THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr M Weaving**

Respondent: **Help-me-Park.com Limited**

Hearing at London South on 24 January 2018 before Employment Judge Baron

Appearances

For Claimant: **Michael Foster - Solicitor**

For Respondent: **Bernard Watson - Consultant**

ORDER AND JUDGMENT AT A PRELIMINARY HEARING

The Tribunal **orders** that the response on form ET3 received by the Tribunal on 28 November 2017 be treated as the response of the Respondent

It is the **judgment** of the Tribunal as follows:

1 The Tribunal finds the complaint by the Claimant that he had been unfairly dismissed by the Respondent to be well-founded;

2 The Tribunal declares that the complaint by the Claimant that there had been unlawful deductions from his wages to be well-founded;

3 The Tribunal decides that the claim in respect of legal fees is to be the subject of further submissions;

4 Issues as to remedies for the Claimant are adjourned until further order.

It is the **decision** of the Tribunal that there be no order for costs.

REASONS

1 Oral judgment was given at the conclusion of this hearing. Mr Watson asked for these written reasons to be provided. I am not setting out the relevant statutory provisions because they are well known, and both parties are professionally represented.

2 The Claimant was employed by the Respondent from 6 April 2009 until he resigned on 26 May 2017. He is bringing claims for constructive unfair dismissal, arrears of pay, and for a breach of contract relating to the payment of legal fees. There is also a claim for notice pay which I mention briefly below. The material facts can be summarised relatively simply.

3 The Respondent operated a business arranging for the parking of customers' cars at Gatwick Airport. The Claimant was employed as a 'Meet and Greet Driver' under the terms of a contract of employment dated 17 October 2010. The only relevant provision is that the Claimant was to be paid on a piece work basis per vehicle driven, as opposed to an hourly rate. There is a slight quirk in that a practice had arisen under which the Claimant was paid an extra amount per vehicle moved between midnight and 5 am. It appears from the response that the Respondent accepted that that practice had become contractually binding. Nothing turns on the point.

4 In 2016 the Respondent decided that it wished the Claimant's payment terms to be changed to an hourly rate. The Claimant considered that that change would result in a material reduction in his income. There were discussions between the Claimant and Olivia Maher, the then HR Manager of the Respondent. A new form of contract of employment was prepared by the Respondent which provided for a flat hourly rate. No agreement could be reached. On 21 July 2016 Ms Maher wrote to the Claimant. The relevant part of the letter is as follows:

> I fully appreciate your concerns in regards to a reduced salary, but as per the discussed business case your current pay scheme is not relevant, fit for purpose or in line with current pay levels to your colleagues for similar duties.
>
> After 3 lengthy meetings of negotiations regarding your hourly rate and shifts, I am confident that care and consideration have been demonstrated throughout this process. Therefore I confirm that your new fit for purpose contract and your negotiated shifts will become effective from 08th August 2016.

5 The Claimant instructed solicitors. On 28 July 2016 a letter was sent to the Respondent stating that the Respondent had no contractual right to change the terms of employment, and that if the change were to be effected then a claim would be made for unlawful deductions from wages. Ms Maher did not reply to that letter. The Claimant continued to submit weekly task sheets as previously, but the Respondent started to pay him on the proposed hourly basis. A further letter was sent by the Claimant's then solicitors on 31 August 2016 protesting at the change. There was no reply to that letter either. At some stage around this time the Claimant sought assistance from ACAS, again to no avail. He also sought a meeting with Ms Maher and Mr McCarthy. The Claimant was met with a stone wall.

6 On 7 December 2016 the Claimant wrote to Mr McCarthy, his line manager, and one of the two directors of the Respondent company. The last two paragraphs of the letter are as follows:

> I have now lost over £1,592.50 in salary payments since August despite my protests and whilst I have continued to work and receive a lower salary, I have been forced to do so as I have financial commitments that I cannot break.
>
> Can you please confirm when I can come in to meet with you, together with a representative to support me, to either try to come to a resolution or for me to take matters further.

