EMPLOYMENT TRIBUNALS

Claimant: Mr J Nash

Respondent: Purple Dog Company.com Ltd

Heard at: **Cardiff** **On:** **7 August 2023**

Before: **Employment Judge Leith**

Representation
Claimant: Mrs Nash (wife)
Respondent: Mr Cater (Consultant)

JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.
2. The complaint of breach of contract (in respect of notice pay) fails and is dismissed.
3. The complaint of unauthorised deduction from wages in respect of the period from 1 May 2022 to 8 October 2022 fails and is dismissed.
4. The complaint of failure to pay for annual leave accrued but untaken succeeds, in respect of annual leave accrued during the period from 1 May 2022 to 8 October 2022 only. The respondent must pay the claimant the gross sum of **£566.49**.

REASONS

Claims and issues

1. The claimant claims unfair dismissal, breach of contract, unauthorised deduction from wages and failure to pay annual leave.

2. The issues for the Tribunal to consider (as far as liability was concerned) were discussed and agreed at the outset of the hearing, as follows:

Status

2.1. It is common ground that the claimant was an employee of the respondent from 1 May 2022 onwards.

2.2. Was the claimant an employee of the respondent within the

meaning of section 230 of the Employment Rights Act 1996 prior to 1 May 2022? The claimant's case is that he was continuously employed by the respondent from November 2019 until the termination of his employment.

Unfair Dismissal

2.3. Was the claimant dismissed by the respondent? The claimant's case is that he was dismissed by the respondent.

2.4. If the claimant was not actually dismissed, was he constructively dismissed?

2.5. If the claimant was dismissed, what was the reason or principal reason for the dismissal, and was it a potentially fair reason? The respondent's case is that if the claimant was dismissed, it was for misconduct which is a potentially fair reason.

2.6. Did the respondent act reasonably in all the circumstances in treating it as sufficient reason to dismiss the claimant?

2.7. If the claimant was dismissed, is there a chance the claimant would have been fairly dismissed anyway? If so, should the claimant's compensation be reduced, and by how much?

2.8. If the claimant was dismissed, should the basic and/or compensatory award be reduced because of the conduct of the claimant before dismissal? If so, to what extent?

Breach of contract

2.9. What was the claimant's notice period?

2.10. It is common ground that the claimant was not paid for his notice period. If the claimant was dismissed, was he guilty of gross misconduct such that the respondent was entitled to terminate his contract without notice?

Unauthorised deduction from wages

2.11. Between 1 May 2022 and 7 October 2022, was the claimant paid less than the National Minimum Wage? It is common ground that the claimant was paid £1,000 per month. The claimant says that he worked 50 hours per week, the respondent says that he worked between 12 and 16 hours per week.

Holiday pay

2.12. It is common ground that the claimant was not paid for accrued but untaken annual leave on termination of his employment. The respondent accepts that the claimant was entitled to annual leave accrued in the period from 1 May 2022 to 7 October 2022.

2.13. Was the claimant a worker prior to 1 May 2022?

2.14. If so, what was the claimant's leave year?

2.15. How much annual leave had the claimant accrued in his final leave year? It is common ground that no annual leave had been taken.

3. Mrs Nash indicated that the claimant was considering bringing separate commercial proceedings regarding the claimant's position as a Director/shareholder of the respondent. These proceedings are not concerned with that the ownership of the respondent, or any commercial relationship between Mr Phillips and the claimant. They are concerned only with the claimant's position as an employee or worker of the respondent.

Procedure, documents and evidence heard

4. I heard evidence from Mr Phillips (Director and shareholder of the respondent), and from the claimant. Both gave their evidence by way of pre-prepared witness statements, on which they were cross-examined.

5. I had before me a bundle of 82 pages.

6. Additional witness statements were tendered by the claimant from Mick Bettridge and Rhian Evans. Mr Bettridge and Ms Evans did not attend the hearing to have their evidence tested, and the statements had not been sent to the respondent prior to the hearing. I adjourned for a short period of time to let Mr Cater read the statements, after which he indicated that there was no objection to their being admitted. I admitted the statements into evidence.

