EMPLOYMENT TRIBUNALS

Claimant: Mr A Russell

Respondent: Blackburn and Darwen Community Transport Limited

Heard at: Manchester (by CVP) **On:** 15 December 2022 and 19 December 2022 (in chambers).

Before: Employment Judge McDonald (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Lewis-Bale (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent concedes that the claimant was a worker and entitled to holiday pay under the Working Time Regulations 1998.

2. The claimant was an employee of the respondent and therefore entitled to claim unfair dismissal.

3. The claimant was unfairly dismissed by the respondent on 19 April 2022.

4. The claimant's claim that the respondent made unlawful deductions from his wage by failing to pay him "suspension pay" from 19 April 2022 fails and is dismissed.

5. Compensation for unfair dismissal and the amount of holiday pay to which the claimant is entitled remains in dispute and will be decided at a Remedy Hearing.

REASONS

Introduction

1. This was the final hearing of the claimant's claim that the respondent unfairly dismissed him, failed to pay him holiday pay and other payments. The hearing was a remote hearing by CVP video link. Although there were occasions when the claimant and Mr Lewis-Bale (Counsel for the respondent) had difficulties connecting I am satisfied that both parties were able to fully participate in the hearing.

2. There were two matters which led to a delay in hearing the substantive case. The first was confusion about the documents in the case. The parties had prepared written witness statements and produced relevant documents for the case. They told me they had been sent to the Tribunal. However, the Tribunal could not locate them. That led to a delay while they were re-sent to the Tribunal. I then had to retire to read the documents before we started hearing the case.

3. The second matter was confusion about whether the Tribunal had received and accepted the respondent's response to the claim. It was accepted that the respondent had not filed a response within the 28-day time limit in Rule 16 of the Employment Tribunal Rules 2013 ("the ET Rules"). However, from my reading of the court's electronic file relating to the claim, the position appeared to be that the respondent had not filed a response to the claimant's claim at all and had not made an application to extend time (or alternatively – the position was confused) that a request had been made but refused. For the reasons set out below under "Preliminary Matters – the respondent's response" I decided that the respondent's response should be accepted.

The Hearing

4. After resolving the preliminary matters in the case, I heard evidence from the claimant and from Mr J Arnold, a Director of the respondent. Both witnesses had provided written witness statements. The claimant was cross examined by Mr Lewis-Bale and answered some questions from me.

5. Mr Arnold was cross examined by the claimant and answered some questions from me. At the point when the claimant was due to begin the cross-examination the claimant told me he did not have a copy of Mr Arnold's statement available to him while he was participating in the hearing by video because his copy of Mr Arnold's statement was on the device he was using to join the hearing. I allowed the claimant a short adjournment to disconnect from the hearing and go through Mr Arnold's 2-page witness statement and identify the points he disagreed with. During the claimant's cross examination of Mr Arnold, I read out the relevant paragraphs of Mr Arnold's statement to enable the claimant to identify cross-examination questions to put to Mr Arnold. I am satisfied that approach was in accordance with the overriding objective and in particular with the need to ensure so far as practicable that the parties were on an equal footing.

6. There was a 75-page trial bundle prepared by the respondent. The claimant confirmed he had been sent that on 8 November 2022 but there had been no further communication between the parties about it. With his written statement the claimant provided 5 pdf documents consisting of copies of documents he considered relevant to the case. Although there was no joint agreed bundle for the hearing I am satisfied that each party had had an opportunity of considering the documents relied on by the other prior to the hearing.

7. The respondent's bundle included email correspondence between Mr Arnold and his legal advisers. Mr Lewis-Bale confirmed that the respondent had included those documents in the bundle. It was not seeking to assert that they were privileged, so I could take their contents into account to the extent they were relevant.

8. During the hearing the respondent provided additional documents relating to its application to extend time for its response. I deal with that in "Preliminary Matters – the respondent's response" below.

9. After hearing evidence, I heard submissions from the parties. There was not time to deliberate and give my decision, so I reserved my judgment.

10. I considered the case in chambers on 19 December 2022. I confirmed the parties could send in any further submission they wished me to consider by 19 December 2022 but neither did so. I apologise to the parties that my absences from the Tribunal on leave has led to a delay in this judgment being sent to them.

