Case No: 2414072/2021

EMPLOYMENT TRIBUNALS

Claimants: Mr G Purcell

Respondent: Castle Cement Ltd

Heard at: Manchester (by CVP) **On:** 15th & 26th July & 12 August 2022

Before: Employment Judge Newstead Taylor (sitting alone)

REPRESENTATION:

Claimants: Mr G Purcell (In person)

Respondent: Miss Flanagan (Solicitor)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. By consent the respondent's name is amended to Castle Cement Ltd.

2. The respondent has made unlawful deductions from the claimant's wages and is ordered to pay to the claimant the agreed gross sum of £6,464.46 in respect of the amount unlawfully deducted.

REASONS

Introduction:

1. The respondent is a leading supplier of heavy building materials to the construction industry. On 16 September 1996, the claimant commenced employment with the respondent as an HGV driver. The claimant's employment is continuing. On 1 July 2021, the claimant was placed on restricted duties due to an injury. This claim is concerned with the wages the claimant received (and is continuing to receive) whilst on restricted duties.

The Tribunal Hearing:

2. The hearing took place on 15th July 2021.

3. The claimant represented himself. He gave evidence, was cross-examined and answered questions from the Employment Tribunal ("the Tribunal").

4. The respondent was represented by Miss Flanagan. Mrs Kerry Simpson, the respondent's Distribution Manager (North), gave evidence on behalf of the respondent. She was cross-examined by Mr Purcell and answered questions from the Tribunal.

5. A joint bundle of 205 pages had been prepared for the Tribunal. In addition, there was a witness statement comprising 18 paragraphs from Mrs Simpson and a witness statement, comprising two emails dated 29 June 2022, from the claimant.

6. At the start of the hearing, the respondents applied for permission to include three further documents in the bundle. First, a sick note for the claimant dated March 2019. Second, a sick note for the claimant dated July 2019. Third, the respondent's job description for an HGV driver. The claimant did not object to the inclusion of any of these documents. I considered the respondent's application in light of Rule 2 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("the Rules"). I took into account that the Case Management Order ("CMO") directed disclosure of documents by 30 March 2022 and there was no good reason for the late disclosure. The two sick notes were documents known to the claimant, having

been provided by him to the respondent. However, the job description was new to the claimant. It was a current job description, not the job description that applied in 1996. Accordingly, its relevance to the proceedings was questionable. Therefore, I permitted the two sick notes to be included but refused the application in respect of the job description.

7. During the claimant's evidence, it became apparent that the claimant's bundle was missing 4 pages that were included in the Tribunal's and the respondent's bundles. These 4 pages comprised the contract of employment between the parties, dated 16 September 1996, and a letter from the respondent to the claimant dated 6 October 2006. The CMO provided for disclosure of documents by 30 March 2022, a draft bundle index by 20 April 2022 and a hard copy bundle by 4 May 2022. These additional pages were provided by email to the claimant on 28 June 2022, being significantly late and 1 day before the extended deadline for witness statements. For reasons that were far from clear, the respondent had not applied for permission, either from the claimant or from the Tribunal, to include these late documents in the bundle. An application was made during the hearing. The claimant agreed to their inclusion. In light of the pivotal nature of these documents and having considered Rule 2 of the Rules, I gave permission for both of these documents to be included in the bundle and afforded time for the claimant to consider them. The claimant confirmed that he had had sufficient time to consider these documents and was content to proceed with the hearing.

The Claims & Issues:

8. At the outset of the hearing, it was agreed that the issue for consideration was whether or not the respondent made unauthorised deductions from the claimant's wages during the period he was placed on restricted duties, being 1 July 2021 – to date and continuing, and, if so, how much was deducted?

9. Specifically, it was agreed that this involved consideration of the issues and sub-issues set out in the attached List of Issues.

Findings of Fact:

10. I make the following findings of fact in this case. These findings are made on the balance of probabilities and the claimant bears the burden of proof.

11. The respondent is a leading supplier of heavy building materials to the construction industry. The respondent has a number of sites around the country. The duties of the respondent's HGV drivers include bulk tankers, packed product tankers ("PPT") and animal waste. Albeit, not all employees are trained in handling animal waste and the facilities at the respondent's sites vary, for example the sites at Avonmouth and Bells Hill do not have any PPT facilities and, consequently, employees at these sites do not undertake PPT duties.

