EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103392/2020 (V)

Hearing held by CVP on 14, 15 and 16 December 2020

10 **Employment Judge I McFatridge**

Mr Fraser Rolley **Claimant**
In person

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20 **Eros Retail Ltd** **Respondent**
Represented by:
Mr Harris Aslam,
Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(One) The claimant was wrongfully dismissed by the respondent. The respondent shall pay the claimant Five Hundred and Nineteen Pounds and Twenty Three
30 Pence (£519.23) in respect of the notice pay to which he was entitled.

(Two) The claimant was unfairly dismissed by the respondent. The respondent shall pay to the claimant the sum of Ten Thousand Three Hundred Pounds and Forty Six Pence (£10,300.46) as compensation therefor. The prescribed element is £3634.61 and relates to the period between 10 July and 24 August 2020. The
35 monetary award exceeds the prescribed element by £6665.85.

(Three) The respondent unlawfully withheld wages from the claimant in the sum of One Thousand and Ninety Pounds and Thirty Seven Pence (£1090.37). The respondent shall pay this sum to the claimant.

REASONS

1. The claimant lodged a claim with the Tribunal in which he claimed that he had been unfairly and wrongfully dismissed by the respondent. He claimed a redundancy payment and notice pay. He also claimed that he was due sums in respect of holiday pay and arrears of pay following the termination of his employment. He also claimed to have suffered a further unlawful deduction of wages in respect of a claim for what he variously termed forced overtime and/or bonus. The respondent submitted a response in which they denied all the claims. They raised the preliminary issue that the claimant did not have sufficient qualifying service to make a claim of unfair dismissal. They denied that the claimant was due notice pay since he had been summarily dismissed for gross misconduct. They did not accept that the claimant was due any payment in respect of bonus and/or forced overtime. They accepted that as at the date of his dismissal the claimant was due a sum in respect of unpaid wages and accrued holiday pay although they disputed the sum stated by the claimant. It was however their position that they had made an authorised deduction from his wages in order to recover monies which were due to them from the claimant in terms of his contract.

2. The case proceeded to a final hearing. Shortly before the hearing the Tribunal was made aware that the respondent had lodged proceedings in the Sheriff Court against the claimant for payment of monies they alleged to be due to them arising from the same circumstances as led to the dispute as to whether the deductions from wages made by the respondent were authorised or not. I decided nevertheless to proceed with the hearing on the basis that the deduction of wages claim involved consideration of matters which went above and beyond the matters which were required to be determined in the Sheriff Court proceedings. I also considered that in terms of the overriding objective it was important that the claimant's unfair dismissal and other claims be dealt with speedily.

3. A few days before the hearing the respondent lodged an application with the Tribunal to have the claims struck out failing which a deposit order made. I considered that it was too late in the day for a preliminary hearing to be fixed to consider this and indicated that I would deal with the matter

at the commencement of the hearing. The respondent's representative raised the matter again at the beginning of the hearing. Having considered the terms of the application I decided that it would not be appropriate to consider the issues of strike out and/or deposit order since I would require to hear evidence in order to deal with these. In particular, the question of whether or not the claimant had the necessary length of service to claim unfair dismissal was, as can be seen below, a somewhat complex one. In order to determine whether the claimant had sufficient qualifying service I first of all required to determine whether the claimant had been guilty of gross misconduct so as to allow the respondent to dismiss him summarily in terms of section 86(6) of the Employment Rights Act 1996 or whether the claimant was entitled to one week's notice in terms of the other provisions of section 86.

4. At the hearing the respondent director Mr Harris Aslam gave evidence on behalf of the respondent. Mr Aslam then led evidence from Rebecca Wallace, an Office Manager with the respondent and Raza Rehman another Director of the respondent. The claimant then gave evidence on his own behalf. The parties had lodged a joint bundle of productions. On the basis of the evidence and the productions I found the following essential facts relevant to the matters to be decided to be proved or agreed.

Findings in fact

5. The respondent are a small chain of retail shops mainly in the convenience sector. They have retail units in Fife, Clackmannanshire and Ellon in Aberdeenshire. The claimant commenced employment with the respondent on 21 May 2018. On 18 April 2018 the respondent sent the claimant a formal offer of employment. This e-mail was lodged (page 1). The claimant sent a short e-mail back in which he accepted the offer of employment. This was lodged (page 2). The offer of employment letter which was enclosed was also lodged (page 3). This states

> "Following our interview process we are delighted to offer you a position with the Eros Retail as Area Manager. The base salary will be £27,000 per annum and we will be providing a company car. As

discussed we will be looking to introduce a discretionary bonus scheme in the very near future and will agree details of this in due course.

We will follow up with the detailed role description in due course, though this will of course be in line with our discussions over the last few weeks.

If you require anything else please either give me a call on …. or you can contact me via e-mail at ….”

6. The claimant then e-mailed them on 21 April 2018 confirming that he would be starting on 21 May (page 4).

7. In his role as Area Manager the claimant was effectively one level down from the directors of the company. He reported to Mr Harris Aslam and both very quickly developed a strong and close working relationship.

8. With regard to the company car the respondent arranged to order a lease vehicle however this was not available for the claimant’s start date on 21 May. As a result of this the claimant continued to use his own vehicle to carry out his role for a number of months. The claimant initially paid for his own fuel however he complained about this to Mr Aslam and eventually an agreement was reached whereby the claimant was reimbursed a sum of money to take account of the fuel he had purchased for use on company business. The claimant’s new vehicle was delivered in or about August 2018. It was a Seat Arona registration number MH18 DWL.

9. There were some discussions between the claimant and the respondent’s office staff including Mr Rehman the Finance Director regarding the insurance of the vehicle. By this time the claimant had a concern that some of the respondent’s administrative procedures were rather slipshod and he was very keen to make absolutely certain that the car was properly insured. He did not want to find himself in a situation where he was inadvertently driving a vehicle illegally. He discussed the matter with Mr Rehman who asked the claimant if he would go about sourcing the insurance himself. The claimant went online and purchased a policy of insurance with Axa. The claimant had previously insured his own vehicle with Tesco Insurance. On this occasion he went with Axa because they

offered a cheaper premium and he was advised that this was what the company wanted. The insurance documentation for this vehicle was lodged (page 5-6). It showed that the vehicle was insured from 21 August 2018 for a period of one year. The claimant provided details of the company credit card to Axa so that they could take payment. They e-mailed Mr Rehman on 21 August confirming to him that the company card would be debited (page 7).

10. At the time it was not appreciated either by Mr Rehman or by the claimant that the insurance had been taken out in the name of the claimant when it ought to have been taken out in the name of the company since the company were the owners of the car. The respondent had not previously provided company cars to any employees other than the directors. They had previously leased a car on behalf of another store manager who was having difficulty obtaining credit in his own name but the claimant was the first employee who was to be given a company car as an adjunct of his employment. In the previous situation with the store manager the store manager had been responsible for paying all outgoings for the vehicle. Since the claimant was getting the car as an adjunct of his employment the respondent paid all costs in respect of the vehicle with the claimant reimbursing them for any private fuel used. The claimant purchased fuel using a company fuel card and paid the company back for any private fuel used. When the car needed servicing Mr Rehman the Company Finance Director made the arrangements for the service to take place. The claimant was not at all involved in the renewal of the insurance when the insurance came to be renewed in August 2019 and at that stage his understanding was that the company added the vehicle to their existing insurance policies.

11. At some point following the commencement of his employment the claimant was sent various employment contract documents by Rebecca Wallace the respondent's Office Manager. These included a 48 hour opt-out agreement which the claimant signed in April 2019 (page 10). The claimant was also sent a statement of main terms of employment. A copy of this document was lodged (pages 83-84). The claimant was supposed to sign this however he refused to do so. He told Rebecca Wallace that

he did not wish to do so because he wanted clarification relating to the company car. He was also sent a document called a deductions from pay agreement. A copy of this was lodged (page 85-86). The claimant was meant to sign it but again he refused to do so and advised Ms Wallace of this. The claimant said that he wished to speak direct to Mr Harris Aslam regarding this before he signed anything.

12. The claimant had become aware shortly after joining the respondent of an issue which had transpired in relation to the previous Store Manager who had had monies deducted on leaving the claimant's employment to cover repairs to a car. The claimant wished to ensure this did not happen to him.

13. Rebecca Wallace did not pass on the claimant's comments to Mr Harris Aslam. Her understanding was that the claimant would discuss the matter with Mr Harris Aslam at some point.

14. The claimant was also sent a copy of the respondent's company handbook in or about April 2019 after he had been in employment for many months. The employee handbook was lodged (pages 89-126). The claimant also signed a document headed Form for Existing Employees, a copy of which was lodged at page 11. It is as well to set out the terms of this document in full. It states

> "Please read the notes and then sign this form and the updated statement of main terms of employment (form SMT attached).
>
> As you may be aware we are legally obliged to issue a written statement of key particulars with regard to terms and conditions of employment and to keep these up to date. We are also taking the opportunity to update the important information kept on your employee file. An update of the statement of main terms of employment (form SMT) and duplicate is therefore attached for your information and you should sign both copies of this form where indicated. The statement makes reference to the employee handbook, copies of which will be in circulation for you to read after which a copy will be kept in each store.
>
> You should now read the information contained in the employee handbook as it forms part of your contract of employment except

where the contrary is expressly stated. Please discuss any queries you may have with your line manager."

There is then a section for the claimant's personal details and the document goes on to state

5 "I have read and I understand the current employee handbook. I accept that this forms part of my contract of employment except where the contrary is expressly stated and I will keep myself informed of its contents. I agree that where the working time regulations apply to my employment, any terms and conditions relating to those regulations,
10 e.g. annual holidays constitute a relevant agreement."

The document was signed by the claimant and bears the date 22nd April 2019. As noted the claimant also signed the 48 hour opt-out agreement which bears the same date.

15. The document headed Statement of Main Terms of Employment which
15 was not signed by the claimant and is lodged at pages 83-84 contains the following clauses:

"Hours of work

Your hours of work are those required to carry out your duties to the satisfaction of the company and as necessitated by the needs of the
20 business. You will be expected to work a minimum of 40 hours per week working between 7am and 10pm Monday to Sunday, a maximum of six days from seven. You may be required to work additional hours when authorised and as necessitated by the needs of the business. You are entitled to unpaid breaks in line with the current
25 working time regulations.