11. A Remedy Hearing has been listed for 14 March 2023 and will be needed given my judgment in favour of the claimant.

Preliminary Matters – the respondent's response

12. Mr Lewis-Bale confirmed that the respondent applied for an extension of time to bring its response form within time. Having considered the documents provided and the submissions made by the parties I decided to grant the respondent's application for an extension of time for filing its response. The claimant asked for those reasons in writing so I set them out here.

13. The position in relation to the response was confused. From the case file there was no record of a response being received by Manchester Employment Tribunal. However, at the hearing the respondent provided a screenshot of an acknowledgement from the Employment Tribunal Service which I was satisfied showed that a response was filed electronically on the 21st September 2022. A copy of the response form was in the trial bundle.

14. Based on the Tribunal correspondence, I found that the initial date for filing a response form was 22nd August 2022. On 27th July 2022, the respondent contacted the Tribunal to say that it had not received any of the paperwork relating to the claim but had been alerted by ACAS that a claim had been made. This led to the Tribunal re-sending the case papers to the respondent at its new address on 24th August 2022. I accepted Mr Lewis-Bale's submission that it was not clear from the Tribunal correspondence sent on

that occasion whether the Tribunal had already extended the time for filing a response to the 21st September 2022. My understanding of the Employment Tribunal Rules is that the Tribunal cannot do so without an application for an extension of time being made accompanied by a draft response but certainly the wording of the Tribunal's letter suggests that an extension might already have been granted. The respondent filed its response form by 21st September, i.e. by the date required in that Tribunal correspondence. There is then subsequent correspondence from the Tribunal which appears to say that an application for an extension of time for filing a response had been refused.

15. I find that the response form was filed on 21st September 2022. I took the view that the respondent was entitled to read the letter from the Employment Tribunal on 24th August to mean that it had to send its response form to the Tribunal by 21st September 2022. There was no suggestion in that Tribunal letter that a further application for an extension of time was required.

16. In reaching my decision I took into account the guidelines set out in **Kwik Save Stores v Swain [1997] ICR 49.** I needed to balance the prejudice to the respondent of refusing to allow the response against the prejudice to the claimant of allowing the response. The explanation for any delay in filing a response is relevant but not paramount.

17. In this case I was satisfied the respondent did take the steps to try and comply with what it understood the Tribunal to require of it, i.e. to file its response by 21 September 2021. The Tribunal correspondence was somewhat confused as to whether an extension for filing the response form had already been granted or needed to be applied for. I accepted Mr Lewis-Bale's submission that there was some merit in the response form in that it raised substantive issues which would lead to the claimant's claim failing if I decided in the respondent's favour. In particular, it maintains that the claimant was not an employee for the purposes of the Employment Rights Act 1996 and so not entitled to claim unfair dismissal. Given the compensation for unfair dismissal can be substantial, there was clearly significant prejudice to the respondent if I denied its ability to defend the claim when it has a response which on the face of it has some merit.

18. The prejudice to the claimant if I granted the application was less significant. He would have to prove his case but there was no suggestion that there would be a delay to proceedings beyond that of dealing with the application itself. The claimant did say he had first seen the response form on 8th November 2022. Although that is significantly after the 21st September date that seems to be a fault on the part of the Tribunal system rather than anything the respondent did or failed to do. The claimant did not submit he was prejudiced in presenting his case by not seeing the response until that date.

19. Taking all those factors into account, I took the view that the prejudice in this case was greater to the respondent than to the claimant and I allowed the extension of time for the respondent until 21 September 2022, meaning that its response was filed in time.

The issues

20. In its response the respondent accepted that the claimant was a "worker" for the purposes of the Employment Rights Act 1996 ("the ERA") and so entitled to holiday pay. The amount due remains in dispute and will be decided at the Remedy Hearing unless the parties manage to resolve it between them before then.

21. The claimant in his claim form said he had been suspended on 19 April 2022 and that his employment continued. He claimed pay for that period of suspension. However, he also claimed he had been unfairly dismissed. The respondent's position was that Mr Arnold terminated the working relationship on 19 April 2022. During the hearing, the claimant agreed that his employment came to an end on 19 April 2022, having been terminated by Mr Arnold at their meeting on that date. That means that his claim for unlawful deduction of wages after that date must fail because he was no longer a worker or employee of the respondent's after that date. Instead, any loss of pay after that date will fall to be compensated as part of any compensatory award for unfair dismissal.

22. That left the following disputed issues:

    (i) Was the claimant an employee of the respondent for the purposes of the ERA. The respondent acknowledged that he is a worker and says that the claimant was not an employee and therefore not entitled to bring a claim of unfair dismissal.