12. On 16 September 1996, the claimant commenced employment with the respondent as an HGV driver. The claimant received a copy of the Drivers Handbook, which is a collective agreement between the respondent and the Transport and General Workers Union ("the Union"), and signed the employment contract.

13. The claimant's employment contract provides as follows:

"4. Remuneration

Your annual wage is given in Section 1e above and is paid in accordance with Section 1 of the Driver's Handbook.

Payments arising under the system of Performance Related Pay are made in accordance with the rules and schedules included in the Driver's Handbook...

Monthly paid employees are paid in equal instalments by direct transfer to their nominated bankers on 28th day of each calendar month or on the preceding work day if the last day falls on a Saturday, Sunday or Public Holiday.

5. Hours of Work

For further clarification see the Drivers Handbook

6. Holiday Leave

... Entitlement to annual holidays in subsequent years is detailed in the Drivers Handbook together with the details of relevant entitlements on termination.

8. Absence due to sickness or for other unplanned reasons

... Annual wage payments during periods of absence for other unplanned reasons e.g. bereavement, jury service, etc may continue subject to the provisions in the Drivers Handbook, Company Policies and/or Statutes...

10. Obligations

> *1. You will carry out all legitimate instructions including those required to perform tasks other than those normally associated with driving if circumstances allow or dictate.*
>
> *2. You will complete each journey in the shortest possible time but will do so safely and acting strictly within the requirements of the Transport Act 1968 and any subsequent amendments or Legislation.*
>
> *3. You will not while employed by the Company or thereafter, use or divulge to any person information of a confidential nature relating to the business of the Company or any associated company except where this is necessary for the purposes of carrying out your duties whilst you are employed by the Company.*
>
> *4. The Company's fleet is noted for its smart appearance and its drivers for high standards of courtesy on the road and on customers premises. You have a duty to uphold these standards.*

11. Grievance and Disciplinary Rules and Procedures

..you should follow the steps detailed in the Procedures included in the Drivers Handbook...

12. Health and Safety at work

Your attention is drawn to the Company's Health and Safety Policy particularly in respect of Driving Duties prepared in accordance with the Health and Safety at Work etc Act 1974 and subsequent amendments and you are required to comply with the policy. A copy is retained by the local Personnel Department.

If the Company shall so request, you will agree to be examined by a registered medical practitioner at the Company's expense, at any time during your employment. You will authorise the medical practitioner to disclose the results of such an examination to the Company's medical advisor.

Reference should also be made to the Driver's Handbook...

14. Change of Terms

Any agreed changes in these terms or in the documents referred to will be notified to you or otherwise recorded for reference within one month of the changes."

14. In or around October 2007, the claimant received an updated copy of the Driver's Handbook ("the 2007 Drivers Handbook") which stated as follows:

"DRIVERS/AUXILIARIES HANDBOOK

Parties to this agreement/handbook are Castle Cement Limited (hereafter known as "the Company") and the Transport and General Workers Union (hereafter known as "the Union.")

The Handbook will be supplied to all Drivers and Auxiliaries of the Distribution Division within Castle Cement Limited and supplements the Statement of Terms of Appointment by providing additional details of Company benefits and administrative arrangements.

Acceptance for employment in any of the jobs covered by this handbook confirms all the rights it embodies. Similarly acceptance/employment in any of these jobs carries with it acceptance of this handbook in total.

The Company is totally committed to the safety and wellbeing of all its employees. A stated objective is to achieve the best safety record in the industry and therefore the Company will endeavour to provide the necessary resources to assist in reaching this goal...

1. Remuneration...

1.4 Payments to employees taking part in Industrial Action, official or unofficial and whether or not that action constitutes a withdrawal of labour will cease. The amount due in any period including such action will be pro rata to the number of complete working days free of action.

In the event that employees are prevented from working normally, for any reason, the Company reserves the right to suspend payment of wages, having given, in the prevailing circumstances, appropriate notice of intention to do so.

1.7 This agreement will run from 1st April 2007 until 31st March 2009.

2. Working Hours & Shift Patterns ...

2.15 Restricted Duties

Drivers requesting restricted duties will be offered the opportunity to move to Basic day shift. Basic day shift will be Monday to Friday working with the proviso that up to 10 weekend shifts per year may be required to be worked.

Where a weekend shift is worked then a lieu date will be given in compensation.

The effects on operational efficiency will dictate the number of people that the company can accommodate on the shift.

There will be two categories

Short-term restrictions- no longer than three months. Subject to Distribution manager's approval. No deduction of

premium payments will be made during this short term restriction.

