



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Eamonn Daly

## Respondent

First Magazine Limited

AND

**HEARD AT:** London Central

**ON:** 14 September 2018 and in Chambers  
16 November and 28 December 2018

**BEFORE:** Employment Judge Hemmings

## Representation

**For Claimant:** Mr D Johnson – HR Consultant

**For Respondent:** Mr R Chandhry – Solicitor

## RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

- (1) The claims against a Second Respondent were dismissed having been withdrawn by the Claimant
- (2) The Respondent failed to provide a Written Statement of Employment Particulars to the Claimant and is ordered to pay the Claimant the sum of £958 supplementary to the award below
- (3) The Respondent made unlawful deductions from wages by failing to pay the Claimant salary for January and February 2018 and the Respondent is ordered to pay the Claimant £5,333.32
- (4) The Respondent is in breach of contract by having failed to pay the Claimant arrears of pension contributions amounting to £20,000 and the Respondent is ordered to pay damages in that sum to the Claimant

## RESERVED REASONS

1. By a Claim Form presented to the Employment Tribunal on 11 June 2018 following unsuccessful Early Conciliation through ACAS the Claimant, Eamonn Daly, complains that he is owed arrears of wages and pension contributions and complains of a failure to provide him with a statutory statement of his Employment Particulars. The claims arise out of Mr Daly's former employment with First Magazine Limited as an Executive Director in the role of Chief Operating Officer. The claims in respect of the alleged arrears are disputed by the Respondent.

2. The ACAS process and the Claim Form nominated a Second Respondent. It was established at the Case Management hearing on 18 July 2018 that there are no claims within these proceedings, in law, against the Second Respondent. Accordingly, as a matter of record the proceedings by the Claimant against the Second Respondent were formally dismissed.
3. The Tribunal had before it an agreed file of documents prepared by the Respondent, marked "R1" (references to page numbers within these Reasons are to documents within R1, unless indicated otherwise). Additionally, during the course of the Hearing, the original of the document at page 34A was handed up, which the Tribunal marked "R2". The Respondent had also prepared Written Submissions.

The Tribunal heard evidence from:

- (1) Eamonn Daly, the Claimant
- (2) Rupert Goodman the Respondent's Chairman and Executive Director
- (3) Alexander Hambro a Non-Executive Director with the Respondent
- (4) Stephen Fryer a representative of the Respondent's Accountants Hedley Dunk

A statement, supported with a Statement of Truth, from Declan Hartnett, an employee of the Respondent, was tendered in writing to the Tribunal. The Tribunal attached to it such evidential weight as was appropriate in all the circumstances, given that Mr Hartnett's evidence was not verified under Oath and the witness was not present to have his evidence tested by cross-examination, nor to assist the Employment Judge with any enquiries he may have wished to put to Mr Hartnett.

#### THE ISSUES

4. The Issues were identified at the Case Management Hearing on 18 July 2018 as follows:
  - (1) *Was the Claimant entitled to wages for January and February 2018 when he says he was working for the Respondent and the Respondent disagrees.*
  - (2) *Is the Claimant entitled to an additional pension payment. The Respondent says there was no breach of contract because, whilst such a payment was paid in past years, it was not contractual.*
  - (3) *Did the Respondent fail to give the Claimant a statement of terms and conditions of employment.*
5. There is a consensus that the Respondent did not give the Claimant a statement of initial Employment Particulars, as required by Part 1 of the Employment Rights Act 1996. Accordingly, the Judgment of the Tribunal is that the claim succeeds. The sum awarded is set out below in the Remedy section.

#### THE FACTS

6. The Respondent First Magazine Limited is a private limited company operating as multi-disciplinary international affairs organisation. Its principal activity is publishing magazines, special reports and books. The Respondent was established in 1987 by Eamonn Daly and Rupert Goodman after leaving J Walter Thompson the marketing and communications company. Mr Goodman has been at all material times the prime mover, majority shareholder and an Executive Director. Mr Goodman's current title is that of Chairman and Founder. He has shareholdings and active executive involvement in other successful private companies. Although the Respondent's business undertaking operates as a private limited company the evidence before the Tribunal describes a relationship between Mr Daly and Mr Goodman akin to partners within a partnership, with Mr Goodman evidently the senior partner and dominant influence and in reality the "principal actor" controlling the affairs of the Respondent company.

