RESERVED **Case No. 2416606/2019**
Code A

EMPLOYMENT TRIBUNALS

Claimant: Mr B Walker

Respondent: Compressed Air Management 2008 Ltd

HELD AT: Liverpool via CVP **ON:** 12 October 2020, 27 October & 16 November 2020 (in chambers)

BEFORE: Employment Judge Shotter (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mrs Caroline Spencer, financial director

JUDGMENT

The judgment of the is:

1. The claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded and is dismissed.

2. The claimant was not entitled to wages between 8 September and 12 November 2019. The claimant's claim for unauthorised deduction of wages between the 8 September 2019 to 12 November 2019 brought under section 13 of the Employment Rights Act 1996 as amended, is not well-founded and is dismissed.

REASONS

Preamble

1. In a claim form received on the 16 December 2019 following ACAS Early Conciliation that took place between 4 October and 14 November 2019 the claimant

complained that he had been unfairly dismissed and was seeking reinstatement and damages. The claimant also brought a complaint of unlawful deduction of wages. In the grounds of complaint, the claimant confirmed he had contacted ACAS who had received no response from the respondent, pleaded in direct contrast to the oral evidence given by the claimant at the final hearing, when he stated that ACAS indicated the respondent had confirmed it had dismissed him. The contradiction by the claimant was indicative that his evidence could not always be relied upon. Credibility issues have been further explored below.

2. The claimant did not provide employment dates within the body of the claim form and he was sent a strike out warning by the Tribunal dated 23 December 2019 as it appeared from his claim he had not been dismissed or given notice of dismissal. The claimant had ticked the box that is employment was continuing. The parties were confused at the final hearing as to whether the unfair dismissal claim had been struck out or not. I confirmed there had been no strike out and unfair dismissal was one of the issues was to be determined at this final hearing which both parties confirmed they were prepared to deal with.

3. In response to the strike out warning the claimant wrote to the Tribunal in an undated email confirming when he received the strike out warning he "I thought I was still employed by the company as I never received any notice, P45 or back holiday pay due to me. However, Rosemarie Johnson from ACAS has contacted me recently to say that the company told her my contract had been terminated. Therefore, I would like my claim to also include unfair dismissal." The complaint was already one of unfair dismissal and no amendment was required. The claimant did not seek to amend his claim to include a complaint for unpaid accrued holiday pay, the email was not treated as an application to amend and there is no complaint for wrongful dismissal before the Tribunal which is unfortunate as the claimant would have succeeded in this claim for statutory notice pay.

4. In a letter dated 10 February 2020 the claimant also confirmed the correct name of the respondent was Compressed Air Management 2008 Ltd.

5. In its response the respondent was confused as to whether the claimant had continued in his employment or not given the fact that no contact had been made by him once the licence revocation period had ended and the claimant was not answering his phone or returning missed calls. The responded denied the claimant's claims maintaining his contractual duties included the need to hold a valid UK driving licence, he could not work until his licence was returned by the DVLA on 12 November 2019 and after that date nothing was heard from the claimant until much later.

Agreed issues

6. The issues were agreed between the parties from the outset and prior to oral submissions being made as set out below:

UNFAIR DISMISSAL CLAIM

6.1 The key issue is whether the claimant had been dismissed and if so, what was the effective date of termination?

6.2 If the claimant had not been dismissed whether it can be inferred from the claimant's actions when his licence was reinstated on the 12 November 2019 to 3 January 2020, no contact was made with the respondent and a claim for unfair dismissal was lodged, that he had resigned from his employment and if so, on what date?

6.3 In the alternative, if the claimant had not been dismissed in 2019 and he had not resigned, whether the respondent's failure to meet with the claimant following the 3 January 2020 text message and failure to offer the claimant work, did a dismissal take place in or around early January 2020?