Your salary is currently £27,000 per annum payable monthly by credit transfer as detailed on your pay statement. In your first year of employment your salary will be proportionate to the amount of time left in the year. …

30 Capability and Disciplinary Procedures

The disciplinary rules that form part of your contract of employment and the procedures that will apply when dealing with capability of disciplinary issues are shown under the headings Capability

Procedures and Disciplinary Procedures in the employee handbook to which you should refer."

There is no reference in the statement of main terms of employment to the claimant's company car nor is there any provision allowing the respondent to make any deduction from wages. The deductions from pay agreement which was not signed by the claimant (pages 85-86) was also lodged. It states in paragraph 11

"Any damage to stock or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement. Any loss to us that is the result of your failure to observe rules, procedures or instruction or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the cost of the loss.

In the event of failure to pay such costs will be deducted from your pay." (p85)

The employee handbook contains the following clause at page 104

"A) Wastage

(1) We maintain a policy of minimum waste which is essential to the cost effective and efficient running of our organisation.

(2) You are able to promote this policy by taking extra care during your normal duties by avoiding unnecessary or extravagant use of services time, energy etc. The following points are illustrations of this.

   (a) Handle machines, equipment and stock with care;

   (b) turn off any unnecessary lighting and heating, keep doors closed whenever possible;

   (c) ask for other work if your job has come to a standstill; and

   (d) start with the minimum of delay after arriving for work and after breaks.

(3) The following provision is an express written term of your contract of employment;

(a) any damage to stock or property (including non-statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of any repair or replacement;

(b) any loss to us that is the result of your failure to observe rules, procedures or instruction or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the cost of the loss.

(4) In the event of failure to pay we have the contractual right to deduct such costs from your pay."

The Handbook also sets out the company disciplinary policy at pages 115 onwards. This contains the following paragraphs.

"A)(4) (d) You will only be disciplined after careful investigation of the facts and the opportunity to present your side of the case. On some occasions temporary suspension on contractual pay may be necessary in order that an uninterrupted investigation can take place. This must not be regarded as disciplinary action or a penalty of any kind.

(e) Other than for an "off the record" informal reprimand you have the right to be accompanied by a fellow employee at all stages of the formal disciplinary process

(f) You will not normally be dismissed for a first breach of discipline except in the case of gross misconduct and

(g) If you are disciplined you will receive an explanation of the penalty imposed and you will have the right to appeal against the finding and the penalty.

B) It is not practical to specify all disciplinary rules of offences that may result in disciplinary action as they may vary depending on the nature of the work. In addition to the specific examples of unsatisfactory conduct, misconduct and gross misconduct shown in this handbook a breach of other specific conditions, procedures, rules etc that are contained within this handbook or that would otherwise be made

known to you will also result in the procedure being used to deal with such matters."

The handbook then goes on to set out rules which are said to cover "Unsatisfactory Conduct and Misconduct". There is then a further section for "Serious Misconduct". Section E) refers to gross misconduct. This section states

"Occurrences of gross misconduct are very rare because the penalty is dismissal without notice and without any previous warning being issued. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct.

Examples of offences that will normally be deemed as gross misconduct include serious instances of (a) theft or fraud, (b) physical violence or bullying, (c) deliberate damage to property, (d) deliberate acts of unlawful discrimination or harassment, (e) possession or being under the influence of alcohol or illegal drugs at work, (f) breach of health and safety rules that endangers the lives of or may cause serious injury to employees or any other person (the above examples are illustrative and do not form an exhaustive list).

16. The handbook also contains a paragraph on page 126 stating

"(c) Return of our property

On the termination of your employment you must return all our property which was in your possession or for which you have responsibility. Failure to return such items will result in the cost of the items being deducted from any monies outstanding to you. This is an express written term of your contract of employment."

17. The respondent manages internal communications with their managers and employees via various whatsapp groups. In performing his role the claimant travelled round the claimant's various retail units. He required to take over management of stores which were in between managers for any reason. He was also involved in setting up a new store.

18. The claimant had a substantial number of discussions with Mr Harris Aslam and they got on well. Mr Aslam advised the claimant that he was in the course of trying to develop a new store at a railway station site in Dundee. This was described by Mr Aslam as a flagship store and he indicated to the claimant that since the claimant lived in Invergowrie close to Dundee then the way forward might well be for the claimant to take over management of this flagship store. The claimant was enthusiastic about the prospects for the company and worked hard to expand it.

19. In or about February 2018 the claimant had a conversation with Mr Aslam regarding a CV. Shortly before this the claimant had become aware of a situation which had arisen whereby a fairly senior manager with the respondent had been dismissed on minimum notice. The claimant felt that in order to protect himself he should see what other jobs were out there and uploaded his CV to a well-known online recruitment platform. Mr Aslam became aware of this because the respondent has an arrangement with a number of online recruitment platforms whereby they will send to the respondent details of any potential employees who might be of interest to them. The CV uploaded by the claimant was lodged (pages 8-9). Mr Aslam considered that the claimant had exaggerated his role with the respondent in the CV. The claimant refers to being an Area Manager of 11 award winning retail outlets, six post offices and two dessert stores. In fact the respondent never had more than eight or nine retail outlets including two post offices during the whole period of the claimant’s employment. They had one dessert store although there was an ice cream concession at the back of the store in Ellon which the claimant considered amounted to a dessert store. The claimant had also indicated the respondent turnover was around £15.3 million when in fact it was around half of this. The claimant had also indicated that he was line manager to 240 colleagues. The respondent never had more than around 150 employees albeit the claimant as Area Manager was either direct Line Manager or indirect Line Manager for most of these. When challenged by Mr Aslam the claimant freely admitted that he had uploaded the CV and explained why. He said that he accepted that he had exaggerated his CV but he understood that this was a fairly normal thing to do and that potential employers tended to expect people to exaggerate a bit. Although

Mr Aslam considered that the claimant had lied in the cv he did not take any action.

20. On 8 June 2019 the claimant was using his company car for private purposes when he was involved in a minor road traffic accident. The accident was not in any way the claimant's fault but was the fault of the other driver. The vehicle was slightly damaged. The claimant immediately advised Harris Aslam of the accident by whatsapp message. His first message stated

> "Good evening Harris sorry to bother you just to let you know a woman has slightly grazed the side of the car I am confident that it is her blame as she was undercutting me at the time. I have exchanged insurance information and take pictures there appears to be minor superficial damage on both cars. I'll take care of all issues and any additional cost in suing apologies for any inconvenience."

The claimant attached a picture showing his own vehicle and the other vehicle. The damage to the vehicle consisted of a dent in the side panel and door. Mr Aslam responded to the claimant stating

> "Hi Fraser no probs – thanks for letting me know. Keep us posted plz."

21. As noted above the claimant's understanding was that this was a company vehicle and that the finance director would be making arrangements for any insurance claim etc. His position was that he would be happy to pay any additional costs such as additional transport costs whilst the vehicle was getting fixed. He did not understand that it was his responsibility to make any arrangements to get the vehicle repaired.

22. On the other hand Mr Rehman's understanding of the position was that since at that time the insurance was in the name of the claimant, Mr Rehman would not be able to arrange for any insurance repair to be carried out and it would need to be the claimant who did this. In the event neither the claimant nor the respondent took any steps to repair the vehicle prior to the termination of the claimant's employment.

23. In the course of his duties the claimant often had to use his company vehicle for transferring stock. He also spent a considerable part of each

day in his car. He did a very high mileage visiting stores in Fife, Clackmannanshire and Aberdeenshire. On occasions he would give a lift to Mr Harris Aslam. Mr Harris Aslam would sometimes comment unfavourably on the tidiness of the vehicle. He asked the claimant if he ever cleaned his car. The claimant would say that he would get round to it.

24. Although the claimant was paid a salary he was expected to use the respondent's clocking in and clocking out system to log the hours he worked each working day. The system was called 'Deputy'. The claimant had administrator privileges with Deputy so if he forgot to log in or log out on a particular day then he could go back into the system and rectify matters. It was a relatively common occurrence for the claimant to do this. The claimant was paid a salary. He was not generally paid for any hours worked over and above the nominal 40 hours which were stated in his contract. Within the respondent organisation other salaried staff similarly did not receive payment for overtime. The expectation was that if a salaried member of staff worked over their hours one week then they would attempt to catch up later and effectively take time off in lieu.

25. The claimant lodged three pages of reports from Deputy showing the hours worked over various weeks in November-March 2020. Although some of the entries had been made retrospectively I considered that these accurately showed the hours worked by the claimant over this period.

26. In or about January 2020 the respondent were advised by Dundee Council that their plan to build their flagship store at the Dundee Railway Station site had been refused by the local authority. The claimant lodged an article from the Dundee Courier of 23 January 2020 in which a spokesman for the respondent is quoted as saying "It is with heartfelt regret that we have reached the conclusion we will no longer be progressing with the retail unit at Dundee Railway Station." (page 81)

27. Shortly after this the claimant had occasion to have a discussion with Mr Aslam when they were both in his car. Mr Aslam referred to his former plan that the claimant would eventually have become manager of this store. Mr Aslam said that he was not sure what the future now held for the claimant.

28. In March 2020 the Covid-19 pandemic broke out. This had a major effect on the respondent's business. All of their stores were deemed to be essential and would continue to remain open. The respondent also made arrangements to set up a home delivery service and provided various types of assistance to members of the public in the communities served by their stores. It was an extremely busy time for all staff. The respondent calculated that in the period from March 2020 up to the date of hearing their overall turnover in their stores increased by around 50%. This was due to the fact that people became much more likely to shop locally because of the various lockdowns and the success of the home delivery service. At the outset of the lockdown Mr Aslam sent a letter to various managers in the whatsapp group. The full text of the message was lodged (page75-76). At this stage it was already clear that there would be considerable stress on managers and other employees and that many managers including the claimant would require to work much harder and for longer hours. In the penultimate paragraph Mr Aslam went on to state

> "The length at which each of you are going to is certainly not going unnoticed and I can assure you that you will be rewarded appropriately."

Despite the fact that the claimant's offer of employment had referred to a discretionary bonus scheme nothing official had been set up at any point by the respondent. It was however the respondent's practice to award bonuses on a fairly ad hoc basis to managers or employees who had performed well in various situations.