7. Mr Daly, joined the Respondent in 1987. His evidence is that he accepted an offer from Mr Goodman of full-time employment as an employee and as an officer of the Company in the position of an Executive Director. The Board of First Magazine Limited consisted of Mr Daly, Mr Goodman and two non-executive Directors. Mr Daly was allotted 15 of the 90 issued shares in the Company, Mr Goodman being the majority shareholder.
8. Over time Mr Daly's title became that of Chief Operating Officer and Mr Goodman as Chairman and Founder.
9. It is a matter of agreement that at the time of Mr Daly's appointment, the Respondent did not fulfil its obligation to issue Mr Daly, nor Mr Goodman, with a statutory Statement of Employment Particulars as then required, in 1987, by the Employment Protection (Consolidation) Act 1978 (an obligation perpetuated from 1996 onwards by Part 1 of the Employment Rights Act 1996 and originating from legislation in 1963), nor did it ever fulfil that obligation during the commendably long period of association between the parties over 30 years.
10. This appears to have been an oversight, and one for which Mr Goodman and Mr Daly blame each other. The Tribunal takes the view that it is more likely that the responsibility for legally compliant employment documentation lay within the conventional responsibilities of a Chief Operating Officer than a Chairman. Nevertheless, neither officer of the Company can deflect governance accountability exclusively to the other for the Respondent's non-compliance in this respect. Certainly, at the time of Mr Daly's appointment in 1987 it was the Respondent's obligation to issue a statutory Statement of Employment Particulars to Mr Daly, and Mr Goodman, within a short period of time after joining the Respondent.
11. Wherever the responsibility lay for the failure to redress the initial oversight, that initial breach of the legal obligation cannot reasonably be placed exclusively at Mr Daly's door but may be relevant to the extent of the remedy.

#### Overview

12. The primary, but not exclusive, focus of the Tribunal has been on six successive situations: the formation of the contract of employment at the outset of the employment relationship, the 2008 meeting to discuss the structure of future remuneration, the December 2016 pension discussion, the November 2017 pension discussion, Mr Daly's resignation on 1. December 2017, and the events of January and February 2018.

#### The Formation of the Employment Contract

13. The evidence regarding the formation of the contractual relationship between Mr Daly and the Respondent is unclear in some material respects.
14. What is clear is that there was a contract of employment created orally which incorporated a tripartite remuneration package comprising annual salary, employer pension contributions, and an annual bonus.
15. The parties are agreed that the annual salary was a contractual entitlement, and that the bonus was discretionary. NIC, both employer and employee contributions (contributing in part towards an entitlement to a state pension), were processed in the usual way.
16. The central issue in the pension claim is the legal status of the arrangements for the Respondent to make periodic employer pension contributions to Mr Daly.
17. In seeking to determine the legal character of the pension arrangements, how the parties established discretionary arrangements in respect of a bonus may provide an indicative clue, of evidential value, as to their intentions in respect of pension contributions.

18. The parties agreed from the outset, as is so commonly the case, that bonuses would be a distinct part of the remuneration package, that they were discretionary i.e no guaranteed entitlement to a minimum amount, that they would be variable from year-to-year, and that they would be paid retrospectively after the conclusion of the financial year, payment being made during the course of the following financial year.
19. Pension contributions were by way of a fixed annual contribution to personal pension schemes, paid with a cheque at each year-end. There are details of pension contributions made by the Respondent to Mr Daly at pages 493 to 496.
20. The position regarding the first seven years, 1988 to 1994 is unevidenced, and the Tribunal is unable to determine what was agreed about pension arrangements prior to 2008. Nevertheless, the documents at pages 493 to 496, which were not disputed during the hearing, establish the following payments by the Respondent to Mr Daly in respect of Employer's Pension contributions up to 2007 (subsequent payments are set out further down within these Reasons), made normally in December of each year:

1995	...	£5,000
1996	...	£5,000
1997	...	£7,186.86
1998	...	£7,209.06
1999	...	£7,209.06 (a loss making year with a deficit of £1,247 – page 498)
2000	...	£7,209.06
2001	...	£7,209 .06
2002	...	£7,209 .06 (paid in January 2003)
2003	...	£7,186.86
2004	...	£7,000
2005-2007		no data but no evidence that payments were withheld

The 2008 Meeting

21. Mr Goodman convened the meeting with Mr Daly to discuss and set a new remuneration regime covering core salary, pension provision and bonus formulae. The note prepared by Mr Goodman in advance of the meeting, setting out various categories of payment and related figures, is at page 33. At page 34A there is a copy of the document at page 33 with manuscript annotations. The original of that document was handed-up during the course of the Final Hearing. At page 34 there is a further version of the page 34A document (and duplicated at page 491). At first glance it appears to be the same document as the annotated copy at 34A except for a curious feature, namely that a manuscript circle and arrow have been added around the "Pension" and "End of Year Bonus" text, with the arrow directing the phrase "Discretionary by RG" (that phrase designating the status of the End of Year Bonus as at Mr Goodman's discretion) to the "£10,000 per year" pensions sum.
22. Pension contributions are a key feature of any remuneration package. Drawing on the Tribunal's industrial experience there is, at Executive Director level within organisations, generally an awareness that large proportions of the salary arrangements must be paid into an individual's pension fund if there is to be any prospect of financial security at a comfortable level during retirement. That appreciation is evidenced in the pattern of payments made by the Respondent in respect of pension provision for Mr Daly. The evidence was of such payments, year-on-year, over 28 years, with annual payments of £10,000 set and agreed in 2008, and paid that year, and in each of the subsequent seven years before the pension payment due in December 2016.
23. The Tribunal is satisfied that the parties, the Respondent and Mr Daly, agreed that the contractual remuneration for 2008 and beyond would consist both of salary and substantial pension contributions, contributions which were agreed by Mr Goodman and

