. For example, even one of the respondents own witnesses, Mr Herworth, referred in his witness statement to some larking about amongst the drivers on a particular trip.

62. We also take note of Mr Hills's evidence, which went unchallenged. He referred to an incident when he had been driving at the time of the "beast from the east" and returning to office, having not been able to progress with his journey due to the extremely poor road conditions because of the weather at that time. He described returning into the office and wanting to get a cup of coffee. He suggested that Mrs Wilson effectively told him that he did not deserve one because he had not been able to do his job. At that stage he described having been on the road for hours and having made no progress whatsoever due to the inclement weather and being cold.

63. The incident which was described with Mr Dallas and comments on social media about Mr Hill is also entirely consistent with the type of culture which appeared to exist within the workplace.

64. There was a type of male dominated culture existing within the respondent company. We note that there were not any people from ethnic minorities employed in the workplace. The respondent's evidence was that two people of ethnic minorities did seek to join the respondent company but neither took up the post. At no stage it appears did the respondent employ anyone from an ethnic minority background. We accept that they are based in the north east of England where in many workplaces the ethnic ratio is likely to be lower than other parts of the UK which are more diverse. However, this was a company which had, on its own evidence, a multicultural client base and offered their services all around the country.

65. The claimant refers to a further incident in 2017 where he says he complained about an overweight truck. He says that he was concerned about driving the vehicle. He says that he was told by Mr Wilson to do so. Mrs Wilson in her evidence explained that they had to be very careful about whether vehicles were overweight. She said that it was not in the interests of the company to carry overweight vehicles because if they did so, they would be fined and possibly lose their licence. The claimant, on the other hand, says that he was following procedure and that the vehicle was overweight. The respondent however denies that the truck was overweight. They say it would have been the correct weight. The claimant said he was threatened with dismissal by Mr Wilson if he did not drive this trick, which Mr Wilson denies.

66. It should be noted that, for many of the incidents raised by the claimant, it is unclear from his witness statement and his oral evidence to the Tribunal exactly when these incidents occurred. During the course of his evidence (both in his witness statement and orally), he moved from one year to another in referring to incidents without actually following anything through chronologically as to what happened and when it happened, which was particularly evident in relation to more recent events during the course of his employment. His evidence at times was vague and unclear regarding what happened when.

67. The respondent had a practice or policy in place whereby they would arrange for a driver to do a long run and then a short run. However, market circumstances dictated when jobs would have to be done so the policy had to be adapted at times to meet the demands of the business. The claimant and some other drivers said that they often had to do a number of long runs in a row. It was noted from the tracker information provided by the respondent in the bundle that, often the drivers did do two long runs in a row and occasionally three in a row. The Scott Schedule, for example, produced by the respondent shows a number of long runs being done by the claimant on 20, 21 and 23 March. The respondent's witnesses on the other hand said that drivers did not do long runs in a row. The drivers, who gave evidence on behalf of the respondent, and Mrs Wilson said the drivers usually did a long run followed by a short run.

68. The Tribunal finds that the claimant did on occasions have to do two long runs in a row: sometimes, although not frequently, more. This seemed to be dictated by the terms of the various contracts which the respondent secured. Both parties agreed that the claimant was at times happy to do long runs, although there was a suggestion that he did not like to do long runs on occasions, for example on Fridays.

69. Mrs Wilson was responsible for managing the drivers' hours, pay and rest breaks. She says that she would go through the trackers and calculate their pay. She said that she would then ascertain what breaks the drivers had taken and deduct those from their hours of work. In her evidence, she admitted that when she looked at the tracker system, she did not usually pay for stop hours or idle hours. She said in evidence that she did not pay when the truck was idling or stopped as she said that she usually took the view that was when the driver was taking a break.

70. The claimant and a number of drivers (Mr Trotter and Mr Hill) indicated that they were not allowed to take breaks. They said Mrs Wilson regularly followed the trackers and told them to get moving. They said that they were discouraged from taking rest breaks. The respondent's witnesses said the contrary. Mr Lindsay in his evidence suggested that he took regular breaks, as did Mr McCluskey and Mr Gardener.

71. Although the claimant, Mr Hill and Mr Trotter said they were not allowed to take breaks and were effectively discouraged from doing so, there is evidence in the bundle at page 453 of the bundle showing posts of Mr Hill taking breakfast.

72. The Tribunal find in general that drivers were allowed to take breaks. The evidence is contradictory from both parties but there is documentary evidence to support some breaks being taken by the drivers. We do however find that they were discouraged from taking very long breaks. It is quite clear from the evidence even from Mrs Wilson that she maintained a very tight control over the way the jobs were undertaken by the drivers and viewed their tracker sheets regularly, which clearly suggested that she was not encouraging drivers to take long breaks. Nevertheless the trackers which have been produced show that the drivers certainly did at times take breaks.

73. The respondent company said that most of the drivers' work was undertaken using the tracker system. Both parties agreed that about 90% of the jobs were actually worked out on the basis of the tracker system. Other journeys were calculated by using Google maps in accordance with the handbook.