Long- term restrictions- Indefinite time period- Payment will be at Basic Rate

Rules

A) Only after company doctor assessment or provision of documentary proof of need

B) Subject to six monthly review

C) The restrictions on driving duties will apply on all shifts including weekend shifts."

15. On 6 October 2006, the respondent confirmed the claimant's move from Flexible Days/Nights to Flexible Days with effect from 9 October 2006. Flexible Days involved a 10-week shift pattern representing a maximum of 48 shifts in any 10-week period. The role could involve bulk tankers, PPT and animal waste, albeit the latter was a small part of the respondent's overall business. Also, the role could involve nights out, being nights sleeping in the truck, with a commensurate night out payment.

16. On 31 March 2009, the 2007 Drivers Handbook expired. Despite efforts made by, among others, the claimant whilst acting as a Union representative, no updated Drivers Handbook was ever agreed and, consequently, none was provided to the claimant and other employees. No express agreement was reached that the 2007 Drivers Handbook would continue in full force and effect after its expiry date. Nonetheless, after 31 March 2009 the respondent and its employees continued to refer to and rely on the 2007 Drivers Handbook and new drivers were provided with the 2007 Drivers Handbook.

17. In or around 2015, the respondent decided to outsource packed product work and, consequently, reduce its PPT fleet. Since July 2021, the respondent has had 39 bulk tankers, 7 PPT (reduced from 20 since 2015) and 3 MBMs. The respondent has also had 47-day drivers and 11-night drivers. Out of the 47-day drivers, 5 (including the claimant) are on restricted duties. The remainder are on Flexible Days. On average per week, the respondent has 31 bulk transfer jobs and 4 PPT jobs. Therefore, the majority of the work for the respondent's HGV drivers is bulk tanker work, albeit there remains a small chance that some PPT work might be required.

18. In or around February 2019, the claimant suffered a rotator cuff injury. The cause of the injury is disputed, but in any event is of no relevance to this claim. In 2019, the respondent was aware that the claimant regularly attended physiotherapy.

19. On 12 March 2019, the claimant obtained a sick note stipulating that for 8 weeks he *"Requires lighter job than usual until current situation with shoulder settles."*

20. The claimant was absent from work from 31 May to 29 July 2019.

21. On 15 July 2019, the claimant obtained a sick note for the period 15 July – 29 July 2019. This sick note stipulated that the claimant required *"Light duties once returned to work until result of MRI scan is known."* Thereafter, the claimant was advised that an MRI scan was not required as the physiotherapist knew what the problem was.

22. On 29 July 2019, the claimant had a Return-to-Work interview with Mr Mark Riley, the claimant's Manager. The respondent's Return-to-Work interview form recorded that the claimant was not fit to return to normal duties. In light thereof, Mr Riley offered the claimant the choice of working solely on either bulk tankers or PPT. Due to his shoulder injury, the claimant chose bulk tankers as he had difficulty operating the curtain sided trailers used in PPT. This

election was not time limited. Specifically, it was not limited until the claimant had had an MRI scan. For the avoidance of doubt, Mr Riley did not raise restricted duties as set out at Clause 2.15 of the Driver Handbook, a move to a Basic day shift or a reduction in pay to Basic Rate. Instead, the respondent's Return to Work interview form recorded that no pay would be withheld.

23. Between 29 July 2019 and May 2021, the claimant worked Flexible Days solely on bulk tankers without any reduction in wages. For the avoidance of doubt, to the respondent's knowledge and expressly with the respondent's prior agreement, the claimant did not undertake any work on PPT in this period (approximately 22 months) and was paid his full wage.

24. In or around March 2021, following the acquisition of Castle Cement Ltd by Hanson, the respondent asked the claimant to work on PPT. The claimant informed the respondent that he would need to see if his shoulder injury had healed.

25. On 21 May 2021, the claimant was assessed by Occupational Health ("OH"). OH concluded that:

"Mr Purcell tells me that he can usually manage pretty well with his normal daily activities, and indeed working on "Tankers", but given that he still feels there is a problem with his shoulder he is concerned that attempting to undertake duties on the packed product trailers with curtains, specifically on the new style trailers which require him to use both arms, will worsen his shoulder condition. Given that there has been a diagnosed rotator cuff tear, that is still causing some symptoms, this is a very valid concern and indeed at some stage it is almost inevitable that undertaking such duties will cause a more significant injury and so my recommendation is that he does not undertake such duties....