Mr Daly at the 2008 meeting would be £10,000 a year. The Tribunal finds that the agreement reached in 2008 was that Mr Daly's remuneration would consist of a contractual sum of £50,000, split £40,000 by way of salary, paid monthly in the sum of £3333.00 gross (pages 549 and 550 recording that monthly salary at that figure was still prevailing in November and December 2017), an annual Employer's pension contribution of £10,000, and discretionary formulae, capable of delivering substantial annual bonuses. The Tribunal does not find that the further annotation, namely the manuscript circle and arrow directing the phrase "Discretionary by RG" towards the reference to pension, was made during the course of that meeting, nor reflects any contemporaneous discussion and agreement, of contractual status, that the pension contribution was in any way a matter of Mr Goodman's discretion, nor subject annually to a condition relating to the Respondent's financial performance.

24. The subsequent annual payments by the Respondent into Mr Daly's pension funds, including 2008, were as follows:

2008	...	£10,000. - A new Personal Pension Plan with Scottish Mutual operative from 22 December 2008
2009	...	£10,000 - A copy of the cheque drawn in favour of Scottish Mutual on the Respondent's bank account is at page 495
2010	...	£10,000 (paid February 2011)
2011	...	£10,000
2012	...	£10,000 (supplemented by a member contribution from Mr Daly in March 2013 of £10,416.66)
2013	...	£10,000 (paid in January 2014)
2014	...	£10,000
2015	...	Payment 1 - £10,000. (in July 2015 as part of the year end 2015 bonus award, directed into the pension scheme)
2015	...	Payment 2 - £10,000

The December 2016 Pension Discussions

25. In December 2016 Mr Daly and Mr Goodman met and the annual pension contribution payments by the Respondent for 2016 were discussed. Mr Goodman told Mr Daly that he had decided that the Respondent would not make any personal pension contribution payments for 2016. His reasoning was that after decades of profitable trading it was apparent that 2016 would only achieve break-even financially, before accounting for pension contributions.

26. Mr Daly agreed that the 2016 trading performance should be reflected in how Mr Goodman exercised his discretion regarding bonuses, but Mr Daly argued that his pension payment formed part of his fixed remuneration and pointed out that the Respondent had substantial retained earnings from preceding years (£515,686) from which the pension lump sum contributions could be paid.

27. Mr Goodman's position was that making pension contributions, impacting adversely on the level of year-on-year Retained Earnings, those Retained Earnings being publicly visible within the Respondent's statutory accounts when filed at Companies House, was unacceptable to him.

28. Mr Goodman said that his embargo on pension contributions would apply equally to him personally but Mr Daly found Mr Goodman's equality-of-treatment proposition unconvincing in terms of comparable hardship because Mr Goodman, as controlling shareholder and Chairman, and the owner of other profitable businesses, could determine, and direct alternative measures enhancing his own financial position, and because the Respondent's 2016 operating costs included £290,000 in fees which the Respondent had paid to one of Mr Goodman's companies, Elmbridge Partners Limited, evidenced in the 2016 Accounts at page 503.

29. Mr Goodman was resolute that pension contributions would not be paid in 2016 and had the corporate power and authority to ensure that his wishes took effect.
30. The Tribunal is satisfied that Mr Daly did not agree to waive his contractual entitlement to his £10,000 pension contribution of 2016, “contractual” as Mr Daly believed it to be and as the Tribunal has found it to have been since 2008.
31. Mr Daly was one year away from a 30 year tour of duty with the Respondent and 20 months away from attaining 60 years of age in August 2018. His attention to the size of his personal pension funds is reflected in his actions in diverting £10,000 of his 2015 bonus into an additional pension payment, doubling the normal amount to £20,000 for 2015. The Tribunal finds it improbable that Mr Daly did not seek to secure an assurance that the effect of Mr Goodman’s intransigence would be a postponement, not a cancellation, of the payment.
32. The Tribunal accepts and takes note that no “pension deferment” was notified to the Respondent’s Accountants (Mr Fryer’s evidence at page 492A). It is not clear whether this was by oversight or design. Notifying the Accountants would have resulted in the Accounts filed at Companies House, referring to the deferment as a liability and conveying the negative impression about the Respondent’s performance which Mr Goodman was seeking to avoid by withholding pension contributions in 2016.
33. Weighing the evidence and likelihoods, the Tribunal’s conclusion is that Mr Goodman imposed an embargo on pension payments under protest by Mr Daly and that whatever was said or was not said and/or agreed about “deferment” the determinative issue is that Mr Daly never released the Respondent from its obligation to make the pension payments. The Tribunal, in reviewing the evidence, has also noted and taken into consideration the following.
34. The Respondent made an operating loss of £8929 in the year ended 31 December 1999 yet paid a pension contribution of £7209 06, at page 498.
35. The Notes to the Financial Statements that year record at Note 9, Pension costs:
- The company operates a defined contribution pension scheme. The assets of the scheme are held separately from those of the company in an independently administered fund. The pension charge represents contributions payable by the company to the fund and amounted to £17,000 (1998: £17,000). All contributions were paid during the year.*
- Retirement benefits are accruing to 2 directors under this scheme*
36. The Respondent’s Statement of Income and Retained Earnings for the year ended 31 December 2016 is at page 502. It records a profit of £167 on a turnover of £1,112,352 and retained earnings at the year-end of £421,792.
37. In the usual way, the preceding year’s data, for 2015, is listed in the adjacent column. It records a loss of £4061 and £511,625 retained earnings.
38. The Notes to the Statement are at page 503. Note 10 is headed “Pension commitments.” and records the following:

