EMPLOYMENT TRIBUNALS

Claimant: Mr J Blundell

Respondent: The Liberty Group

HELD AT: Liverpool **ON:** 3 and 4 May 2018

BEFORE: Employment Judge Robinson

REPRESENTATION:

Claimant: In person
Respondents: Mr N Grundy, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims for constructive unfair dismissal, unlawful deduction of wages and damages for breach of contract all succeed and the claimant is entitled to compensation.

2. The contractual counter claim of the respondent is dismissed.

3. The issue of costs has been dealt with in paragraphs 52 – 56 below.

4. The remedy hearing will take place at **Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX** on **20 August 2018** commencing at **10.00am**.

REASONS

1. The claims before me are constructive unfair dismissal, an unlawful deduction of wages and a counter claim by the respondents relating to money that they say Mr Blundell owes them. All the matters before me rely on very narrow factual issues.

2. The essence of the claim is whether at some point Liberty Gas, before the transfer to Forviva, agreed that the claimant would work for two days over a

weekend and yet still be paid his initial salary of £16,500 per annum. His written contract signed in October 2010 states that the claimant will be paid £16,500 but it also states that his working hours are 40 hours per week. He did not work 40 hours over the weekend.

The Facts

3. The facts of the case are as follows:

4. The claimant has worked for the respondent company in its various guises since 2003, with a break just prior to 2010. He returned and signed up to a contract in October 2010 to which I have just referred. The company started as Apollo then became Liberty then the directors of Liberty purchased, at some point, Booth Mechanicals. By the time the TUPE transfer took place to Forviva, the owner of the present respondent, the company had nearly 800 employees working for it.

5. The initial arrangement between the claimant and the respondent was an ad hoc arrangement. That may have been because his brother was a director of the original company. With various transfers this respondent has parted company with most of the original directors, if not all.

6. There have been four periods of work that Mr Blundell undertook for the respondent. A period before the contract was signed in 2010. The details of those terms and conditions are unclear to me with regard to that period. The second period was between 2010 and 2012 when Mr Blundell was working 40 hours a week for £16,500 per annum. Then there was a period between 2012 and 2015 where things changed. He worked as a business analyst for the company and undertook a number of roles. He worked mainly from home but he went into the office when he needed to in order to complete work. The fourth period was post 2015 until his resignation in 2017. During that period he worked from 8.00am until 4.00pm on a Saturday and on a Sunday. That was with the agreement of the directors at that time, one of whom was his brother.

7. The claimant enjoyed preferential treatment because of his family connections and close friendship with all the directors. The normal rules of employment did not wholly apply to Mr Blundell. That was before Forviva took over the company. The directors of Forviva, however, brought a level of consistency and good administration into the business. Before then, it was a family run company with a loose corporate set up.

8. In 2015 there was a sea change in the work that the claimant did. From 2015 onwards the claimant did not work on weekdays and he did only weekend work as set out above.

9. The original agreement of working 40 hours per week for £16,500 changed to the claimant receiving £16,500 per annum but only working weekends. There was never an hourly rate set in the claimant's terms and conditions.

10. In July 2016 The Liberty Group was acquired by Forviva and has been part of that group of companies since then.

11. It seemed that for a while, even with Forviva Directors in control, things drifted, with Mr Blundell working his two days a week and earning the same amount of money that he always had since 2010.

12. For reasons which I do not need to go into, Mr Kevin Cossey, Operations Director with Forviva, was asked to go over to Liberty's Knowsley premises from his normal base in Sheffield, and it was at that point that things started to go awry between the claimant and the respondent company.

13. The information given to this respondent by the original directors at the time of the TUPE transfer is set out at page 75 of the bundle. The new directors were told by the old directors that the claimant worked for 40 hours a week at £16,500 per annum, and he was described in that document as a service administrator. That is the only information provided to Forviva.

14. Ultimately, because of the loss of confidence the claimant had in the new directors, he resigned. The way in which the claimant left his employment was confused.

15. Mr Blundell was trying to obtain clarity with regard to his position and he told Katie Frail, the HR assistant with the respondent, that unless the Director's position changed with regard to their "decision to unilaterally deduct my pay without notice, I would be leaving within days under constructive unfair dismissal" (sic). That is what his email says, and that email was sent in anticipation of Mr Elsey's decision not to uphold the claimant's grievance. At that point the claimant was not going into work because of stress.

