



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113661/2021 (V)

Hearing held via Cloud Video Platform (CVP) on 6, 7, 8 and 13 June 2022

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Employment Judge: J McCluskey

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Mr L Anderson

**Claimant
In person**

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Corporate Washroom Services Limited

**Respondent
Represented by:
Ms S McDonald
Company Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

- (1) The claim for unlawful deduction of wages in respect of the claimant's hourly rate of pay in the period from 1 May 2021 until termination of his employment is well founded and the respondent is ordered to pay the claimant the sum of

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ETZ4(WR)

THREE HUNDRED AND FOUR POUNDS (£304) less any deductions for tax and national insurance.

- (2) The claim for breach of contract is not well founded and does not succeed.
- (3) The claim for holiday pay is not well founded and does not succeed.
- 5 (4) The claim for unfair dismissal for asserting a statutory right regarding the payment of wages is not well founded and does not succeed.
- (5) The claim for unfair dismissal related to an allegation of failure to pay the minimum wage is not well founded and does not succeed.
- (6) The claim about the contents of the written statement of reasons for dismissal
10 being disputed is not well founded and does not succeed.

REASONS

Introduction

- 15 1. The claimant presented a claim to the Tribunal on 8 December 2021. He brings claims (i) for unlawful deduction from wages, (ii) for breach of contract in relation to reimbursement of his mobile phone expenses, (iii) for holiday pay, (iv) for automatic unfair dismissal for challenging the payment of his wages with the respondent, (v) for automatic unfair dismissal related to an
20 allegation of failure to pay the minimum wage and (vi) that the contents of his written statement of reasons for dismissal are disputed. All of these claims are resisted by the respondent.

2. The Tribunal heard evidence from the following witnesses: (i) the claimant (ii) Melanie Anderson, the claimant's wife; and for the respondent the Tribunal heard evidence from (i) Mrs Sian McDonald, company director of the respondent; (ii) Ms Rhiannon Garvie, an employee of the respondent and (iii) Mr Iain McDonald, company director of the respondent. The respondent had proposed calling further witnesses but decided not to do so following agreement of the issues to be determined by the Tribunal.
3. The claimant's wife is Spanish and does not speak English as her first language. I was satisfied that Ms Anderson was able to understand and respond fully to the questions asked of her by her husband, the questions asked of her in cross examination and the questions asked by the Tribunal.
4. In terms of the bundle of documents, the respondent produced documents numbered 1-31 before the hearing. A copy was provided to the claimant. The documents were unpaginated and some documents comprised more than one page. These documents are referred to as R1 – R31 in this judgment. The claimant produced a bundle of documents comprising 32 pages. A copy was provided to the respondent. These documents are referred to as C1-C32 in this judgment. The claimant's bundle largely contained different documents to that in the respondent's bundle. Throughout the hearing both parties added additional documents to their respective bundles. Neither party opposed the adding of additional documents. These documents were added to the respective party's bundle using follow on consecutive numbering.

Issues

5. The Tribunal identified the following issues to be determined -

Unlawful deduction from wages

6. The claimant alleges that (a) throughout his employment he had a contractual entitlement to be paid for 37 hours per week; (b) from 1 May 2021 his contractual entitlement increased from £9 per hour to £10 per hour; (c) the sum of £30 was deducted from his final salary without contractual authority to do so.

7. The respondent alleges that (a) with effect from commencement of employment until 1 January 2021 the claimant's contractual hours were 35 hours per week. This was increased to 37 hours per week from 1 January 2021 and the respondent agreed to backdate the increased hours to 1 October 2020; thereafter from 1 May 2021 until termination of employment there was an agreed variation of the claimant's contract of employment from 37 hours per week to 32 hours per week; (b) with effect from 1 May 2021 there was an agreed variation of the claimant's contract of employment from £9 per hour to £9.50 per hour, not £10 per hour as alleged by the claimant; (c) the respondent was entitled to deduct the sum of £30 for a bus lane fine from the claimant's final salary.

8. During the course of the hearing, it was confirmed by the claimant that he was not making any claim in relation to payment for overtime hours worked.

Breach of contract

9. The claimant alleges that he had a contractual entitlement to be reimbursed for all costs incurred by him in relation his personal mobile phone contract. The costs claimed are £50 per month throughout his employment. The respondent resists this claim and alleges that respondent agreed to reimburse £24 per month of the claimant's personal mobile phone costs.

Holiday pay

10. The claimant alleges that he has accrued but untaken holiday for which he is still to be paid.

Dismissal

11. The claimant alleges that the reason or principal reason for his dismissal was that (i) he asserted a statutory right by alleging that he was being underpaid wages (ii) he made an allegation to the respondent that they had failed to pay him the minimum wage. The claimant also disputes the contents of his written statement of reasons for dismissal.