*The company operates a defined contributions pension scheme. The assets of the scheme are held separately from those of the company in an independently administered fund. The pension cost charge represents contributions payable by the company to the fund and amounted to £Nil (2015 - £30,000). Contributions totalling £Nil (2015 - £Nil) were payable to the fund at the balance sheet date and are included in creditors.*

39. Note 12 records the following:

*During the year, consultancy fees amounting to £290,000 (2015 - £Nil) were paid to Elmbridge Partners Limited. The company is a related party by virtue of being controlled by Mr R A W Goodman, Director.*

#### The November 2017 Pension Discussions

40. In the second half of November 2017 Mr Daly and Mr Goodman met on a number of occasions to discuss future strategy, with Mr Daly using the meetings to establish the position regarding his pension contributions, both for 2017 but also the outstanding amount from 2016. Mr Goodman adopted the same stance as in December 2016 namely that the Respondent was failing to achieve its projected operational profits and that he would not agree to Mr Daly's pension contribution of £10,000 being paid.
41. This compounded Mr Daly's dissatisfaction from December 2016. He challenged Mr Goodman's rationale, particularly in the context of cash reserves of £350,000 within the business.
42. The Tribunal is satisfied that, as before in December 2016, Mr Goodman was resolute and that Mr Daly never agreed directly or indirectly to waive his contractual entitlement to a £10,000 pension contribution payable by the Respondent, "contractual" as the Tribunal has found the pension contributions to be.
43. The Tribunal is satisfied that the treatment of Mr Daly in respect of pension contributions for 2016 and 2017 played a determinative part, along with other considerations including his approaching 60<sup>th</sup> birthday, the 30<sup>th</sup> anniversary in 2017 of having joined the Respondent, and opportunities to contribute towards his wife's family business in Italy, in his decision to leave the Respondent's employment with the prospect of new beginnings from the start of 2018.

#### Mr Daly's Resignation - 1 December 2017

44. On Friday 1 December 2017 Mr Daly, by email and hardcopy, gave notice of resignation as an Executive Director effective from 1 January 2018. The resignation letter, at page 75, in unilateral unconditional terms, is important evidentially and is set out in full as follows:

*1 December 2017*

*Dear Rupert*

*Further to our discussions these past weeks this is to confirm my decision, and to give formal notice to the Board, of my resignation as a director and Chief Operating Officer of FIRST Magazine Ltd and FIRST Forum for International Relations (FFIR) - effective as of 1<sup>st</sup> January 2018.*

*It has been a pleasurable and fulfilling journey to build a successful company (and what proved to be an enduring brand in a fascinating arena) with you over the past 30 years, since we both left JWT together to start FIRST as founding executive directors. I greatly appreciate the time we spent together on this journey and all that I have learned on the way. I wish you and FIRST well for the future.*

*I will prioritise my remaining time to effect a smooth handover of my responsibilities at FIRST, including supplier accounts and client relationships etc. I suggest we sit down together early next week to make a list of these priorities and deal with any other "loose ends" arising as a result of my leaving.*

*As you know, throughout the years I have been receiving an annual lump sum pension payment as part of my agreed basic remuneration package with the company. This is currently fixed at £40,000 basic salary plus a £10,000 annual pension contribution payment for the past number of years, as stated in my remuneration formula which you have documented and gave to me. You took a decision to suspend this pension payment for the year end 2016, in order to preserve the level of carried forward cash assets of the company (£421,792 as stated in our published company accounts). I agree to this deferment on the basis that this payment would be honoured as a priority in the future. I will be due a further £10,000 pension payment from the company for the year ending 2017. I would be grateful to receive your confirmation that these contractual pension payments will be honoured on my departure.*

*With very best wishes - Eamonn*

45. The letter was copied to the two non-executive directors, Alex Hambro and Timothy Bunting.
46. Mr Daly and Mr Goodman met in a coffee shop on Monday 4 December 2017 to discuss the resignation. Mr Goodman's agenda included understanding better Mr Daly's reasons for resigning and to establish whether or not Mr Daly had a settled intention to leave, which Mr Daly evidently had. The scope for Mr Daly to remain within the organisation beyond the end of the year, in some role or other on a part-time basis was discussed, identified as a potential and mutually desirable option which was subsequently explored through a number of discussions, (although by 31 December 2017 no firm heads of agreement had been concluded for working together in 2018 under different arrangements).
47. There is a letter dated 21 December 2017, at pages 83-84, from Mr Goodman to Mr Daly confirming receipt of Mr Daly's resignation letter. It is in the following terms:

*Dear Eamonn*

*Thank you for your email and hard copy note dated 1<sup>st</sup> December 2017, confirming your resignation from FIRST and FFIR, effective from 1<sup>st</sup> January 2018. Your email was copied to the Directors and I will arrange the relevant paperwork.*

*It has been a great pleasure working with you over the years and I am very sad you have decided to leave. We have had a number of discussions, subsequent to your letter about you assisting on FIRST projects in a different capacity. Let me know if you wish to arrange a new modus operandi in the New Year.*

*Given the financial performance of FIRST last year, we had both agreed to forego any additional pension contributions. The Company's statutory pension scheme, however, continued to operate throughout the year.*

*I wish you the very best of luck working with Claudia's family company and look forward to further discussions in the New Year.*

*A very happy Christmas to you and your family.*

*Very best wishes - Rupert*



48. Another curious feature of this case is that the letter, although properly addressed to Mr Daly's home, was never received by Mr Daly.
49. The following day 22 December 2017 Mr Goodman informed the Respondent's Accountants of Mr Daly's resignation.

January/February 2018

50. Mr Daly came into the office at the beginning of January and working either there, or from home or elsewhere, was involved in the Respondent's business matters during January and February. He also went to Italy in January for a few days, booked as annual leave.
51. Whether or not Mr Daly was an employee of the Respondent on and after 1 January 2018 is in dispute as is the extent of any Respondent-related activities undertaken by him during those two months. In any event the Respondent did not pay the Claimant at the end of January nor subsequently at the end of February 2018.
52. At pages 35 to 51 there is a log, downloaded on 11 July 2018, of about 650 Temporary Internet files recording Mr Daly's browsing history on his personal computer at work during January and February. The Tribunal has scrutinised the log. It is largely indecipherable but appears to include, unsurprisingly, Internet searches which are both related and unrelated to work, including a degree of dabbling in crypto currency trading.
53. The bulk of the 550 pages in the Bundle consists of email strings where Mr Daly is the author or recipient of an email on his email account with the Respondent. They are, unhelpfully, largely unstructured and unanalysed with multiple duplications, incorrect descriptions and dates within the Index to the Bundle, with no consistent chronological order or sequencing logic, and in many cases of limited, if any, evidential value, for example where third parties have sent emails to Mr Daly, directly or as a recipient copied into the email from senders evidently unaware of Mr Daly's transition from the business. The emails encompass in excess of 410 pages of the Bundle all of which the Tribunal has read.
54. There are further emails out of sequence at pages 536 to 542. At pages 504 to 519 there are work-related SMS text screen prints.
55. Between pages 522 and 535 there are further documents which include January and February 2018 SMS texts appearing to be between Mr Daly and a third party regarding Bitcoin and Ripple crypto currency trading.
56. The Bundle makes challenging reading, consisting of 550 pages primarily focused, other than copies of the Tribunal documentation, on what Mr Daly was doing during January and February 2018 in terms of personal matters and matters related to the Respondent's business affairs. Each such page has required consideration by the Tribunal to evaluate its evidential value because the parties have referred to the vast majority of them, either individually or collectively. The substantial tranche of emails aside, there are perhaps less than 15 documents which have any material bearing on the disputed issues within these proceedings.
57. The Note signed by Declan Hartnett, dated 7 September 2018, at page 548 represents Mr Hartnett's recollection that, discounting the two weeks in February 2018 when Mr Hartnett was abroad, he could recall Mr Daly coming into the office on some days, there being "quite a few days" when he was not in the office at all, and that on occasions Mr Daly left early "often soon after lunch".

58. Mr Goodman having informed the Respondent's Accountants that Mr Daly was leaving at the end of December 2017, no salary was processed through payroll for Mr Daly at the end of January or February 2018.
59. The evidence placed before the Tribunal has satisfied the Tribunal that Mr Daly continued to work throughout January and February 2018 in the office, from home and elsewhere, on broadly the same basis as in previous months and years combining both personal matters with work duties as commonly many busy people do nowadays fulfilling the demands of their personal and work lives assisted by technology devices. There is ample evidence that substantial and important work was undertaken by Mr Daly including significant initiatives and involvement with an impressive portfolio of major international governmental bodies. The Tribunal is satisfied that Mr Goodman was aware of what Mr Daly was doing, certainly at a headline level, and that the January/February 2018 situation broadly preserved the status quo from 2017 in order to further the discussions on a continuing part-time contribution from Mr Daly as the Respondent's COO but in a capacity structured within a service company consultancy arrangement.
60. The Tribunal concludes that Mr Daly was transitioning from his full-time involvement and discharging his duties in January on the basis of at least 80% of full-time hours and continued to do so in February 2018 on a diminished basis but still at around 80% of working time.