29. At the time of the coronavirus outbreak the claimant was managing three stores which were in between managers as well as having to carry out his overall duties as Area Manager for all of the stores. Due to disruptions in supply chains he found himself having to deal with stock transfers as well as generally firefight issues which were arising. On or about 31 March Mr Aslam became concerned that he did not really know what the claimant was doing. Mr Aslam formed the view that whilst other colleagues had stepped up tremendously Mr Aslam was hearing from store managers that the claimant was not fully available to help them. The claimant's position in this was that basically he was spending all his time dealing with other

matters but in any event the claimant was contacted by Mr Aslam on the morning of 31 March. He was contacted by whatsapp. The initial message was very brief at lunchtime stating "Fraser – where you at?" The full text of the exchange was lodged on pages 13-14. The claimant is shown as indicating that he was at the respondent's Tillicoultry outlet and that he would probably not be back at the head office until Friday. Mr Aslam then had a lengthy telephone call with the claimant. Mr Aslam raised a number of issues regarding what he perceived to be deficiencies in the claimant's performance. The claimant's response was basically to the effect that he was working all the hours there were doing things and that contrary to what Mr Aslam appeared to suspect the claimant was extremely busy doing his job. Following this conversation, the claimant wrote a lengthy response to Mr Aslam on whatsapp. The full text can be seen at pages 13-14. The claimant indicated that he had been seething all day as a result of the telephone conversation. He felt that some of the points raised were insulting, ill-informed and wrong. He then referred to a number of specific points. He set out in brief what he had been doing during the week which included attending large deliveries at a number of different stores and working considerable additional hours. He referred to the fact that during the conversation he had specifically spoken to Mr Aslam about this and said that he felt the additional hours he worked deserved a financial reward. He went on to state in his whatsapp message:

> "Given the hours worked I'll be making considerably less than the temporary staff that we have hired to stack shelves."

Finally he noted,

> "Finally after being told to seriously consider my position with the company I have done so all day and feel that if you are not happy with my performance or commitment at this time then I'll reluctantly but happily offer you my resignation today and take one of the many alternative job offers that I have swiftly declined in the recent months. I do not react well to challenges like this and to be honest I've never felt less inspired or demotivated at any point in my career than following today's conversation. You are a talented man manager

however during this time and strain on retail I believe this has been misjudged. Please let me know how you would like this to proceed. I love my job at Eros and my colleagues at HQ and at store level. I take my senior management responsibilities incredibly seriously I do however refuse to work daily under such limited job security based on unfounded fallibilities of my performance."

30. The whatsapp messages then goes on to cover an exchange where Mr Aslam noted that he was going to be travelling up to Ellon on 2 April and asked if the claimant could give him a lift back.

31. The claimant and Mr Aslam travelled together from Ellon back to Central Scotland on the evening of 2 April. During this time they had a very lengthy and frank conversation with each other. The outcome was that each felt that the air had been cleared and the claimant continued to work for the company. At this meeting Mr Aslam raised various performance issues with the claimant and these had been refuted by the claimant. Although Mr Aslam referred to this being some sort of capability procedure it was absolutely clear to me that this was simply a conversation between a line manager and someone working for him and that there was no question of any formal procedure having been instigated. The claimant's position was that he disputed that there were performance issues but confirmed that he would continue to do his best.

32. Although in evidence Mr Aslam referred to the discussion as resulting in some sort of verbal warning it appeared clear to me that this was not what happened. There was simply a discussion regarding the claimant's performance. The claimant defended his performance and the outcome was that each party felt that they had had their say in the matter. No written record of any warning, verbal or otherwise was produced.

33. During the course of the conversation the claimant raised the issue of wanting to be paid for the additional hours that were worked. He indicated that he felt that he was due a bonus. Mr Aslam indicated that the claimant would be rewarded for the hard work he was doing but nothing specific was said about how this would be calculated and absolutely no specifics were gone into regarding this.

34. The claimant had been due to go on holiday for four days from 20 April. He cancelled his holiday and sent a whatsapp message to the respondent confirming this (page 15). The respondent's holiday year ran from 1 April to 31 March in each year. The claimant took no holidays between 31 March 2020 and the date of termination of his employment.

35. On or about 27 April 2020 there were a series of exchanges on whatsapp which involved the claimant, Mr Aslam and a manager of one of the respondent's stores called L. It commenced when L sent a message to Mr Aslam confirming that she was off on holiday for a week. This followed a few weeks when L had been off sick. Mr Aslam was concerned by this and immediately demanded to know who had authorised the holiday. The claimant confirmed that he had authorised the holiday. Mr Aslam felt that the claimant should have told him about this in advance. Mr Aslam then raised the issue that L had been off for a few days sick. Mr Aslam formed the view that the claimant's version of precisely when L had told him she was sick and when she had asked him for holiday differed from that of L. Matters ended with an exchange between Mr Aslam and the claimant where Mr Aslam stated

> "I am not interested in the holiday aspect just now but I cannot and will not have two conflicting stories from anybody in senior management. Trust is at the core of every relationship and I need to ensure that's feeding through."

The claimant responded

> "I had no idea L was off sick until we spoke on Friday not a single clue. To be completely honest I'm not ever sure I was told that L was absent on Friday only that she had been very unwell. I have confirmed this with L and yourself at midday today after talking with L directly. Is my credibility being challenged here?
>
> I spoke with L on Friday. We discussed ambient chilled and F&D orders cash ups. We did a store walk where I highlighted areas of improvement required prior to her going off. I was advised that these would be sorted I have not been back since.

> I got a holiday request on Monday. Is there any conflict with my side of this story."

There is no record of any response. Mr Aslam's position is that he felt that the claimant was fudging the fact and changing his position over what was a relatively simple issue. I did not find that Mr Aslam was justified in this view.

36. On Tuesday 12 May the claimant had a day off. He was still dealing with orders and calls at home using remote working. At some point during that day he had a conversation with Mr Shazad Aslam who is the father of Mr Harris Aslam. Mr Aslam senior had an arrangement for the respondent to be supplied with fresh strawberries from a farm near Dundee. It had previously been agreed that since the claimant lived very close to Dundee he would pick up these strawberries and deliver them to various of the respondent's retail outlets. Over the course of the previous two weeks the claimant had collected and distributed strawberries in this way on several occasions. Mr Aslam told the claimant that there were more strawberries for him to collect.

37. The following morning at around 8:20 Mr Shazad Aslam telephoned the claimant and asked him if he had picked up the strawberries yet. The claimant had a very busy day planned and had made out his plan so that he would use his time most efficiently. He did not wish to get into a situation where Shazad Aslam would interfere with this plan. He told Mr Aslam that he had already picked up the strawberries. In fact he had not. He then travelled to the farm near Dundee and picked up the strawberries at some point between 8:30 and 8:45. During this time he had a telephone call from Mr Harris Aslam and he told Harris Aslam that he was at the farm picking up the strawberries. Mr Harris Aslam had had a phone call from his father who had checked with the farmer after the claimant's earlier call and had told Harris Aslam that the strawberries had not been picked up. Harris Aslam then spoke to the farm and the person who answered the phone initially indicated that the claimant was not there. Mr Harris Aslam phoned back a few minutes later however to be told that the strawberries had been picked up. The claimant delivered the strawberries to the respondent's shop in Tillicoultry at around 9:00 am. It

was the claimant's position that this clearly showed that he was at the farm on the first occasion when Mr Aslam had phoned and had been told that the claimant was not yet at the farm.

38. The claimant was aware that he was in the wrong through having told Shazad Aslam that he had picked up the strawberries when he had not. He tried to contact Shazad Aslam on various occasions during the day in order to apologise but Shazad Aslam did not answer the phone to him.

39. There were a series of whatsapp messages between the claimant and Harris Aslam on 13 May. The first one was timed at 8:22 which was after the claimant had spoken to Shazad Aslam and told him that the strawberries had been picked up but prior to the conversation between Harris Aslam and the claimant where the claimant had indicated he was already at the farm. The message simply stated

> "Morning Fraser. Can you come and see me at the new offices today what time will you be across?"

The claimant responded by whatsapp saying

> "Good morning, Harris. To be honest I have no idea I've got chilled orders/cash to do in the Cardenden and Coaltown before 12.
> Ambient orders in Tillicoultry including home delivers as my driver has went back to work also Fishers orders in all three stores. Currently at the fruit farm picking up more strawberries which I'll need to distribute as well."

This was timed at 8:26. Mr Aslam's response at 8:30 was

> "Ambient order needs sent in Tilli or worked?"

This was timed at 8:30. The claimant's response at 8:32 was that the order needed scanned and sent by 16:00. Mr Aslam then sent a message to the claimant saying

> "OK cool, where were you Monday/Tuesday?"

The claimant responded

"Sunday: completed store rotas for Cardenden, Coaltown and Tillicoultry store teams have three weeks. Updated standing orders for Fishers for all stores using accurate updates sales figures from ITS and saved Tuesday's orders for Monday.

On Monday I scanned all chilled orders in Coaltown and Cardenden for Monday I reconciled store cash in Coaltown and forwarded off all outstanding DRS. I scanned and sent all ambient orders in Cardenden and Coaltown due for yesterday plus additional orders from Filshill for both store for lines that were unavailable. Then I was across to do the chilled order in Tillicoultry for Tuesday morning and then home deliveries for the Tillicoultry branch. Completed all outstanding home deliveries.

Tuesday I had off as it was my mum's birthday we went and visited her in her garden (2 metres apart) first time we'd seen anyone in three months. Did all Fishers orders remotely from laptop was on the Nisa claims about two missing pallets in Tillicoultry for Saturday (now resolved and delivered). Arranged home deliveries for Tillicoultry

Today as above."

40. Following this exchange there were telephone conversations between the claimant and Mr Aslam during the course of the day. Mr Aslam indicated to the claimant that the claimant was to come and meet with him at the respondent's head office. He did not give any reason for this. The next whatsapp message lodged was at 16:34 (page 20) and the claimant stated

"Really unsure what the motivation behind today is however to be honest I think I'm done Harris I literally can't do much more to keep stores afloat myself simply impossible do you still want me to go to head office."