Findings in fact

12. The claimant was employed by the respondent as a service engineer from 10 August 2020 to 10 September 2021.
13. On commencement of employment the claimant's contractual hourly rate was £9 per hour and he was contracted to work 35 hours per week. These terms

were set out in a contract of employment provided to the claimant at some point not long after his employment commenced. The claimant did not sign this contract.

5 14. In or around September 2020 the claimant had a discussion with Mr and Mrs McDonald about his personal mobile phone contract which was coming up for renewal. Mr and Mrs McDonald told the claimant that they would reimburse a phone allowance of up to £26. Mrs McDonald told the claimant that one of the other employees received a phone allowance of a similar sum.
10 Towards the end of September 2020 the claimant called Mr McDonald to advise that he was renewing his mobile phone contract. He asked Mr McDonald if he could go ahead and renew and Mr McDonald agreed that he could. He did not tell Mr McDonald any price for the renewal. He did not tell Mr McDonald that the cost was £71 per month.

15 15. The claimant entered into a personal contract with his mobile phone provider. The monthly cost was £71. Shortly thereafter this was reduced to around £50 per month.

20 16. On or about the beginning of January 2021 the parties agreed an increase in the claimant's contractual hours from 35 hours to 37 hours per week. This was to allow 2 hours per week for the claimant to clean the respondent's van, which he used for work purposes. The respondent's business had got busier since the claimant's employment had started. The respondent recognised
25 that the claimant had struggled to find time to clean the van.

17. The parties agreed that payment for the extra 2 hours would be back dated to 1 October 2020. The backdated payment was made to the claimant at the end of February 2021. The claimant's payslip for the period ended 28 February 2021 shows an entry for payment made for "shortfall of wages from October 2020" R9b.
18. On 26 January 2021 the respondent met with the claimant R5. At the meeting the respondent raised with the claimant their concerns about his timekeeping, his standards of work, not following management requests and that he did not show due respect for management.
19. On 26 January 2021 the respondent provided the claimant with a further copy of his contract of employment for signature. The contract had been amended from the previous unsigned copy to include the additional 2 hours for van cleaning.
20. The claimant signed this amended contract of employment with the respondent on 11 February 2021. The contract of employment stated that:
- (a) the claimant's days and hours of work were Monday to Friday, 7 hours per day. with 2 hours per week to clean the van (37 hours per week);
 - (b) the claimant was expected to keep his working hours flexible to a reasonable extent depending on the needs and requirements of the business.
 - (c) the claimant's hourly rate of pay was £9 per hour. The claimant was paid monthly on the last working day of the month.

- (d) a phone allowance was provided. The amount of the phone allowance was unspecified.
- (e) the respondent's holiday year ran from 1 April to 31 March.
- (f) the claimant's holiday entitlement was 30 days inclusive of public holidays.
- (g) the respondent reserved the right to make deductions from the claimant's salary for any losses in relation to property or monies of the respondent caused through the claimant's carelessness, negligence or recklessness or through the claimant's breach of the respondent's rules.

21. In April 2021 the claimant met with Mr McDonald. The respondent was keen to support the claimant with his own business venture. The parties both made handwritten notes in a notebook R21. Mr McDonald's notes show calculations based on a comparison of wages between a 37 hour week at £9.00 and a 32 hour week at £9.50 per hour. The claimant's notes show the suppliers and products which he would contact as part of his own business venture. The parties reached agreement that the claimant would work 4 days a week for 8 hours each day. On the fifth day the claimant would carry out his own business venture and he would be supported by Mr McDonald. The claimant would not be paid for the fifth day as he was in business on his own account that day. The parties reached agreement that the claimant would be paid £9.50 per hour. The claimant asked what would happen if his own business was successful. Mr McDonald confirmed the claimant could move to 3 days

per week with the respondent and spend more time on his own business, if that was the case.

22. On or around 28 April 2021 Mrs McDonald sent a text to the claimant about
5 calling a client. The claimant confirmed he would call the client. Mrs McDonald replied the same day "So it's £10 for an eight hour day x 4"
C33. Ms McDonald sent a further text to the claimant on Thursday 29 April 2021 saying "Apologies, can you please come into the unit today with Iain and do your run tomorrow" The claimant replied shortly thereafter to confirm
10 he would do so. He did not question the reference to the hourly rate or the hours of work C34.

23. On 24 May 2021 Mrs McDonald wrote to the claimant R13. She raised with
15 the claimant the respondent's concerns about his timekeeping and his standards of work. The respondent proposed various ways to assist the claimant with these matters. The letter referred to the concerns raised by the claimant that he was working more hours than he was getting paid for. The letter said that "We ask at this time, due to your concern that you are working
20 more hours than you are getting paid for, please do not bring Melanie to work with you". The letter proposed various ways to assist the claimant in managing his time and the driving routes he carried out as part of his job. The letter referred to the sales training which Mr McDonald was to provide to the claimant as part of the claimant's own business venture. The letter proposed a follow up meeting in August 2021 on a date to be arranged.