Fitness for Work Advice and Recommendations

Overall therefore although Mr Purcell is fit for the range of duties he has been undertaking for the last couple of years he is not fit to work on packed products, as it would require him to use the

curtained trailers. This restriction should be regarded as long term..."

26. From at least 15 April 2021, the respondent paid the claimant on the 15th of each month.

27. On 28 May 2021, the claimant and Mrs Simpson had a face-to-face meeting in which Mrs Simpson confirmed that as a result of his injury the claimant would move to restricted duties with payment at the basic rate from 1 July 2021. However, if the claimant wished to retain his allocated work vehicle, he would need to continue to do nights out.

28. Between 2 June 2021 and November 2021, the claimant raised two grievances in respect of the shift change and the reduction in his wages. The claimant attended grievance hearings. On 29 July 2021, the respondent dismissed the claimant's first grievance stating that, in light of the OH Report dated 21 May 2021, he had a long-term restriction and had been moved to Restricted Duties with payment at the basic rate. As to the second grievance, the respondent undertook further investigation. On 20 August 2021, the respondent relied on Clause 2.15 of the Driver's Handbook and dismissed the claimant's second grievance. The claimant appealed the outcome of the second grievance. The appeal hearing was delayed in order to obtain up-to-date medical evidence. The Tribunal understands that the respondent's original decision has been upheld, but has not seen any confirmatory documentation.

29. On 21 June 2021, the respondent emailed to the claimant Shift Pattern Change Paperwork. On the same date, the claimant confirmed that he would not sign the paperwork until he had received a copy of his original contact and spoken to ACAS.

30. On 1 July 2021, the claimant was moved to restricted duties which resulted in a decrease in his 2021 annual wages from £41,171 to £34,980.

31. On 13 October 2021, the claimant commenced these proceedings. On 12 November 2021, the respondent completed the ET3 and submitted separate Grounds of Resistance.

32. On 13 November 2021, the claimant attended a face-to-face appointment with OH. OH concluded that he was fit to drive the tankers. He should be able to gradually return to driving the curtained HGVs following physiotherapy, but, presently, he should avoid driving the curtained HGVs.

33. On 8 February 2022, the claimant had an online appointment with OH. The OH Report concluded that, once the claimant had been signed off by the physiotherapist, he could gradually introduce the curtained HGVs. Further, OH confirmed that the claimant could be signed off by the physiotherapist without a review by OH.

34. On 22 April 2022, the claimant had a face-to-face appointment with a physiotherapist who recommended 6 sessions of physiotherapy and advised that *"...Mr Purcell is currently unfit for certain aspects of his role. The physiotherapist has advised that Mr Purcell should avoid the curtain activity, but Mr Purcell advised that the role had already been modified accordingly."*

35. On 8 July 2022, the physiotherapist signed-off the claimant.

The Law:

i) Unlawful Deduction from Wages:

36. The right not to suffer an unauthorised deduction from wages is contained in section 13 (1) of the Employment Rights Act 1996 ("ERA") as follows:

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

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

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

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

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

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

37. The term wages is defined in s.27 (1) ERA as *"any sums payable to the worker in connection with his employment."* Salary comes within the definition of wages.

38. An employer has made a deduction *"Where the total amount of wages paid on any occasion by the employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion" (S.13 (3) ERA.)*

39. A deduction is unlawful unless it was authorised. A deduction can be authorised if made by virtue of a statutory provision (s.13 (1) (a) ERA), made under a relevant provision of the worker's contract (s.13 (1) (a) ERA) and / or the worker has previously signified their agreement to the deduction in writing (s.13 (1) (b) ERA.)

ii) <u>Collective Agreements:</u>

40. What is a collective agreement? The statutory definition of a collective agreement is found in s.178 (1) of the Trade Union and Labour Relations (Consolidation) Act 1992. This states that *"...In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified [in s.178 (2)]..."* In short, it is an agreement made, in general, between an employer and a trade union ("TU") which sets out the procedure governing the relationship between those parties and the terms and conditions of employment of those covered by that agreement.