6.4 If the claimant has been dismissed, can the Respondent establish that the sole or principal reason for the dismissal was claimant's failure to hold a full UK driving licence under section 98(2)(a) of the Employment Rights Act 1996 as amended ("the ERA")? The claimant initially disputed that a driving licence could be regarded as a qualification under section 98, however he eventually accepted it was a qualification but disputed the employment contract specified that a driving licence was an essential and continuing condition of the claimant's employment as an engineer/apprentice engineer. This gives rise to three issues, namely,

6.4.1 Had the claimant received the appendix to the contract of employment? Did the contract specify that a driving licence was an essential and continuing condition of the claimant's employment?

6.4.2 Was as a matter of fact a full UK driving licence an essential and continuing condition of the claimant's employment?

6.4.3 Was the claimant employed as an apprentice engineer or fully qualified engineer?

6.5 When the claimant lost his driving licence was he dismissed? If he was dismissed, was the Respondent's decision to dismiss the Claimant within the range of reasonable responses in the circumstances of this case taking into account the test set out in section 98(4) of the ERA? Was the procedure followed a fair procedure taking into account the ACAS Code?

6.6 Remedy if applicable.

Unauthorised deductions

6.7 Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by the first respondent, and if so how much was deducted?

Witness evidence

7. The Tribunal heard oral evidence from the claimant under oath, and on behalf of the respondent it heard from four witnesses; Caroline Spencer, financial director, Stephen Spencer, managing director, Joseph Spencer, qualified engineer, and Elizabeth Ollerton, office manager. There were few conflicts in the evidence and the key events were largely undisputed. However, there were credibility issues with the claimant's evidence that raised a question mark over the disputed evidence he gave, primarily the claimant's allegation that he was informed by ACAS the respondent had confirmed he had been dismissed. Stephen Spencer who discussed the claim with ACAS disputed this had been said, and in oral evidence maintained that at no stage had the respondent dismissed the claimant, even following the filing of the ET1 claim form when unfair dismissal was claimed, the claimant sought reinstatement within the form and the final text sent to the respondent informing it "licence is back do you want me to come in for a chat someday."

8. The Tribunal was referred to an agreed bundle of documents and having considered the oral and written evidence and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), I have made the following findings of the relevant facts resolving the conflicts in the evidence.

Facts

9. The respondent is a small family business consisting of Caroline Spencer, financial director, Stephen Spencer, managing director, Joseph Spencer, one of three qualified engineers employed and Elizabeth Ollerton, office manager who manages two additional office staff.

10. The claimant had been employed as an apprentice engineer and his evidence that he was not aware of this fact was not credible. It became increasingly apparent as the claimant gave evidence and asked questions on cross-examination of the respondent's witnesses that he regarded himself as an apprentice engineer and it is not disputed the claimant from March 2019 was responsible for carrying out small jobs on straight-forward compression engines as part of his training and building up to the more complex compression repairs and servicing carried out by the respondent for garages, dentists and large compressors that required a fully qualified engineer well beyond the capacity of the claimant, who was an apprentice during the relevant period.

11. The claimant was issued with a one-year fixed term work experience placement commencing 2 October 2014 to 12 June 2015.

12. The claimant commenced working for the respondent under an employment contract from the 30 November 2015 and he was issued with a written contract that included his job title, description and duties set out within an appendix referred to as "Schedule 1." The claimant has denied receiving a copy of the contract, maintaining he was asked to sign it which he did on the 17 December 2015 but not Schedule 1 which he argues, was evidence Schedule 1 was not attached and he had never read

it. On the balance of probabilities, the Tribunal preferred the evidence of Caroline Spencer that the claimant was provided with a copy of the contract and schedule 1 which set out his responsibilities as an apprentice engineer, remuneration, hours of work and at clause 1(a) his responsibility for "maintaining a valid UK driving licence once the test is passed."

