THE EMPLOYMENT TRIBUNALS

Claimant: **Mr I Griffiths**

Respondent: **Hartlepool Life Limited**

Heard at: **Teesside Justice Hearing Centre** **On: 28 February & 29 April 2019**
Deliberations: 2 May 2019

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Mr B Culshaw, Solicitor**
Respondent: **Mr S Healy of Counsel**

JUDGMENT

The judgement of the Tribunal is as follows:

1. The claimant's complaint under Section 23 of the Employment Rights Act 1996 that the respondent made deductions from his wages in contravention of section 13 of the that Act in that it did not pay him the National Minimum Wage in respect of the hours he worked for the respondent as is required by section 1 of the National Minimum Wages Act 1998 is not well-founded and is dismissed.

2. The claimant's complaint under regulation 30 of the Working Time Regulations 1998 that the respondent failed to pay him the whole or any part of any compensation due to him related to entitlement to leave in accordance with Regulation 14 of those Regulations was withdrawn by the claimant and is dismissed.

3. As was conceded on behalf of the respondent, it was in breach of its duty under section 1 of the Employment Rights Act 1996 to give to the claimant a written statement of initial employment particulars but as the Tribunal has not found in his favour it is unable to make an award to him in relation to that breach pursuant to section 38 of the Employment Act 2002.

REASONS

Representation and evidence

1. The claimant was represented by Mr B Culshaw, Solicitor, who called the claimant to give evidence. The respondent was represented by Mr S Healy of Counsel who called four directors of the respondent to give evidence on its behalf: Mr D Van Der Werff (responsible for such matters as photography and photo editing and being the link between editorial and production); Mr Steve Hartley (editor in charge of all the news and features); Mr Paul Healy (responsible for advertising and distribution); Mr Abd-el-Krim Bouabda ("Krimo") (investor and contributor).

2. I also had before me a relatively small agreed bundle of documents comprising 159 pages and particularly considered those to which I was referred by the representatives or the witnesses.

The claimant's complaints

3. The claimant has presented two particular complaints to the Tribunal as follows:

    3.1. Under Section 23 of the Employment Rights Act 1996 ("the 1996 Act") that the respondent had made deductions from his wages in contravention of section 13 of the 1996 Act in that it did not pay him the National Minimum Wage in respect of the hours he worked for the respondent as is required by section 1 of the National Minimum Wages Act 1998 ("the NMWA").

    3.2 Under Regulation 30 of the Working Time Regulations 1998 that the respondent had failed to pay him compensation related to entitlement to leave in accordance with Regulation 14 of those Regulations.

4. He also claimed what he referred to as being "compensation" under section 38 of the Employment Act 2002 for the respondent's failure to comply with sections 1 and 4 of the1996 Act.

The issues

5. Given the withdrawal of the claim for compensation related to annual leave the issues before the Tribunal were relatively concise being whether or not the respondent complied with its duty under section 1 of the NMWA to pay the claimant at a rate which is not less than the national minimum wage. This, of course, leads to the fundamental issue of how many hours of work the claimant undertook for the respondent as a "worker" as that word is defined in section 54(3) of the NMWA.

6. A further issue is whether, when these proceedings were begun by the claimant, the respondent was in breach of its duty to give to him a written statement of initial employment particulars pursuant to section 1 of the 1996 Act.

Consideration and findings of fact

7. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

   7.1 The respondent is a small to medium company in the business of producing the newspaper, "Hartlepool Life". In terms of employees it grew from approximately 10 (including the directors) prior to May 2017 to approximately 20 in May 2018, most of whom work part-time, (again including the directors). The claimant was employed by the respondent from its incorporation on 9 May 2017 until his dismissal on 21 June 2018. On appointment his role was to be responsible for the design and production of the newspaper pages and ensuring that the final copy was sent to the printers on time.