41. The claimant attended at head office at around 6:30 and was immediately asked to go into Mr Aslam's private office. Mr Aslam began the conversation by stating that this was a formal investigation meeting regarding the allegation that the claimant had lied to senior management in the business. There was then a short conversation between the parties. The claimant accepted that he had told Mr Shazad Aslam that he had picked up the strawberries when in fact he had not. He said that he had

been at the farm at around 8:27 when Mr Aslam telephoned. He pointed out that the person to whom Mr Aslam spoke would not have any idea what the claimant looked like. He told Mr Aslam that he had dropped the strawberries off at the store within 30 minutes of that time and that it would not have been possible for him to drive that distance if he had only picked up the strawberries later than 8:30. He asked Mr Aslam to check. Mr Aslam did telephone the manager of the store in question. The manager confirmed the claimant had been in with strawberries that morning but could not recall the exact time. The claimant suggested that it would be possible for Mr Aslam to check the CCTV at the store. The claimant was aware that all of the stores have CCTV which is synchronised so as to be telling the correct time. Mr Aslam declined to do this. Mr Aslam then left the room for a short time. During this period he spoke to his fellow director Raza Rehman. Although a director of the company Mr Rehman was at that time working primarily for another company called Skwishee. This is an associated company of which Mr Harris Aslam and Mr Rehman are both shareholders and directors. It installs frozen drinks concessions throughout the UK. Mr Aslam advised Mr Rehman that he was dismissing the claimant but asked Mr Rehman if Mr Rehman had any roles in Skwishee which could be filled by the claimant. Mr Rehman advised that he did not. Mr Aslam then went into the meeting and told the claimant that he was being summarily dismissed for gross misconduct. The claimant remonstrated with him advising that if he was guilty of any misconduct at all it was certainly not gross misconduct. He referred to the accusation as “bullshit”. The claimant then left.

42. Later on that evening there was a whatsapp exchange between the claimant and Mr Aslam which was in reasonably friendly terms. Mr Aslam indicated that he would give the claimant a call in the morning to confirm car collection and other leaver procedures.

43. At 5:58 the next morning Mr Aslam sent an e-mail to the claimant enclosing a letter confirming his termination of employment. The e-mail was lodged (page 21). The letter attached to this e-mail was also lodged (page 25). The letter states

> "I am writing to confirm to you the company's decision to terminate your employment immediately without notice following a disciplinary hearing conducted by myself on 13 May 2020 for reasons of gross misconduct specifically on grounds of dishonesty. Having reviewed the incidents in detail I have reached the conclusion that there has been unequivocal dishonesty on at least two occasions within the last three weeks. In line with company procedures it has been concluded that due to the severity and reoccurrence of the issue this is gross misconduct.
>
> As you are well aware and as discussed we as a business pride ourselves in upholding a level of respect that is given to all colleagues customers and suppliers. As part of this it is essential to be able to trust and rely on all colleagues particularly so from members of senior management. Once that relationship of trust and confidence between the employer and employee is destroyed it is impossible to allow the working relationship to continue. Your P45 will be forwarded to you in due course.
>
> You have the right to appeal against the decision to dismiss you for gross misconduct. Any appeal should be sent in writing to Amir Aslam, Eros Retail, 7 Glass Street, Markinch, Scotland KY7 6DP or via e-mail to …. by 28 May 2020."

44. Mr Amir Aslam is the brother of Harris Aslam and is also a director of the company. He lives at the same address as Harris Aslam. It is probably as well to record at this point that the claimant did not take up the offer of an appeal. His view was that it was completely pointless. He believed that the company had shown that they were not prepared to abide by any kind of disciplinary procedure and he did not believe that he would get a fair appeal.

45. The e-mail sent at 5:58 on 14 May also referred to the claimant's vehicle. It stated

> "In relation to your vehicle (Seat Arona white MH18 KPZ) – (NB this was not in fact the claimant's vehicle) This accordingly needs to be immediately returned to the company. Please can you ensure this is either dropped off to the new office location at Unit 14 Randolph Place,

Randolph Industrial Estate, Kirkcaldy, Fife KY1 2YX or we can arrange collection at the cost of £100 plus VAT (we would need to know by 12pm today to arrange collection between 1pm and 8pm)

I have enclosed standard company vehicle collection process below. If you can please ensure this is followed that would be greatly appreciated. As per previous discussions I understand the vehicle has incurred some damage in parts (whilst continuing to be roadworthy) As has been well discussed and documented, this is your responsibility to repair and in absence of these having been completed despite repeated requests any repair costs will be need to be directly chargeable back to yourself. As noted below there may be a delay in providing an invoice for damage to yourself given current Covid-19 restrictions however any chargeable issues will be well documented at the point of return.

We also note the car is in a fairly dirty condition internally and externally. Again we would advise as per point 1 below that this is cleaned thoroughly prior to collection to mitigate any charges to yourself.

The car must be returned by 14 May 2020 (today) as subsequent to this the car will be withdrawn from use and any relevant policies etc provided by the company removed with immediate effect. Please note if the car is not returned by the above date this will incur further charges to yourself.

Before collection please ensure

1. The car is cleaned thoroughly internally and externally and made ready for collection ensuring no delays when dropping off (the car is collected)

2. If being collected the car is parked with access to the entire vehicle with natural lighting and not in a garage or underground/multi-storey car park.

3. The car must have a valid MOT.

4. The tyres are roadworthy.

5. The car is carrying all standard equipment including all appropriate keys, accessories and documentation where applicable.

6. If the vehicle is being collected a minimum of half tank of fuel is left in the car as the car will need to be driven to head office.

7. All personal items removed from the car.

8. Any personal data contained within satnav, Bluetooth phone systems etc is wiped from the car's internal system. …"

46. There were then provisions regarding details of the collection and the e-mail goes on to state

"Recharges will be made for damage in line with the British Vehicle Rental and Leasing Association (BVRLA) fair wear and tear guidelines. In exceptional circumstances other damage recharges will be considered such as those where the collection agent has not been able to gain access e.g. vehicle underside or whether other extenuating circumstances may have prevented damage being noted. The fair wear and tear guidelines may be found 'a website'."

47. At this point the claimant had not received any car policy from the respondent nor had he received any guidance or information from the respondent as to their expectations in relation to his company car. He had not been referred to the BVRLA guidelines. The claimant had previously been copied in to an e-mail sent to one of the respondent's store managers who, as noted above, had been given a car for a short period of time but not as an adjunct of his employment. The e-mail sent to that employee was very similar in terms to the one sent to the claimant on 14 May.

48. The claimant responded to this e-mail at 8:48 (page 22). He referred to the e-mail and stated

"Can you please provide me with any documentation? As you are aware I have received nothing in receipt of use of the company car the damage was not caused by myself as a driver. As previously highlighted given my service to the company and the extremely unorthodox manner of my dismissal (lack of investigation, lack of impartial disciplining manager, no opportunity for representation I assumed we could deal with this in a less formal manner you appear to have chosen to do so on a different manner which is extremely disappointing … "

The claimant also enquired as to when he would be paid his outstanding pay and holiday pay and also referred to "bonus discussed due to working unacceptable hours during this crisis".

49. The claimant arranged for himself and his girlfriend to clean the car as best they could and they delivered it to the claimant's premises in Markinch. Keys were left with an employee. The claimant sent a whatsapp message to the respondent confirming this later on 14 May (page 26). Prior to dropping off the car the claimant took photographs of the interior which were lodged (pages 27 and 28). The claimant did not have time to do a deep clean of the vehicle which had been used for transporting strawberries the day before. Due to the Covid pandemic it was not possible to get the vehicle valeted. It was also not possible to arrange for any repairs.

50. Mr Aslam wrote to the claimant at 22:32 on 14 May. He noted the claimant's comments. He stated that as yet he had been unable to verify that the vehicle had been dropped off or inspected. He went on to state

> "In respect of outstanding/final pay etc there is currently £519.23 due to yourself on the 15th May 2020 (work forth – 10th May 2020) and £207.69 due on Friday 22 May for your work this week. Further, there is £363.45 due to you in respect of 3.5 days outstanding holiday pay ordinarily payable on the last pay date being 22 May 2020. These figures are gross pay and prior to any deductions as per below. Re your point on deductions I would draw your attention to the deductions from pay agreement you have signed which explicitly formed part of your contract of employment. In particular clause 11 refers to damage of property and the circumstances in which relevant costs incurred rendered you liable to pay for the cost of repair or replacement and allow the company the ability to deduct from pay in the event of failure to pay …"

The claimant responded to the respondent's e-mail sent at 9:03 on 15 May (page 31). He confirmed that he had not signed the deductions from pay agreement as he was confused by the reference to this. He confirmed that he had no intention of appealing. He stated he had no confidence that

it would be done in an impartial way given the Appeal Manager was a family member of Mr Harris Aslam and lived in the same household. He indicated that he had taken legal advice and had been advised that the respondent's claim that he had been dismissed for gross misconduct was incorrect.

51. The claimant was paid weekly in arrears and on 15 May which was a Friday he was due to be paid for the week beginning 4 May 2020. The claimant did not receive this payment. He e-mailed Mr Aslam and the respondent's account department raising the issue with them at approximately 19:30 on Friday 15th. On the same day the claimant applied for state benefits. The claimant e-mailed Mr Aslam again on 16 May. He once again advised that he had no recollection of signing a deductions from pay agreement and that he had requested evidence of this which had not been provided.

52. At no point did the respondent pay anything to the claimant in respect of the wages which were due up to the point of his dismissal or his holiday pay. As at the date of his dismissal the claimant was due to be paid a week's pay for the week ending 11 May and three days' pay for Monday 11th - Wednesday 13th May. He was paid 1/52nd of his annual salary per week gross.

53. On or about 16 or 17 May Mr Aslam took photographs of the claimant's former car. These photographs were lodged (pages 127-154). I accepted that these are an accurate representation of the condition of the vehicle when it was returned by the claimant. The damage to the door and panel on the passenger side can be seen on page 129. The vehicle had not been repaired. Although superficially tidy the interior of the vehicle showed some minor staining of the carpets and mats.

54. Subsequently the respondent raised a simple procedure action against the claimant in Forfar Sheriff Court in which they claimed the sum of £3534 for damage to a vehicle. In this action they quote the wrong registration number of the vehicle. They do not make any reference to the amount they deducted from the claimant's pay. At no time has any invoice been produced showing the cost of any repairs to the vehicle nor has any

invoice been produced showing the cost of valeting the vehicle. No evidence was provided about what happened to the vehicle after it was returned by the claimant. The claimant has defended the action in the Sheriff Court. It is due to go to a hearing in the New Year.