24. On 30 July 2021 the claimant sent a Whatsapp message to Ms Garvie R32. The message asked about overtime payment. The message also said “Finally my phone allowance which has been agreed at £24 per month, Sian said would now be paid monthly....not sure if this will get paid separately at the end of the month?”
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25. At some point towards the end of August 2021 the claimant agreed with Mrs McDonald that he would not work on the Monday of a particular week but would work on the Friday instead. He had just returned from holiday at the weekend and was tired. Mrs McDonald agreed to this change of days. When the claimant worked on the Friday Mr McDonald told the claimant to make a claim for overtime as Friday was a non-working day for the claimant. The claimant did not disclose to Mr McDonald that he had swapped his working day and was not entitled to claim overtime. When Mr and Mrs McDonald became aware of what had happened, they were concerned. They considered that there had been a lack of honesty on the part of the claimant. The claimant had not disclosed to Mr McDonald that he had not worked on the Monday and that he was not entitled to overtime.
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- 20 26. On 30 August 2021 Mr and Mrs McDonald met with the claimant at their home R19. They raised with him their concerns about his time keeping, his inability to take instruction, his speaking out of turn with customers, members of staff and others and his lack of honesty. The respondent provided examples of these to the claimant. The claimant did not agree with the allegations which were being made against him. The claimant was given a warning and a
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further meeting was arranged for one month after to reassess the claimant's attitude and standard of work.

27. The respondent prepared a note of the meeting on 30 August 2021 and asked the claimant to sign a copy of the note. The claimant did not sign the note as he did not agree with the allegations raised against him in the meeting.
28. On 2 September 2021 whilst carrying out his duties in the respondent's van the claimant incurred a bus lane fine. As the van was registered to the respondent the fine from Glasgow City Council was issued to the respondent.
29. On 3 September 2021 the claimant arrived at work and asked to attend a funeral that day. Mrs McDonald asked the claimant to carry out two local deliveries and then return to the respondent's premises. She explained that Mr McDonald would need to decide whether the claimant could attend the funeral but he was currently on the phone. The claimant did not return to the respondent's premises as instructed to do so and attended the funeral without the agreement of the respondent. These matters were of concern to the respondent.
30. The respondent checked the tracker log for the claimant's vehicle for 2 and 3 September 2021 R18. They formed the view that the claimant had started work late and finished work early. He had spent too long on service deliveries despite it being a route he knew well. He had done jobs over two days rather than one, contrary to the instructions of the respondent. These matters were of concern to the respondent.

31. On 4 September 2021 the claimant was instructed to drop off the respondent's van, which he used for work, at Mr and Mrs McDonald's home. The van was needed by a friend of Mr McDonald and for work purposes as the other van owned by the respondent had broken down. The claimant did not communicate with Mr and Mrs McDonald throughout the course of the day and they did not know if and when he would return the van. The claimant then returned the van to Mr and Mrs McDonald close to midnight that evening. These matters were of concern to the respondent.
32. On 5 September 2021 the respondent sent the claimant an email with a letter attached with the subject "Possible Dismissal" C18. The letter stated "You failed to follow through instruction yet again on Saturday 4 September 2021. Instead of apologising you carried it out in a way to suit yourself.... We feel considering the way this week has gone, that we as your employers are unable to amicably come to an agreement with you on what is a reasonable daily work schedule that suits us both and not only yourself.... if you have had a genuine change of heart, accepting that you do need to be more focussed and harder working, then I am happy to pick you up on Monday morning". The letter also referenced the concerns which the respondent had raised with the claimant at the meeting on 30 August 2021.
33. On 5 September 2021, at 22.31, the claimant sent Mr and Mrs McDonald an email, replying to Mrs McDonald's email of earlier that evening C16. In that email he alleged that he was being underpaid wages in relation to his contractual hours and his hourly rate of pay. He alleged that he had agreed

with Mr McDonald that his personal mobile phone contract costs would be reimbursed in full by the respondent. The client denied the allegations regarding his time keeping, his inability to take instruction, his speaking out of turn with customers, members of staff and others and his lack of honesty, for which he had been given a warning.

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34. On 6 September 2021 at 01.58am Mr McDonald replied to the email from the claimant. The email from Mr McDonald referenced the claimant's inability to accept the allegations for which he had been given a warning. The email stated that the claimant was being dismissed on one week's notice for which he would be paid but during which he would not be required to work. The email stated "Sian and I have made it clear probably too kindly at times that your standard of work was not acceptable in so many different ways. We have customers, staff that will support our findings." The claimant's employment ended on 10 September 2021.