74. The respondent has produced a small number of sheets showing trackers for journeys which the claimant did during his employment. They said that they did not have the trackers for most of the trucks as the many of the trucks had been sold. The claimant principally drove one truck (OU14) but also drove other trucks for various different reasons; often when his own truck was in for repair from time to time when he would be required to drive other tucks. The respondent accepts that many of their trucks were well used and old. They often required repair and maintenance. As the respondent's business has started to grow, they have gradually started to replace those older trucks. Their evidence was that all their trucks are now fitted with tachographs. The respondent also said that they now pay all their employees a salary and overtime. They no longer calculate wages as they did at that time based on the trackers or occasionally on Google maps.

75. At the time of the claimant's employment the respondent paid drivers based on the trackers and very occasionally on Google maps.

76. The respondent has produced a number of trackers for a few of their trucks (YK11 and BX) which are at pages 217-227 of the bundle. They have also produced some trackers for other trucks including the claimant's regular truck at pages at various pages throughout the bundle. They have not been able to produce most of the trackers for the trucks which the claimant drove during his employment as those vehicles have subsequently been sold.

77. Mrs Wilson gave evidence that she would review the trackers and then calculate pay based on the running time on the tracker. She would then make some adjustments to that pay to reflect what she considered to be breaks taken by the drivers. She largely ignored the idle/stop times which she said she adjusted to what she thought had been the breaks taken by the driver based on her own knowledge and experience. An example of a tracker is at page 265 of the bundle.

78. The respondent did not take the Tribunal to each of the trackers by reference to the payslips or by cross referencing nor more importantly to the claimant's timesheets which were subsequently produced by him.

79. The claimant was paid 7.5 hours for the journey at page 265, although the tracker itself showed 10.5 hours on that date - 20 March. On 21 March he was paid 10 hours, but the tracker showed at least 12 hours. It is noted that the claimant was paid less hours than the time on the tracker, which stated when it started and when it ended. He was largely not paid for most of the stop and idle durations.

80. There are various other examples. For example, at page 302 on 14 May the claimant worked 10 hours, but was paid 9 hours. On 15 May he worked 6 hours and was paid 6 hours. On 16 May, he worked 6 hours according to the tracker, but was paid for 5½ hours. At page 307 the claimant appeared to work 8 hours and was paid 8 hours. He appeared to have had breaks on that occasion. On page 248 the claimant was paid for 6 hours and worked 6 hours, which again appears to be consistent with the tracker.

81. From the Tribunal's reading of the various limited number of tracker reports produced by the respondent it appears that, on rare occasions the claimant is paid for some of the stops and idle hours, but most of the time he is not paid for either.

82. In Mrs Wilson's evidence to the Tribunal, she confirmed that she did not pay for idle or stop time. When she was asked about what happened if there was traffic or roadworks she was unclear as to whether she took that into account. She was also asked about what happened if a driver wanted to take a break because he might have miscalculated the time and was ahead of schedule. It seemed from her evidence that she simply took the view that he should be not leaving too early and ignored that time on the tracker.

83. The way in which Mrs Wilson calculated the pay according to the trackers seemed to be completely ad hoc and random. Most of the time she did not seem to pay for stop or idle hours, which she seemed to treat as breaks. Very occasionally she does pay for those hours. She did not a detailed or cogent explanation for the system of pay adopted by her to the Tribunal.

84. The claimant produced no evidence supported his claim for wages for the first period of his employment and did not pursue that claim which was substantially out of time; the claimant having failed to provide any explanation why it was not feasible to bring that claim in time.

85. Initially the claimant simply claimed a sum of £10,013.70 for whole period of his second period of employment. He was asked repeatedly throughout these proceedings to provide details of those claims and how he calculated those sums. An order was made at the end of the first hearing, when it was adjourned requiring him to provide a detailed breakdown of the sums being claimed. He failed to comply with that order. He simply produced a further document in April 2020 in which he then claimed a total figure of £9443.36 which largely repeated the information previously provided, but again did not give a detailed breakdown of the sums being claimed. A further order was then made in April 2020 ordering the claimant to add his comments to the Scott Schedule produced by the respondent and to provide a detailed breakdown of the sums he was claiming and how he calculated those sums. Due to the limited number of tracker sheets, many of the details on the Scott Schedule were sparse and they only related to a limited number of periods of the claimant's employment. The claimant did eventually, in response to that Order, provide comments on the Scott Schedule, but he also provided some detailed time sheets setting out what he was claiming for each day and how he had calculated it. These documents were sent in July 2020. The claimant did not produce the documents from which he had compiled those timesheets or his comments on the Scott Schedule until the penultimate day of the hearing in February 2021. The Tribunal ordered those documents to be disclosed to the respondent and gave the respondent the opportunity to review those documents or to adjourn the hearing. The respondent's representative confirmed that both he and the respondent had had the opportunity to review the documents and were content to proceed. It should be said that the respondent's representative did not ask any detailed questions on those documents or the documents provided in July 2020, despite being given several opportunities to do so. The Tribunal reviewed those documents and noted that the times indicated in the claimant's time sheets in so far as it was possible to ascertain, largely corresponded with the times on the limited number of tracker documents provided, albeit that the Tribunal did not review every document and only reviewed a cross section of documents. Equally, the Tribunal cross referenced, again briefly and by way of a few examples, those times sheets to the subsequent documents provided by the claimant in February 2021 from which he said those details had

been derived. Those additional documents consisted of notes with times from what the claimant described as a black book and various job sheets. The way both parties addressed these claims was wholly unacceptable. Neither of the parties took the Tribunal through the documents in any detail. On that basis, the Tribunal eventually dealt with this issue in the best way possible. It undertook of its own volition a brief review of those documents cross referencing a number of examples and adopted a broad brush approach.