13. Elizabeth Ollerton provided a written statement and gave oral evidence confirming how she had posted first class a copy of the signed contract and schedule 1 attachment to the claimant with a covering letter to the address provided by the claimant, on the 9 October 2019 which the claimant also denied receiving. In cross-examination she was questioned on why the contract was not emailed as the claimant had requested, and the Tribunal took the view there was no good reason why the letter and enclosures would not have been successfully posted by the Royal Mail given the fact it was not returned to sender and in the weeks which followed 9 October 2019 no further requests were made by the claimant, which strongly suggests he had the copy contract and schedule 1. I concluded the claimant had received a copy of his contract together with Schedule 1 when it was signed and a duplicate in or around 11 October 2019 preferring the evidence given on behalf of the respondent to that given by the claimant, who was found to be an inaccurate historian.

Contract of employment, policies and procedures.

14. The claimant was issued with a contract of employment which he signed on the 17 December 2015 that included schedule 1.

15. The contract refers to the annex attached as follows: "your job title, description and duties are set out in Schedule 1 entitled 'duties' annexed to this contract." At paragraph 7 in the body of the contract reference was made to the provision of a company vehicle and a 'Company Vehicle Handbook'. At paragraph 7.1.1 it provided general rules relating to use of the company vehicle including its return in the event of an employee being absent due to sickness or injury. Paragraph 8 set out a contractual grievance and appeal policy and a sickness policy which provided payment of SSP upon self-certification or medical certificates being provided. The claimant received SSP under this provision following an accident that resulted in revocation of his driving licence.

16. Schedule 1 provides at 1(a) "apprentice engineers [are] responsible for…maintaining a UK driving licence once test is passed."

17. The claimant worked without issue as an apprentice learning from the fully-qualified engineers when working on large machines in the workshop which were beyond his capabilities and experience. Prior to being provided with his own company vehicle in March 2019 the claimant accompanied the qualified engineers on jobs. He drove the company van and would frequently leave the engineer in situ driving to collect any parts needed. As the claimant's experience grew he was given the responsibility of looking after small compressors used on golf shoe cleaners which required the claimant to drive long distances throughout golf clubs based in the North West and North Wales. It is undisputed by the claimant that the respondent had no two-men jobs and Stephen Spencer's evidence that customers would not pay

a one-and-a-half-man rate if the job required only one qualified engineer, and when the claimant lost his driving licence there were no jobs that could be charged out at this rate, was not disputed.

18. On the 12 May 2019 the claimant was involved in an accident outside work and he was absent from work until 29 July 2019 having been in receipt of sick pay during his absence. The claimant confirmed he was well enough to legally drive and continued driving the works van to repair/service small compressors as before and with no issue. The claimant was not sufficiently experienced to work in the workshop and his duties revolved around servicing gold clubs and small machines.

Revocation of the claimant's licence 8 December 2019.

19. On the 8 September 2019 the claimant reported to Caroline Spencer that he had been stopped by the police and informed his driving licence had been revoked. As a result of not having a driving licence the claimant was unable to carry out his work for the respondent travelling to and from clients, and was not sufficiently experienced or qualified to deal with the large more complex compressors that were repaired in the workshop. In short, unless the respondent could offer the claimant a two-man job, which was not in the pipeline, there was no work for him to do.

20. It is undisputed between the parties that the respondent was prepared to wait until the claimant's licence was reinstated, and the claimant indicated the provisional date for this was 12 November 2019. Caroline Spencer discussed the position with the claimant on the 8 September 2019, suggesting a number of possibilities ranging from returning to his GP for a sick note on the basis that if he was not well enough to drive was he well enough to work, speeding the licence reinstatement process by an early application to the DVLA and promising two men work if it arose before the anticipated licence reinstatement. The respondent at that stage took the view it did not want to discipline the claimant for driving the company van on a revoked licence and the decision was made to wait until the claimant made contact following reinstatement of his licence in just over 2-months' time. There is no suggestion by any of the parties that the claimant had been dismissed, however on the facts of the case I took the view that he had on the proviso that he could take up his job later when the licence was reinstated. The claimant was not offered any work and was not paid. There was no agreement to the effect that the claimant would be paid throughout his absence, either in full or on SSP given the claimant was well enough to work but unable to do so as a direct result of losing his driving licence.