   7.2 The history of the business is quite important. The context is that each of the directors of the company, apart from the claimant, had a background of working in the newspaper industry. At risk of over-simplification, this can be summarised as follows:

      i) Mr Healey's experience as a newspaper sales/promotion manager for Johnson Press, which included the Hartlepool Mail, and work for the Northern Echo.

      ii) Mr Van Der Werff as a photo-journalist and picture editor for the Hartlepool Mail.

      iii) Mr Hartley as a journalist and senior newsroom manager and assistant editor.

   7.3 Each of the above three directors had worked for the Hartlepool Mail. After their employments there ended they kept in touch and would talk about 'the old days'. Mr Healey thought there was an opening for a free newspaper to be circulated in Hartlepool and discussed his thinking with Mr Leo Gillen, who ran a number of local businesses, and he agreed. At this time Mr Healey was having some leaflets printed at a business run by the claimant called Bright Ideas and he spoke to the claimant about his idea for a newspaper and the need to have someone to do the production. The claimant told him that he was experienced in newspaper production and he could do that.

   7.4 Mr Healey then spoke to Mr Van Der Werff and Mr Hartley and they too expressed interest.

   7.5 In late 2016 and through to the beginning of 2017 Messrs Healey, Gillen, Van Der Werff and Hartley and the claimant met to discuss the proposal

and agreed to come together as a partnership to progress the production of a newspaper. After further discussion and preparatory work the first edition of Hartlepool Life came out on 22 March 2017.

7.6 It was accepted by all five men that there was a risk that the venture would fail and that they would initially work for no pay devoting as much of their time and attention to the business as was needed. That said it was agreed that they would each be allocated a notional salary of £250.00 per week; it would not be paid but it could possibly be paid out of future profits. In this respect I did not accept the uncorroborated evidence of the claimant that it had been agreed that he would be paid £350.00 a week from May 2017.

7.7 During the early pre-production stage of the newspaper it became apparent that there was a need to involve others and, from day one, Mr Chris Moran and Ms Laura Langthon (the claimant's partner) were employed as graphic designers: Mr Moran dealing with large display advertising and Ms Langthon with the classified adverts and births, marriages and deaths.

7.8 The other partners considered that the claimant struggled with the design of a full-page newspaper, having previously only designed booklets and advertising leaflets and not having had experience of producing a newspaper, and that he needed assistance. Ms Jackie Gough, an ex-editor of the Hartlepool Mail, was therefore employed to assist and guide the claimant in the preparation, production and design of the newspaper. She provided this assistance in respect of issues one and two.

7.9 The design of the newspaper was still taking too long, however, and the respondent decided that a local company, Spark Media, should be engaged to design the centre pages and the four sports pages of the newspaper. This arrangement operated from weeks two to thirty-five onwards. Additionally, from week three, Mr Keith McCaffery was brought in as a sub-contractor to design fifty percent of the editorial pages of the newspaper. From approximately week four that the claimant and Mr McCaffery were each doing some seven or eight pages but as time wore on Mr McCaffery took on more work leaving the claimant with perhaps four or five pages.

7.10 Thus, the workload that had been expected of the claimant in producing the newspaper was reduced by the assistance that he received and by certain areas of his work being wholly taken on by others; and the editorial content was being produced by the editorial team. The claimant was therefore left with the design of a smaller number of pages; approximately four or five.

7.11 The workload of the claimant and others in the design of the paper was also reduced by the fact that as the newspaper progressed a set of template designs for individual pages were developed in the software used by the respondent and, after the first month or so, these templates were followed each week. Thus, after about issue four the need for the partners to work extremely hard had died down.

7.12 In May 2017 Mr Gillen dropped out of the business. It had been intended that he would be the main investor. He had also been supposed to set up a

company to operate the business but had not done so. That task then fell to Mr Van Der Werff and the respondent was incorporated on 9 May 2017. At that time the claimant thought that he became a director and shareholder but he did not legally become either until 6 September 2017.