5 55. Shortly after the claimant's dismissal the claimant was copied in to a whatsapp message where he was passed a copy of a message that Mr Harris Aslam had sent to other managers at 8:44pm on 13 May which was a few hours after the claimant had been dismissed. The message was lodged (page 80). The message stated

10 "Good evening all just a quick update from me. Fraser (Area Manager) is no longer with the business with immediate effect. This is not a decision that has been taken lightly (particularly as a result of the current coronavirus scenario), though one which has been necessary following company procedures and policies. All store managers will 15 be reporting to myself directly until further notice and any store colleagues previously reporting directly into Fraser should raise any queries with Dougie in the first instance. We will be announcing some minor changes in terms of the management structure in Coaltown and …."

20 Another manager is then reported as stating

"Dougie seems to be the new Area Manager and I get the impression that this has all been pre-planned before today."

Another manager then states

"Shazad when into Cardenden at 8 tonight and told Charlene and 25 Michelle you have been sacked because you told too many lies and that the company doesn't need an Area Manager and stores don't need managers as the staff should be able to do orders."

56. In or about August 2020 the claimant was in correspondence with one of his former colleagues who is the manager of another store. This 30 correspondence was lodged (page 82). In that correspondence the colleague confirmed that they had eventually been paid a bonus. It stated

> "Just no trust any more now I just want out asap now well he'll be major regretting that, silly boy I got a bonus but because I constantly asked for it."

57. On the subject of bonus Mr Aslam was quoted in an article in a Scottish retail news. In this he states

> "Praising the wider industry Harris said shops and businesses across the country had 'gone the extra mile' to ensure no-one has been neglected."

He added

> "Our own amazing team have been working round the clock to deliver over 2000 packages of groceries and other household essentials which had been ordered online in the past week.
> Harris has rewarded staff by bringing forward a pay increase by two weeks with further bonuses planned …."

58. Following the termination of his employment with the respondent the claimant registered for universal credit. He required to move out of his home and back to live with his mother because he could not afford to remain living at his home. The claimant applied for various jobs. The claimant provided a list of jobs he had applied for and recruitment agencies with which he had registered. These were lodged as appendix 1 to his schedule of loss. He started registering with companies on 13 May. He applied to well over 100 companies. In or about July 2020 he was successful in obtaining a post with a carpet company however unfortunately this job offer was subsequently withdrawn after a few days for reasons entirely unconnected with the claimant. The claimant also obtained an offer of employment from a company in Spain. His employment was approved but due to the imposition of fresh coronavirus restrictions in Spain his job offer was deferred by the company. The claimant was also having second thoughts about moving to Spain but at the end of the day the company deferred the offer and would not allow him to travel to Spain for his induction even although coronavirus restrictions may well have allowed this. Eventually the claimant was successful in obtaining employment in a company which works in the motor industry.

He took up this employment on 24 August. The new employment pays slightly more than he received whilst he worked for the respondent. The claimant advised the Spanish company that he was no longer in a position to take up their offer. The claimant took entirely appropriate steps to mitigate his losses.

Matters arising from the evidence

59. I considered the claimant to be a truthful witness who gave honest evidence. He made appropriate concessions when questioned about matters and I had no doubt that he was genuinely trying to assist the Tribunal by being entirely truthful. With regard to the respondent's witnesses I found Mr Aslam to be a much less satisfactory witness. He had clearly developed a narrative in his head in which he sought to gloss over facts which were inconvenient to his case. Mr Aslam's position in evidence was that the claimant had received a series of verbal warnings and that he had been subject to a number of disciplinary processes which had not yet concluded. The claimant denied this. Mr Aslam's position was that there was absolutely no paperwork to support this but that verbal warnings had been given in terms of a disciplinary policy. It appeared clear to me that Mr Aslam had only the haziest idea of what a 21st century disciplinary policy and procedure would look like. He referred to the claimant being invited to a disciplinary hearing in respect of incidents which had taken place at a work social event at some point in 2019 but accepted there was no paperwork whatsoever in respect of this. The respondent's office manager who had been responsible for keeping all personnel records up to the point she went on maternity leave indicated that she had absolutely no knowledge of any such formal procedures taking place. Her position was that sometimes Mr Aslam and the claimant would go into Mr Aslam's office but she had no idea what transpired there. I did not accept Mr Aslam's evidence that the claimant had gone through any sort of disciplinary process in 2019 as such would be properly understood. I also did not accept that the claimant had received any verbal or written warnings at any point in the past. I did accept that Mr Aslam was a very exacting employer and that on numerous occasions he would question or upbraid the claimant in relation to what he perceived

as deficiencies in the claimant's performance. It was clear to me that on most of these occasions the claimant did not accept there was any justice in what Mr Aslam was saying. I accepted that the parties had had a fairly good relationship where each rubbed off on the other and they would often have full and frank exchanges. During the hearing each of the parties led evidence in relation to the other which amounted to little more than character assassination.

60. I regret that I probably allowed more of this evidence to be led than would have been ideal however in each case it was not at all clear to me at the start of each passage of evidence just where the matter was going and given that both parties were not represented I felt it appropriate to allow them to lead the evidence simply to see if it was going anywhere relevant. Generally speaking none of it was relevant. The claimant led some evidence that effectively the respondent were poor employers and had a reputation for trying to dismiss people before they acquired any employment rights after two years' service. Mr Aslam led evidence to the effect that the claimant was known for being dishonest and was extremely disorganised and that he was personally dishevelled and untidy. For what it is worth both of the respondent's other witnesses denied that the claimant was disorganised or dishevelled and untidy in his personal appearance.

61. With regard to the events of the day in question Mr Aslam's position was that he had been telephoned by his father at about 8:00 am. He had then contacted the claimant and the claimant had indicated by whatsapp that the claimant was at the strawberry farm. His position was that he had spoken to someone at the farm who had said that the claimant was not there. He had then spoken to the claimant and then spoken again to someone at the farm who accepted that by this time the claimant had been there and picked up the strawberries. It was clear to me that Mr Aslam had had a preconceived view after he had spoken to his father and was not really prepared to accept anything the claimant said. It appeared to me to be more likely than not that the claimant was in fact at the strawberry farm when he said he was and that the person at the strawberry farm (who

would not know what the claimant looked like) may well have told Mr Aslam that he was not aware the claimant was there.

62. In his evidence in chief Mr Aslam said that he told the claimant that the claimant was attending an investigation meeting as part of a disciplinary process at the very start of the meeting. This accorded with the claimant's own evidence. Following his cross examination Mr Aslam was asked by myself what notice the claimant had had of the meeting and why the claimant had not been advised of his right to be accompanied. Mr Aslam then indicated that the claimant had been told at around 4:30pm in a telephone conversation that it was a disciplinary meeting. Whilst cross examining the claimant Mr Aslam put it to the claimant that the claimant had known fine that he was coming to a disciplinary meeting and that this had been clear from much earlier in the day. He cross examined the claimant on the basis that the fact the claimant had made 14 missed calls to his father indicated that the claimant knew he was being called to a disciplinary meeting. My view was that I preferred the claimant's evidence on this point which in fact accorded with what Mr Aslam had first said in examination in chief. The claimant was unaware that it was to be an investigation or disciplinary meeting of any kind until he arrived at the meeting.

63. I found that the evidence given by the other two respondent's witnesses was extremely limited in its scope. I was prepared to accept it for what it was worth given that they had no involvement whatsoever in what had happened. The respondent's office manager indicated that she had kept personnel files for each employee and that these had been in good order when she left to go on maternity leave. She confirmed that the claimant had refused to sign the statement of terms and conditions of employment and that he had told her one of the reasons for this was that he wanted clarity about the car. She accepted that she had not passed this information on to Mr Aslam. This was on the basis that the claimant had said he would speak to Mr Aslam directly about it. Mr Rehman confirmed that Mr Aslam had spoken to him about the possibility of Mr Rehman taking on to the claimant in the sister business Skwishee following his dismissal by the respondent. He indicated that this conversation had

taken place during the break in the meeting as discussed by Mr Aslam. He also confirmed that the company had paid the insurance premium. His position which I considered to be correct was that the company were in some difficulty in obtaining the benefits of this insurance to pay for the repair to the car since the insurance had been taken out in the claimant's name rather than the name of the company.

64. I should also record that by the time the respondent's two witnesses gave evidence it had been made clear to Mr Aslam that the fact he had failed to provide any vouching for the alleged repairs to the car was something which was going to be raised by the claimant. Mr Aslam therefore asked his witnesses how much they felt it would cost to fix the car. Mr Rehman said it would be around £1500 to £2000 whereas Ms Wallace indicated that it would be somewhere in the hundreds where Mr Aslam put it to her that it would be at least £1500 she agreed it would probably be more. I did not find the evidence of either witness on this point to be of the least assistance to me. Neither claimed any expertise in costing repairs the closest being that Ms Wallace indicated that her stepfather taught bodywork repairs.

65. With regard to the documentation my clear finding was that the claimant did not sign the deduction from wages agreement or the statement of terms and conditions of employment. He did sign the document at number 11 which refers to the company handbook and the claimant did have the opportunity to acquaint himself with the company handbook since he was involved in recruiting employees and the handing it over to them.

Discussion and decision

66. The claimant claims that he had been both unfairly and wrongfully dismissed by the respondent. He also claimed that he was due holiday pay and arrears of pay including what he termed a bonus. Apart from a general denial of the claims the respondent raised two matters which required to be determined at the outset. The first matter was that they considered that the Tribunal had no jurisdiction to hear a claim of unfair dismissal. It was common ground between the parties that the claimant had commenced employment on 20 May 2018 and had been dismissed

at around 6:00pm on 13 May 2020 without notice. The claimant's position however was that the claimant was entitled to notice and that in terms of section 97(2) of the Employment Rights Act 1996 the effective date of determination the date when the notice required by section 86 to be given by the employer would if duly given on that date have expired. Accordingly, before I could deal with the claim of unfair dismissal I required to determine what date was the effective date of termination taking into account the terms of section 97(2) of the Employment Rights Act 1996. As can be seen below this involved a determination as to whether or not the dismissal was wrongful in the sense that the employer breached the contract of employment by terminating the contract of employment without notice in circumstances where he was not entitled to do so.

67. With regard to the claimant's other claims I required to make a determination as to whether the claimant was entitled to any of the sums claimed and if so how much. More importantly I also required to rule whether or not the respondent were entitled to make the deduction from wages which they had made.