41. A collective agreement is not legally binding as between the employer and the TU. However, the terms of a collective agreement can be legally binding as between an employer and employee if they are incorporated, either expressly, impliedly or by way of agency, into the individual employment contract. Further, the fact that a collective agreement has been incorporated does not mean that all of the terms will form part of the individual employment contract. Whether a particular term has been incorporated is a question of law. To be incorporated, regard must be had to the contractual intention of the parties and the terms must be apt for incorporation, ***Griffiths v Buckinghamshire County Council*** **[1994] ICR 265.** Once incorporation is established, construction of the agreement is then a legal question. When interpreting a collective agreement, the objective is to *'elicit the*

parties' objective intentions from the language which they used' ***Adams and ors v British Airways plc 1996 IRLR 574, CA***.

42. Any such terms as are incorporated remain part of the individual employment contract until varied by agreement. They cannot be altered unilaterally unless the contract expressly provides to the contrary; ***Robertson v British Gas Corporation*** **[1983] ICR 351.** Also, in the absence of an express term prohibiting oral variation, a mutually agreed variation can be oral; ***Rock Advertising Limited v MWB Business Exchange Centres Ltd*** **[2018] UKSC 24.** Further, an implied variation accepted by both parties can be inferred by conduct; ***Armstrong Whitworth Rolls v Mustard*** **[1971] 1 ALL ER 598, DC.**

43. In ***Framptons Ltd v Badger*** **EAT/0138/06,** the Employment Appeals Tribunal considered whether or not the employer and employee remained bound by the terms of a collective agreement where that agreement had terminated due to the effluxion of time. The EAT held that the collective agreement which had been incorporated into the employees' employment contracts continued to bind the employer and employee even after the collective agreement had expired for the following reasons:

"[39] *We agree with his submission. The tribunal had plenty of evidence to justify its analysis that the behaviour of the parties from November 2002 demonstrated that a Collective Agreement was still in force. We would prefer it to be seen as a variation of the original agreement by conduct, continuing the original agreement, but nothing turns on whether it is seen in those terms or whether there is deemed to be a new Agreement on precisely the same basis. This does not mean, as Mr Roy at one stage submitted, that the courts are construing the terms of the contract by what happened after its formation. Rather, it is recognising that it is always open to the parties to vary the contract (or in this case the Collective Agreement) after it is has been made. Here, even if the Collective Agreement on its proper construction did envisage the agreement terminating after two years, the parties can by their conduct demonstrate an intention to waive that limitation and continue to respect and*

apply the agreement. That is what the tribunal found occurred here and we consider they were fully entitled to reach that conclusion.

[40] *Strictly that is enough to determine the appeal, at least with respect to the weekly workers, but we also deal with an alternative way in which Mr Brown put his submission and which indeed was one of the ways in which the tribunal found that the terms had been incorporated. So far, we have upheld the tribunal's conclusion on the basis that the Collective Agreement did in fact continue. But the other argument advanced by Mr Brown is that strictly it does not matter whether it did or not, since the tribunal was also correct to find that the terms continued to be incorporated into the contracts of employment even after the termination of the Collective Agreement.*

[41] *We also agree with that alternative way of putting the case. As we have said, the Collective Agreement can continue to be the source of contractual terms well after the Collective Agreement has ended, as the Robertson case illustrates. There is nothing strange or unusual in that. If one focuses on the individual contract, there is, in our view, no difficulty in saying that the parties must have intended that individualised terms would continue to take effect even after the Collective Agreement had either run its course or been terminated by one of the parties. In our judgment, it could not sensibly have been envisaged that once the Collective Agreement had ceased, the individual contract would simply be an empty shell, bereft of any terms save for those minimum terms specified in the written statement. There is no reason in those circumstances why the relevant terms, including these enhanced redundancy rights, should not continue to take effect. This is especially so where they have for so long been part of the contracts of those who worked in this company. The notion that the individual parties would have understood that if the collective parties chose to set a time limit to the terms of a Collective Agreement then this would in turn have the effect of removing altogether the contractual rights which the employees had for so long enjoyed seems to us wholly unrealistic. It is not the real world in which employees and employers operate. They would not have intended, in other words, that the time limit found in the agreement should itself be incorporated into the contract of employment. Mr Roy is right to say that the tribunal do not analyse the matter in quite that way, but we think that is essentially what they have found."*

44. The EAT in ***Framptons Ltd v Badger*** **EAT/0138/06** summarised the principles relating to collective agreements as follows:

"[30] *It seems to us that the following principles can be gleaned from these cases. First, employees do not derive rights directly from the Collective Agreement. The parties to that agreement are the employer and the union, and (save possibly in very exceptional and limited circumstances) it is generally accepted that the union does not act as agent for its members*