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35. The claimant was reimbursed the sum of £71 for his personal mobile phone costs on 27 November 2020 and a further £71 on 11 February 2021. The claimant was reimbursed the sum of £96 for his personal mobile phone costs on 2 July 2021 which comprised four payments of £24 for March – June 2021. The claimant was reimbursed the sum of £48 for his personal mobile phone costs for July and August 2021. The claimant agreed in cross examination that based on a monthly sum of £24 he had received reimbursement for all of his personal mobile phone costs. The issue was whether the contractual

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agreement was to reimbursement of all of his monthly costs, which had been £71 per month then reduced to £50 per month, or £24 per month.

36. The respondent deducted the sum of £30 from the claimant's final salary for
5 a bus lane fine.

37. The claimant's contractual holiday entitlement when he worked 5 days per week was 30 days.

10 38. The claimant took 12 days of holiday from 1 April 2021 until his employment terminated. These were 4 days in April 2021 and 8 days in August 2021.

39. With the agreement of the respondent, the claimant had carried forward 2 days of annual leave from the holiday year 2020/2021.

15 40. On or around 30 September 2021 the claimant was paid his final salary R9b. This included the sum of £105.84 holiday pay for accrued but untaken holiday pay.

20 **Observations on the evidence**

41. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those parts of the evidence which it considered most relevant to the issues it had to decide.

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42. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was

more likely than not, then the Tribunal is satisfied that the event in fact occurred.

43. I found the respondent's witnesses to be credible and reliable. There were a
5 number of conflicts in the evidence. I have resolved these mostly in favour of
the respondent. This is mainly on the basis that the contemporaneous
documents to which I was referred supported the evidence of the respondent,
on most occasions, rather than that of the claimant. In relation to the hourly
rate of the claimant from 1 May 2021 I resolved this in favour of the claimant,
10 again based on the contemporaneous documents to which I was referred.

44. The Tribunal did not regard the fact that it preferred the evidence of the
respondent on most occasions as tainting the claimant's overall credibility.
These were differences in recollection and differences in perception.

15 45. For example, on the issue of the hourly rate of pay to be paid to the claimant
from 1 May 2021 the handwritten notes of Mr McDonald in the notebook in
which both he and the claimant wrote, shows a discussion about an hourly
rate of £9.50 per hour. The later document on 28 April 2021, which is a text
20 message from Ms McDonald to the claimant, shows that the claimant was
entitled to be paid £10 per hour. Mrs McDonald sought to explain this by
saying that as there had been concerns about the claimant, which had been
raised in the meeting of 24 May 2021, it had been decided by the respondent
that the claimant would be paid £9.50 per hour. This was the figure which had
25 been given to the claimant by Mr McDonald. I reached the view that the
claimant was entitled to receive the £10 per hour which had been notified to

him by Mrs McDonald. Having notified him of this sum the respondent was not in a position to reduce the figure unilaterally. Consistent with this text message I was also satisfied that the claimant's contractual hours from 1 May 2021 were 32 hours per week, and not 37 hours per week as alleged by the claimant. This was also consistent with the text message on 28 April 2021 from Mrs McDonald.

46. With regard to the reason or principal reason for dismissal I was satisfied that the reason for dismissal of the claimant was for the reasons set out in the emails from the respondent to the claimant on 5 and 6 September 2021, namely his time keeping, his inability to take instruction, his speaking out of turn with customers, members of staff and others and his lack of honesty. I did not agree that the claimant was dismissed for making allegations about underpayment of his wages. The claimant had been making allegations over a long period of time about what he considered was an underpayment of his wages. For example, he raised concerns about payment of his additional two hours of work in February 2021 and concerns about payment for hours worked in May 202, as documented in correspondence from the respondent to the claimant. I did not find any causal link, as alleged by the claimant, between the email that the claimant sent to the respondent at 22.31 on 5 September 2021 and the subsequent notice of dismissal issued to the claimant at 01.58 on 6 September 2021. I did not find any causal link between the claimant's dismissal and the allegations he made at any time about underpayment of his wages.

47. With regard to reimbursement of the personal mobile phone contract costs the claimant's position, and supported by his wife, was that the he had asked Mr McDonald if there was a limit to the amount which could be spent and Mr McDonald had said "no, whatever you like". Mr McDonald denied that he had said this. On this matter I am persuaded by the evidence of Mr and Mrs McDonald that there had been a discussion in person between the two of them and the claimant, some days before the phone call between Mr McDonald and the claimant. At that discussion the claimant had been told that there would be a maximum reimbursement of £26 per month. Mrs McDonald had said to the claimant during the discussion that this was on a par with the phone allowance given to another employee. The claimant and his wife both accepted that the claimant had not referred to a figure of £71, or any figure, on the call. On balance, I am satisfied that it is unlikely that Mr McDonald would have replied to a question about whether there was a limit by saying "no, whatever you like" against the background of the discussion several days before between Mr and Mrs McDonald and the claimant about the mobile phone costs.