86. The time sheets produced by the claimant are from November 2016 to June 2018. He is claiming for 771.42 hours in total. In the time sheet he has set out his start and finish time for each day, the total hours he worked and the hours he says he was short. In his evince, he said that he complied these time sheets and his comments on the Scott schedule from his back book which he retained throughout his employment and the various documents including job records which he had. He said that those times largely correlate to the times on the trackers in the bundle produced by the respondent. In his evidence he said that he was not paid for all the hours recorded on the trackers. He said he was not paid for stop or idle breaks or any time at the beginning or end of his shift when, for example he would have to do checks and clean the vehicle. He Hasid he was not paid for all the hours he was in the truck and working. He also said that he was not paid for any breaks and has not allocated any time to breaks.

87. The tracker details noted on the Scott Schedule reflect the time from the journey started until when he returned. They do not appear to take account of when the claimant had to clean the vehicle at the end of the day or prepare the vehicle for the next day. Further those details largely to ignore any idle time at the end of the day, as is noted at page 248 of the bundle. The respondent has indicated it largely did not pay for idle time but did do on some occasions. The respondent effectively that time as break time. The respondent said that there was no time required for cleaning or checking the vehicle and they paid from the time once the vehicle was switched on

88. The evidence of the drivers was the respondent would try and pay them according to the Working Time directive, which corresponds to a degree with what Mrs Wilson said about idle/ stop times not being paid, which appears to include an element of levelling off at times.

89. The claimant and witnesses on his behalf suggested that the respondent required them to complete timesheets. They suggested that those time sheets were made to comply with the Work Time directives and were not necessarily reflective of the hours they actually worked. The respondent on the other hand said that they asked the employees to complete timesheets, which were required for inspection but were not used to calculate pay.

90. The claimant and Mr Hill said that only half an hour was allowed was allowed for delivery of vehicles but sometimes the delivery would take considerably longer. The respondent's directors and a number of their witnesses suggested delivery should usually be done in half an hour. It does appear that the drovers were only paid effectively on the basis that delivery was completed within that 30 minute slot.

91. The respondent would normally pay according to the trackers. However, there were occasions when they would pay on the basis of calculating the distance

by Google maps as is noted in the handbook. An example of this was given by Mr Hill regarding the Horsham job. In his evidence Mr Hill said that he had thought he was being underpaid for some time. He said that it came to a head with the Horsham job. He said that they were usually working about 16 hours a day on that job. The claimant and a number of other drivers also worked that job which ran over approximately a four week period. Mr Hill's evidence, it should be noted, was not challenged other than in general terms by the respondent's solicitor.

92. In her evidence, Mrs Wilson said that she paid 10 hours a day for the Horsham job. She said that she had based this on Google maps. She said that the journey took 4½ hours each way from the north east. The claimant and Mr Hill said that the journey was considerably longer and more like 5½-6 hours each way. The Tribunal itself notes from its own experience that a journey of that nature is somewhere in the region of five hours to drive from Newcastle to London and that Horsham is considerably further south than London.

93. Mrs Wilson put in a bid for the contract and fixed the price at 4½ hours, so she based it on her view of Google maps at that time whilst bidding for the contract. She never reviewed it to take account of different times of the day or different circumstances as the job had been priced on her initial view. That was her evidence to the Tribunal.

94. On 26 June 2018 the claimant had an accident in truck BX. He called to report the accident. He said that he called Mrs Wilson and Mr Wilson. He said that Mr Wilson told him to carry on with the journey to deliver the car, but he then noticed a problem with the radiator which he then reported to the respondent. He says that he spoke to Mr Wilson about the latter. Mr Wilson in his evidence, said that he could not recall being contacted by the claimant about the matter. Mrs Wilson said that any contact regarding vehicles would have been through Mr Wilson. We accept the claimant's evidence that he did call Mr Wilson. His evidence was clear and consistent with the subsequent sequence of events

95. Mr David Spraggan, the mechanic, came down to meet the claimant to deliver another truck to him as the claimant still had a delivery to complete. The claimant says that Mr Spraggan told him that there was a problem with the truck when he delivered it. Mr Spraggan did not attend to give evidence to the Tribunal but denied in his witness statement, of which we have taken little notice, that was the case. Mr Alan Lindsay was also present with Mr Spraggan to deliver the truck as they drove down together. He did not drive the truck, but came down in a separate vehicle. He said that he could not recall anything being said about the truck by Mr Spraggan. There is an MOT certificate for that truck for that same day at page 139 of the bundle. That makes no reference to any problems with the truck.

96. The claimant said that, after he took delivery of the truck YK11, he then started to have problems with that truck which started to pull from right to left. He said that he spoke to Mr Wilson about it and he was told to bring it in with him on his return on 26 June. The claimant says that when he spoke to the respondent, he was told that the truck would be fixed for him to drive the next day. Mrs Wilson cannot recall that conversation, and neither it appears can Mr Wilson. It should be noted that, despite the incident concerning the trucks to be the most recent incidents, Mr Wilson evidence was somewhat limited as he appeared to recall very little about

these particular matters. His evidence regarding earlier matters is interesting apparently clearer.