21. The claimant found alternative employment following his conversation with Caroline Spencer during this period and beyond. The respondent found out about the alternative employment obtained by the claimant and thought nothing of it, believing the claimant would return to work for it immediately his driving licence was reinstated. The onus was on the claimant informing the respondent the date of reinstatement and his immediate return to work was expected initially, but nothing came of this and the respondent did not press the claimant for a decision on whether he wanted to return to work for it or not.

The claimant's alternative employment

22. The claimant's evidence on the alternative employment he had taken up was far from reliable. In oral evidence he confirmed it was only "one-day casual labourer as a scaffolder" then later contradicted himself by stating it was for a longer period. He did not work at heights, then he worked with a harness at heights after the scaffold had been erected, his employer was a friend/company whose name he could not recall, he did not know precisely where the site(s) he worked were based and was less than forthcoming about the type of work he did, when he carried it out and the duration. The claimant was also less than forthcoming about the date when his driving licence was reinstated; it was towards the end of November 2019 then when setting out the dates for the unlawful deduction of wages, the claimant confirmed his licence was reinstated on the 12 November 2019.

23. Following the discussion with Caroline Spencer on the 8 September 2019 she investigated the possibility of alternative employment; there was none and informed the claimant accordingly with a promise that is any jobs came up the respondent would be in touch. No work was available and as a consequence none was offered to the claimant.

24. The claimant sent Stephen Spencer a text on the 16 September 2019 requesting a copy of his contract and hourly pay as he had an appointment with the Citizens Advice Bureau, and on the 18 September confirmed he had been working elsewhere; "I was offered a days work I took it I have a kid and bills to pay." There was an argument over the whereabouts of the van which resulted in it being returned to the respondent as the claimant was not keeping it at the same address he had provided for the insurers and could not drive it. By the 16 September 2019 the respondent was aware that the claimant was seeking legal advice, and the claimant no longer had access to the company vehicle, which he could not have legally driven in any event. It is notable that when the vehicle was returned the claimant took his tools and personal effects, a further indication that the employment had terminated albeit with a possibility of reinstatement in the future.

25. As indicated above, the claimant was provided with a copy of his contract and schedule 1 on 9 October 2019 sent by first class post. Prior to receiving this the claimant had texted the respondent a number of times requesting a copy, the last being 19 September 2019 and after this date there were no more texts from the claimant or any other direct communication with the respondent until 3 January 2020.

26. ACAS early conciliation took place between 14 October and 14 November 2019.

Reinstatement of the driving licence

27. The driving licence was reinstated on 12 November 2019 and the claimant made no attempt to contact the respondent and inform it he was ready to start work, despite the agreement reached with Caroline Spencer on the 8 September that he

would do so. In oral evidence the claimant maintained he was not working during this period and was being financially supported by his family, in direct contrast to the text message sent to Stephen Spencer on the 16 September 2019 that he was working because he had a family and bills to pay. The claimant's evidence was far from credible and the Tribunal concluded on the balance of probabilities that he had taken the decision to work elsewhere and for some unaccountable reason hide this fact from the respondent. This conclusion was reinforced by the claimant's explanation given in oral evidence for the 3 January 2020 test message, which followed his claim for unfair dismissal being lodged with the Tribunal. He explained his personal situation had changed, "I needed stability and the job back." When it was put to the claimant in cross-examination that the respondent had not done anything and it was for personal reasons; the claimant agreed. I concluded on the balance of probabilities that following the claimant's dismissal on 9 September 2019 and reinstatement of his driving licence on 12 November 2019 the claimant decided that he did not want to return to work for the respondent until after proceedings had been issued.

The Tribunal claim

28. An Employment Tribunal claim for unfair dismissal, reinstatement and unlawful deduction of wages was received on the 16 December 2019 and sent to the respondent on 23 December 2019. By that stage Stephen Spencer took the view the claimant had gone to permanently work elsewhere, although no real attempt was made to clarify the position. It is understandable that the respondent was confused given its understanding that it had not dismissed the claimant and it was left the onus was on the claimant to inform it when he was due to return to work, and the claimant's silence on this issue was followed by a claim for unfair dismissal.