20 **Relevant law**

Dismissal for asserting statutory right

48. Section 104 ERA Dismissal for asserting a statutory right says: (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

5 (2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

10 (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section [including]—

15 (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

Breach of contract

49. The Tribunal has jurisdiction for a breach of contract claim under the
20 Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.

Holiday pay

50. Regulations 13 and 13A of the Working Time Regulations 1998 say a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker's

employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken. (Less than half a day's leave is rounded up to half day's leave and if more is rounded up to a whole day.) The holiday year begins on the date when employment begins unless a relevant agreement provides otherwise. A worker is entitled to leave paid at the rate of a week's pay calculated under ERA.

51. Regulation 13(3) WTR sets out when the leave year begins and provides that in the absence of a relevant agreement in writing the leave year begins on the date on which the employment begins.

52. Regulation 14 WTR, sets out the entitlement where a worker's employment ends during a leave year and provides, at 14(2), that where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with the formula set out in Regulation 14(3), which is $(A \times B) - C$.

Unauthorised deduction from wages

53. Section 13 ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of ERA.

54. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA).
55. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.
56. Under Section 27(1) of ERA “wages” means any sums payable to the worker in connection with their employment.

Disputed contents of written statement of reasons for dismissal

57. Section 93(1) ERA provides that a complaint may be presented to an employment tribunal by an employee on the ground that....(b) the particulars of reasons given in purported compliance with that section are inadequate or untrue.
58. Section 93(2) ERA provides that if an employment tribunal finds a complaint under this section well-founded, the tribunal—(a) may make a declaration as to what it finds the employer's reasons were for dismissing the employee, and(b) shall make an award that the employer pay to the employee a sum equal to the amount of two weeks' pay.

Dismissal related to failure to pay the minimum wage

59. Section 104A ERA the national minimum wage provides at section 104A(1)

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason)

5 for the dismissal is that—

(a) any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies;

10 60. Section 104A (2) provides that it is immaterial for the purposes of paragraph

(a) [or (b) of subsection (1)] above—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed,

but, for that subsection to apply, the claim to the right and, if applicable, the

15 claim that it has been infringed must be made in good faith.

Submissions

61. The parties made short closing submissions. The claimant maintained that each of his claims were well founded and that there remained sums due to
20 him for unpaid wages, holiday pay and reimbursement of mobile phone costs.

The claimant maintained that he had been dismissed for raising issues about his wages with the respondent. The respondent maintained that each of the claims were resisted, that all monies due to the claimant had been paid and that the reasons for his dismissal were because of the concerns they had

about his work performance, time keeping and honesty as set out in the correspondence and dismissal letter to him.

Discussion and decision

5 Deduction from wages

62. At some point not long after the commencement of employment on 10 August 2020, the claimant was provided with a contract of employment which set out an hourly rate of £9 per hour and 35 hours per week. The claimant did not sign this contract. The evidence of Mrs McDonald was that she had provided the claimant with a contract and had asked him several times for this to be returned and signed but he had not done so. This is referenced in the notes of the meeting which the respondent had with the claimant on 26 January 2021 and I accepted that the contract had been provided to him and that the claimant had worked under this contract.

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63. In around the beginning of January 2021 the parties agreed an increase in the claimant's contractual hours to 37 hours per week. This was to allow 2 hours per week for the claimant to clean the respondent's van which he used for work purposes. Mrs McDonald's evidence was that the claimant was struggling to keep the van clean. It was therefore agreed with him that an additional two hours would be added to his 35 hours contractual entitlement.

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64. The respondent confirmed to the claimant that the extra 2 hours would be back dated to October 2020. The backdated payment was made to the claimant in February 2021. The claimant was provided with a payslip dated

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end of February 2021 which showed that the hours for the van cleaning had been backdated to October 2020. I accepted that the payslip was an accurate reflection of what the respondent had confirmed to the claimant and this was supported by the evidence of Mrs McDonald. There was no evidence that the claimant had challenged this payslip on receiving it.

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65. I was satisfied that the claimant and Mr McDonald had agreed a contractual variation the claimant's contract, with effect from 1 May 2021, where by he would carry out his duties as a service engineer for 4 days a week. On the fifth day of the week the claimant would work on his own account developing his own business, with sales assistance from Mr McDonald. The claimant had an interest in sales and Mr McDonald agreed to provide support to the claimant. It was agreed that the claimant could use the respondent's premises on the fifth day of the week, whilst working on his own account and accessing the support of Mr McDonald. The Tribunal is assisted in reaching this conclusion by the handwritten notes of both the claimant and Mr McDonald in a notebook R21 and the email exchange between the claimant and Mrs McDonald on 28 and 29 April 2021 (C34) where Mrs McDonald refers to the claimant's working arrangements "So it's £10 for an eight hour day x 4" and "Apologies, can you please come into the unit today with Iain and do your run tomorrow" C34.