16. The reason the situation had got to that point was because, on 16 February 2017, some seven months after Forviva had taken over Liberty Gas, the claimant was told that his pay would be reduced pro rata in line with the hours he worked. In essence this meant that his hourly rate would be £7.93 per hour and he would therefore be working for a much lower wage than he had been used to. The claimant was upset by this, telling his new employer that he would not be able to pay his household bills, etc. All this arose because, when Mr Cossey reviewed the working arrangements of the staff generally, he noticed that the claimant was only working weekends and still drawing the annual wage of £16,500.

17. The respondent concluded that the claimant was not working his full 40 hours as per his written terms and conditions according to the information they had received during the due diligence process. The respondent was concerned there was nothing in writing to show that the claimant's hours had been reduced, and furthermore nothing to show that he would remain on a salary of £16,500. However, for 2½ years that had been the contractual agreement for Mr Blundell.

18. The claimant cannot be criticised for inaccurate information being given to this respondent. He knew nothing of the way in which the former directors had given information to the new company at the TUPE transfer or just before. He is not responsible for what Mrs Molyneux said at any time leading up to, and during the meeting on 16 February 2017.

19. The decision to reduce the claimant's wages on 16 February 2017 had already been made and Mr Cossey was simply the messenger. The respondent decided the claimant was only going to be paid for the hours that he worked.

20. There was no investigation by Mr Cossey. Neither Mrs Ricketts (the assistant director who heard the claimant's grievance, submitted on 30 March 2017) nor Mr Elsey (a director who heard the grievance appeal) went to the previous directors running the company before the TUPE transfer and asked those directors what the situation was. Mr Cossey said, at the meeting on 16 February, that the old directors did not make anyone aware of the agreement to continue to pay the claimant £16,500 per annum. However, there must have been something that made Mr Cossey unsure about his ground at that time because he noted later that he needed to look into the situation more. However, at that meeting Mr Cossey told the claimant that he would only be paid for the hours worked.

21. A crude calculation had been made by the respondent. 40 hours per week over 52 weeks, with annual pay of £16500, worked out at £7.93 per hour. It was that wage that the respondent was prepared to pay from that moment to Mr Blundell. The claimant urged Mr Cossey to do an investigation but, as the decision had already been made, that investigation never took place.

22. Mr Cossey also had the means to investigate. He could easily have got in touch with Mr Ian Blundell and/or Mr Sean McLean to find out the true position and ask them about what Mr Blundell had said to him at the February meeting. I accepted that Mr Cossey had heard Mrs Molyneux's comment at page 42 of the bundle where she said to Mr Blundell "no, you've been paid for 40 hours". Whether she said that to cover her own back or protect the previous directors I know not. The fact is that after the 16 February meeting Mr Price, from the Human Resources department of the respondent, confirmed that the salary was for 40 hours at £16,500 and therefore the claimant was now going to be paid £7.93 per hour for any hours that he worked.

23. The claimant accepted that he only worked 16 hours per week and therefore Mr Price on that evidence reduced the claimant's pay.

24. During the course of the hearing I saw an email dated 16 February 2017, sent just after that meeting, where Mr Cossey advises colleagues to pay to the claimant his full salary of £16,500 until formal consultation had been completed. Mr Price, however, ignored that and sent an email to Mr Blundell mentioning an overpayment of wages to the claimant. There was a clear inference that the respondent would be chasing Mr Blundell for the overpayment the company now viewed had been made to him over a number of years, and certainly since they took over in the summer of 2016.

25. The first grievance hearing took place on 3 May 2017. The grievance and the appeal were held in accordance with the respondent's procedure. The claimant has been consistent throughout, both when giving his evidence internally and also to this Tribunal. He has reiterated during this hearing what his working hours were and the wage that he received.

26. The claimant said that the minutes of the meeting on 16 February were not accurate. He said that he had started six months before the written contract in October 2010 was signed. He also said that the respondent was trying to hold him to an old contract.

27. The respondent took some time to deal with the claimant's grievance, from March to May 2017. The claimant was told that the previous directors had made a mistake and that he was being overpaid and therefore the decision to reduce his pay in February 2017 was the correct decision. Mrs Ricketts who dealt with the initial grievance hearing so concluded without speaking to the previous directors. The appeal to Mr Elsey was not successful.