Remaining as Part-Time COO

61. Mr Daly prepared notes, at page 31, with added manuscript annotations in the copy at page 32, for the discussion with Mr Goodman proposing draft Heads of Agreement in respect of "continuing employment" as COO setting out his proposals on the role and focus of his role, "consideration" (in the contract law sense of financial reward) being based on a continuation of £40,000 per annum full-time equivalent salary income and the current bonus structure, warranties that there would be an arrangement to refund the "10k per annum pension payments, which were deferred in 2016 and 2017".
62. Although those notes are undated it is apparent they were prepared by Mr Daly in February as there is also reference to a requirement for immediate payment of the unpaid salary for the work undertaken by Mr Daly during January 2018, coupled with a proposal for a prorated payment for February 2018.
63. At pages 466 to 479 is a draft Consultancy Agreement procured by Mr Goodman and made available to Mr Daly. This appears to have happened around the second week in February, the letter from Mr Goodman to Mr Daly dated 2 March 2018, at page 482, referring to "the contractual offer made to you in a few weeks ago". The parties are expressed to be the Respondent and a service company through which Mr Daly would provide his services to the Respondent. The draft anticipates a 12 month arrangement backdated to 1 January 2018 for the provision of the Chief Operating Officer services to the Respondent, performed by Mr Daly, that Mr Daly would be based at its London offices, but would work four days a week, to be paid monthly, together with a formula for additional fees related to sales performance, and a Discretionary Bonus.
64. At risk of oversimplification the post-2017 proposition for an evolved working relationship was therefore that Mr Daly would remain as the Respondent's COO, on a part-time 80% FTE basis, on 80% of Mr Daly's full-time salary under a fixed term contract of 12 months backdated to 1 January 2018, and Mr Daly providing his services through a Service Company.
65. The Tribunal's conclusion is that both Mr Daly and Mr Goodman would have been happy, in principle, with such an arrangement but that any dynamics influencing Mr Daly's desire to leave the Respondent, beyond those he had used to explain his retirement decision, coupled with the Respondent's failure to pay his salary at the end of January and the

resolute refusal by Mr Goodman to authorise payment by the Respondent of £20,000 into Mr Daly's pension fund (£10,000 in respect of 2016 and £10,000 to 2017) had by the end of February 2018 fractured irreparably any interest and willingness on the part of Mr Daly to perpetuate a working relationship with Mr Goodman within the Respondent organisation.

66. At page 480 is Part 1A of a P45, in respect of Mr Daly, which specifies at Box 4, that Mr Daly's leaving date was 1 January 2018 but there is no conclusive evidence placed before the Tribunal as to when that document was prepared and filed with HMRC.
67. At page 481 there is a Companies House record which refers to Mr Daly's appointment as a director in 1992 and his resignation on 1 December 2017.
68. Form TM01, the Form for reporting the termination of a Director's Appointment to Companies House, at page 520 also records the termination date as 1 December 2017 but, of evidential interest, was only received, through eFiling, at Companies House on 7 March 2018. The reference in both cases to resigning from office effective on 1 December 2017 is evidently wrong, Mr Daly's resignation from the Respondent as an Executive Director was expressly stated by Mr Daly in his resignation letter to be effective from 1 January 2018, and there is no evidence whatsoever from any source that Mr Daly ceased to be a director on 1 December 2017.
69. At page 482 is a letter from Mr Goodman to Mr Daly dated 2 March 2018 in the following terms:

*Dear Eamonn*

*Many thanks for your response to the contractual offer made to you a few weeks ago, following your request. I am grateful to you for confirming that you do not wish to proceed.*

*Following your resignation on 1st December 2017, there may still be a few loose ends - and perhaps you could liaise with Chris about any operational matters.*

*I reiterate my very best wishes to you for the future and express my renewed thanks for your contribution, over many years, to FIRST.*

*With my best wishes  
Rupert Goodman - Chairman*

70. On the 9 March 2018 Mr Daly replied by letter, at pages 483 and 484, acknowledging the generous sentiments from Mr Goodman, addressing the administrative "loose ends" and setting out the basis for seeking payment of unpaid wages and outstanding "deferred pension" broadly in the terms which were subsequently maintained through the Early Conciliation ACAS process alluded to in the email between Mr Goodman and Mr Daly on 31 March 2018, at page 543.
71. Mr Goodman replied by letter dated 21 March 2018 to Mr Daly referring to "significant inaccuracies and misunderstandings" in Mr Daly's letter to him of 9 March and set out Mr Goodman's perspective, again in terms which have been maintained subsequently, within the Response entered with the Tribunal to the Claimant's Claim Form, and in his statement and testimony to the Tribunal.

The Respondent's Witnesses, other than Mr Goodman

72. At page 492 there is a letter dated 25 July 2018 from Alexander Hambro, one of the non-executive directors, marked "To whom it may concern" setting out his perspective, which

the Tribunal has taken into account. Mr Hambro's statement and testimony to the Tribunal, verified the content of his letter of 25 July 2018.