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66. The claimant's position in evidence was that Mr McDonald had told him that he would be working a four day week, Monday to Thursday, and that he would be earning £10 per hour. The claimant's position was that Mr McDonald did

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not say to him that he would be working 8 hours per day. The claimant's position was that he agreed to the four day working week and the rate of £10 per hour but that there was no agreement to an 8 hour working day. I understood the claimant's position in evidence to be that his hours of work would remain at 37 hours per week, albeit worked over 4 days. This was because, according to the claimant, the hours per day had not been discussed with Mr McDonald.

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67. The claimant said in evidence that he was a newly married man and could not afford to take a pay cut. Against this however I accepted the evidence of the respondent that Mr McDonald had agreed to provide support to the claimant to carry out business on his own account, one day per week, usually Fridays. This would have provided an additional income stream to the claimant in addition to his wages from the respondent. The Tribunal found the handwritten entries of the claimant and Mr McDonald in a notebook R21 of assistance in reaching this conclusion. The entries show a discussion between the claimant and Mr McDonald where he would work 4 days per week for 32 hours and compared his salary with working 5 days per week for 37 hours. The claimant also said in his evidence that he would get the profits he made from sales on Fridays, which I was satisfied pointed to an arrangement whereby the claimant was working on his own account on Fridays.

68. In her cross examination of the claimant Mrs McDonald put it to the claimant that she had spoken to the claimant and offered him £10 per hour. But that

there were then complaints from customers so the respondent dropped the pay rise from £10 per hour to £9.50 per hour. The claimant did not agree that there had been complaints. The claimant did not agree that, having been offered £10 per hour on 28 April 2021, he had subsequently agreed a reduction to £9.50 per hour.

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69. The claimant said in evidence that the text exchange on 28 and 29 April 2021 with Mrs McDonald came after the discussion he had with Mr McDonald about the change to his working arrangements. I accepted this. When Mrs McDonald sent the text message on 28 April 2021 "So it's £10 for an eight hour day x 4" the claimant did not challenge the contents of the text. He did not challenge the reference to an eight hour day. I found this surprising. If it had been the claimant's understanding that his contractual hours of work were to remain 37 hours per week, I consider that, on balance it is likely that the claimant would have raised that at the time with the respondent. He did not do so.

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70. I am satisfied that the claimant's contractual hours changed with effect from 1 May 2021 such that he was entitled to be paid £10 per hour and that he would work 32 hours per week. The claimant was paid the sum of £9.50 per hour for 32 hours per week. This leaves a shortfall due to the claimant of £0.50 per hour x 32 hours per week, which totals £16 per week. There was a period of 19 weeks from 1 May 2021 until the claimant's employment ended on 10 September 2021. The claimant is entitled to be paid the sum of 19 weeks x £16 which totals £304.

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71. The claimant alleged that when the parties agreed that an extra 2 hours was to be added to his contractual hours for cleaning the van, the parties also agreed that this would be backdated to 10 August 2020 when his employment started. The respondent disputed this and said the agreement was that the claimant's hours would be increased and that payment for the additional two hours would be back dated to October 2021. The backdated payment was made to the claimant at the end of February 2021. The claimant's payslip for the period ended 28 February 2021 shows an entry for payment made for "shortfall of wages from October 2021". R9b . On balance I consider that if the claimant had considered in February 2021 that he had been underpaid in relation to the backdated period he would have raised this with the respondent at the time. I am therefore satisfied that, on balance, the parties had agreed the additional two hours backdated to 1 October 2021. This would be consistent with the respondent allowing a period of time for the claimant to settle in and then becoming aware that an extra two hours were needed each week to provide time for the claimant to clean his van.

72. The claimant asserted that he was being paid below the national minimum wage from August 2020 to February 2021. The Tribunal was satisfied that there was a contractual arrangement between the parties for two hours of van cleaning during this period. The rate of pay for the two hours of van cleaning was at the rate of £9 per hour. This was the same hourly rate as the claimant's other 35 hours during that period. The respondent was in arrears of pay for that period for the van cleaning duties. Those arrears of pay were made good

by the respondent in February 2021. The contractual agreement was for pay which was above the national minimum wage. The claimant's assertion that he was paid below the national minimum wage is not well founded.

- 5 73. The claimant asserted that he was being paid below the national minimum wage from 1 May 2021 until his dismissal. He alleged that his contractual entitlement was to be paid £370 per week (£10 per hour x 37 hours) during that period. He alleges that he was working 37 hours per week but only receiving payment of £304 per week (32 hours x £9.50). He alleges that this
10 took him below the national minimum wage. I am satisfied that the contractual entitlement was to £10 per hour and to work 32 hours per week which is not below the minimum wage. The claimant's assertion that he was paid below the national minimum wage from 1 May 2021 until his dismissal is not well founded.