7.13 Mr Gillen having dropped out, Mr Van Der Werff suggested that Mr Bouabda, a recently retired very successful businessman, might become an investor, which he did in July 2017. He also became involved in the design of the newspaper; for example, the Hartlepool history page, the Hartlepool people page, a cookery page and a wedding page, each of which took him no more than approximately thirty minutes.

7.14 Mr Bouabda identified that important employment documentation was not in place within the respondent and prepared a staff handbook and what he described as being a "draft contract of employment", which he gave out to each employee including the directors within approximately two weeks of him starting with the respondent. He handed two contracts to the claimant: one for himself and the other for his partner, Ms Langthorn. Uniquely in my experience, the contracts of employment were only templates with the details left entirely blank for each employee to complete and return to Mr Bouabda. He explained that was how he had operated his previous business successfully for some thirty years. Be that as it may, none of the directors returned their completed contracts of employment.

7.15 At about this time, Mr Hartley and the claimant indicated that they were struggling financially and it was agreed that each of the directors could draw a salary of £1,000 per month if they wished to do so. Mr Hartley and the claimant did so from July 2017 as did Mr Van Der Werff intermittently. I do not accept the claimant's evidence that the balance (ie the difference between £350 a week that he asserted it had been agreed he would be paid over the £1,000 per month that he was paid) would be paid into what he variously described as each director's "loan account" or "current account".

7.16 Shortly thereafter, again motivated by the claimant struggling financially, the directors agreed that the claimant could take other employment on Wednesday and Thursday of each week working for "The Annexe", which is operated by the Wharton Trust in Hartlepool. He was also still continuing to operate his own business, Bright Ideas.

7.17 Towards the end of 2017, a shortage of money led to the respondent terminating the engagement of Spark Media and the sports and centre pages came back in-house. Initially these pages were dealt with by the claimant and Mr McCaffery but, in early 2018, Mr Roy Kelly, an experienced sports reporter for the Hartlepool Mail, was engaged as a sub-contractor to design the sports pages completely.

7.18 Relationships between the claimant and his fellow directors deteriorated over time; possibly borne out of them being seasoned newspaper professionals, which he was not. On one occasion, at a directors' meeting in October/November 2017, the claimant informed the others that if they

thought they could produce the newspaper they could do so and announced that he was taking a week's holiday immediately. The newspaper was produced ahead of schedule. At another directors' meeting a heated exchange took place between the claimant and Mr Van Der Werff leading to the claimant threatening to come over and knock out Mr Van Der Werff; as he put it, "he threatened to punch my lights out".

7.19 In early 2018 the directors discussed launching a second newspaper, the East Durham Life, but explained to the claimant that the design would be undertaken wholly by Mr McCaffery and Mr Moran and that he would not be involved.

7.20 The claimant was absent due to sickness in early April 2018. By letter of 11 April 2018 the respondent suspended him from work with immediate effect pending investigations of an allegation of misconduct.

7.21 By letter of 14 April 2018 (72) the claimant made a Subject Access Request under the Data Protection Act 1998 for, amongst other things, paper copies of all e-mails sent and received by him, staff, directors or sub-contractors of the respondent containing his name, minutes of all directors meetings containing his name and certain CCTV footage. The respondent did not respond to this request. The explanation given at the hearing was that to do so would involve the production of some thirteen thousand e-mails, which was considered to be disproportionate, and the directors would await an approach from the Information Commissioner before doing so.

7.22 By letter dated 14 June 2018 (74) the claimant was dismissed with one week's notice on the grounds that "there has been a fundamental and irretrievable breakdown of trust and confidence between you and the other Directors, and therefore the dismissal is for 'some other substantial reason'". The claimant's employment thus ended on 21 June 2018.

7.23 Following the claimant's suspension in April 2018 it was necessary for the respondent to 'cover' his work. I accept the evidence of Mr Healy (supported as it is by documents at pages 87 – 108 of the bundle and an exhibit to his witness statement marked PH1) that, on average, this resulted in Mr Moran's hours being increased by 10.72 per week and Mr McCaffery not being paid anything in respect of extra work.