73. At page 489 there is a letter dated 12 July 2018, with a further letter dated 6 September 2018 at page 492a, from Stephen Fryer, one of the accountants at Hedley Dunk the Respondent's Accountants, setting out his perspective, which the Tribunal has taken into account. Mr Fryer states that he was unaware of any arrangement to defer pension contributions in 2016 and 2017, pointing out that had he been aware, he would have complied with accounting obligations to qualify the Accounts in that respect for both years by recording a liability-provision. Mr Fryer's statement and testimony to the Tribunal refined the contents of those two letters.
74. The Tribunal also received a short statement dated 10 September 2018 by Declan Hartnett, tendered in writing, verifying his letter dated 7 September 2018, which is at page 548. Mr Hartnett refers to having met, somewhat reluctantly, Mr Daly at Mr Daly's request, for lunch at the RAC Club. Mr Daly made enquiries of Mr Hartnett's willingness to be a witness on behalf the Claimant within these proceedings. Mr Daly's approach and requesting former colleagues to be witnesses, and the almost invariable reluctance of former colleagues to get involved, is both understandable and commonplace. The Tribunal detects no irregularity whatsoever in Mr Daly discussing his proceedings with Mr Hartnett and exploring any willingness to support his case, nor is the Tribunal surprised by Mr Hartnett's reservations about getting involved.
75. Although Mr Hartnett was not present in the Tribunal to confirm his statement under oath, to be cross-examined, and to assist the Employment Judge with any enquiries the Judge may have had, Mr Hartnett's statement has been accepted by the Tribunal as credible and of evidential value.
76. Nor is there any reason to doubt the integrity of Mr Hambro and Mr Fryer, the Tribunal nevertheless, bearing in mind that Mr Hambro is a non-executive director not operationally located on a day-to-day basis in head office, and from his distant vantage point necessarily reliant upon the information provided to him from the executive directors, and Mr Fryer was based at Hedley Dunk's offices and necessarily acting upon the information and instructions given to him by his client, the Respondent.

#### ACAS Early Conciliation and these Proceedings

77. ACAS Early Conciliation failed to resolve the dispute regarding unpaid salary and pension contributions. Mr Daly presented his Claim Form to the Employment Tribunal on 11 June 2018. On 3 July 2018 the Respondent entered its Response denying the claims.

#### 78. SUBMISSIONS

##### On behalf of the Claimant

The Claimant, having identified and presented his evidence, and the case for his claims to succeed, during the course of this Hearing did not wish to make any further submissions about why the claims were well founded.

**On 17 September 2018 written submissions were sent by the Claimant to the Employment Tribunal, copied to the Respondent.**

**On 19 September 2018 the Respondent wrote to the Tribunal observing, justifiably, that the Claimant's written submissions were unexpected, and belated, and lodged a Reply in writing, setting out the Respondent's perspective on the Claimant's submissions.**

**Employment Judge Hemmings exercises his discretion and accepted the Claimant's Written Submissions and therefore the Respondent's Reply in writing.**

On behalf of the Respondent

The Respondent, having prepared Written Submissions and having also identified and presented its evidence and case comprehensively during the course of the Hearing did not wish to make any supplementary submissions about why the claims should fail and be dismissed.

**On 29 October 2018, by letter from the Tribunal to the parties (in which the Employment Judge referred to both parties having made submissions) the parties were invited to lodge, if they wished, further submissions on the application of the decision of the Supreme Court in Braganza v BP Shipping Ltd [2015] 1 WLR 1661 UKSC, the Respondent's contentions in defending the Claimant's principal claim being grounded on propositions of a discretionary entitlement and a lawful and legitimate exercise of that discretion but neither party addressing the "*Braganza* duty" to exercise a discretionary rationally, i.e honestly and in good faith and not in an arbitrary, capricious or a rational way.**

**The Claimant did not take up the invitation.**

**The Respondent did, by further submissions in writing dated 2 November 2018.**

**All the submissions by both parties received the Tribunal's careful consideration.**

79. THE LAW

The Employment Tribunal's function is to procure and conduct fair hearings resulting in just outcomes. It does so by applying the relevant principles of employment law to its findings of fact in respect of workplace related claims within its jurisdiction. In doing so the Tribunal seeks to fulfil the Overriding Objective set out in Rule 2.

The applicable principles of law, concisely identified as required by Rule 62(5) of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, are as follows, acknowledging that it is the statutory text which must be applied in reaching a judgment whilst having regard to the clarification and guidance on that text available to the Tribunal through the reported Decisions of the Higher Courts.

The law applied in the Employment Tribunal is to be found in the Common Law in relation to contract disputes but otherwise primarily in Acts of Parliament and Regulations made under the authority of Parliament, and found within authoritative Appeal Court Decisions explaining the operation and effect of those Parliamentary sources of law and reported in various hard-copy and on-line libraries of Law Reports and, finally, found within the body of recorded case-law constituting the Common Law of the land.

Unlawful Deductions

It is unlawful for an employer, by virtue of Part II of the Employment Rights Act 1996 to withhold wages which have been earned in the absence of any lawful excuse for withholding them.

Breach Of Contract

The starting point for the Tribunal is to identify the intention of the parties to the contract and to require the parties to honour the enforceable obligations they intended to create in the event of a dispute which comes before a Court of Law.