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Holiday pay

74. The claimant carried forward 2 days of holiday from the previous holiday year which ended on 31 March 2021. This was with the agreement of the respondent.

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75. The claimant's holiday year ran from 1 April each year. The claimant had an entitlement to 30 days of holiday based on working 5 days per week. In the month of April 2021 the claimant worked 5 days per week. In the month of April 2021 he accrued 2.5 days based on working 5 days per week.

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76. From 1 May the claimant worked 4 days per week. His pro rata annual holiday entitlement was 24 days (30 days x 0.80). In the period 1 May 2021 until termination of employment on 10 September 2021 the claimant accrued 8.64 days (133/365 = 0.36) x 24 days = 8.64 days. The claimant's accrued annual leave from 1 April 2021 to 10 September 2021 was 11.14 days (2.50 + 8.64 days). The claimant took 12 days of holiday in the holiday year beginning 1 April 2021. The claimant took more holidays than he had accrued by 0.86 days. The claimant carried forward two days from the previous holiday year. Taking this into account the claimant's accrued but untaken holiday entitlement on termination was 1.14 days for which he was entitled to be paid at the rate of £80 per day (£10 x 8 hours). On or around 30 September 2021 the claimant was paid his final salary R9b. This included the sum of £105.84 holiday pay for accrued but untaken holidays. This sum discharged the respondent's liability to pay holiday pay to the claimant. The claim for holiday pay is not well founded and does not succeed.

Breach of contract

77. The claimant maintained that there was an agreement to pay £71 per month for his personal mobile phone bill. Once that sum had been reduced by EE, his telephone provider, the sum which he paid each month was around £55. The claimant submitted that in the respondent's note of the meeting with the claimant on 26 January 2021 the respondent admitted that Mr McDonald had agreed to pay the claimant's mobile phone contract in the sum of £71. I was

satisfied that the notes did not contain an admission by the respondent that there was a contractual agreement to pay £71.

78. The claimant was reimbursed the sum of £71 for his personal mobile phone costs on 27 November 2020 and a further £71 on 11 February 2021. The claimant was reimbursed the sum of £96 for his personal mobile phone costs on 2 July 2021 which comprised four payments of £24 for March – June 2021. The claimant was reimbursed the sum of £48 for his personal mobile phone costs for July and August 2021. The total reimbursement made to the claimant was £286. The claimant agreed in cross examination that based on a monthly sum of £24 he had received reimbursement for all of his personal mobile phone costs. The issue was whether the contractual agreement was to reimbursement of £71 or £24 per month. In any event the claimant subsequently renegotiated his personal mobile phone costs with his phone provider. The claimant's position was that he was entitled to be paid the sum of £550 (11 months x £50) less the sum of £286 which had been paid to him. The claim was therefore for £264. I found based on the documentary evidence that the respondent agreed to pay the sum of £24 per month as reimbursement of mobile phone costs and that all payments due to the claimant have been made.

79. The claimant's position, and supported by his wife, was that the he had asked Mr McDonald if there was a limit to the amount which could be spent and Mr McDonald had said "no, whatever you like". Mr McDonald denied that he had said this. On this matter I am persuaded by the evidence of Mr and

Mrs McDonald that there had been a discussion in person between the two of them and the claimant, some days before the phone call between Mr McDonald and the claimant. At that discussion the claimant had been told that there would be a maximum reimbursement of £26 per month. Mrs McDonald had said to the claimant during the discussion that this was on a par with the phone allowance given to another employee. The claimant and his wife both accepted that the claimant had not referred to a figure of £71, or any figure, on the call. On balance, I am satisfied that it is unlikely that Mr McDonald would have replied to a question about whether there was a limit by saying “no, whatever you like” against the background of the discussion several days before between Mr and Mrs McDonald and the claimant about the mobile phone costs.

Bus lane fine

80. On 2 September 2021 whilst carrying out his duties in the respondent’s van the claimant incurred a bus lane fine. As the van was registered to the respondent the fine, issued by Glasgow City Council, was payable by the respondent R16. This fine in the sum of £30 was deducted from the claimant’s final wages.

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81. I was satisfied that the respondent was entitled to make this deduction. The claimant’s contract of employment, signed by him on 11 February 2021 provided that the respondent reserved the right to make deductions from the claimant’s salary for any losses in relation to property or monies of the

respondent caused through the claimant's carelessness, negligence or recklessness or through the claimant's breach of the respondent's rules. The claimant's position was that he drove in the bus lane when travelling to client premises that he had not visited before. The respondent's position was that it was a route he used regularly and that the road was clearly marked as a bus lane only, so he should not have used it. I was satisfied from a review of the photographs on the bus lane fine R16 that the road was clearly marked as a bus lane. I was satisfied that the respondent's cost incurred for this fine fell within the clause in the employment's contract which allowed for deduction from wages, namely carelessness on the part of the claimant. In accordance with section 13 ERA there was a provision in the claimant's contract advised in writing, which allowed the deduction to be made. This aspect of the claimant's unlawful deduction from wages claim is not well founded and does not succeed.