7.24 Following receipt of the claimant's claim form (ET1) in respect of these proceedings, the respondent checked its records and acknowledged that the claimant had in fact been underpaid and was due a balance of £2,960, which has now been paid to the claimant.

7.25 Given the importance of the issue of the hours worked by the claimant for the respondent I address below rather than in this section of these Reasons the evidence and my findings in that respect.

Hours worked

8. As indicated above, this section of these Reasons addresses the evidence and my findings in respect of the hours worked by the claimant as a worker for the respondent for the purposes of the NMWA; again either as agreed between the parties or found by me on the balance of probabilities.

9. The evidence in these respects was confused and conflicting. This arose from and was compounded by a number of factors, principal amongst which were the following:

    9.1 the changing status of the business from a partnership formed in early 2017 to a limited company, which was incorporated on 9 May 2017;

    9.2 arising from that, the change in status of the claimant from partner to employee and later director and shareholder;

    9.3 the claimant having been initially tasked with the design and production of all of the pages of the newspaper and ensuring that the final copy was sent to the printers on time but his workload then diminishing by, first, others being brought in to assist him from a very early stage and later, and, secondly, certain of his work being put out to another business, Spark Media, but subsequently being brought back in-house, all of which is fully described above;

    9.4 none of the witnesses being able to provide real precision as to how and when the demands upon the claimant to spend time undertaking his responsibilities fluctuated;

    9.5 the claimant asserting that some 70% of his work for the respondent was undertaken at home or in other remote location such as a coffee shop, including all weekend, evenings and early mornings before he went into the office, which the respondent's witnesses could not dispute.

10. All the witnesses accepted that initially everyone worked long hours in a spirit of comradeship amongst entrepreneurs and their commitment to a start-up business. The claimant has, however, rightly in my opinion, withdrawn his claim in respect of the time that he worked in partnership with his future directors. The focus of this case, therefore, is on the period of his employment with the respondent from incorporation on 9 May 2017 until his dismissal on 21 June 2018.

11. During that period each of the witnesses in these proceedings was a director of the respondent, either legally or acting as such; although I repeat that the claimant did not legally become a director until 6 September 2017. As is common amongst directors of a modest business, they all worked flexibly undertaking the work that was required of them and had discretion as to how much time to dedicate to that work. The difficulty for all concerned, however, is that no one kept any records, whether formal or informal, of the amount of time given by any of them to the business. The claimant's position is that that fault is attributable to the respondent and in that regard he relies upon the duty of employers to keep records that is

contained in section 9 of the NMWA. Broadly, I accept the claimant's contention in that regard but it does overlook the fact that for much of the relevant time he, like the other directors, was an officer of the respondent with responsibility to ensure that that duty was discharged.

12. Notwithstanding that no one can precisely quantify the hours that the claimant did work, he contends that, with the exception of holidays, he worked, on average, between 70 and 100 hours per week working seven days per week. Further, that even though he took up part-time employment with the Wharton Trust Annexe from 11 October 2017, he continued to work long hours for the respondent. In summary, the claimant asserts that during the period 1 March to 10 October 2017 he worked approximately as follows: Monday 15.5 hours; Tuesday 11.5 hours; Wednesday 3 hours; Thursday 11 hours; Friday 14 hours; Saturday 13 hours; Sunday 12.5 hours, making a total of 18.5 hours per week. From 11 October 2017 he commenced part-time employment with the Wharton Trust Annexe working 15 hours per week for most of each Wednesday and then Thursday and Friday mornings. As such his approximate hours of work for the respondent from this date became as follows: Monday 15.5 hours; Tuesday 11.5 hours; Wednesday 3 hours; Thursday 10 hours; Friday 9 hours; Saturday 13 hours; Sunday 13 hours, making a total of 75 hours per week. The respondent's witnesses variously described this evidence as being, for example, "fantasy" or "almost hilarious".