97. The vehicle was defective at that time as is noted at page 138 of the bundle. Mr Spraggan confirmed that it was indeed defective.

98. The respondent says that the truck was fitted with a steering pump and repaired on the morning of 27 June 2018.

99. On 27 June 2018 the claimant then drove the truck again after it had been repaired. He said that further problems occurred. He said that once again the problem was the steering, which pulled from right to left.

100. The claimant says that he telephoned Mr Wilson to report the problems with the vehicle and he was told to complete the delivery and then bring it back. The claimant says he used the company telephone/ipad to make this call, but it was on company business. Mr Wilson does not deny that he was told about the defects in the vehicle by the claimant, but suggests that he told the claimant to contact the RAC for assistance. It is acknowledged that the respondent usually tried to bring vehicles in for the mechanic (Mr Spraggan) to mend. Mr Wilson said that as far as he was concerned the vehicle had been previously repaired. Mr Wilson also said that it was the claimant's decision to complete the delivery. The claimant did not suggest in his evidence that Mr Wilson threatened to dismiss him as the claimant had suggested back in 2017, but the claimant did say that he was scared to challenge Mr Wilson and was very concerned about continuing to drive the vehicle. The Tribunal believes that the claimant was given little or no choice about undertaking the delivery first and was then effectively told by the respondent to bring the vehicle back. It is not clear why Mr Wilson did not do what he had done the previous day and send a different truck or Mr Spraggan down to repair the truck.

101. On 27 June 2018 Mrs Wilson says that the claimant came back with the truck and that the mechanic, Mr Spraggan, looked at it and could find no fault.

102. On 28 June 2018 the claimant started his deliveries. He said he started to encounter similar problems which he had had with the truck from the previous day. The claimant says that he texted Mr Wilson to tell him that there was a problem and the truck was pulling from right to left. He then left the yard and went home. At the same time, the claimant also said that he had problems with his back. Mr Wilson says that the claimant decided that he did not want to work that day and did not come back. Mr Wilson said that the claimant did not tell him why and that Mr Spraggan had to do the delivery that day but had no issues with truck. Mr Spraggan said in his witness statement that he was called once the claimant had returned the truck and asked to do the claimant's delivery. He says in his witness statement that he was not told of any problem

103. The claimant said in evidence that he was worried about driving a defective truck. He said he was concerned about his health and safety and those of other road users. His evidence was that he thought he was putting himself in danger by driving a defective truck.

104. The Tribunal prefers the claimant's evidence in relation to this matter. It is more credible and consistent. It is unlikely that Mr Wilson would have accepted what

he suggests occurred without enquiry. Further, there is no reason why the claimant, having already raised problems with the truck, would not have done so again if there continued to be problems as he indicated. Therefore the Tribunal finds that Mr Wilson was told about a defect with the truck on 28 June and told that the claimant would not do the delivery.

105. On 29 June 2018 (although it is not clear if the incident did occur on that date because neither party is clear about the date), the claimant phoned in sick. Mr Wilson went to collect the keys to the truck and the delivery information from the claimant's house. The claimant says that Mr Wilson harassed his wife, which Mr Wilson denies. Mr Wilson says that the claimant did not want to do a long trip that day. He said that sometimes the claimant did not want to do long trips.

106. The claimant said that he tripped down the stairs and hurt his ankle, although the respondent subsequently suggested that it was his back. The claimant's wife confirmed that she felt harassed by Mr Wilson on that day, but again was unclear of the exact date.

107. The claimant was then signed off sick having been assessed on 29 June 2018. He was signed off sick with a back problem for one month.

108. The claimant was then signed off sick for a further five months with work related stress. He was signed off for one month at a time.

109. In July 2018, the respondent made enquiries with the claimant as to when he was intending to return to work. Issues had been raised about his absence. It seems that there was a suggestion made that the claimant might be looking for alternative work and looking to leave the company. Mrs Wilson asked the claimant to come into the office (page 191 of the bundle). Around the same time, he claimant himself raised issues about holiday and sick pay.

110. In August/September 2018, it appears that the claimant did not provide a sick note and was not paid his sick pay. The respondent wrote to the claimant in August requesting for an up-to-date sick note (page 192 of the bundle).

111. At that stage the claimant raised other issues about a potential grievance in mid- August 2018 (page 192 of the bundle). It should be noted that, around this time, Mr Hill had commenced / pursuing a claim against the respondent in the employment tribunal regarding outstanding wages. The claimant was not only aware of that claim, but was providing assistance/ evidence to Mr Hill in relation to those proceedings. We will comment further on those proceedings in due course.

112. The claimant was invited to a meeting on 15 August 2018 to discuss his absence and the grievances referred to in his letter. Mrs Wilson noted that the claimant's grievances related to deductions from his pay for car damage, tolls, a phone bill and driving hours missing from his payslips and sick pay. The letter is dated 10 August and is at pages 145-146 of the bundle.

113. The respondent wrote to the claimant again on 24 September 2018 to invite him to an informal welfare meeting, on 27 September 2018 (page 148 of the bundle).

114. The claimant said that there was a delay in producing his sick note for September and October 2018. He said he was not paid his sick pay. He said he raised issues about this in an email again on 26 September (page 149D of the bundle). In that email he refers to concerns about his life being put at risk in the truck; making him do long distance trips and only paying him half the rate. He also refers to withholding his pay whilst he was off sick with stress. He also notes that he has now been threatened with losing his job if he does not hand in a sick note.