7. At the end of the evidence, I heard submissions from Mr Cater and Mrs Nash. I indicated that I would reserve my decision.

The evidence before the Tribunal

8. There was relatively little contemporaneous documentation placed before the Tribunal. I heard live evidence from two witnesses, the claimant and Mr Phillips. I did not find either of them to be particularly compelling witnesses.

9. In cross-examination, the claimant tended to give long and meandering answers in response to direct questions. He had to be reminded on more than one occasion not to look towards his wife for assistance in answering questions that were put to him. At one point during his evidence, after he had been asked a question by Mr Cater he actually got out of his chair and started walking towards his wife; I had to remind him to sit back down.

10. He placed a lot of emphasis, in his witness statement, on his character and integrity. His evidence was in essence that he had brought a degree of rigour to the respondent's business, in contrast to Mr Phillips' more laid-back approach. That was perhaps best encapsulated in this passage from his witness statement:

> "Asking Mr Phillips to follow basic employment rules became a chore and took me away from driving future business… I persevered because I truly thought I could educate Mr Phillips on the legalities of running a medium sized business. The forecasts we of large demand [*sic*] so a small

business mentality would not be what the company needed. I kept talking of governance and laws, licensing regulation and financial accountability but it just seemed to go over Mr Phillips' head."

11. That portrayal of himself was, however, inherently inconsistent with the remaining evidence. In particular:
    11.1. His case was that he always regarded himself as an employee, but he apparently never sought to be issued with a written employment contract. That was an issue not just for him, but for the respondent (because the failure to issue a contract would put it in breach of s.1 of the Employment Rights Act 1996, something he accepted he was aware of).
    11.2. He apparently transacted his business with Mr Phillips orally, and he never sought to follow up in writing or create an audit trail. He referred to meetings with Mr Phillips but disclosed no notes or minutes of those meetings and did not suggest that such records existed. His answer, when that was put to him, was that Mr Phillips preferred to talk than to exchange emails. However, that did not really address why the claimant, with his expressed focus on governance, appeared rarely to commit anything to writing himself.
    11.3. He presented no evidence that he had recorded the time he spent working for the business (save for the 80 hours referred to on the invoice in respect of the Lions trip).

12. A significant amount of the claimant's evidence was given for the first time in cross-examination, in response to questions from Mr Cater. When that was put to him, he gave no explanation for why he had failed to include various important details in his witness evidence.

13. In respect of Mr Phillips, his evidence contained significant inconsistencies, which I highlight where they occur in the chronology below.

14. In assessing the oral evidence I have heard, I bear in mind that a genuinely held belief which is wrong, or one untruth told, does not necessarily render other evidence from that witness unreliable. Furthermore, generally good historians still tell untruths, and people do, on occasion, behave in unexpected ways.

15. The statement of Mr Betteridge purported to be a character reference for the claimant. The statement was unsigned and did not bear a statement of truth. Mr Betteridge did not attend the Tribunal to be cross-examined. In the circumstances, I do not consider it is appropriate to give the statement any weight.

16. Similarly, the statement from Rhian Evans, although signed, did not bear a statement of truth. Ms Evans did not attend the Tribunal to be cross-examined. In the circumstances, I do not consider it is appropriate to give the statement any weight.

Fact findings

17. I make the following findings of fact on balance of probabilities. I have not covered every area that was referred to in evidence; I have focused on the key points necessary to reach a conclusion on the issues before me.

18. Mr Phillips is the sole Director of the respondent company. Mr Phillips and the claimant have known each other for over 30 years.

19. Mr Phillips had previously organised tours for friends and acquaintances. In 2017 the claimant travelled with Mr Phillips on one of those tours to New Zealand, as a paying guest.

20. In around mid-2018, Mr Phillips decided to see if he could make a business out of organising tours. Initially he did so as a sole trader.