[31] *Second, there is a presumption that the Collective Agreement is not intended to be legally enforceable. That is now contained in statute: see s 179 of the Trade Union and Labour Relations Act 1992. However, the rights (and obligations) found in Collective Agreements can bind employer and employee by being incorporated into the individual's contract of employment. This is so even though the terms of the Collective Agreement itself are not legally binding as between the collected parties.*

[32] *Third, that incorporation can operate either expressly, such as for the weekly operatives in this case, or by implication. In order to determine whether that has occurred, it is necessary to focus on the relationship between the employer and employee and not on the relationship between the employer and the trade union.*

[33] *Fourth, not all terms typically found in a Collective Agreement will be incorporated. That is so, even where the contract of employment ostensibly incorporates all the terms from the Collective Agreement. The terms must, by their nature and character, be suitable to take effect as contractual terms. Some collective terms will not do so because, for example, they are too vague or aspirational, or because their purpose is solely to regulate the relationship between the collective parties.*

[34] *Fifth, the terms of a Collective Agreement may continue to operate and bind the parties to the individual contract even when the Collective Agreement has been brought to an end, and indeed even after the employer has withdrawn recognition from the union. In each case it is necessary to construe the terms of the individual contract to determine whether the Collective Agreement continues to have that normative effect even after it has ceased to be in operation.*

[35] *Sixth, there will be a very strong presumption that the parties to the individual contract will have intended that terms should continue to be derived from the Collective Agreement, even after that agreement has ceased to have effect, if the consequence of not so doing is that there would be no binding contractual terms at all."*

Discussion & Conclusions:

45. First, I must determine whether or not the Drivers Handbook was incorporated into the claimant's employment contract. I note that there were two versions of the Drivers Handbook. The 1996 version and the 2007 version. The 1996 version was provided to

the claimant at the commencement of his employment. No copy of the 1996 Drivers Handbook was before the Tribunal. The 2007 version was provided to the claimant in 2007. I also note that the claimant accepted that both versions of the Drivers Handbook had been incorporated.

46. As to the 1996 Drivers Handbook, I find that it was expressly incorporated into the claimant's employment contract. Primarily, by the numerous references to the Drivers Handbook in the claimant's employment contract, as detailed at paragraph 13 above. These references are not just passing references, but specifically refer the claimant to the Drivers Handbook for the full terms and conditions of his employment. Accordingly, the claimant was given reasonable notice of the Drivers Handbook and was, in fact, provided with a copy. Secondly, the opening statement to the Drivers Handbook, as detailed at paragraph 14 above, provides that acceptance of employment in any of the jobs covered by the Drivers Handbook carries with it acceptance of the Drivers Handbook in total. The claimant was provided with the Drivers Handbook, signed the employment contract and was employed as an HGV driver. In all the circumstances, I am satisfied that the 1996 Drivers Handbook was incorporated into the claimant's employment contract.

47. As to the 2007 Drivers Handbook, the claimant's employment contract does not expressly state that the Drivers Handbook as amended is incorporated into that contract. However, Clause 14 of the employment contract deals with change of terms, as detailed in paragraph 13 above, and provides that any agreed changes in the documents referred to will be notified to the claimant or otherwise recorded for reference. In or around October 2007, the claimant received the 2007 Drivers Handbook. Accordingly, the claimant was duly notified of the updated Drivers Handbook. The claimant accepts that the 2007 Drivers Handbook was incorporated into his employment contract from October 2007. I agree.

48. Second, I must determine whether or not the incorporation of the 2007 Drivers Handbook survived the expiry by effluxion of time of that document on 31 March 2009. I find that it did. In reaching this conclusion I have been greatly assisted by the EAT case of *Frampton Ltd v Badgers*, which is binding on me, but was not cited to me at the hearing.

49. In accordance with *Frampton Ltd v Badgers at §39- 40*, I am satisfied that the behaviour of the parties from 31 March 2009 to date demonstrated that a collective agreement was still inf force. In particular, I refer to and rely on the fact that negotiations for a replacement Drivers Handbook had not been successful. The respondent and its employees continued to refer to and rely on the 2007 Drivers Handbook and new employees were provided with the 2007 Drivers Handbook. Therefore, the parties by their conduct demonstrated an intention to waive the duration clause and continue to respect and apply the 2007 Drivers Handbook, whether by variation of the 2007 Drivers Handbook by conduct and / or by way of a new agreement on the same terms as the 2007 Drivers Handbook.