    (ii) If the claimant was an employee of the respondent was he unfairly dismissed on 19 April 2022?

    (iii) If the claimant was unfairly dismissed, at what point, if any, would he have been fairly dismissed in any event (the "Polkey" point) and did he contribute to his own dismissal such that compensation for unfair dismissal should be reduced.

Findings of Fact

23. In the absence of much in the way of relevant documentary evidence, my findings in this case were based primarily on the witness evidence. There were on some points a direct conflict between the claimant's witness evidence and Mr Arnold's. Although the claimant did at points in his evidence become agitated, I found his evidence to be consistent with such documentation as there was and generally reliable. As I explain below, I found Mr Arnold's evidence in cross-examination to be at times inconsistent with the documentary evidence. At times he shifted his position on matters in cross examination evidence. Overall, I found his evidence less reliable than the claimant's and where there was a direct conflict in their evidence I preferred the claimant's version of events.

<u>Background facts</u>

24. The respondent is a community transport operator providing accessible transport to vulnerable adults and children. It uses the trading name "Dial a Ride". It has contracts with local authorities to provide school transport for children with special educational needs. The funds derived from those contracts support other loss-making community services which it provides. Because the local authority contracts involve public funds, Mr Arnold's unchallenged evidence was that the respondent has to be transparent and was held accountable for the funds relating to those contracts.

25. Mr Arnold's unchallenged evidence was that the respondent had a mixture of paid drivers and volunteers. If a driver did not come in then a volunteer or Mr Arnold or his business partner would, in his words, "pick up the slack", i.e. cover that run.

Start of the working relationship, working hours and pay

26. The claimant worked for the claimant as a driver from 5 January 2018. He was introduced to the respondent by his cousin, who was a business contact of the respondent. That cousin had introduced previous drivers to the respondent. There was no interview or appointment process as such. There was no written contract or other employment documentation.

27. Instead, Mr Arnold and the claimant met and Mr Arnold then arranged for a DBS check to be carried out for the claimant. A valid DBS check was a requirement to be a driver given the work done by the claimant. The claimant was provided with an "Approved Driver" card confirming the DBS was carried out on 2 January 2018 and that the "Employer Name" was "Blackburn & Darwen CT". (An updated version of that card was issued to the claimant after a DBS check on 9 March 2021. It also gave "Employer Name" as "Blackburn & Darwen CT").

28. I prefer the claimant's evidence that neither his cousin nor Mr Arnold said anything to him when he started work about not being an employee or his being engaged to work on a zero-hours basis.

29. I find that the claimant and Mr Arnold agreed that the claimant would be paid for 4 hours' work per day, i.e. 7.30 -9.30 a.m. and 2.30-4.30 p.m. Monday to Friday during school term time. I find the agreed amount to be paid per 5 days week was a fixed rate of £150 net per week, based on the then National Minimum Wage. That is consistent with the payments shown on the claimant's bank statements from 2018 (the earliest payslips in the bundle dated from September 2019). I find that the claimant was paid that fixed amount even if he completed his "school run" in less or more than the 4 hours per day.

30. Where the claimant carried out additional driving duties he was paid additional amounts over and above the agreed fixed payment. Those additional amounts were recorded as "overtime" on his payslips (pp.57-58). That happened very occasionally when, for example, one of the children needed picking up or dropping off at somewhere other than school, e.g. at a day centre.

31. The respondent accepted that the claimant was paid through the PAYE system. The payslips in the Bundle covering September 2019 onwards showed deductions for tax and employer and employee national insurance contributions.

Work routine and uniform

32. The claimant worked on the respondent's local authority contracts. His work involved using a minibus to pick up the 2 passenger assists and the disabled pupils from home and taking them to school in the morning then taking them back home in the afternoon after school. During his period of working for the respondent the claimant did that "school run" for different schools but for 2 and half a years the run was for the same school.

33. On a working day, the claimant would drive to the depot in his car to pick up the minibus he would be using that day. He would usually (but not always) use the same minibus, registration ESV175. He had to use other minibuses for his route if that minibus was off the road.

34. On most days he would do the same route. Those routes might vary slightly depending on which pupils were to be picked up for the school run. Occasionally the claimant would be sent an email to tell him which children were to be picked up. There was no suggestion that the claimant would be contacted by the respondent at the start of a day or a week either to offer him work or to tell him he would not be needed on a particular day. I find that except on those days when he took time off, he turned up for work and did the school run with minimal input from the respondent.