7 Mr McCarthy replied on 12 January 2017 saying that there would be a grievance hearing on 17 January 2017 to be conducted by Mr Duplain. The grievance was stated by Mr McCarthy to be as follows:

> Since your contract of employment was changed last summer you have received lower salary payment and it is your contention that this change to the contract of employment is unlawful.

8 The grievance hearing was held on 19 January 2017. The notes of that meeting record that the Claimant set out the history of what had occurred, and that he said that he had felt bullied by Ms Maher. There was a further meeting on 10 February 2017 at which the Claimant was told that his complaint of bullying was to be investigated. The notes do not make any mention of the contractual issue. By an email of 24 February 2017 to Mr McCarthy the Claimant sought an update about the matter.

9 Mr McCarthy replied on 28 February 2017 saying that he had 'taken steps to progress the grievance' and that he was 'working towards bringing this matter to a resolution.' Nothing further occurred until the Claimant met Mr McCarthy on 25 April 2017. At that meeting Mr McCarthy proposed that the Claimant should revert to his original terms of employment, that he be paid back-pay, and that the legal fees he had incurred be reimbursed. Although Mr McCarthy is one of the two directors of the Respondent I find that the management structure of the group of companies of which the Respondent is a part required Mr McCarthy to obtain approval from a more senior manager. I prefer the evidence of Mr McCarthy that this was a proposal, or conditional agreement.

10 The Claimant did not at the end of April receive the pay which he considered had been promised by Mr McCarthy. That is not entirely surprising because inevitably there will be some delay in amending a payroll run. The next pay day was 26 May 2017. The Claimant did not receive payment according to his original contract, together with arrears, on that date either. The Claimant decided to resign. He wrote to Mr McCarthy on 26 May. He set out the history of the matter and then said as follows:

> Given the situation has been going on now for almost a year and the fact that I can no longer continue to work for the reduced salary due to my financial commitments, I am now forced to look for another job. I therefore write to inform you that I am resigning my position as Meet and greet driver for help-me-park with immediate effect. Please accept this as my formal letter of resignation and termination of our contract.

11 The position of the Respondent as put forward by Mr Watson in summary was this. What occurred in July and August 2016 had the effect of terminating the Claimant's original contract of employment. The Respondent could impose new terms for good business reasons. The Claimant had accepted those terms by continuing to work for the Respondent. Then in April and May 2017 there was a proposal for the Claimant to return to his original contract, to which the Claimant agreed. The Claimant expected the arrangements to be made quickly and the failure to make those arrangements by 26 May 2017 did not amount to a repudiatory breach of contract so as to justify resignation. The Claimant did not give the Respondent a sufficient opportunity to effect the change.

12 Mr Foster made submissions for the Claimant. He said it was the Claimant's case that the original contract of employment had never been terminated. The Claimant had persistently sought to resolve the matter after August 2016 by various means. The Respondent was in breach of the

contract every month by not paying the Claimant in accordance with the contract. Mr Foster accepted (as indeed I do) that Mr McCarthy was seeking to right a wrong. It was, said Mr Foster, inconceivable that Mr McCarthy did not have the authority to make the decision himself. It was reasonable for the Claimant to decide at the end of May 2017 that he had had enough.

13 I do not accept the submission by Mr Watson that the letter of 21 July 2016, and the subsequent change in the manner of payment, had the effect of terminating the Claimant's original contract of employment and imposing new terms. My analysis is that the Respondent was stating in the letter that it intended to repudiate the original contract. It is well settled that in such circumstances the innocent party can either elect to accept the repudiation, or to require the other party to adhere to the original terms. It is not in dispute that the Claimant made it clear that he was not accepting the proposed new terms. He strove by various means to procure that the Respondent complied with its obligations. Significantly the Claimant carried on working as before and completer weekly task sheets recording the number of vehicles moved by him.