50. Further or alternatively, the 2007 Drivers Handbook remained the source of the contractual terms as between the claimant and the respondent after it had ended as it had been incorporated into the claimant's employment contract, see *Frampton Ltd v Badgers at §*41 quoted at paragraph 43 above. It is unrealistic to think that the claimant and the respondent intended that on termination of the 2007 Drivers Handbook the employment contract would be gutted leaving only its bare bones. In short, the time limit in the 2007 Drivers Handbook was not itself incorporated into the claimants' employment contract. This means that the 2007 Drivers Handbook continued in full force and effect as between the claimant and the respondent until varied in accordance with Clause 14 of the employment contract.

51. Third, I must determine whether Clause 2.15 on Restricted Duties was apt for incorporation in the claimant's employment contract and, if so, whether it applies to the facts of this case. I am satisfied that Clause 2.15 on Restricted Duties was apt for incorporation into the claimant's contract of employment. I do not think that Clause 2.15 is either aspirational or advisory such that it is unsuitable for incorporation into the individual employment contract. Nonetheless, as conceded by Mrs Simpson, Clause 2.15 lacks clarity and I am not satisfied that Clause 2.15 applies to the facts of this case for the following reasons:

51.1. In accordance with Clause 2.15, an employee can request restricted duties and, if requested, the respondent has a discretion, having taken into account operational efficiency, whether or not to offer restricted duties. The claimant did not request restricted duties. In response to a request to work on PPT, he said he would have to see if his shoulder was up to it. This is not the same as requesting restricted duties.

51.2. Clause 2.15 comes within the section of the 2007 Drivers Handbook titled "Working Hours & Shift Patterns." Drivers requesting restricted duties will be offered the opportunity to move to Basic day shift, being 10 shifts within any fortnight with a limitation of only 10 weekend shifts in any calendar year. Clearly, the focus of clause 2.15 is on a reduction in working hours and shift patters not a reduction in or alteration to the content of the work performed during those hours.

51.3. Clause 2.15 Rules (a) refers to *"a company doctor assessment or provision of documentary proof of need"* This provision is clearly included to substantiate the employee's request for Restricted Duties. No doubt, some such request will be made on medical grounds (hence the requirement for

a doctor assessment) and some on other grounds (hence the provision of documentary proof of need). However, what clause 2.15 does not do is establish an agreed contractual procedure requiring an injured employee to consult with OH and, as a result thereof, to move to Restricted Duties solely due to the impact the employee's injury has on the content of the work he could undertake as opposed to the working hours or shift pattern he could undertake.

52. Accordingly, whilst I have found that the 2007 Drivers Handbook and, in particular, Clause 2.15 were incorporated into the claimant's employment contract, I am not satisfied, for the reasons given above, that Clause 2.15 entitled the respondent to move the claimant to restricted duties and, effectively, impose a reduction in the claimant's wages. In light of the wording of Clause 2.15, I am not satisfied that it was the intention of the parties that clause 2.15 be used in the way it has been by the respondent in this case. This conclusion is supported by the fact that on the claimant's return to work in July 2019 the respondent did not seek to apply Clause 2.15 in this way nor at any time between 29 July 2019 and May 2021. This conclusion is further supported by the fact that neither the respondent's employees who do not undertake work on animal waste nor the respondent's employees at Avonmouth and Bell's Hill who do not undertake PPT duties have been moved to Restricted Duties. In short, Clause 2.15 was intended to address working hours and shift patterns not the content of an employees work during those hours / shifts.

53. For the avoidance of any doubt, I have also considered Clause 1.4 of the 2007 Drivers Handbook, see paragraph 14 above, which I was referred to by the respondent. However, this does not assist the respondent as it addresses suspension of wages, as opposed to reduction / deduction, as a result of an employee's involvement in Industrial Action. It is not, as implicitly accepted by Mrs Simpson in her evidence, applicable to the circumstances of this case.

54. Further or alternatively, if I am wrong and Clause 2.15 entitles the respondent to act as it has, then I must consider whether or not the agreement reached between the claimant and the respondent on his return to work in July 2019 amounted to a variation of the contract. I am satisfied that it did for the following reasons:

54.1. First, there is nothing in the claimant's employment contract preventing orally agreed variations of the contract terms. In fact, in accordance with Clause 14 of the claimant's employment contract, there is a mechanism for agreed changes to the terms of the employment contract and/or the documents referred to in that contract, see paragraph 13 above.