35. Mr Arnold's evidence was that consistency of driver, bus and uniform was important to the pupils who were on the school run, many of whom were autistic. For those pupils familiarity and routine were important.

36. The claimant was required to wear a t-shirt, sweatshirt or sleeveless jacket bearing the respondent's "Dial a Ride" logo when doing the school run. Mr Arnold's evidence was that the claimant only sometimes wore that branded clothing. I prefer the claimant's evidence that he always wore it when doing the school run. As well as preferring the claimant's evidence in general to that of Mr Arnold, it seems to me inconsistent with the importance placed on regularity and routine that the claimant would have been allowed to regularly ignore the requirement to wear branded clothing.

Absences from work

37. The respondent's case was that the claimant had had two long period of absence from work which illustrated that he was not obliged to carry out work for it when it was offered. Mr Arnold's evidence was that about 6 months after he started working for the respondent, the claimant had taken 3 months off work to look after his mother who was ill. The claimant denied that. I prefer the claimant's evidence on that point. Mr Arnold was not clear about the exact dates the claimant had been absent. However, 6 months after he started would have been around June/July 2018. There are no payslips for the claimant covering that period. However, his bank statements show payments

from the respondent for June; on 19 July 2018 and a further payment on 14 September 2018. That does not tally with a 3 months' absence from work. The gap from July to September reflects the school summer holiday.

38. Mr Arnold suggested that the payments were made during the claimant's absence as a good will gesture. That does not seem to me consistent with the evidence about the need for accountability for the funds on local authority contracts. Given the not-for-profit nature of the business it also seems to me implausible that the respondent would have continued to pay the claimant during that period if he had not been working.

39. Mr Arnold also claimed that the claimant had taken 2-3 months off about 12 months after that period to go and see relatives abroad. The claimant accepted that he had taken a month off in January 2019 to visit relatives in the USA and Canada. The claimant produced Facebook screenshots evidencing that. Although Mr Arnold suggested they had been fabricated I did not find that plausible. I preferred the claimant's evidence. Again it was consistent with the bank statements he produced, showing a gap in payments at the relevant time.

40. As well as North American trip, the claimant accepted that he did on occasion take holidays during what would have been school term weeks. Specifically, he took long weekends in Marbella in September 2018 and in September 2019 which meant he missed the start of the school term in those years. The claimant's evidence was that he asked for permission from Mr Arnold when he took time off. Mr Arnold's evidence was that the claimant merely informed him when he was taking time off. There was no relevant documentation. Mr Arnold at one point in his cross-examination evidence suggested that there were text messages relating to the claimant's absences on leave. There were none in the Bundle. When I asked where those messages were, Mr Arnold changed his position saying there were no text messages only phone calls of which there was no record. I preferred the claimant's evidence and find that he did have to seek permission before taking time off.

<u>Other findings of fact relating to the working relationship</u>

41. It was accepted that the claimant was paid furlough pay from March 2020 when schools were in lockdown. In his email to his advisers (p.43) Mr Arnold explains that the local authorities agreed to honour their contracts with the respondent during COVID lockdown so it was "right and proper that [the respondent] paid the drivers what they would have worked, obviously only term time only".

42. The claimant also produced 3 further documents which he submitted supported his claim to be an employee. One was a "To whom it concerns" letter dated January 2021 on the respondent's letterhead confirming that the driver was a frontline keyworker "employed by [the respondent]" ("the keyworker letter"). That was to enable drivers to operate during Lockdown.

43. The second document was a letter dated 20 May 2021 ("the LFT letter") confirming that drivers working on local authority contracts were required to take lateral flow tests twice a week. I find the wording of that letter was

probably copied from the communication from the local authority to the respondent (it refers to "your drivers who work on our contracts"). I find the claimant was required to comply with that lateral flow testing requirement.

44. The third document was a letter from the respondent dated 21 January 2021 addressed to "Dear employee" informing that £1 would be deducted from "each employee" per week to cover the cost of hot drinks ("the hot drink letter"). I accept Mr Arnold's evidence that the letter was by the kettle in the office.

Dismissal/claimant's conduct

45. At the hearing the parties agreed that the claimant was dismissed at a meeting with Mr Arnold on 19 April 2022. There was a significant difference in the clamant and Mr Arnold's version of events at that meeting.