28. Mr Blundell was not satisfied with the outcome of his appeal sent to him by letter, from Mr Elsey on 28 June 2017, and therefore resigned. The resignation was messy because the claimant was off work with stress. The respondent's HR department knew he was going to resign but did not have the date of resignation confirmed until an email from the claimant on 2 August 2017 saying he had given notice on 7 July 2017. His last day of employment was 4 August 2017.

29. Those are the facts.

The Law

30. An employee has the right not to suffer unauthorised deduction of wages where the total amount of wages paid on any occasion by the employer is less than the total amount of wages properly payable. If that be the case, there is a breach of section 13 of the Employment Rights Act 1996 and consequently there has been an unlawful deduction of wages.

31. With regard to constructive unfair dismissal, the burden is upon the claimant to prove that there has not only been a breach of contract but a fundamental breach of contract going to the heart of the relationship between the parties. The breach must have caused the employee to resign and an employee must not delay too long before resigning and therefore affirm the breach.

32. If express terms are in writing then it is a question of interpretation of those terms. Oral promises can also be seen as express terms. It is essential for me to establish the terms of the contract in order to pin down whether there has been a breach of contract and whether the breach is minor or fundamental.

33. Conclusion

34. Applying that law to the facts of the case I concluded as follows.

35. I need to say a word about the credibility of all the witnesses. I was not impressed by the claimant's witnesses, not because I thought they were not telling me the truth but in the way they ran their business before the TUPE transfer to this present respondent. The claimant was managed in a loose way. The original directors treated the employment of Mr Blundell in a cavalier and ad hoc fashion. It may be because of the history between Mr Blundell and the directors. It may be that the claimant's contract was run that way because it suited him. The fact that he was part of the family, the fact that he was friendly with Mr McLean and there was a real

connection between the claimant and the old directors, did not help the business to closely manage the claimant with regard to hours worked and monies paid to him.

36. By the former director's actions in not putting the claimant's employment position on a footing which had certainty and for giving seemingly misleading information to the new owners, the claimant has had to go through a difficult internal and Tribunal process. If there had been clarity during the period between 2015 and 2017 we might not have needed to be here over the last couple of days.

37. I also have criticisms of the respondent. I accept the evidence that Mr Cossey gave to me was truthful but it was his responsibility, if he was questioning the position of the claimant within the organisation, to look into the background with an open mind and with more rigour to ascertain what really were the claimant's contractual terms. Moreover, the company directors had already made up their minds when it came to the meeting of 16 February, when the claimant's wages were discussed. Mr Cossey went into that meeting ready to inform the claimant that his wages would be reduced. It was not fair on the claimant that they dealt with him in that way. More than that, it was a breach of his contract to unilaterally change his terms and conditions.

38. The company should have allowed a further period of investigation and during that period kept the wage of Mr Blundell at what it was before the reduction.

39. The one witness who has been consistent and straightforward in this unhappy saga is the claimant himself. I accept that there were a number of things which upset him during the period leading up to his resignation. For example, being called into a meeting with no warning on 16 February 2017, being told his wage would be reduced unilaterally, not having someone to accompany him, and also not having his grievance upheld, both initially and during the appeal process, when there had been no contact between the new directors and the old directors to find out what the position had been pre TUPE transfer. That must have been frustrating for Mr Blundell.

40. I concluded as follows.

41. The claimant's role did change in 2012 so that he could work at home. Even at that point, although his contract said that he should work 40 hours per week, Mr McLean made it plain to me that sometimes the claimant could have worked 35 hours per week and then the next week, 45 hours. That is an example of the loose management of the claimant and a first change in his terms and conditions not recorded in writing.

42. However, on balance I find that the claimant did work his 40 hours between 2012 and 2015, and that during that period he put in timesheets so that he could show to the directors how many hours he put in. He did work at home preparing reports, and he did go into the office as and when he was needed.

43. I find that in 2015 there was a change. I suspect that, as Mr McLean suggested, it was in the first quarter of 2015. At that point it was agreed between the directors and Mr Blundell that he would only work at weekends. There was also an agreement between the directors and the claimant that he would continue to be paid

the same per year, even though it was obvious to those directors that he was only working at weekends. Mr Blundell has never denied that he only worked 16 hours and has never pretended that he was working longer hours for the company. He has never said to me, for example, that he was still doing reports at home during that period. He told Mr Grundy, when cross examined, that he only worked at weekends during that period. I find the claimant to be an honest historian.