14 I have not accepted the case for the Claimant that at the meeting on 25 April 2017 there was any further contract created. Mr McCarthy entirely properly accepted that the Claimant had been wronged and agreed to seek to resolve the matter. While Mr Foster is quite correct in his analysis of the rights and powers of directors under company law as against the shareholders of the company, that does not necessarily reflect the reality of a group structure.

15 I do accept Mr Foster's submission that each payment by the Respondent to the Claimant of a sum less than was due to him amounts to a fundamental breach of contract, at least where the reduction in payment is deliberate as was the case here. The Claimant resigned as a result of the breach. That was a 'constructive' dismissal.

16 Having found that there was a dismissal, the next issue is whether the Respondent can show the reason for the dismissal, and that it was a potentially valid reason. Mr Watson relied on the residual category of some other substantial reason such as to justify the dismissal of the Claimant. I accept that in principle the failure of an employee to agree to new terms of employment can be such a reason. Here there was a woeful lack of evidence on the point. In paragraph 5 of his statement Mr McCarthy said that he had provided the Claimant with a business case to justify the change, and referred to three pages in the bundle starting at page 60. Those pages contain five graphs, one for each of the days from 3 to 7 June 2016. They show in effect the demand for the Respondent's services and the drivers to be made available to fulfil that demand throughout each day. I cannot see any relevance whatsoever to the proposal to vary the calculation of payments to the Claimant, and Mr McCarthy did not suggest when giving evidence that they had any relevance to that point.

17 The claim for unfair dismissal therefore succeeds, as does the claim for unlawful deductions from wages. I am not making any specific finding in respect of the claim in paragraph 9(c) of the particulars of claim for notice

pay. It appears to me that having found that the Respondent was in breach of contract entitling the Claimant to resign the issue of notice pay is one of remedy, rather than a separate one requiring a decision on the merits.

18 The claim for legal fees was put solely on the basis that there was a contract entered into on 25 April 2017 entitling the Claimant to reimbursement. I have found that there was no such contract. However, the Tribunal does have the power under section 24(2) of the Employment Rights Act 1996 to make an award to compensate an employee for financial loss attributable to any unlawful deductions from wages. Submissions are invited as to whether such an award can and should be made, or cannot and should not, as the case may be. Any submissions must be exchanged by 23 February 2018 with replies to be exchanged by 2 March 2018 and a copy to be supplied to the Tribunal at the same time.

19 Mr Foster applied for an order for costs to be assessed by way of detailed assessment. The relevant provision in the Employment Tribunals Rules of Procedure 2013 is as follows:

> **When a costs order or a preparation time order may or shall be made**
> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

20 The Tribunal is basically a 'no costs' environment in that costs do not follow the event. In order for the Tribunal to be able to have the power to make an order one or other of the criteria in that rule must be satisfied. The application was made on the basis that the response had no reasonable prospect of success. That is a high hurdle to overcome. It is the same test as applies to an application under rule 37 to strike out a claim or response. I would have liked to make an order in favour of the Claimant but I am not able to find that the test is satisfied. If I had made an order then it would not have been for a detailed assessment as I do not consider that the extra time and expense would have been justified for a one day case.

21 The claim contains an inherent contradiction in that on the one hand it was averred, in effect, that the original contract of employment continued in force, but on the other hand that there was a new contract entered into on 25 April 2017. There could not have been any consideration for the offer to pay legal costs other than a variation to the pre-existing contract.

22 Rule 76 concentrates on the response. Having said that it was denied that there had been a breach of contract entitling the Claimant to resign the response then averred that there was a strong business case justifying a change in the terms of employment. That could have been some other substantial reason within section 98(1)(b) of the Employment Rights Act 1996 justifying the (constructive) dismissal of the Claimant. In the end the evidence did not support such a proposition. That in my judgement does

not mean that the response did not have any reasonable prospect of success *ab initio.*

Employment Judge Baron

Dated 02 February 2018