115. The respondent wrote to the claimant on 25 September 2018 raising concerns about the claimant not producing his sick note. They made it clear that he needed to follow the procedure on absences otherwise they may have to proceed with disciplinary action against him (page 149 of the bundle)

116. The respondent wrote again to the claimant on 27 September 2018. They acknowledged his email of 26 September and noted the grievances he was raising. They again suggested a meeting to discuss those grievances in early October. They notes the grievances were with regard to putting the claimant's life at risk in the truck when he was told to get back on the road; making him do long distance trips, withholding his pay whilst he was off with stress and threatening his job if he did not hand in his sick note. Mrs Wilson, who sent the letter on 27 September, also enclosed a copy of the grievance procedure. That letter is at pages 150-151 of the bundle.

117. The respondent wrote again to the claimant on 27 September 2018 after he had provided his sick note (page 152 of the bundle). He was then paid his sick pay. The respondent said that the welfare meeting could still proceed.

118. On 2 October 2018 Mrs Wilson wrote again to the claimant to inform him about the welfare meeting. The claimant indicated he was unable to attend. She asked him when would be a good time to reschedule it for.

119. There was then a series of text messages between the claimant and the respondent asking about holiday pay being added to his sick pay. Mrs Wilson said that she would check with HR, but told him she was unable to authorise it whilst the claimant was certified sick (pages 196-197 of the bundle).

120. The respondent wrote again to the claimant on 12 October 2018 noting that he had not attended the welfare meeting on 5 October and had not advised them that he was not intending to attend. A further meeting was suggested with some questions for discussion (pages 155-156).

121. The claimant issued proceedings to this Tribunal on 31 August 2018. He indicated that Mr Hill was making a claim and asked him to be his witness. He stated that Mr Hill was making his own claim (page 4 of the bundle). The claim was for unfair dismissal; deductions from wages; and concerns about disclosures relating to the truck. The claimant was however still employed when he issued the proceedings.

122. The claimant was asked to provide further information regarding his claim. He sent in some further particulars on 22 October 2018, which were copied to the respondent’s solicitors (pages 157-159 of the bundle).

123. In January 2019 there was a series of texts between the claimant and Mr Wilson with a view to trying to resolve the matter in which the claimant indicated that if he was not paid what he was owed he would resign and claim constructive dismissal. The claimant indicated that he had calculated the sums which were owed to him (page 200-201). He also referred to the claim which had been issued by Mr Hill against the company.

124. On 22 January 2019, the claimant resigned from his employment. His letter of resignation is at page 160 of the bundle. In that letter he states that he is resigning because he was underpaid every month and has given the respondent the opportunity to rectify the situation twice and that he was either called an idiot or referred onto the solicitors. He also referred to the fact that the company was also putting his life at risk making him work over the Working Time directive, in a faulty truck. He said he expected to be paid his SSP and holiday pay.

125. In his evidence to the Tribunal, the claimant led no evidence on what led him or triggered him to resign when he did. When he was questioned about the reason(s) for his resignation, he said in evidence that it was because the respondent refused to resolve the issues around his claim for unpaid wages. That is consistent with the suggestions he made about threatening to resign in the emails to the respondent in January.to wages

126. On 24 January 2019 the respondent received confirmation from their insurers with regard to third party repairs and the excess in relation to the accident in which the claimant was involved in June 2018. The excess was £500 (page 161 of the bundle).

127. On 29 January 2019 the respondent wrote to the claimant in which they asked the claimant to reconsider his resignation. They indicated that they are again happy to discuss the matter at a grievance meeting. They made it clear that they would be deducting monies regarding the excess fee in respect of the accident on 26 June 2018 and referred to their right to make deductions (page 163 of the bundle). They also refer to the requirement to return his uniform or face a deduction of £150.

128. The respondent issued the claimant with a payslip from which they initially deducted excess damage and the claimant's uniform. The claimant's original final payslip showed that he was paid at £8.91 for his final month of employment (page 105C of the bundle).

129. However, the claimant then returned the uniform to Mr Lindsay. His payslip was adjusted such that he was paid £158.91. The £150 for his uniform was not deducted (pages 505 and 505B of the bundle).

130. In or around 2018/2019 Mr Hill also brought proceedings before this Employment Tribunal claiming unlawful deduction from wages relating to underpayment of wages. He said in evidence that the issues around this were raised in the proceedings were brought around the summer of 2018. He said that the hearing was to be in January/February 2019. Mr Hill also said that the claimant was going to a witness in those proceedings and provide evidence on Mr Hill's behalf. The claimant confirmed that was the position. Both the claimant and Mr Hill intimated that they had discussed their respective claims with each other and liaised with each other as they were intending to give evidence on the other's behalf.

131. Turning back to the calculation on wages, as indicated above the claimant eventually provided some calculations and documents supporting the sums he was claiming for his second period of employment with the respondent. The respondent's representative did not cross examine the claimant in any detail about any of the calculations made or the documents produced, or effectively dispute the figures as they did not cross examine him on any of the calculations set out in his time sheets, although they were given ample opportunity to do so on several occasions.