44. It is clear that nothing was put in writing between the parties with regard to the change in terms. There were written, express terms in the October 2010 contract which set out his hours and salary but there is nothing to inhibit the parties changing those written terms, orally. A contract includes both express and implied terms and those terms often fluctuate and change over time with changing circumstances. I accept an implied term cannot override an express term. However I find there was an express agreement, freely entered into by both parties over 2 years before this respondent took over the business and actually continuing over a number of months after they took over the business, that the claimant would work at weekends for his original annual salary. He had had no pay rise in the interim. The directors of the respondent, before the TUPE transfer, knew that the claimant worked for two years on the basis that he would receive his £16500 per annum salary yet only work at weekends. There was no complaint by either party, nor did the former directors question the input the claimant gave to the company at that point. Such a dramatic change in the terms under which the claimant worked from early 2015 would have been questioned by the old directors if they had not agreed to the change and the claimant had simply moved himself to weekend work without permission. When the TUPE transfer took place, and by novation, Forviva were stuck with the claimant's altered terms and working conditions.

45. In short, therefore, I find that there was an express term of the claimant's contract from 2015 to 2017 that he should work only at weekends for £16,500 per annum.

46. It is only when the new owners of the company had a review of working practices that they saw the potential tension between what the claimant was actually doing, his written terms of contract and the information they had received just before the TUPE transfer.

47. Changing the claimant's pay unilaterally was a breach of the claimant's contract going to the heart of the relationship. The claimant had every right to question it and put in a grievance, and when his grievance was not upheld to resign.

48. I find that there were two fundamental breaches of the claimant's contract. Firstly, the unilateral reduction in February 2017 without proper investigation, and the breach of the implied term of trust and confidence in the way that that was done and, secondly, the way the claimant's grievance was rejected at both stages.

49. I find that there was a resistance by the respondent to investigate further for whatever reason.

50. It may be that they thought that if they investigated the matter they would discover answers to pertinent questions which they would not like, and consequently they did not take the trouble to speak to the previous directors.

51. I find that Mr Cossey had his own misgivings about what might happen if the issue was delved into too deeply. However, because of the way things worked out, he was not involved in the aftermath, once he had had his visit in February 2017.

52. Both Mrs Rickets and Mr Elsey could have righted the wrong done to this claimant but they chose not to. The claimant has satisfied the burden of proof upon him. Consequently, I find the claimant has been constructively unfairly dismissed, and also has suffered an unlawful deduction of wages between February 2017 and August 2017. He must be recompensed for that period and for his unfair dismissal. The claimant did not affirm the new contractual terms imposed upon him in February 2017. He worked under protest, as set out in his grievance, and once he realised the situation was not going to change he resigned timeously during the grievance process.

53. Finally, given the facts that I have found above I find that the counterclaim does not succeed and I dismiss it. The claimant owes no money to the respondent. It is he who has not received the wage properly payable.

Costs

54. Mr Grundy made an application with regard to the costs thrown away previously when the hearing on 4 April 2018 had to be abandoned because Mr Blundell did not have his witnesses with him. I therefore order Mr Blundell to pay part of those costs in the sum of £1,200. Mr Grundy's fee.

55. I find that the only cost thrown away on that day was the cost of counsel. I do not think it appropriate to order Mr Blundell to pay any costs over and above counsel's fees. The matter had been fully prepared by the respondent's representatives at that point for the present hearing.

56. I do, however, find that it would have been straightforward for the claimant to get his brother and Mr McLean to come and give evidence on that day without any difficulty or without those directors necessarily compromising their position vis-à-vis the TUPE transfer. By not doing so, there was an increase in costs payable to Counsel.

57. I have made that order for costs without taking details of the claimant's financial position, but I have also made it clear that those costs are not payable until the remedy hearing has taken place. I have decided, in principle, that Mr Blundell should pay the costs of Mr Grundy and that money can be deducted from any compensation that he receives from the respondent.

58. I therefore order that the costs should only be paid after the remedy hearing which will take place at **10.00am** on **20 August 2018** at **Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX**.

59. No further order or direction need be made with regard to this case.

31-05-18

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Employment Judge Robinson

Date_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 June 2018

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