54.2. Second, on 29 July 2019 the claimant attended a return-to-work interview. At this interview, Mr Riley, the claimant's Manager, offered the claimant a return to work on bulk tankers or PPT. The claimant chose bulk tankers. The respondent agreed to this. Accordingly, the claimant returned to working Flexible Day shifts solely on bulk tankers and without any reduction in his wages. If clause 2.15 applies as alleged by the respondent, then this amounted to a mutually agreed oral variation. I have taken into consideration Mrs Simpson's statement that Mr Riley did not follow due process. I have concluded that that is a matter between Mr Riley and the respondent not the respondent and the claimant. Mr Riley was the claimant's manager. He conducted the claimant's return to work interview. The respondent did not deny that Mr Riley had actual or ostensible authority to vary the terms of the claimant's employment contract.

54.3. Third, the claimant worked for the respondent from 29 July 2019 to May 2021 on Flexible Day shifts. His duties were limited to tankers. He did not work on PPT at all during this period. He was paid the full Flexible Day rate. Accordingly, if clause 2.15 applies as alleged by the respondent, then an implied variation, accepted by both parties, can also be inferred from their conduct in the period 29 July 2019 to May

2021. This is in accordance with ***Armstrong Whitworth Rolls v Mustard*** where an employee was originally engaged to work an 8-hour shift 5 days per week, but, when a workmate left, was asked to work a 12hr shift 5 days per week. This arrangement continued for seven years. On redundancy, it was held that his redundancy pay was to be based on a 60-hour working week. In the absence of an express agreement to vary his hours, an agreement was inferred from the parties' conduct.

55. Therefore, I am satisfied that the sums claimed by the claimant, being the difference in pay between Basic Rate and Flexible Days Rate, amounts to wages under s.27 (1) (a) ERA. The total amount of wages properly payable to the claimant from 1 July 2021 to date is the Flexible Days Rate not the Basic Rate, being a difference of £530.08 a month for 6 months in 2021 and £547.33 a month for 6 months in 2022. Accordingly, the respondent has made deductions from the claimant's wages in the gross total sum of £6,464.46 as per s.13 (3) ERA. Those deductions were (and are) unlawful as they were not authorised in accordance with S.13 (1) (a-b) ERA.

56. For the avoidance of doubt, I accept the respondent's submissions that there is no shift change difference to be accounted for when calculating the value of the deductions and that the 10 days of time off the claimant claims to have lost is accounted for in the figure of £6,464.46, being the difference between Basic Rate and Flexible Days Rate.

Employment Judge Newstead Taylor
Date: 31 August 2022

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 SSPTEMBER 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

List of Issues

Unlawful deduction from wages

1. Do the sums claimed amount to "wages" under s 27(1)(a) of the Employments Rights Act 1996 ("ERA 1996"):

"(1)In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including— (a)any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise" ?

2. If the sums are to be considered as "wages", what was the total amount of wages properly payable by the Respondent to the Claimant from 1 July 2021 to date within the meaning of s.13(3) of the ERA 1996:

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

3. Did the Respondent make any deduction from the total amount of wages properly payable to the Claimant within the meaning of s.13(3) of the ERA 1996 (save in relation to statutory PAYE deductions) ?

4. If a deduction was made, was the Respondent entitled under any statutory or contractual provision to make the deductions within the meaning of s.13(1)(a) of the ERA 1996?

5. Had the Claimant previously signified in writing his consent to the deduction of wages within the meaning of s.13(1)(b) of the ERA 1996?

"(1)An employer shall not make a deduction from wages of a worker employed by him unless— (a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b)the worker has previously signified in writing his agreement or consent to the making of the deduction."

6. Should the Tribunal find that there has been an unlawful deduction from the Claimant's wages, what is the value of the deduction made? While the Respondent

denies that there has been any unlawful deduction from wages, to assist, the Respondent confirms that :

a. Annual pay for “Days, Days & Nights, Night Drivers” for 2021 - £42,304
b. Annual pay for “Basic Days” for 2021 - £35,943
c. Annual pay for “Days, Days & Nights, Night Drivers” for 2022 - £43,679
d. Annual “Basic Days” for 2022 - £37,111

7. If the employment tribunal finds that any unlawful deductions were made by the respondent what declaration, if any, should be made in relation thereto?

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2414072/2021**

Name of case: **Mr G Purcell** v **Castle Cement Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 1 September 2022

the calculation day in this case is: 2 September 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.