21. The claimant was at that stage the director of another company, Voltcom Limited. That company suffered financial difficulties, which led to the claimant entering into an IVA.

22. There was some discussion between the claimant and Mr Phillips about the claimant becoming involved with the new business. There was some dispute about that nature of that discussion. Nothing was documented at the time about the relationship between Mr Phillips and the claimant.

23. The claimant's evidence was that he agreed with Mr Phillips that they would run the new business 50/50, although he would be partner in title only until his outstanding IVA had been settled. His evidence was that after carrying out some research, he became aware that the business would need an ATOL license and appropriate insurance, which Mr Phillips had not appreciated. His evidence was that he carried out the necessary work to put those in place, and also to put in place terms and conditions and policies. The claimant's evidence was that from November 2019 onwards he worked on average 50 hours per week for the business.

24. Mr Phillips' evidence was that the agreement between them was that the claimant would provide some services to his business as a consultant, which he subsequently did.

25. I do not need to make findings about what was agreed regarding the ownership of the respondent.

26. The respondent company was incorporated in January 2020. Mr Phillips was the sole shareholder, and the sole director. A website designer was engaged to design a website for the company. After the website had been designed, the claimant then took on the task of managing the website.

27. Mr Phillips' evidence was that the company was effectively mothballed from the onset of the COVID-19 pandemic until February 2022. That evidence was inconsistent with his own evidence that the respondent employed two administrative assistants via the Kickstart programme from October 2021 to January 2022. I find that Mr Phillips sought to significantly overplay the effect of COVID-19, and the duration of the effects it had on the business. It was, however, common ground that the pandemic did cause significant disruption to the respondent. A planned trip to South Africa in 2021 for the British and Irish Lions tour had to be cancelled.

28. The claimant's IVA was cleared in February 2022.

29. In March 2022, the claimant led an expedition to Everest Base Camp. Mr

Phillips' evidence was that the claimant was paid £1,650 for doing so. The claimant's evidence was that while that sum was transferred to him, it was in respect of accommodation and visa costs. There was in the bundle before me a text message from Mr Phillips to the claimant dated 20 March 2022, the relevant part of which read as follows:

> "Hi mate ive transferred over 1650 for the hotel and visa, don't forget to get an invoice from them!!"

30. When this was put to Mr Phillips, his evidence was that part of the payment was for expenses, but part was a payment to the claimant. He could not, however, recall what part of the payment was for expenses and what part was for remuneration.

31. On that point, I consider that the contemporaneous text message gives the most reliable evidence regarding the nature of the payment. I find that the payment of £1,650 was to cover the costs of the trip, and that none of it constituted remuneration to the claimant.

32. With effect from 1 May 2022, the claimant was put on the respondent's payroll. He was paid £1,000 per month. He was also appointed as a director of the respondent company.

33. Mr Phillips' evidence was that the rationale for putting the claimant on the respondent's payroll at that point was simply that they could afford to do so. His evidence was that he also went on the payroll as an employee at that point, and he was also paid £1,000 per month.

34. Mr Phillips' evidence was that at that point, the claimant's role was to manage the website, place occasional adverts on facebook, and preparing some invoices. His evidence was that since the claimant left, the respondent has a consultant who carries out the claimant's website role, and who is paid for one day per month. In respect of the facebook adverts, his evidence was that placing an advert on facebook would take around 15 to 20 minutes. Based on that, his evidence was that, at a generous estimate, the claimant spent between 12 and 16 hours per week working for the respondent from May 2022 onwards.

35. The claimant's evidence was that he would deal with around 5 to 10 enquiries per month from the website, and that placing a facebook advert would take up to an hour. His evidence was that preparing an invoice would take 20 minutes, although it took longer as he had to chase Mr Phillips for information. He accepted that the tasks outlined by Mr Phillips would, broadly, take 12 to 16 hours per week. However, his evidence remained that he worked 50 hours per week during that period. His evidence was that he spent the remaining time setting up the business and managing compliance, generating policies and procedures.