The burden of proof in a contract claim is on the Claimant i.e to succeed the Claimant must establish the merits of their claim and meet the standard of proof. That standard in a contract claim is to establish the facts underpinning the merits of the claim on the balance of probabilities.

Failure To Provide Written Statement Of Employment Particulars

When a Claimant makes certain claims to an Employment Tribunal, i.e those claims listed in Schedule 5 to the Employment Act 2002 and the Tribunal is satisfied that the Respondent has failed to comply with its obligation under Part 1 of the Employment Rights Act 1996 to provide a Statement of Employment Particulars to the employee within two months of commencement of employment the Tribunal must award two weeks' pay, capped at the statutory rate for a week's pay, or may pay four weeks' pay if it is just and equitable to do so.

80. CONCLUSIONS

Statement of Employment Particulars.

- (1) The Respondent has not contended that it ever issued a Statement of Employment Particulars to the Claimant as required by law. The Claim succeeds.

Unlawful Deduction from Wages

- (2) The Tribunal is satisfied that during January and February 2018 the Claimant carried out about 80% of his duties, more in January than in February, in spite of having resigned on 1 December 2017, and specifying 31 December 2017 as his leaving date. Without more, the Claimant would not be entitled to be paid for any duties undertaken during 2018.
- (3) But there is more. After 30 years collaboration within the Respondent organisation, which they founded in 1987 and as former colleagues in a previous organisation, the process of transitioning took three months, not one month, the Claimant largely on a business-as-usual basis whilst he and Mr Goodman explored and negotiated possible heads of agreement for a continuing relationship throughout 2018 on an 80% full-time-equivalent basis.
- (4) Because of the divergence in the testimony on the central issues of whether or not the Claimant undertook any duties in 2018 in respect of which he was entitled to be remunerated, and whether or not the annual pension contributions were a contractual entitlement of the Claimant the Tribunal paid particular attention to Mr Daly and Mr Goodman during the course of their evidence in chief and under cross-examination in addition to evaluating the testimony of other witnesses and assessing what the 550 pages of documentary evidence contributed to reaching a judgment on the disputed facts
- (5) There are a number of unhappy features to this matter: unexplained annotation to a key evidential document; a key letter which although properly addressed never arrived in the post; but primarily a protracted litigious dispute about relatively small sums, "relative" to a business relationship spanning more than 30 years between two senior and evidently successful and prosperous executives.
- (6) The Tribunal is satisfied that the Claimant postponed his date of leaving from 31 December 2017 until the end of February 2018 consensually with the Respondent, continuing to discharge the bulk of his duties as Chief Operating Officer, with the knowledge, acquiescence and agreement of Mr Goodman for the purpose of a smooth transition and reaching agreement, if possible, on a continued relationship, under different arrangements, on a part-time basis.
- (7) The Tribunal's judgment is that the Claimant is entitled to be paid for the work undertaken in those two months. The Respondent has unlawfully deducted wages by withholding that salary, and the claim succeeds.

Breach of Contract

- (8) The Tribunal has found that the meeting in 2008 resulted in an agreement between the Respondent and Mr Daly that the remuneration provisions in his contract of employment provided, in addition to discretionary bonus formulae, for core annual remuneration of £50,000 apportioned between salary of £40,000, payable monthly at £3,333 gross, and £10,000 as an annual pension contribution payable to Mr Daly's pension providers in December at the end of the calendar year which is also the end of the Respondent's financial year.
- (9) The Respondent discharged its contractual obligation to Mr Daly every year from 2008 until 2016, when it defaulted, as it did again in December 2017. Mr Daly never agreed to waive his entitlement. Rather, he protested repeatedly about the Respondent's default, in 2016, 2017, and subsequently.
- (10) The non-payments amounted to breaches of contract and breaches which were continuing throughout their respective periods of non-payment. The claim of breach of contract succeeds.

REMEDIES

Statement of Employment Particulars

- (11) Given that that Claimant bears at least 50% responsibility for the Respondent's continuing defaults the Tribunal awards him two weeks' pay. The amount of a week's pay for this purpose is subject to a statutory cap. The cap at February 2018 was £479. The award is £958.

Unlawful Deduction from Wages

- (12) The Respondent is ordered to pay the Claimant arrears of wages for January and February 2018 when, the Tribunal has determined, the Claimant was working part-time at 80% of the full-time equivalent and awards him £2,666.66 (80% of £3,333) for each month. Accordingly, the Tribunal awards the Claimant £5,333.32 to be paid by the Respondent in respect of unlawful deduction from wages (i.e non-payment of salary) less such PAYE deductions as the Respondent is obliged by law to make and to account for to HMRC.

Breach of Contract

- (13) The Respondent is ordered to pay damages in the sum of £20,000 to the Claimant in respect of the Respondent's breach of contract by failing to pay £10,000 pension contributions at the end of 2016 and 2017.

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**Employment Judge Hemmings**

Date 26 February 2019

JUDGMENT AND REASONS SENT TO THE  
PARTIES ON

6 March 2019

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FOR THE TRIBUNAL OFFICE