68. Both parties made full legal submissions. Although neither party was legally qualified both parties' submissions were of high quality and clearly set out the issues which I required to determine. The respondent's representative made reference to various appropriate legal authorities. I do not consider that it is helpful to set out their submissions in full but I will refer to them where appropriate in the discussion below. Given that the issue of whether or not the Tribunal had jurisdiction to hear a claim of unfair dismissal required to be determined as a preliminary issue I shall somewhat unusually deal with the issue of wrongful dismissal first.

69. The claimant claims that he was unfairly dismissed in terms of section 94 of the Employment Rights Act 1996. Section 108 of the Employment Rights Act 1996 states

> "Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

70. Section 97 of the said Act provides

"(1) Subject to the following provisions of this section, in this Part 'the effective date of termination' –

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employer whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where –

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purpose of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

71. Section 86 of the Act provides

(1)The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month, or more –

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years …..

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

72. The respondent correctly referred me to the case of ***Lancaster & Duke v Wileman EAT/0256/17***. In that case the EAT accepted the respondent's argument that the reference in section 97(2) and to section 86 of the Employment Rights Act is a reference to the whole of section 86 including section 86(6). He referred to the previous case law on the subject including the case of ***Lanton Leisure Limited v White and Gibson [1987] IRLR 119*** and ***Duniec v Travis Perkins Trading Company Limited UKEAT/0482/13***. The EAT confirmed that in cases that genuinely involved gross misconduct (i.e. where an employer could lawfully dismiss without notice), section 86(6) ERA will apply so as to mean there will be no statutory minimum notice period and thus no extension to the effective date of termination.

73. In this particular case the issue arises in stark terms. If the effective date of termination is 13 May then the claimant has not been continuously employed for a period of two years or more. On the other hand, if the claimant was given notice on 13 May it would expire on 20 May therefore making 20 May 2020 the effective date of termination. The effect of this is that the claimant would have had exactly two years' continuous service on the effective date of termination and in terms of section 108 the claimant is entitled to have his claim of unfair dismissal heard. In the words used in the case of Lanton Leisure, the first step is for me to determine "by means of an enquiry on the merits whether there was in fact such conduct which would enable an employer to terminate without notice".

74. It should be noted that in making this enquiry I am required to carry out a different enquiry than the Tribunal is usually required to carry out in a case of statutory unfair dismissal. When considering the issue of whether a dismissal was unfair or not I am in general terms looking at the conduct of the employer to determine what the employer's reason for dismissal was, whether that is a potentially fair reason for dismissal and whether the employer has acted fairly and in accordance with employment law in treating that reason as a sufficient reason for dismissing the claimant. In the present case, at this stage, I am required to look at the conduct of the employee as established on the evidence and decide whether there was

in fact such conduct by the employee such as would enable the employer to terminate without notice.

75. It is trite law that in order to justify a dismissal without notice the employee's behaviour must amount to a breach of a serious term of the contract or a repudiation of the contract which entitles the employer to terminate summarily. In the case of ***Wilson v Racher [1974] ICR 428*** Lord Justice Edmund Davis said "reported decision provide useful but only general guides each case turning upon its own facts."

76. My starting point therefore is to look to see whether there were any breaches by the claimant of the contract of employment such as to justify dismissal without notice. The respondent's representative referred me to the case of ***Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT0218/17***. I understood the respondent's position to be that they relied on a "pattern of conduct" by the claimant. The respondent's position as I understood it was that the claimant had told lies and that this amounted to a breach of the term of trust and confidence. In this case the respondent's representative did not refer specifically to any of the examples of gross misconduct given in the claimant's statement of terms and conditions of employment but as I understood it, it relied on the implied term of trust and confidence.

77. So far as I understood it the respondent's position was that the claimant had in some way misled Mr Aslam about whether he had authorised holidays for a shop manager and the precise circumstances under which he had done so and secondly that he had lied in connection with the collection of strawberries.

78. My own factual finding was that I could not establish to the required degree of proof that the claimant had in fact lied over the circumstances in which he had allowed one of the store managers to take holidays. Mr Aslam claimed that the claimant's position differed from that of his store manager. Mr Aslam could have led evidence from the store manager but he did not. In any event I accepted the evidence of the claimant that he had told the truth to Mr Aslam.

79. I did find it established that the claimant had told Mr Aslam's father that he had collected the strawberries on the Wednesday morning when in fact he had not. I did not find it established that the claimant had lied to Mr Aslam when he told Mr Aslam that he was at the farm. I believed he was at the farm when that call was made albeit Mr Aslam clearly believed that he was not at the farm.

80. Mr Aslam also led evidence that the claimant had in Mr Aslam's view lied in the CV which he had uploaded to a job search website in or about February 2019. My findings in fact relating to this are as set out above and in my view it is clear that the claimant had exaggerated matters such as the turnover of the company and the number of employees. I do note however that nothing was made of this at the time by Mr Aslam other than a comment in the course of conversation and furthermore, the CV was not actually intended to be read by Mr Aslam in any event.

81. My view, taking the evidence in the round, is that on the facts of this case the claimant had not committed any serious breach of contract nor could he be said, by any stretch of the imagination, to have behaved in a way which amounted to a fundamental breach or repudiation of the contract. The circumstances are that he had, as an obligement, made an arrangement whereby he would pick up strawberries from a farm which was close to his house for distribution to some of the shops. This project appeared to be a pet project of Mr Aslam's father. He had collected the strawberries on several previous occasions. He was doing this at a time when he and the rest of the business were under a vast amount of stress as a result of the Covid pandemic. He had taken a day off on the Tuesday which was something he was entitled to do in terms of his contract albeit he was expected and did do some remote work from home that day and it was clear to me that this fact was resented in some way by Mr Aslam who expected the claimant to work more hours than he did. He then receives a telephone call very early in the morning from Mr Aslam's father asking him about the strawberries. The claimant's position is that he had a plan as to what he would be doing that day which did involve picking up the strawberries but also carrying out other tasks which were required in connection with his extremely challenging and busy job. I can quite see

why in those circumstances he would be tempted to say to Mr Aslam that he had picked up the strawberries since that would cut Mr Aslam off and avoid a situation which the claimant feared whereby Mr Aslam senior would try to micro-manage his day around the strawberries and mess up his plan. I do not say that the claimant was justified in doing this or that this was the correct thing to do but the context of the matter is that the claimant's intention was to pick up the strawberries within a very short period of time (around an hour or so) which he in fact actually did. In those circumstances I do not consider that this act of dishonesty was in any way sufficiently serious as to justify instant dismissal.

82. The respondent's Mr Aslam sought to give evidence that the respondent operated to a higher moral code and that the claimant's actions should be judged in accordance with this. I should say I entirely rejected his evidence on this point. Much of the claimant's evidence directly contradicted this. In any event the fact of the matter is that by the time of the hearing Mr Aslam had identified a number of matters where he considered the claimant's honesty fell short of the standard which the company espoused however at the time of these incidents the company had taken no action whatsoever against the claimant.

83. Mr Aslam's position was that he had warned the claimant about the dishonesty in his CV however it is clear that absolutely no action was taken. Furthermore although the respondent's position was that he had given the claimant a verbal warning about the dispute over the manager's holiday it was clear that absolutely no formal disciplinary process had taken place. This was confirmed by the evidence of the respondent's office manager and indeed Mr Aslam in evidence could not point to any documentation suggesting that any such procedure had been carried out. The only evidence is that Mr Aslam may have raised the matter in a conversation which took place in a car journey from Ellon a few days later however the claimant didn't accept that he had and I was not prepared to make any finding that the matter had been raised at all. In my view it was not possible for the respondent to claim that they hold themselves and their employees to a higher standard than normal in a situation where previous similar conduct has resulted in no disciplinary proceedings

whatsoever. In my view having heard all of the evidence in this case it is clear to me that the respondent was not entitled to terminate the claimant's contract without notice and accordingly the claimant was entitled to receive notice. For the purposes of determining whether or not the claimant's claim of unfair dismissal can proceed the appropriate notice period is the period set out in section 86(1) which is a period of one week. As noted below, the appropriate notice period for determining compensation for wrongful dismissal is that set out in the claimant's contract however for the purposes of section 97(2) it is only the notice period under section 86 which is appropriate. This means that the effective date of termination of the claimant's contract was 20 May 2020 and accordingly the claimant had exactly two years' continuous service as at the date of termination of his employment. Accordingly, not only was the claimant wrongfully dismissed without notice but also section 94 applies and the Tribunal has jurisdiction to hear the claimant's claim of unfair dismissal.

Unfair dismissal

84. Section 98 of the Employment Rights Act 1996 states

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) The reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

85. It was the respondent's position that the reason for dismissal was one relating to the conduct of the employee which is a potentially fair reason falling within section 98(2)(b) of the said Act. The claimant strongly disputed this. It was his position that basically the respondent had decided to get rid of him because it no longer suited them to continue his employment for a number of reasons. One reason was that the intention had been that the claimant would manage the new flagship store at

Dundee Rail Station. A few months before the claimant's dismissal it had become clear that this project could not proceed and I found it established that during a conversation with the claimant Mr Aslam had indicated he did not know where the claimant's future lay. It was also the claimant's position that the respondent was well aware of the two year time limit for bringing Employment Tribunal cases and that they wished to get as much work out of him as possible before dismissing him in circumstances where he would not be able to claim unfair dismissal.

86. I have to say I found this question much more difficult to answer than is usually the case in claims of unfair dismissal. I found the evidence of Mr Aslam in relation to what his reasons were for acting as he did somewhat odd when compared with the facts of the case. Mr Aslam's position during most of the hearing was that the claimant had been dismissed for a single act of gross misconduct in that he had lied to his father and that Mr Aslam simply could not accept this. It was made clear to him during cross examination by the claimant that if this was his position then he was in some difficulty given that the letter of dismissal spoke of more than one instance of misconduct. In submissions he changed tack and said that the reason was actually a course of conduct and he referred specifically to the "***Mbubaegbu"*** case.