36. It was put to the claimant that there were no policies or procedures left behind when he left the respondent. His evidence was that he had sent copies to Mr Phillips for sign-off, but never received a response. That point was not put to Mr Phillips in cross-examination. The claimant's evidence in cross-examination was that he had kept copies of all of the documents, although he had not disclosed them in the Tribunal proceedings. That was

inconsistent with his witness statement, in which he said this:

> "I can assure you, any IP or data I had on my computer has been deleted."

37. Tellingly, there was no record of the time the claimant spent working, or of his normal working hours. Nor was there any evidence of when the policies and procedures he claimed to have spent his time on were created, or how long they took to create.

38. I deal with my findings on this point in my conclusions.

39. On 9 May 2022, the claimant invoiced the respondent for work he had undertaken on the (abortive) South Africa trip. The invoice was broken down as follows:

Engagement Service Fee	£999
Labour rate: 80 hours at £75/hr	£6,000
Security report & recommendations	£1,550
Mitigation measures and standard operating procedures	£1,350
Travel – Car Hire and internal flights	£357.99
Expenses: Food and drink – 10 days	£550
New client discount	(£1,164.98)
Total	£10,000

40. The invoice had the claimant's name and address at the top. It was addressed to the respondent. It gave the customer ID as "British Lions Tour South Africa – Security Brief". At the bottom of the invoice it said "Thank you for your business!"

41. The claimant's evidence was that the invoice was produced because Mr Phillips could take a dividend at the end of the year, but he could not (since he was not a shareholder). His evidence was that Mr Phillips had taken a dividend of £10,000, and it was a mechanism for him to be paid an equivalent sum. That evidence was not contained in either the claimant's pleaded case or his witness statement. It was not put to Mr Phillips in cross-examination, so Mr Phillips did not have the opportunity to answer it.

42. It was put to the claimant that the items on the invoice were consistent with him having been a consultant providing services to the respondent. The claimant's evidence was that all of the information on the invoice was hypothetical, and that having an invoice with no information on it would have looked "a little ropey".

43. I deal with my findings regarding the Lions Tour invoice in my conclusions.

44. On 22 September 2022, the claimant incorporated a new company called Rogue Sports Travel Limited ("Rogue Sports"). The company had one director, the claimant. The registered office address was the claimant's home address.

45. Mr Phillips' evidence was that he became aware of the incorporation of Rogue Sports in September or October 2022. His evidence was that he

started seeing adverts for the company on Facebook, and that he was asked by clients if the claimant had left the respondent, because they had seen that he was involved in another business in the same field. His evidence was that this exacerbated concerns he had already had about the claimant. The genus of those concerns was calls he had received from credit card companies about enquiries the claimant had made about setting up payment systems, and calls from the accountant regarding enquiries the claimant had made about the finances of the respondent.

46. The claimant's evidence was that he had agreed with Mr Phillips that they would separate the business of sports tours from the business of adventure travel, because their website was too confusing for customers. His evidence was that he set up Rogue Sports to be the vehicle for the adventure travel side of the business. The claimant was asked a number of direct questions by Mr Cater about the setting up of Rogue Sports, and about what Mr Phillips knew. In response, the claimant gave lengthy and meandering answers. However, I understood his evidence to be that while he had spoken to Mr Phillips in general terms about separating out different elements of the business, he had not specifically discussed setting up Rogue Sports. None of the claimant's evidence regarding the setting up of Rogue Sports appeared in his witness statement – it was all given for the first time in cross-examination.

47. I did not accept the claimant's evidence regarding Rogue Sports, for the following reasons:

    47.1. If the claimant had intended to set Rogue Sports up to be (effectively) part of the same group of businesses as the respondent, I consider that it is far more likely that he would have registered it to the same address as the respondent and registered Mr Phillips as a Director.
    47.2. Given that (on his evidence) he believed that he was an equal shareholder in the respondent, I consider that it is also inherently unlikely that he would have set the company up without making either Mr Phillips or the respondent a shareholder (which there is no evidence that he did).
    47.3. While the claimant might have thought it would make more sense to market the different types of holidays differently, perhaps using different websites, no real explanation was given as to why that would require a separate limited company.