Automatic unfair dismissal for asserting a statutory right

82. The claimant in evidence made reference to the letter he had received from Mrs McDonald on 24 May 2021. The letter said that "We ask at this time, due to your concern that you are working more hours than you are getting paid for, please do not bring Melanie to work with you" R13. The claimant acknowledged in his evidence that this letter showed that he had been raising his concerns about his hours of work verbally with the respondent "for a long time".

83. The claimant's position in evidence was that prior to the claimant sending his email on 5 September 2021 at 22.31 the respondent seemed quite happy for the claimant to return to work although there were things he didn't agree with. I do not agree that this was supported by the evidence and with the facts found.

84. In a claim brought under section 104 ERA, there are three main requirements: (i) the employee must have asserted a relevant statutory right (ii) the assertion must have been made in good faith, and (iii) the assertion must have been the reason or principal reason for the dismissal. There is no minimum qualifying period of employment applicable to these rights – section 108 ERA.

85. I am satisfied that the claimant asserted a statutory right. The relevant statutory rights covered by sections 104(4)(a) include protection of wages rights and the claimant alleged that he had suffered an unauthorised deduction from wages.

86. Section 104(2) ERA provides that it is immaterial whether or not the employee actually has the relevant statutory right or whether the right has been infringed. However, the subsection goes on to state that the employee's claim to the right — and that it has been infringed — must be made in good faith.

87. I am satisfied that the claimant's assertion that he had suffered an unauthorised deduction from wages was made in good faith, from 1 May 2021. He believed in good faith that from 1 May 2021 the respondent had

agreed to pay him additional wages and that there was an unlawful deduction from wages by his employer. This remains the case although I have found that the claimant agreed to a contractual variation of his hours of work from 37 hours to 32 hours with effect from 1 May 2021.

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88. The final requirement under section 104 ERA is that the assertion of the relevant statutory right must be the reason, or the principal reason, for the employee's dismissal. The burden of proof is on the claimant to establish the reason for dismissal, on the balance of probabilities. Where the parties advance different reasons, it is for the Tribunal to decide — as a question of fact — which reason caused (or principally caused) the dismissal.

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89. I was satisfied that the reason for dismissal was because of the reasons set out in their dismissal emails of 5 and 6 September 2021. The claimant sought to rely on the fact that he had asserted that there had been an unlawful deduction from his wages in his email sent late on 5 September 2021 and he had been given notice of dismissal in the early hours of 6 September 2021. However, I note that the claimant had regularly been asserting an unlawful deduction from his wages and concerns about reimbursement of his mobile phone contract costs since not long after his employment with the respondent had commenced. This had continued regularly following the contractual change to his wages with effect from 1 May 2021. The burden of proof is on the claimant to establish the reason for dismissal. The claimant did not establish, on a balance of probabilities, that the reason for his dismissal was for asserting a statutory right. The claim for automatic unfair dismissal for

asserting a statutory right under section 104A is not well founded and does not succeed.

Detriment and/or dismissal related to failure to pay the minimum wage

5 90. Section 104A ERA states that it will be automatically unfair to dismiss an employee where the reason for the dismissal is that: (i) any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, the employee's right to the national minimum wage.

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91. It is immaterial whether or not the employee has the right in question or whether or not that right has been infringed, provided the complaint was made in good faith — S.104A(2) ERA. There is no minimum qualifying period of employment applicable to these rights — S.108 ERA.

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92. As with the automatic unfair dismissal claim under section 104A I am satisfied that the reason for the claimant's dismissal was as set out in their emails to the claimant on 5 and 6 September 2021. The claim for unfair dismissal related to the claimant's assertion of a failure to pay the minimum wage under section 104A is not well founded and does not succeed.

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Disputed contents of written statement of reasons for dismissal

93. Section 93 ERA provides that (1) A complaint may be presented to an employment tribunal by an employee on the ground that.....(b) the particulars

of reasons given in purported compliance with that section are inadequate or untrue.

94. The respondent provided a written statement of reasons for dismissal on
5 5 and 6 September 2021. Those reasons accorded with my findings as to
the reason or principal reason for dismissal of the claimant. The reasons
given were detailed and I am satisfied that they were both adequate and true.
The claim for breach of section 93 ERA on the ground that the particulars of
reasons are inadequate or untrue is not well founded and does not succeed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

J McCluskey
07 July 2022
07 July 2022