29. The respondent also received at the same time as the claim form and ET3 response form, a letter from the Tribunal informing it that no response was required to be entered to the unfair dismissal complaint together with a copy of the strike out warning sent to the claimant. Given the factual matrix the Tribunal preferred Stephen Spencer's evidence that when ACAS was contacted on the 2 January 2020 Rosemary Johnson was not told the respondent had dismissed the claimant, in direct contrast to the claimant's evidence that she had, it is entirely credible that Rosemary Johnson's advice was that the respondent should not respond to the unfair dismissal claim given the clear instruction from the Tribunal in its 23 December 2019 letter to the respondent, and the Tribunal preferred the evidence given by Stephen Spencer on this issue to the less than credible evidence given by the claimant which was unsupported by contemporaneous documentation. Stephen Spencer incorrectly took the view that because the respondent had offered the claimant his job back on reinstatement of his driving licence he had not been dismissed.

30. By a text dated 3 January 2020 the claimant gave Stephen Spencer the impression that his licence had just been reinstated when he wrote "licence is back do you want me to come for a chat one day." Given the correspondence received from the Tribunal concerning the unfair dismissal and advice received from ACAS Stephen Spencer did not respond to the claimant's suggestion, which had taken him by surprise as he believed the claimant was to have returned by the 12 November 2019, had found another job and yet it appeared from the text message his licence

had just been reinstated. It is notable that the claimant, in the 3 January 2020 text message, did not refer to any continuing employment and a suggestion that Stephen Spencer may invite the claimant for a "chat someday" points to the employment relationship having come to an end and the claimant seeking to work for the respondent again following his decision that he needed some stability in his life and the respondent could provide that stability.

Law

31. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by his employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes capability (qualifications) of the employee as being a potentially fair reason for dismissal.

32. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

33. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

34. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Unlawful deduction of wages

35. Under part II of the Employment Rights Act 1996 (ERA) the general prohibition on deductions is set out. S.13(1) ERA states that: 'An employer shall not make a deduction from wages of a worker employed by him.' This prohibition does

not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b).

36. Section 13(3) provides that where the total amount of wages paid on any occasion by the employer to the worker 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 for the purpose of this Part as a deduction made by the employer from the worker's wages on that occasion.

37. The determination of what is 'properly payable' is relevant in this case. The approach Tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT. It must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion and this requires consideration of all the relevant terms of the contract, including any implied terms (including the implied term of mutual trust and confidence) — Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714, CA.

Conclusion

38. This was a difficult case to decide as both parties originally took the view the claimant had not been dismissed; the respondent inferring the claimant had resigned on some unknown date after November 2019 with the possibility that he may return to work, and the claimant taking a view that he had not been dismissed until discussions with ACAS as recorded in the undated email sent to the Tribunal in response to the strike out warning.

39. With reference to the first issue, namely, whether the claimant had been dismissed and if so, the effective date of termination, the Tribunal found he had been dismissed on the 9 September 2019 when he was no longer paid a salary, was not offered work and subsequently worked for another employer and the fact that the parties anticipated (a) reinstatement of the driving licence on 12 November 2019 and (b) the claimant taking up his employment on this date, if not earlier depending on reinstatement of the licence. The claimant was dismissed without notice as a consequence of him losing his driving licence and in the subsequent two discussions it was anticipated he would pick up his employment again within a matter of two months or so. It is notable in Caroline Spencer's written statement she described a discussion that had taken place with the claimant about how the loss of his licence "affected his ability to work…we could not have him at work whilst he could not drive…"