132. Firstly, taking the details from the tracker documents and the Scott Schedule produced by the respondent, it would appear from the respondent's own evidence that there are approximately 40-50 journeys for which they have produced the trackers. Of those journeys somewhere close to three quarters appear to have been underpaid by idle and stop times having been deducted. This is noted from cross referencing the actual times on each of the trackers for that journey.

133. The claimant has given us more detailed information relating to each journey and has tried to cross reference this on to the Scott Schedule. He has given us a full breakdown of each journey for each date he is claiming and we accept those figures which were effectively not disputed. However, in those time sheets he has not accounted for any breaks whatsoever, which we do not accept. We consider that he would have taken a break on each day. Without either party addressing this matter, we have had to take a view ourselves on what might be a reasonable break to allocate for each day when he was often driving for long periods of the day. Clearly on some days when he had short runs, he might not have taken a break or only a short break but without either party leading any evidence on this issue we have had to take a broad brush approach to breaks. On that basis, we have attributed a break of approximately 45 minutes to each day. We note from the claimant's time sheets that he is claiming for approximately a total of between 340 – 350 days. He is claiming a total of 771.42 hours over that period. That means he is claiming on average about an additional 2.25 hours a day. If we deduct 45 minutes for each day that means he is claiming approximately 1.5 hours for each day, which equates to 510 hours in total, which is slightly less than three quarters of the journeys, but is not dissimilar to those sums which the respondents themselves acknowledge were deducted by them for stop and idle time.

134. Therefore we prefer the claimant's calculations for the sums claimed for the second period of the claimant's employment. We consider that he was underpaid. It is clear that the claimant was being underpaid even from the respondent's own evidence set out in their Scott Schedule.

135. We therefore accept the claimant's evidence, which is supported by the documentary evidence. We have had to adopt a broad brush approach to this element of the claim as neither party has taken us through any detailed calculation despite both of them having been given the opportunity to do so.

136. In relation to his other monetary claims at paragraph 23 (17) (a) – (l) - he led no evidence in relation to 17(a); (g); (h); or (k). He did not appear to be pursuing these claims. He was unable to provide any particulars in relation to paragraph 17(d) or (e). We note that the uniform (17)(f) was not in fact deducted from his final salary payment

137. This Tribunal has concluded that the evidence from neither the claimant nor the two directors from the respondent, in particular Mrs Wilson, was particularly cogent or at times always credible. The claimant's evidence was at times very disjointed and unclear regarding various matters, including most of his Wages Act claims, and he was unclear about when most of these matters occurred. He seemed to shift from one month/year at a time. His evidence lacked any chronological order as to when things occurred. Mrs Wilson's evidence again was not particularly transparent in that at times she was referring to matters in her own evidence which that were not in her knowledge but matters she had been told but she suggested this was her own evidence , for example in relation to the matter regarding Mr Dallas. Mr Wilson's evidence was also not clear and was not always consistent with Mrs Wilson's evidence as is noted from the supplemental statement of Mrs Wilson. His recollection of some of the events in June 2018 was unclear and inconsistent. His evidence did not address what actually happened on those occasions day. He seemed to simply comment on the matters even though he was one of the people involved. His recollection of events earlier in the claimant's employment appears to be much better even though those events occurred many years earlier.

138. Of the other witnesses Mr Hill's evidence was largely accepted as it was not contested other than in general terms with one question on cross examination. Mr Lindsay, who was in a difficult position as he was the claimant's cousin and an employee of the respondent, gave evidence for the respondent. His evidence was not entirely consistent with Mrs Wilson's evidence, for example Mrs Wilson gave evidence about a deduction from wages which had been made when Mr Lindsay was repairing a vehicle. Mrs Wilson suggested the respondent did not make deductions for such matters.

139. The other witnesses largely gave evidence according to for whom they were giving evidence. We note that the drivers on behalf of the respondent said that rest breaks were given; the claimant's witnesses all effectively said that rest breaks were not allowed. We were largely unable to rely particularly heavily on any of the evidence in relation to those witnesses because it really did depend on for whom who they were giving evidence. We considered all of the oral evidence but were often were left to balance our decision based on the documentary evidence.

140. Conclusions

141. In relation to the complaint of racial harassment, this Tribunal does not consider that there is sufficient evidence either way to conclude whether there was an act/acts of race discrimination. There was a lack of evidence for the incidents. The respondent effectively cannot recall the incidents which were many years ago, whereas the claimant appears to recall the incidents in graphic detail. He quotes them almost verbatim, yet at no stage did he raise any of these matters during the course of his employment; nor after the incidents arose; nor indeed in any correspondence between himself and the respondent at any stage until he issued these proceedings. Even in his original claim form there is no detail about any of these allegations.

142. The claims are considerably out of time. In relation to the first allegation of race discrimination, it occurred whilst the claimant was employed with the respondent during his first period of employment. He left his employment three months afterwards and did not bring a claim.

143. In relation to the second allegation, although the claimant suggests that he can recall exactly what was said, he cannot recall the exact date when this was said. This raises concerns about how he can be so clear about what he alleges was said. It raises questions about his credibility in relation to these incidents.

144. This alleged incident occurred sometime in 2017, yet be did not bring a claim until August 2018, at least a year after the incident in question.