87. During his evidence it appeared to me that Mr Aslam viewed matters entirely through the prism of what he considered to be best for his business. He did not appear to be troubled in any way by considerations of employment law. He did accept in evidence that in hindsight the company's procedures ought to have been more robust but it appeared to me that the company's procedures were almost totally non-existent. It appeared to me that this was a company which was very much run by Mr Aslam who sought complete control. The e-mails which he sent to the claimant at the end of March which Mr Aslam sought to portray as some sort of disciplinary process were absolutely nothing of the kind. It was clear from the evidence of both the claimant and the respondent that both parties enjoyed a fairly robust relationship where they would talk freely to each other and both were agreed that the particular business they were in, running retail convenience stores, is a high pressure one. That having

been said to effectively accuse the claimant of not doing his job in circumstances where no enquiry has been made and where it was absolutely clear to me on the basis of the claimant's evidence that the claimant was working at a level well over and above that called for in his contract was indicative of the unreasonable attitude of Mr Aslam and his extremely focused approach to his business. There is nothing wrong with a focused approach to business; in fact it is something which is to be admired, however in the context of the present case it is clear to me that in his mind Mr Aslam did not differentiate between what he thought was bad for business and what would in employment law terms be conduct of an employee which could result in disciplinary action.

88. Most tellingly however I considered that a valuable insight into the respondent's true reasons for dismissal can be found in the action Mr Aslam took in the short interval between discussing things with the claimant on 13 May and ostensibly reaching his decision to dismiss. The evidence is that Mr Aslam went into another office and asked Mr Rehman if he had any vacancy for the claimant in his company Skwishee Limited. It was clear to me that if Mr Rehman had said yes then the claimant would have been transferred, by whatever mechanism I do not know, from the employment of the respondent to the employment of Skwishee Limited which was another company of which Mr Aslam was a director and shareholder. In my view this passage of evidence casts extreme doubt on Mr Aslam's position that he found the claimant's conduct so egregious and amounting to such a fundamental breach of the contract of employment that he was forced to dismiss.

89. I also note that following the claimant's dismissal the respondent have not replaced him and indeed I accepted the evidence presented by the claimant that within a very short period of time the respondent had carried out a reorganisation of the management structure.

90. I note that the burden is on the respondent to show what the reason for dismissal was. In my view the respondent has not met that burden and demonstrated that the reason for dismissal was indeed conduct.

91. In my view, on the basis of the evidence the reason for the dismissal was that the respondent's Mr Aslam had basically decided that it no longer suited him for the claimant's employment to continue and that he seized on the issue of conduct as a pretext. It appears to me from the terms of the letter that the Mr Aslam was well aware that the claimant had just less than two years' service (albeit he may not have been aware of the effect of section 97(2) at that time) and that he wished to make clear the claimant was being dismissed for gross misconduct because he wanted to avoid a situation where the claimant's notice period took him into the period where he would acquire the right not to claim unfair dismissal.

92. Having failed to establish a potentially fair reason for dismissal that means that the dismissal is unfair in terms of section 98. In the event that I am incorrect in this however I consider that it is as well to proceed to consider matters in terms of section 98(4) which would have been applicable had I decided that the reason or principal reason for the dismissal was conduct (which I have not).

93. If the reason for dismissal had been conduct then I would require to determine whether the respondent had been entitled to come to the view they did as to the claimant's conduct and that it was within the band of reasonable responses to dismiss on the basis of the view they had taken as to the claimant's guilt. I would also require to consider whether or not the dismissal was procedurally fair.

94. Dealing with procedure first, as noted above the respondent's representative confirmed that with hindsight the procedures could have been more robust. In my view this is a gross understatement. The proceedings were virtually non-existent. My finding is that the claimant was not told that he was attending a disciplinary until he turned up. He was not advised of his right to be accompanied at the hearing. He was not advised in advance of the hearing what the charges would be. There appeared to be a confusion in Mr Aslam's own mind even at the time of the Tribunal hearing as to whether the meeting which he convened with the claimant on 13 May was an investigative hearing or a disciplinary hearing. In addition, there was no attempt made to ensure that the person who dealt with the hearing was impartial. Mr Aslam appears to have been

the person who decided that disciplinary proceedings would be instigated, drew up the charges whatever they were and then convened the hearing. The fact that Mr Aslam was dealing with an allegation which appeared to be principally about telling a lie to his own father also does not assist. The procedure adopted was one which no 21st century employer, however small, could possibly consider to be appropriate. It was certainly outwith the band of reasonable responses.

95. With regard to the conduct I am required to determine whether the employer had a genuine belief in the guilt of the employee at the point at which the employee was discharged, whether the employer had reasonable grounds for that belief and whether at the point where they formed that belief they had carried out as much investigation as was reasonable in the circumstances of the case. In this case I accept that the respondent's Mr Aslam did genuinely believe that the claimant had lied to his father about having collected the strawberries. I am not entirely convinced whether or not he genuinely believed that the claimant had lied about being at the farm when he had spoken to Mr Harris Aslam on the phone that morning. Mr Aslam's evidence regarding the allegation the claimant had lied about the manager's holiday request was so unclear that I cannot make a finding he genuinely believed the claimant had lied in connection with that. With regard to investigation I consider the investigation to have been wholly deficient. No witness statement was taken from Mr Aslam senior. Whilst I accept that the claimant accepted that he had told Mr Aslam senior that he had collected the strawberries when in fact he had not the context of the matter was important and in my view it was entirely outwith the band of reasonable responses for an employer not to investigate that context. There was a clear divergence of view between the claimant and Mr Aslam senior as to when the claimant had been asked to collect the strawberries. The claimant said it had been on the Tuesday whereas Harris Aslam's father said it had been on the Sunday. This was something that required to be investigated. With regard to the issue of whether or not the claimant had been at the farm when he had received the call from Mr Harris Aslam that morning Mr Harris Aslam was reliant entirely on his telephone conversation with a member of the farm staff at the time. The claimant had made the point that this person

would not recognise the claimant. That matter was not investigated, no statement was taken from that person. More importantly the claimant suggested that a check be made as to the precise time when he had delivered the strawberries to the first shop on the route. Although a phone call was made the respondent did not check the CCTV which would have been easy for them to do. Given Mr Aslam was reliant on previous incidents as he indicated from time to time during his evidence then these incidents should have been investigated at the time and they were not. Finally my view is that at the time he made the decision Mr Aslam did not have in any way reasonable grounds for believing that the claimant was habitually dishonest. He did have reasonable grounds for believing that the claimant had told his father that he had collected the strawberries when in fact he was to be collecting them within an hour or so but that was all. In my view, given the findings which Mr Aslam was entitled to make, and taking matters at its highest, dismissal was entirely outwith the band of reasonable responses. I therefore had no hesitation in indicating that even if I had found that the respondent had established that the reason for dismissal was conduct the dismissal would still be regarded as unfair in terms of section 98.

96. I shall deal more fully with remedy below however it is appropriate at this stage that I deal with the issue of whether or not the claimant's compensatory award ought to be reduced because of his failure to exercise his right of appeal. In my view, given the way the claimant was treated by the respondent it is entirely unsurprising that he did not feel confident that any appeal process would be dealt with properly. The appeal was to a family member of Harris Aslam who lived in the same house as him. As noted above it is clear to me that Mr Harris Aslam is very much in the driving seat in this company. It was entirely reasonable for the claimant to decide that there was no point in appealing and in my view no question of any deduction in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 arises.

Unlawful deduction of wages/holiday pay

97. The claimant worked the whole week commencing 4 May 2020. He was entitled to be paid £519.23. He was not paid this sum. The claimant also

worked the week commencing 11 May 2020 for two days. The claimant did actually also do work on the Tuesday however I understood the parties' position to be that this was his weekly day off and that he was only entitled to two days' pay. The claimant accepted the pay for those two days amounted to £207.69. I accepted the claimant's calculation of his holiday pay entitlement as £363.45. The respondent's holiday year ran from 31 March in each year. During the current holiday year the claimant had taken no paid holidays. In addition to this the claimant claimed a bonus payment which he described as unpaid hours worked of £1817.

98. In order for the claimant to be entitled to bonus I would require to make a finding that he was entitled to this as part of his contract of employment. This could be either in his written terms and conditions or other documentation or indeed such a bonus could have been agreed verbally between the parties. In this case however I find on the facts that it was not a term of the claimant's employment that he be paid a bonus. I considered all of the various adminicles of evidence which the claimant provided most carefully. I accept that the claimant was told at the time of recruitment that a bonus scheme would be instigated. This is in his original letter of appointment. It appeared clear to me however that nothing was ever done about this and that in any event such a scheme would have been entirely discretionary. I also accept that on various occasions Mr Aslam told the claimant and other employees at the time of the onset of the pandemic that their additional work would be recognised financially. At the end of the day however the key point is that the claimant accepted in evidence that nothing concrete was ever agreed in relation to this. Mr Aslam's evidence was that the company does pay bonuses but on an entirely ad hoc basis which is entirely at Mr Aslam's discretion. This was borne out to some extent by the text messages lodged by the claimant from another manager who indicated that she had obtained a bonus but only after continual nagging.

99. I accept that the claimant feels aggrieved that he worked extremely hard for additional hours without receiving recompense for this but at the end of the day it is not for the Tribunal to set out what would be fair terms of a contract of employment. So far as this point is concerned it was for the

Tribunal to identify what the actual terms of the contract were and it is absolutely clear that there was no binding obligation on the company to pay the claimant any bonus. Although it is taking the matter slightly out of turn I should also say that I considered whether any bonus payment to the claimant ought to have been included in calculating his compensatory award for his unfair dismissal. This would be on the basis that had the claimant not been unfairly dismissed he would have remained in the respondent's employment and received a bonus payment at some stage in the future prior to his employment terminating. Whilst there is a possibility that the claimant would have received such a bonus my view having heard the evidence of Mr Aslam is that Mr Aslam's decision on whether or not to pay a bonus was an entirely personal and ad hoc one. It was clear to me that by May the claimant was no longer in Mr Aslam's 'good books' and it would be unrealistic for me to make a finding that no matter how much the claimant had nagged he would have been paid a bonus prior to the termination of his employment in the usual course. It therefore appears to me that the financial amounts which were due to be paid to the claimant in respect of arrears of pay and holiday pay as at the termination of his employment amounted to £1090.37 (519.23 + 207.69 + 363.45).

100. The respondent refused to pay this sum on the basis that they are entitled to deduct from this sum and indeed a greater sum from the claimant's wages.

Unlawful deduction of wages

101. Section 13 of the Employment Rights Act 1996 confers all employees the right not to suffer unauthorised deductions except in various circumstances. This states

> "(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."