40. Qualifications' for the purposes of S.98(2)(a) ERA are defined as 'any degree, diploma or other academic, technical or professional qualification relevant to the position which [the employee] held' — S.98(3)(b). Holding a driving licence is a qualification, because it relates to the ability to do a job which necessitates driving and in the claimant's case holding a valid driving licence was expressly stated in the contract of employment and as a matter of fact, was required in order that he could carry out his work. It was an essential and continuing condition of the claimant's employment that could not be met by the 8 September 2019 when the claimant was disqualified from driving. The claimant was fairly dismissed at that point as no other

alternative employment was available then or in the foreseeable future. There was a subsequent discussion about the claimant possibly working with a qualified engineer on a two-man job, but none came up and this work was not offered to him. The clear evidence before the Tribunal was that the claimant needed a valid driving licence in order to travel the length and breadth of the North West and North Wales in order to carry out his contractual duties, and there was no alternative work he was qualified to undertake. It was no economically viable for the claimant to partner a qualified engineer, and the Tribunal heard credible undisputed evidence on the present and future contracts that would not cover the cost of the claimant working with a qualified engineer i.e. two men engaged on a one-man job.

41. It is notable that the claimant worked for another employer and the respondent did not make any meaningful contact with the claimant on or after the 12 November 2019 to ascertain whether he intended to return to work on the reinstatement of his driving licence. The factual matrix points to the employment having been terminated, and the claimant then deciding approximately 4-months down the line that he wanted his job back, hence the tone and tenor of the text dated 3 January 2020 which followed the presentation of a claim for unfair dismissal with re-engagement being sought as a remedy.

42. With reference to the second issue, namely, if the claimant had not been dismissed whether it can be inferred from the claimant's actions when his licence was reinstated on the 12 November 2019 to 3 January 2020, no contact was made with the respondent and a claim for unfair dismissal was lodged, that he had resigned from his employment and if so, on what date. There is no requirement for the Tribunal to deal with this issue having found the claimant was dismissed on 9 September 2019, the effective date of termination. The problem for the respondent in inferring that the claimant had resigned on or upon the 12 November 2019 was that at the time the possibility that the claimant had resigned did not cross the minds of the directors dealing with the claimant, who were willing to wait for the claimant to make the first move. I concluded from the factual matrix that it was not open to the respondent to infer the claimant had resigned on the basis that (a) the respondent had made it clear to the claimant there was no work for him to carry out and it did not offer the claimant work, (b) the claimant had not been offered any two men jobs up to and including the 3 January 2020 as there were no available work, (c) the respondent did not take the claimant up on his offer set out in the 3 January 2020 text and (d) it was aware from the 9 September 2019 onwards the claimant was unhappy with not being offered work or pay when he was available to work, albeit without a driving licence. An employer cannot unilaterally deem an employee to have resigned when he has not, and it is undisputed the claimant as far as the respondent was concerned, had not resigned. At no stage did the respondent write to the claimant seeking clarification of his intentions; it was happy to wait for the claimant to approach as and when the claimant was ready to start work again until these proceedings were issued and contact was made with ACAS, following which the position changed and the claimant was never going to be offered work.

43. With reference to the third issue, namely, if the claimant has been dismissed, can the Respondent establish that the sole or principal reason for the dismissal was claimant's failure to hold a full UK driving licence under section 98(2)(a) of the ERA, the Tribunal found the sole reason for the dismissal was revocation of the claimant's

driving licence and his inability to carry out his contractual obligations under the employment contract. Taking into account the factual matrix including the contractual terms a driving licence was an essential and a continuing condition of the claimant's employment as an apprentice engineer for the reasons set out above. The claimant had received the appendix to the contract of employment on 17 December 2015, the date he signed the contract, and he was aware of the importance of a driving licence as he took on more responsibility and continued progressing to the status of a qualified engineer. The "duties" of "apprentice engineers" are set out and under paragraph 1(a) the claimant was expressly responsible for maintaining a valid UK driving licence; a qualification that was both essential and a continuing condition of the claimant's employment in order that he could carry out his duties. In evidence the claimant was unable to point to any job he was qualified to do or available for him that did not require a driving licence.