46. By way of context for that meeting, I find that there had been an earlier meeting between the two on 14 March 2022. At that meeting the claimant had raised with Mr Arnold the fact that the respondent had not honoured his statutory holiday entitlement since 2018. Mr Arnold's position at that meeting was that the claimant did not qualify for holiday pay because he was a term time worker.

47. The claimant researched the matter further and was dissatisfied with Mr Arnold's response. He raised a formal grievance by a letter dated 25 March 2022. In it he set out the information about holiday entitlement set on the Direct.Gov website. He asked Mr Arnold to let him know by 1 April 2022 when he could meet with him to talk though his grievance. He said he would like to be accompanied at that meeting by a colleague.

48. Mr Arnold did not respond to the grievance. The claimant then contacted ACAS and initiated Early Conciliation on 3 April 2022. I find based on the claimant's letter of 29 April 2022 to Mr Arnold that there had been some further communications in an attempt to resolve the issues between then and Tuesday 19 April 2022. That was the claimant's first day back at work after the Easter holidays.

49. Mr Arnold's version of events on that day (given for the first time in cross examination evidence rather than in his witness statement) was that the claimant had burst into his office aggressively and started to scream in Mr Arnold's face. Mr Arnold said that was witnessed but that the witness was not available to give evidence because they had moved to Italy. In his witness statement Mr Arnold said he had decided to bring the working relationship to an end on 19 April 2022 because the claimant was causing issues in the office with members of staff and acting inappropriately. In his email dated 2 August 2022 to Harjit Gill, who was advising him on the case (p.43 of the bundle) Mr Arnold wrote that he had had to speak to the claimant "on numerous occasions in relation to his behaviour especially towards women. One such incident involved a local authority."

50. Given the nature of the work the claimant was doing (which required him to be DBS checked) I find it implausible that Mr Arnold would not simply have

brought the working relationship with the claimant to an end earlier if the claimant had behaved as he described in that email. The explanation in that email for not taking action (with the absence of a contract the respondent could not take disciplinary action against the claimant as could against an employee) I also find implausible. If as Mr Arnold says he believed, the claimant was not an employee, then the respondent could simply have offered him no further work when those events occurred with no risk of an unfair dismissal claim.

51. For all those reasons I prefer the claimant's version of events which is that Mr Arnold called him into the office on 19 April 2022 and told him he was suspended pending an investigation. I find the claimant did not act aggressively as alleged by Mr Arnold. Both parties accept that "suspension" was in fact a dismissal/termination of the working relationship.

Relevant Law

Employee Status

52. The definition of an employee appears in section 230(1) of the Employment Rights Act 1996 ("the ERA"):

> **"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."**

53. There is significant case-law about employment status but the Tribunal's starting point must always be that statutory language.

54. The respondent accepts that the claimant was a "worker" for the purposes of the ERA. That definition includes an employee and an individual who works under:

> **"any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual (s.230(3)(b)."**

55. In **Autoclenz Ltd v Belcher and others, [2011] UKSC 41, [2011] ICR 1157** Lord Clarke confirmed that the question in every case is "what was the true agreement between the parties" (para 29). There is in this case no written contractual documentation so issues about any written contract failing to reflect the reality of the situation do not arise.

56. The statutory definition simply incorporates the common law concept of what is a contract of service or a contract of employment, traditionally distinguished from a contract for services which is a contract for a self-employed arrangement. The relevant principles were summarised in **Ready Mixed**

Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497:

"The contract of service exists if these three conditions are fulfilled:

(1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(3) The other provisions of the contract are consistent with it being a contract of service."

Those principles remains the starting point though some of the language used ("master" and "servant" is outdated).

57. In **Carmichael v National Power Plc [1999] ICR 1226** the House of Lords confirmed that there is an "irreducible minimum of mutual obligation necessary to create a contract of service". A lack of obligations on one party to provide work and the other to accept work would result in an absence of that irreducible minimum.

58. In **Revenue and Customs Commissioners v Atholl House Productions Ltd** [**2022] ICR 1059** the Court of Appeal did not accept that the existence of the necessary pre-conditions of mutuality of obligation and control creates a prima facie presumption that a contract of employment exists. This is because at the third stage of the **Ready Mixed Concrete** test it is the court's task to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists.