145. This Tribunal does not consider that the claims are part of a continuing course of action. There is insufficient evidence to conclude whether the incidents occurred, but even if they did occur they are clearly ad hoc incidents even on the claimant's own evidence. The Tribunal note that in relation to the first incident the claimant appeared to have had no difficulty in remaining in the respondent's employment; nor after leaving his employment returning to work for the respondent again. That would not be consistent with him having felt that his dignity was violated or indeed that the respondent had created an intimidating, hostile, degrading, humiliating or offensive environment for him.

146. In relation to the second incident, the claimant does not raise any matters about this incident until he leaves his employment. In the meantime, he then appears to continue to work with the respondent without any issue.

147. The respondent for their part cannot really recall the incidents. Mrs Wilson indicates that Mr David Young, one of the alleged perpetrators, has in fact since died and she could not discuss the incident with him.

148. The Tribunal therefore does not consider that it is just and equitable to extend time in relation to these complaints. These were ad hoc incidents, which were never raised at the time and happened years ago. There would be substantial prejudice to the respondent in extending time, not least since one of the alleged perpetrators has died. Therefore, those complaints are not well-founded and are hereby dismissed.

149. In relation to the complaint of constructive unfair dismissal, the claimant relies upon various alleged breaches of contract as referred to in the list of issues referred to above at paragraph 23 (8) (a) - (t). Most of these alleged breaches occurred months and years before – he even relies on matters arising from his first period of employment (a). He effectively accepted most of these breaches by carrying on working for the respondent for all that period of time, in particular paragraphs 23 (8) (a) – (i). Therefore, the Tribunal could not take those incidents into account as the claimant has effectively affirmed the contract of employment in the meantime. They are not continuing acts of discrimination except potentially paragraphs23 (8) (c) and (d).

150. In relation to paragraph 23 (8) (c) the Tribunal does not find that the claimant was regularly given long shifts. The tracker information shows that he was given some long shifts. Both the claimant and Mrs Wilson said that sometimes he liked doing long shifts and sometimes he did not. We will comment further on 23 (8) (d) in due course.

151. In relation to paragraph 23 (8) (q), no evidence was relied on in relation to that and it was unclear when that occurred.

152. In relation to paragraph 23 (8) (r) the claimant was paid his sick pay when he submitted his sick notes. The reason why he was not paid his sick pay was because he not, as required, produced a sick note. That would not amount to a breach of contract.

153. In relation to paragraph 23 (8) (t), we find that the claimant was allowed rest breaks as stated in the trackers.

154. In relation to the non- payment of wages under paragraph 23 (8) (d) and the issues raised regarding what happened in June 2018, we consider that they could amount to breaches of contract.

155. It is not clear that the claimant resigned because of paragraph 23 (8) (s). In any event, we prefer Mr Wilson's evidence in that regard as he was required to attend to pick up the keys for the truck and instructions for the delivery for that day and he had to go to the claimant's home to do so. We do not think it was harassment for him to have attended at the claimant's home to collect those items.

156. We note in the emails sent in January 2019, the claimant threatened to resign unless the respondent settled his claims.

157. The claimant's letter of resignation indicates that his reason for resigning did not cover most of the matters at paragraphs 23 (8) (a) – (t) of this claim. Indeed, the letter of resignation simply referred to issues about being underpaid and because of the incident with the trucks in June 2018.

158. In his witness statement the claimant did not indicate what triggered him to resign. It is interesting to note that the claimant led no evidence on what led him to resign. When the claimant was asked in evidence about what led him to resign, he said that he resigned because the respondent did not resolve issues with him and that he was not paid the monies he was claiming for unpaid wages.

159. Around this time, the claimant was liaising regularly; providing support/witness evidence in Mr Hill's Employment Tribunal which had been brought for a similar reason relating to an underpayment of wages. The Tribunal note that Mr Hill had also raised similar claims at the same time.

160. The Tribunal note that the claimant did not resign until six months after the incident in June 2018, effectively over six months after he went on sick pay and around the time his sick pay ran out.

161. We therefore do not consider that the claimant resigned because of any of the breaches of contract, either the underpayment or because of the incident in June 2018, but because the respondent did not resolve his claim for unpaid wages unlawful which he was pursuing in this Tribunal, which was running in tandem to a degree with the similar claim being pursued by Mr Hill in Employment Tribunal as well.

162. We therefore consider, having tried to analyse the reasons for his resignation, from the evidence that he has given to the Tribunal and his letter of resignation, that it was not because of any of these matters that he resigned but because the respondent would not resolve his claim and settle with him his claim of unpaid

wages. It should be noted that he did not actually provide details of what he was claiming in relation to that claim or how he calculated it detail until the penultimate hearing day of these proceedings; some 2 and half years later. It would have been difficult for the respondent to actually try and settle the claim because the claimant had not produced any evidence in support of that claim.

163. In any event, the Tribunal consider that, even if the claimant resigned because of the incident in June 2018 and the deduction from his wages, the last deduction from his wages was in June 2018 and not in January 2019 as by that stage he was on sick pay.

164. Therefore the claimant, by accepting sick pay over a period of in excess of six months, effectively affirmed the contract. He therefore accepted any previous breaches of contract by continuing to accept sick pay.

165. The Tribunal reminded itself that the burden of proof is on the claimant and the claimant has not met his burden of proof to prove that the reason for his resignation was because of the breaches he relies upon. The tribunal accepted what the claimant said in his evidence to the Tribunal to be the reason for his resignation, which was not because of the various breaches upon which he now relies. Further, in any event this Tribunal finds that the claimant did affirm the contract in the meantime by accepting sick pay over a substantial period of time.