48. I consider that it is far more likely that the claimant intended to set up Rogue Sports as a vehicle for himself to provide sporting holidays, and I find that that was what he did.

49. In parallel to the Rogue Sports issue, the claimant's evidence was that he had for some time been trying to get financial information regarding the company, which he felt he was entitled to as a Director.

50. The claimant and Mr Philips met on 7 October 2022.

51. Mr Phillips' evidence was that the claimant asked him whether he still trusted him, and Mr Phillips responded that he could not be sure. His evidence was that the claimant then suggested that they needed to go separate ways, to which Mr Phillips said, broadly, that if that was what the claimant wanted to do it was fine with him.

52. The claimant's evidence in his witness statement was that it was Mr Phillips who raised the issue of trust, by telling the claimant that he did not trust him. However, in cross-examination his evidence was that he asked Mr Phillips if he trusted him. His evidence was that Mr Phillips said he would need some time over the weekend to think about the position. The claimant's evidence was that he told Mr Phillips that if they could not resolve the situation, they would need to go their separate ways.

53. On 8 October 2022, the claimant wrote to Mr Phillips. The letter was headed "Terminating our commercial relationship". Both parties agreed that they did not consider the letter to be covered by without prejudice privilege. The letter said this:

> "Over the last few months it has become apparent to both of us that we are moving in different directions with the business. In addition, I cannot be a director (and fiduciary) of a company – as well as being an equal share owner – where I have never had meaningful access to the books and records of the company nor the banking system. This creates a liability for me which is unacceptable. I was also disappointed that you told me that you were unable to trust anyone and by extension me, with information and access. To that end and as an equal shareholder and director, I believe we must separate our business interests as soon as possible. I am sure you understand my position and I believe that you agree with me.
>
> Therefore to summarise our discussion yesterday:
>
> 1. We have agreed to separate our business interests,
> 2. Subject to the mutual approval and signing of a Separation Agreement, I will relinquish my 50% shares in Purple Dog Company Ltd back to you. I will stand down as a director and employee of the company."

54. The letter then went on to set out the terms that the claimant sought by way of a formal Separation Agreement. It then said this:

> "I see this as fair, however if we cannot reach a settlement, then I will be reliant on my legal representation's calculation of cost as part of the shareholding dispute. Their course calculations are a lot higher, I can assure you. We can deal with other issues such as my removal from Companies House records, notification to the Purple Dog market, letters to accountants and professional advisers as routine parts of the Separation Agreement once we have agreed the main issues above.
>
> After our meeting on Friday, we agree for you to respond by Midday on Monday 10th October having had the weekend to think about it. If I do not hear anything form you by midday I will assume you are not interested and initiate the legal investigatory process whereby my legal representation will write to the company, the Bank, the Accountant and the Trust to seek a formal breakdown of all the figures, inclusive of the financial performance within Purple Dog and its historical channels of monies received.

> I think we both believe it is in our best interests that we enter into our agreement and separate our business interests as soon as possible, however I am willing to seek what is 'fair' and not simply get into a process where you 'horse-trade' on the back of calculations that are in your head and deem a sum of £10k as fair. This is not good enough and I ask you to considerably review your offer."

55. It is common ground that the claimant did no further work for the respondent thereafter, and nor was he paid.

56. The claimant notified ACAS under the early conciliation process of a potential claim on 15 November 2022. The early conciliation certificate was issued on 27 December 2022, and the claim was presented on 26 January 2023.

Law

Employment and worker status

57. An "employee" is defined by section 230(1) Employment Rights Act 1996 (ERA) as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship.

58. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

59. The Court of Appeal in the case of *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Howe* [2009] EWCA Civ 280 gave guidance on the position where the claimant is a shareholder. The fact that an individual is a shareholder in a company, even the sole shareholder, is not a barrier to that individual also being an employee of the company. And even in the case of a company with a single shareholder, the company and the individual are not the same person – the company is still capable of exerting control over the individual. Control exercised by an individual as shareholder will not ordinarily be of special relevance in deciding whether or not that individual has a valid contract of employment.

60. The principles were considered more recently by the Employment Appeal Tribunal in the case of *Rainford v Dorset Aquatics Limited* [2021] UKEAT 2020-000123. The EAT set out in paragraphs 16 and 17 various propositions relating to the question of whether a shareholder was also an employee.

61. A "worker" is defined by section 230(3) ERA as being: "an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the

contract that of a client or customer of any profession or business undertaking carried on by the individual."

Constructive dismissal

62. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

63. The employee must show that they were dismissed by the respondent under section 95. Section 95(1)(c) provides that an employee is dismissed if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

64. Guidance was given by the Court of Appeal in the case of *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 211:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

65. A constructive dismissal may be founded on the breach of an express term or an implied term. There is implied into all contracts of employment a duty of mutual trust and confidence. That duty was described by the House of Lord in the case of *Malik and Mahmud v BCCI* [1997] ICR 606 as being an obligation that the employer must not:

> "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

The test is an objective one.

66. The employer does not have to act unreasonably in order to be in repudiatory breach of contract. In the words of Sedley LJ in the case of *Buckland v Bournemouth University* [2010] EWCA Civ 121:

> "It is nevertheless arguable, I would accept, that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement. Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the

> most, indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part."

67. A breach may be made up of a sequence of events which meet the test cumulatively, even if none of those events would have done so individually. In such a case, the employee may rely on a "last straw" which does not in itself have to be so serious as to constitute a repudiatory breach (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978). However, the last straw must not be entirely innocuous or trivial.

68. In order to succeed in a claim of constructive dismissal, the employee must resign in response to the breach. However, the breach need not be the only reason for the resignation (*Wright v North Ayrshire Council* [2014] IRLR 4).

69. If after a breach of contract the employee behaves in a way that shows he or she intends the contract to continue, they will have affirmed the contract. Once the contract has been affirmed, the breach is waived and the employee can no longer rely on it to found a claim of constructive dismissal unless there is a last straw which adds something new and revives the earlier issues.

Unfair dismissal

70. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

71. Misconduct is a potentially fair reason for dismissal under section 98(2).

72. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

73. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell v British Home Stores* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all

aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563).

74. Section 108 of the 1996 Act provides that in order to bring a claim of unfair dismissal, an employee must have two years continuous service as at the Effective Date of Termination.

Polkey

75. In the case of *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords set down the principles on which a Tribunal may make an adjustment to a compensatory award on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed.

76. In undertaking the exercise of determining whether such a deduction ought to be made, the Tribunal is not assessing what I would have done; rather, it must assess the actions of the employer before it , on the assumption that the employer would this time have acted fairly though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274.

Contributory fault

77. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

78. Section 122(2) provides as follows: "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

79. Section 123(6) then provides that: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Unauthorised deduction from wages

80. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

81. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

Breach of contract

82. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in section 86 ERA. For someone who has been employed at least one month but less than two years, this is one week's notice. Thereafter, it is one week's notice for each completed year's service, up to a maximum of 12 weeks.

83. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice.

84. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Holiday pay

85. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave. The protection applies to workers. The

definition of "worker" is the same as that set out in section 230 of the Employment Rights Act 1996.

86. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose.

87. The calculation is set out in regulation 14(2)(b) of the Working Time Regulations 1998, as follows:

> (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–
>
> (A × B) − C
> where–
>
> A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;
> B is the proportion of the worker's leave year which expired before the termination date, and
> C is the period of leave taken by the worker between the start of the leave year and the termination date.

Conclusions

Status

88. I start by considering the claimant's status prior to 1 May 2022. It is of course common ground that the claimant was an employee of the respondent from 1 May 2022 onwards.