59. When it comes to that third stage, Mr Lewis-Bale in his submissions referred me to **Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99**, where the Court of Appeal concluded that the claimant was not an employee despite being subject to house rules, being required to attend a weekly meeting and being subject to a weekly roster. Despite that degree of integration into the respondent's business she was not an employee because the respondent was not required to pay her any wages so one of the key obligations of an employment contract was missing.

60. Mr Lewis-Bale also referred me to **Braine v The National Gallery (ET/2201625/2018)**. That is a first-instance case and not binding on me. It turned on the specific findings of fact made by the Employment Judge in that case. I accept it provides an example of a case where the lack of mutual obligation meant that the claimants were not employees despite their being paid through PAYE, undertaking regular work and having a probationary period. I also accept that being paid through PAYE is not in itself a strong indication of the legal basis for the relationship between the parties (**O'Kelly v Trusthouse Forte [1983] ICR 728**).

61. Mr Lewis-Bale's submission for the respondent was that the main element missing was mutuality of obligation in the sense that the claimant was not obliged to accept work from the respondent and not required to seek time off

from the respondent (written submissions para 27). That was said to be the irreducible minimum for a contract of service in **Carmichael and anor v National Power plc [1999] ICR 1226, HL**. In his submissions on this point Mr Lewis-Bale also referred me to the remarks of Elias J (as he then was) on mutuality of obligations in **Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471** and to **Knight v BCCP (UKEAT/0143/10)**.

The right not to be unfairly dismissed

62. Section 94 ERA gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

63. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

64. If the employer shows a potentially fair reason for dismissal then whether the dismissal is fair (having regard to that reason) will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee. That "shall be determined in accordance with equity and substantial merits of the case" (s.98(4) ERA).

Compensation for unfair dismissal

65. S.118(1) ERA says that:

“Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

66. The basic award is calculated based on a week’s pay, length of service and the age of the claimant.

67. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

68. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142**). The reduction is usually made on a percentage

basis, reflecting the chance that the employee would have been fairly dismissed even had there not been an unfair dismissal.

69. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

70. The case law confirms that the question for the Tribunal is whether the claimant was culpable or blameworthy, by which is meant "deserving of blame". That was confirmed most recently in the Employment Appeal Tribunal case of **Sanha v Facilicom Cleaning Services Limited UKEAT/0250/18/VP**. **Sanha** confirmed that that may potentially apply to conduct that is merely foolish, and at least to some conduct that is unreasonable and does not have to involve conduct in breach of the contract of employment.

71. If the Tribunal finds that the claimant did contribute to the dismissal then it must make a reduction to the compensatory award, although the amount of reduction is for it to decide on a just and equitable basis. The Employment Appeal Tribunal in the case of **Hollier v Plysu Limited [1983] IRLR 260** provided guidance, suggesting that broadly a reduction should be as follows:

- Where the claimant is wholly to blame there should be a 100% reduction in the compensatory award;
- Where they are largely to blame, a 75% reduction;
- Where the employer and the employee are equally to blame, a 50% reduction;
- Where the claimant is slightly to blame, a 25% reduction.

72. In **Dee v Suffolk County Council EAT 0180/18** the EAT confirmed that a Tribunal is permitted to make both a **Polkey** reduction to a compensatory award and a reduction for contributory conduct. It said that after deciding the appropriate reductions the tribunal should "stand back" and look at the matter as a whole, avoiding double counting and ensuring that the result is just and equitable.

73. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA). That also requires a finding of culpable or blameworthy conduct (**Sanha**). It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so (**Steen v ASP Packaging Ltd [2014] ICR 56, EAT**).

Conclusions on the issues

74. I set out my conclusions, applying the relevant law to my findings of fact.

(i) Was the claimant an employee of the respondent for the purposes of the ERA. The respondent acknowledged that he is a worker and says that the claimant was not an employee and therefore not entitled to bring a claim of unfair dismissal.

75. I accept Mr Lewis-Bale's submission that I must step back and view the entire picture of the relationship between the respondent and the claimant. I bear in mind that the respondent has accepted that the claimant meets the definition of a "worker" in the ERA. It accepts, therefore, that the claimant undertook to perform personally work or services for the respondent and that the respondent was not a client or customer of a profession or business undertaking carried on by the claimant.

76. Turning to the **Ready Mixed Concrete** tests, I find, contrary to Mr Lewis-Bale's submissions, that there was the necessary mutuality of obligation for an "umbrella" contract of employment covering the whole of the claimant's working relationship with the respondent. Looking at the reality of the situation, I find that the claimant was obliged to turn up to drive the minibus for each week during term time unless he had obtained permission to be on holiday. I also find that the respondent was obliged to provide him with work. In practice, there was no suggestion that it had failed to do so other than during lockdown. During lockdown the claimant had been paid furlough pay for what he would have worked. That seems to me consistent with an obligation to provide work.