166. The Tribunal does not consider that the claimant suffered any detriment as a result of making a qualifying disclosure in 2017. The claimant has led no evidence in that regard.

167. However, the Tribunal has gone on to consider whether or not the claimant did make a disclosure on 26-28 June 2018. The claimant raised issues with the respondent, principally Mr Wilson, with regard to defects to a truck which he was driving. He raised concerns about health and safety, namely his health and safety, and that of other users.

168. This Tribunal considers that those verbal comments made to Mr Wilson did amount to disclosures. We accept that the claimant did have a reasonable belief that the truck was defective on those three dates. We also find that he raised concerns verbally on each of those dates with Mr Wilson on 26, 27 and 28 June 2018.

169. The respondents themselves accept that these were old vehicles. Indeed it is noted that the vehicle was repaired and that there was a problem with the steering pump. The respondents got a bill for that a month later page 144.

170. We accept that the claimant had a reasonable belief that there was a defect to the truck. He had been driving it on those three occasions. He had raised those concerns three times on three consecutive days.

171. We note that, although he had raised concerns about the vehicle on three separate occasions, he was on each occasion asked to carry on driving the truck. On 26 June he was told to carry on driving the truck to do the delivery by Mr Wilson. On 27 June 2018 he was told the truck was OK, although he still had concerns, but he was still required to continue to drive that truck that day and complete his

delivery. We prefer the claimant's evidence to that of Mr Wilson that it was not up to him to decide whether or not he did the delivery. He was clearly required to do so. The claimant also raised the matter again after the delivery on 27 June 2018 and again the following day on 28 June 2018.

172. We prefer the claimant's evidence about his discussions with the respondent and, particularly Mr Wilson, regarding the defects to the truck. Mr Wilson himself acknowledges that the claimant did, on at least one occasion, raise his concerns about the truck with him. Mr Wilson did not suggest that the claimant regularly raised concerns about defects in trucks, so there is no reason why the claimant would do so on these occasions, unless he had concerns and was worried about driving the truck.

173. We consider that the claimant did raise a qualifying disclosure which amounted to a protected disclosure under section 43B of the Employment Rights Act 1996. That disclosure related to concerns about the defective truck on three separate occasions on three separate days in late June 2018. He raised those concerns with his employer.

174. The Tribunal does not however consider that was the reason for his dismissal. The claimant himself did not rely on that as the only reason for his dismissal. We do not, on the basis of the claimant's own evidence, consider that that was the principal reason for his dismissal, which led him to resign from his employment. It may have been one of the reasons, but on his own evidence, he said that the reason he resigned in January 2019, some 6 months after the incident in June 2018, was because the respondent would not settle his claim for outstanding wages.

175. It should be noted that the claimant would not necessarily have been required to drive that truck on his return to work in any event. Over 6 months had passed and no evidence was led about what had happened to the truck in that time and what, if any, further repairs might have been undertaken. At that stage, the claimant had been off work for over six months. The claimant himself led no evidence to suggest that he would be required to drive that truck again.

176. We do however think that the claimant suffered a detriment because for those three days he was required to drive a truck which he reasonably believed to be defective. The respondent said the truck was repaired on the first day but the claimant raised concerns about it on the following two days and believed it to be defective and dangerous. We therefore consider that the detriment which he suffered was limited to the requirement to have to drive that truck for those three days. The Tribunal will list a further remedy hearing to consider that claim of detriment.

177. The Tribunal does not consider the claimant suffered a detriment to his sick pay for making that disclosure. His sick pay was not paid because he had not submitted his sick notes. Equally he did not suffer a detriment by being threatened with dismissal. He led no evidence to suggest that he was threatened with dismissal for making those disclosures in June 2018.

178. In relation to the claimant's complaints of unlawful deduction from wages, the Tribunal finds as follows:- those complaints at paragraphs 23 (17) (a), (d), (e), (f), (g) , (h) and (k) are not well-founded and are hereby dismissed - the claimant either withdrew those claims or led no evidence in support of them; those complaints are

paragraphs 23 (17) (c) and (l) are also not well founded are hereby dismissed. The respondent was entitled to deduct those monies under the terms of the respondent's contract of employment on which he signified his agreement in writing. The claimant's contract however does not entitle the respondent to deduct monies in relation to time sheets so his claim under paragraph 23 (17) (i) succeeds. In relation to the claim for phone charges under paragraph 23 (17) (j), the Tribunal finds that those charges did relate to business use – the claimant was reporting the accident to his truck on 26 June 2018 and concerns about the truck at the end of June. Those sums cannot be deducted from the claimant therefore under his contract of employment. In relation to the claim under paragraph 23 (17) (b) we find that deductions were made from the claimant's wages. We prefer the claimant's evidence, which was supported by documentary evidence. He is entitled to 510 unpaid hours from November 2016 until June 2018 at the rate of £8.00 per hour amounting to £4080. According the claimant's complaint for unlawful deductions from wages in respect of paragraphs 23 (17) (b), (i) and (j) are well founded and the claimant is awarded the total sum of £4114.36. The respondent is ordered to pay those sums to the claimant.

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Employment Judge Martin

Date 14 May 2021