89. The claimant's case is that he was an employee of the respondent from November 2019. That cannot be right, as the respondent was not incorporated until 27 January 2020. At most, prior to that he could have been an employee of Mr Phillips. But that is not his evidence, and not how his case has been put. His evidence was not that he worked for Mr Phillips or was subservient to Mr Phillips. Rather, his evidence was that they were in business together, and that he was employed by the respondent company.

90. I do not need to reach any conclusions regarding what was agreed about the ownership of the business. I do, however, bear in mind that on the claimant's evidence, he regarded himself as having a stake in the business throughout.

91. Regarding the period from 27 January 2020 to 30 April 2022, I consider the position to have been as follows:

91.1. The invoice the claimant tendered for the South Africa tour was strongly suggestive of work done by a self-employed contractor. In particular:

91.1.1. It contained a mixture of sums paid for specific tasks, such as the security report, and sums invoiced on an hourly basis for a trip to South Africa. That is consistent with the way that a contractor would invoice.

91.1.2. It included an "Engagement Services Fee", and a "New Customer Discount" – both of which were entirely inconsistent with an employer/employee relationship.

91.1.3. I considered that the claimant's evidence that those details were (effectively) invented so as to avoid the invoice "looking ropey" was inconsistent with the stress he put, in his own evidence, on his character and his drive towards improved governance and accountability within the respondent. I consider it is more likely that the invoice was intended to capture and charge the respondent for work the claimant had done as a self-employed contractor.

91.2. There was no evidence before me of the respondent exercising control over the claimant. There was no evidence before me that the claimant was required to work certain hours. The only evidence of any particular output being required was in respect of the South Africa tour. But there was no evidence that the respondent exercised any control over the way the claimant undertook that work; rather, the invoice was consistent with the claimant having considerable autonomy over the way that he carried out that work as an independent security consultant.

91.3. There was nothing in the evidence before me to suggest any obligation on the respondent to offer work to the claimant, or to pay him. Nor was there any evidence that the claimant owed obligations to be available for work or carry out particular tasks on an ongoing basis (save for the South Africa Lions trip). It is again telling that, while the claimant's evidence leaned heavily on the role he said he played played in trying to improve governance within the respondent, there was no audit trail of any of the work he claimed to have carried out, or of there being any mutual obligations prior to May 2022.

91.4. The claimant's evidence was that he worked 50 hours per week. But again, there was no evidence that he had done so. Nor was it obvious what the claimant would have spent that time doing. The respondent was a small business. For a significant part of the time in question, it was unable to run tours due to the impact of the COVID-19 pandemic.

91.5. While the claimant's evidence was that he was told by Mr Phillips that the respondent could not afford to put him on the payroll, there was no evidence of him asking to be put on the payroll or treated as an employee (or indeed a worker). The claimant is an intelligent and articulate man. He has been a company director in the past, for a much larger company than the respondent. If he had considered himself to be an employee or a worker, it is in my judgment inconceivable that he would not have raised his employment status in writing at any stage.

92. Looking at the situation in the round, I conclude that the claimant was not an employee of the respondent at any point prior to 1 May 2022.

93. I consider also that the claimant was not a worker of the respondent prior to 1 May 2022. In my judgment, the only contract entered into between the

claimant and the respondent prior to 1 May 2022 was an implied contract for the claimant to provide his services to the respondent as a client. The claimant was a self-employed contractor.

Unfair Dismissal

94. It follows from that conclusion that the claimant did not have the necessary qualifying service to bring a claim of unfair dismissal. The claim of unfair dismissal therefore cannot succeed.

Breach of contract

95. I conclude that the claimant resigned from the respondent's employment. I reach that conclusion for the following reasons:

95.1. Following the meeting on 7 October 2022, it was common ground that the Mr Phillips needed some time to think about the situation in light of his concerns about whether he could trust the claimant. Rather than giving him time to reflect, the claimant emailed him the next day with the heading "Terminating our commercial relationship". That was, in my judgment, indicative of a desire on the part of the claimant to bring the relationship to an end.