77. I also find that the required element of "control" was present to make this a contract of employment. I did not understand the respondent to be saying that control was not present. I find that the respondent controlled what routes the claimant did, the times when he worked, what bus he used and what he wore while working for it (in the sense of requiring him to wear branded clothing).

78. Turning to the third element of the test, I remind myself that the Court of Appeal in **Atholl House** stressed that the existence of mutuality of obligation and control does not create a presumption that a contract of employment exists. I need to examine all relevant factors to determine as a matter of overall assessment whether such an employment relationship exists.

79. Doing so, the picture that emerges is of the claimant attending work every term-time week unless he had obtained permission be on holiday. He would usually use the same bus (provided by the respondent) and for significant period of time (2 and a half years) do the school run for the same school. Although he would on occasion be emailed to told of a change in the pupils to be picked up this was not a "gig economy" case where the claimant was offered ad hoc assignments which he could accept or reject. It is consistent with the nature of the work that he was required to attend each school day to carry out the school run. In doing so he was expected to wear branded clothing and was subject to other rules imposed by the respondent (e.g. the requirement to undergo lateral flow testing set out in the LFT letter).

80. I accept Mr Lewis-Bale's submission that the fact that the claimant was paid via PAYE is not in itself a strong factor in favour of the claimant being an employee but it is certainly not inconsistent with it.

81. I accept that the existence of rules about dress code and a degree of integration into the business is not sufficient to make someone an employee if mutuality of obligations is absent (**Quashie**) but unlike in that case, in this case the required mutuality of obligation is present

82. I do not find that the keyworker letter carries any weight. It does refer to the keyworker being "employed" but it seems to me that it would have been used by all the respondent's drivers whether workers or volunteers. I find it unlikely that when the letter was drafted careful thought was given to the use of the term "employed". The same applies to the hot wate letter.

83. I do not find the lack of holiday pay inconsistent with employment. The respondent has accepted that the claimant should have been entitled to holiday pay.

84. My overall assessment is that the relationship between the claimant and the respondent was an employment relationship. The claimant is entitled to bring a claim of unfair dismissal.

    (ii) If the claimant was an employee of the respondent was he unfairly dismissed on 19 April 2022?

85. I have set out my findings of fact about what happened on 19 April 2022 above. I preferred the claimant's version of events and find that he was dismissed because he was in dispute with the respondent about unpaid holiday pay Arguably, the dismissal was automatically unfair because the principal reason for it was that the claimant was seeking to enforce a statutory right. The claimant has not put his case that way and so I deal with it as an "ordinary" unfair dismissal claim. I find that the dismissal was unfair. I did not accept Mr Arnold's version of events. The respondent has not shown that the dismissal was for a potential fair reason, i.e. conduct.

86. Mr Lewis-Bale did not seek to argue that there had been any fair procedure followed prior to dismissal. That accords with my findings of facts.

87. I therefore find the claimant was unfairly dismissed.

    (iii) If the claimant was unfairly dismissed, at what point, if any, would he have been fairly dismissed in any event (the "Polkey" point) and did he contribute to his own dismissal such that compensation for unfair dismissal should be reduced.

88. I have found that there was in this case no potentially fair reason for dismissal. I did not accept that the claimant had been guilty of behaviour which could amount to misconduct. He had sought to assert his right to holiday pay and been dismissed as a result. I did not accept Mr Arnold's evidence that he had been aggressive on the 10 April 2022. In those circumstances, I do not find that there are grounds for reducing compensation for unfair dismissal on the "Polkey" basis because he could have been fairly dismissed at some point. I also find there was no "culpable or blameworthy" conduct on the claimant's part justifying a reduction to his unfair dismissal compensation on the basis he had contributed to that dismissal. It does not

seem to me that seeking to assert statutory rights to holiday is in itself "culpable and blameworthy" conduct unless it is done in a blameworthy way. On the facts I have found that the claimant did not assert his rights aggressively int his case.

89. I make no reduction to the compensation for unfair dismissal on the "Polkey" or contributory bases.

Employment Judge McDonald

9 March 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
9 March 2023

FOR THE TRIBUNAL OFFICE

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