44. With reference to the fourth issue, namely, was the respondent's decision to dismiss the claimant within the range of reasonable responses in the circumstances of this case and the test set out in section 98(4) of the ERA, the Tribunal found that it was taking into account there was no alternative employment available at the time or dismissal or thereafter. In short, the respondent's decision to dismiss the claimant fell well within the range of reasonable responses having regard to the reasons shown by the respondent, and all of the circumstances of the case including its small size and limited administrative resources in the respondent's undertaking. The respondent acted reasonably in treating the claimant's loss of his driving licence as a sufficient reason, taking into account the offer of reinstatement immediately the claimant could legally drive.

45. With reference to the fifth issue, namely, was the procedure followed a fair procedure taking into account the ACAS Code, the Tribunal found the ACAS Code was not relevant in the circumstances and in any event, the respondent followed a fair procedure taking into account the small size and limited resources of the business. The evidence of Caroline Spencer was that she had discussed with the claimant the effect of the licence revocation on his ability to work. A number of options were discussed, including the claiming being signed off work and claiming SSP, an early contact with the DVLA to avoid delay and the possibility of the claimant working on two-men jobs. Following the discussion, Caroline Spencer investigated the possibility of alternative employment involving two-men jobs that did not require the claimant to drive, and there were none. She informed the claimant of the position, promising (a) the claimant would be informed if there were any two-men jobs and (b) as soon as his licence was reinstated he could return to work immediately. Taking into account the particular circumstances of the case and the 'reasonableness' test set out in ERA the Tribunal concluded that, having regard to the reason shown by the respondent, it acted reasonably in treating the revoked driving licence and claimant's inability to carry out his duties as a sufficient reason for dismissing him. In short, there were no steps that the respondent, as a reasonable employer, could have taken when faced with an employee who cannot carry out his duties, and the decision that the claimant could not continue working and would not be paid, which is essentially a dismissal, fell well within the band of reasonable responses.

46. The Acas Code of Practice on Disciplinary and Grievance Procedures sets out basic requirements for fairness that will be applicable in conduct cases. including the steps to be taken at investigation and disciplinary hearing stage. No disciplinary action was taken against the claimant; he was not disciplined for driving a company vehicle without a valid licence and was not dismissed for misconduct and no grievance was raised; therefore, the ACAS Code is not applicable.

Unauthorised deductions

47. With reference to the final issue, namely, did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13, and if so how much was deducted, the Tribunal found that it did not.

48. The claimant seeks payment of wages unpaid from 8 September 2019 to 12 November 2019 during a period when he was working for another employer. The claimant argues that he should have been paid as he was signed by his GP fit for work, but could not work because he did not have a driving licence and the respondent would not "allow me to come into work." After the 12 November 2019 the claimant confirmed there is no unlawful deduction of wages claim because "I didn't go back to work, my responsibility."

49. The determination of what is 'properly payable' is relevant in this case. The approach Tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT. It must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion and this requires consideration of all the relevant terms of the contract, including any implied terms. The Tribunal found the claimant was dismissed on the 9 September 2019; he was entitled to notice pay but there is no wrongful dismissal claim before the Tribunal for statutory notice. The Tribunal found that no wages were "properly payable" during the period claimed by the claimant. As indicated earlier, had the claimant brought a claim for unpaid notice pay it is likely this claim would have succeeded. For the avoidance of doubt, the Tribunal did not have before it any application to amend to bring a wrongful dismissal/breach of contract claim for notice pay and it cannot enter a judgment in the claimant's favour for unpaid statutory notice if the claimant, who is a litigant in person, has not brought such a claim.

50. In conclusion, the claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded and is dismissed. The claimant was not entitled to wages between 8 September and 12 November 2019. The claimant's claim for unauthorised deduction of wages between the 8 September 2019 to 12 November 2019 brought under section 13 of the Employment Rights Act 1996 as amended, is not well-founded and is dismissed.

16.11.20
Employment Judge Shotter

JUDGEMENT & REASONS SENT TO THE PARTIES ON

23 November 2020

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FOR THE SECRETARY OF THE TRIBUNALS