95.2. That correspondence indicated that the claimant would stand down as a director and employee of the respondent. While that was stated to be subject to mutual approval and signing of a Separation Agreement, in my judgment that was no more than a lever to attract some sort of settlement from Mr Phillips regarding the commercial side of the agreement. More tellingly, the email said that the claimant believed that the parties must separate their business interests as soon as possible. Read as a whole, I regard the correspondence as indicating that the claimant no longer intended to work for the respondent.

95.3. The claimant undertook no further work for the respondent after sending that email. Again, that is inconsistent with him considering that the employment relationship remained live.

95.4. The claimant had already set up another company, Rogue Travel, around two weeks before the meeting on 7 October 2022. I have found that that company was set up by the claimant to further his own ends. That is again, in my judgment, consistent with him looking to leave the respondent.

96. The claimant did not offer to work his notice period. He carried out no work for the respondent after he had sent the email of 8 October 2022. I therefore consider that he had resigned without giving notice, and that no notice pay was payable to him.

97. It follows that this aspect of the claim fails and is dismissed.

Unauthorised deduction from wages

98. This aspect of the claim rested on the claimant's evidence that he had worked approximately 50 hours per week. I am not satisfied that the claimant worked that many hours per week. I prefer the evidence of Mr Phillips that the claimant worked on average 12 to 16 hours per week, for the following reasons:

98.1. The claimant accepted that the tasks Mr Phillips had described would have taken him approximately 12 to 16 hours per week.

98.2. The claimant's evidence regarding what he spent the remaining 34 to 38 hours per week doing was vague.

98.3. There was no documentary evidence regarding the hours the claimant claimed to have worked, or what he was said to have done.

98.4. Regarding the policies and procedures, the claimant claimed to have created, there was again simply no evidence of them.

99. The claimant was paid approximately £230 per week. Even at the higher figure of 16 hours per week, he was paid over £14 per hour, which is well in excess of the national minimum wage.

100. It follows then that the amount the claimant was paid did not fall below the national minimum wage. It was not suggested that there was any other reason why the claimant ought to have been paid more than the £1,000 per month that was agreed (and which he received).

101. It follows then that this aspect of the claim fails and is dismissed.

Holiday pay

102. It is common ground that the claimant was not paid for accrued but untaken annual leave on termination of his employment. The respondent accepts that the claimant was entitled to annual leave accrued in the period from 1 May 2022 to until the termination of his employment.

103. I have concluded that the claimant was not a worker prior to 1 May 2022.

104. It follows that the claim in respect of failure to pay accrued but untaken annual leave succeeds, in respect of annual leave accrued between 1 May 2022 and 8 October 2022 only.

105. Because I indicated that I would be dealing with liability in the first instance, I have not heard submissions from the parties regarding the calculation of annual leave. Given the findings I have made above regarding the claimant's pay and his length of service, calculation of the accrued annual leave is an arithmetic function, using the calculation in the Working Time Regulations 1998. I consider that it would be disproportionate to ask the parties to return for a remedy hearing simply to carry out that calculation. I have therefore done so, and I set it out below. If either party takes issue with the calculation, they may ask me to revisit it by making an application for reconsideration, setting out what they consider to be the error in the calculation.

106. In that regard:

106.1. The claimant's entitlement was the statutory entitlement to annual leave; that is 5.6 weeks per year (A);

106.2. The claimant was employed for 160 days, so the proportion of the year which had expired was 160/365 (B);

106.3. The claimant had not taken any annual leave (C);

106.4. The claimant's weekly pay was £230.77 (£1,000 per month);

107. Applying the formula (A x B) – C, and multiplying by the claimant's weekly pay, gives ((5.6 x (160/365)) – 0) x 230.77, which gives a total of £566.49. That is the sum I award.

Employment Judge Leith

Date - 11 August 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 21 August 2023

FOR THE TRIBUNAL OFFICE Mr N Roche