102. In this case the respondent's primary position was that the claimant was bound by his terms and conditions of employment and by the terms of a deduction from wages agreement which were lodged in evidence. I found as a fact that the claimant had not signed either document and that these documents could not be regarded as in any way authorising the respondent to make deductions either in terms of section 13(1)(a) or section 13(1)(b). The situation was that the claimant had started to work for the respondent and there was clearly a contract of employment between them. In the normal course of events if the employer provides the employee with a copy statement of particulars of employment then that sets out the terms of the employee's contract even if there is no specific document entitled contract of employment which is in writing. It is not at all uncommon for contracts of employment to be constituted orally although statute indicates that the employer must provide a statement of terms and conditions. In this case it was clear to me that when the employer had presented their terms and conditions the claimant had refused to sign this and I accepted based on his evidence and the evidence of the respondent's own Office Manager that the primary reason for this was that he was unhappy that there were no specific provisions relating to his company car.

103. The claimant did sign a document in April 2019 where he acknowledges

> "I have read and I understand the current employee handbook I accept that it forms part of my contract of employment except where the contrary is expressly stated and I will keep myself informed of its contents. I agree that where the Working Time Regulations apply to my employment any terms and conditions relating to those regulations e.g. annual holidays constitute a relevant agreement."

The employee handbook is an extremely lengthy document extending to over 30 pages. It contains on page 104 a clause headed Wastage. This contains a clause to the effect that

> "(a) any damaged stock or property (including non statutory safety equipment) that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement,
>
> (b) any loss to us as a result of your failure to observe rules, procedures or instruction or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full part of the cost of the loss.
>
> 4. In the event of failure to pay we have the contract right to deduct such costs from your pay."

104. It is clear from the case law that contractual provisions and written agreements authorising deductions ought to be drafted as precisely as possible. In the case of ***Galletly v Abel Environmental Services Ltd*** ET No 3100684/98 the Employment Tribunal went so far as to state that a general provision giving the employer the right to deduct all sums due to the employer from the employee for whatever reason was too widely drawn. In the case of ***Jones v Salisbury Rugby Football Club*** the Employment Tribunal confirmed that any such ambiguity ought to be construed against the employer.

105. In this case I consider that since the employer was solely responsible for drawing up the handbook the document ought to be construed carefully particularly where it is alleged that this is the sole written authority from which the employer's right to make deductions is derived. In this case I note that the effective part of the clause is potentially in two parts.

Paragraph 3 provides the circumstances in which an employee becomes liable to pay the cost of repair or replacement to the employer. Circumstances are where the damage is as a result of carelessness, negligence or deliberate vandalism (3a) and as a result of failure to observe rules, procedures or instruction or is as a result of negligent behaviour or unsatisfactory standards of work in respect of (3b). I shall deal with that particular point further below. More important however is the way that paragraph 4 is drafted. This states "In the event of failure to pay we have the contractual right to deduct such costs from your pay." First of all I note that the right to make the deduction is contingent on a "failure to pay". In this case it is clear to me that absolutely no demand for payment was made prior to the deduction being made. It therefore appears to me that at the point the deduction was made the respondent was not in a position to rely on this clause. That is perhaps to be regarded as perhaps a technical point but it is still a valid one.

106. Of more importance however is that the paragraph was drawn up in the form of an assertion that the contract of employment does contain such a provision. In this case it is clear to me that the contract of employment did not, as a matter of fact, contain such a provision. It appears to me that the respondent sought to include such a term and sought to obtain the claimant's written agreement to this by forwarding to him a copy of his terms and conditions of employment for signature together with a copy of the deduction from wages agreement. I found as a fact that the claimant refused to sign both documents. The presumption arising from this has to be that the claimant was not content to be bound by this particular clause in the proposed contract. It therefore appears to me that on a proper construction of the clause contained in the company handbook, which was a document brought to the attention of the claimant prior to the deduction being made, the employer was not entitled to make any deduction from wages.

107. That is essentially the end of the matter however in the event that I am incorrect in this I should say that had I found the respondent was entitled to make a deduction from wages in the general sense, I would have gone on to find that in the particular circumstances of this case the employer

was not entitled to make the deduction which he did make. The first reason is that so far as the repairs to the car are concerned these would only be recoverable if the damage had been caused by the claimant's 'carelessness, negligence or deliberate vandalism'. The evidence was that the vehicle had been damaged as a result of an accident which was the other driver's fault. There was absolutely nothing to suggest that the claimant was negligent in any way for the accident.

108. So far as the cost of cleaning was concerned I was not at all convinced that any cost whatsoever had been incurred to the respondent as a result of the state the vehicle was returned in. I can also see no ground for holding the claimant liable as being negligent on the basis that he had been forced to return his company car on minimum notice in the middle of a pandemic. I accepted the claimant's evidence that no car valeters were allowed to be open at that time. I accepted his evidence that he cleaned his car as best he could. The photographs tend to bear this out. It was not returned in showroom condition but was a perfectly acceptable way (in terms of cleanliness) to return a vehicle which had been used on the employer's business the day before for the transport of strawberries.

109. I accept that the respondent may have found themselves in a difficult position with regard to getting the repair carried out given the fact that the insurance was in the claimant's name. I note however that this was entirely the responsibility of the respondent. The claimant's position was that this was a company car and that it was up to the respondent to have organised the repairs. Given that the respondent described this as a company car this would appear to be a reasonable view to take. I note that the respondent's Finance Director arranged for things like servicing the vehicle. I did consider whether there was any possible argument that the loss to the respondent in being to have lost the opportunity of having the repair cost recovered from the insurer and whether this could be said to be due to any failure on the part of the claimant to observe rules, procedures or instructions or was a result of negligent behaviour or unsatisfactory standards of work. It appeared to me to be clear that this was not the case. It would have been open to the respondent at any time following the accident to take steps to arrange that the claimant fix his

vehicle. I accept this was not something which could be said to be the claimant's responsibility. On several occasions the claimant pointed to the complete absence of any company car policy. No doubt this is something which the respondent will wish to address in future but in the absence of any such written procedure I do not see how it could possibly be said that the claimant was at fault in failing to get the car repaired by his insurers. Finally, I should say that I was extremely surprised to find that the respondent was seeking to recover a sum in respect of repair costs for the vehicle without lodging the invoice for repair or indeed leading any evidence that the vehicle had been repaired at all before being handed back to the leasing company. At the end of the day however this is not a major consideration. It did appear to me fairly likely that the cost of the repair to the door would be more than the £1050 which was deducted. That having been said however I do not consider that the claimant would have been responsible for paying this sum to the respondent and in any event the respondent did not have the required statutory authority in terms of section 13 to make the deductions.

110. From the above it can be seen that the claimant is entitled to be paid his arrears of wages amounting to £726.92. He is also entitled to be paid his holiday pay of £363.45. The claimant was wrongfully dismissed in that he was dismissed without notice in circumstances where the respondent was not entitled to dismiss him without notice. With regard to notice pay I note that the terms and conditions of employment which were offered by the respondent but were not signed for provide for one week's notice. I would have thought that in the usual way of things an Area Manager could expect to be entitled to a longer notice period however the matter was not specifically challenged by the claimant and in the circumstances my finding is that the claimant's contractual entitlement to notice was the same as his statutory entitlement i.e. one week's pay. The claimant is therefore entitled to notice pay amounting to £519.23.

111. With regard to his claim of unfair dismissal the claimant is entitled to a basic award of two years' pay amounting to £1038.46. So far as the compensatory award is concerned I am entirely satisfied that the claimant took appropriate steps to mitigate his loss. I was satisfied on the basis of

his evidence that his failure to take up the offer of employment abroad was because this was withdrawn by the employer until such time as the Covid pandemic was over. The claimant quite properly decided not to wait and in the meantime accepted a different job. I did not consider that the exchange of texts between the claimant and a colleague which was lodged by the respondent in any way changed these essential facts. The claimant was unemployed from 13 May until 24 August, a period of 14 and a half weeks. The claimant has received payment for one week's notice pay and therefore in order to avoid double counting the claimant is entitled to a compensatory award based on 13.5 week's pay amounting to £7009.60. I have used the claimant's gross rate of pay since no information has been provided about his net pay. I consider that the claimant is entitled to £400 for loss of statutory rights. I did not consider that the fact that the claimant had only just acquired statutory rights by the skin of his teeth should reduce the compensation he was due for losing them.

112. As noted above I considered whether any deduction should be made to the compensatory award in terms of section 207A of the Trade Union and Labour Reform Act 1992 on the basis that the claimant did not exercise his right of appeal. My view is that it was entirely reasonable for the claimant not to take part in any appeal hearing which in my view would have been little more than a sham. In those circumstances it does not appear to me that the claimant's failure to lodge an appeal was in any way unreasonable and section 207A(3) is therefore disapplied. In any event it would not be just and equitable to reduce the award.

113. On the other hand it is clear to me that this was a case to which the ACAS Code on disciplinary hearings applied. It was also clear to me that the employer completely failed to comply with the code in relation to the matter. If it is not clear by now I would refer to the paragraphs above regarding procedural fairness. The claimant was not warned in advance that he was being called to a disciplinary hearing. He was not given any opportunity to understand the allegations against him in advance of the hearing and was given no proper opportunity to prepare his case or to defend himself. No proper investigation was carried out and the decision making was throughout tainted by a complete lack of natural justice. In

my view the failure by the respondent to comply with the ACAS Code was unreasonable. The respondent are a fairly substantial employer. It is clear that they had access to some employment advice albeit they chose to interpret employment law in a way peculiar to themselves. In the circumstances I consider that it is just and equitable to increase the compensatory award by the maximum amount of 25% in terms of section 207A.

114. I would add to the claimant's wage loss of £7009.60 the sum of £400 for loss of statutory rights bringing the total up to £7409.60. Adding 25% to this amounts to £1852.40. The total compensatory award is therefore £9262. Adding the basic award of £1038.46 to this gives a total award for unfair dismissal of £10,300.46.

115. The claimant indicated he was on recoupable benefits from 10 July. The prescribed element is therefore £3634.61 and relates to the period between 10 July and 24 August 2020. The monetary award exceeds the prescribed element by £6665.85.

Employment Judge: **Ian McFatridge**
Date of Judgment: **20 January 2021**
Date sent to parties: **20 January 2021**