13. Primarily in paragraphs 16 to 19 of his witness statement, the claimant has provided an extremely detailed description of his hours of work and of the work he undertook. That is a matter of record and is therefore unnecessary for me to set out that detail in these Reasons. I have, however, given careful consideration to that evidence, the remainder of his witness statement and the evidence that he gave orally. In summary, as detailed above, the claimant's evidence is that during the period 1 March to 10 October 2017 he worked seven days a week totalling 80.5 hours, which reduced to 75 hours a week over seven days after he commenced part-time employment for the Wharton Trust working 15 hours on most of Wednesday and then on Thursday and Friday mornings. The claimant described his work as including designing pages of the paper (including adverts and memoriam entries), overcoming problems from the previous week, dealing with emails, liaising with designers, other staff, advertisers, funeral directors and the printers, posting updates on social media and learning new software, InDesign, which he had never used and took a long time. On some occasions he would start work at 6.00am (at home) and on other occasions was still working at 3.00am. He was constantly attached to his computer, refreshing the screen and searching for work that might have been put into the system. He could not leave his computer for very long including during evenings and at weekends when he would spend the entire time looking for work coming through or improving on work already done. This led to the breakdown of his relationship with his partner with whom he could not spend any significant time due to the constraints of the business. He worked more hours than any other director or employee of the company. He would often have meetings with clients to bring in new business and regularly spoke to business and community contacts. He would be expected to maintain the office printer and fix printer problems, which occurred regularly. He would proof-read every page himself as the editorial staff would often miss many errors and inaccuracies. After speaking with other directors at meetings he became the

newspaper's representatives on the Hartlepool Armed Forces Liaison Group, which met monthly, and on the Hartlepool Carnival Committee, which met weekly.

14. For their part, the respondent's witnesses strongly denied that the claimant worked between 70 and 100 hours per week. Acknowledging that, like all directors, his working hours were flexible, it is asserted on behalf of the respondent that his approximate pattern of work was as follows: Mondays 12.00pm to 4.00 or 5.00pm; Tuesdays 7.30am to 7.30pm; Wednesdays and Thursday no work at all; Fridays only if required, for example, if there was a directors' meeting. In summary, the respondent asserts that it was only aware of the claimant working no more than around thirty hours per week.

15. The respondent's witnesses accepted that they were not in a position to say how much work the claimant did at home. I accept their evidence, however, that based upon their experience in the newspaper industry, what they can say is how long it would have taken the claimant to assemble what has been described as being "the jigsaw of pieces" such as articles, photographs and adverts to put together a page prior to it being sent to the editor, Mr Hartley, for approval before printing. As Mr Van Der Werff said, "I know how long it takes to produce a paper", and although he accepted that he had no knowledge of what the claimant did, he did see the product of his work, "the chaos and confusion".

16. Mr Van Der Werff's evidence was that for the two or three weeks before the launch of the newspaper they were all working crazy hours, 70-80-90. They were all very busy and worked the hours necessary to keep the business afloat. That fell in the first two weeks of production, however, to 30-40 hours and then settled down further very quickly when, by May/June, they had the resources they needed. The excessive hours were, of course, in the period during which the business operated as a partnership, which covered the production of issues 1 to 7 of the newspaper. Mr Van Der Werff further explained how the amount of time the claimant had to commit to the work fell as others were brought in to assist him. Ms Gough (whom he described as an award-winning designer) was brought in to help the claimant even before issue one and she sat alongside him to guide him. Even then, issue one was published a day late. She had left after issue two but, after issue one, the design of the four sports pages and the two centre pages was subcontracted out to the Spark Media. Furthermore, after issue three Mr McCaffery was brought in to help the claimant with the editorial pages. This being so he could not understand how the claimant could come up with the hours he claimed. Having been referred to paragraphs 18 and 19 of the claimant's witness statement, in which (as described above) he sets out a description of his work, he did accept that the claimant had done all the things referred to at some point in the year but not every day or every week. He described those paragraphs as being "all obfuscation". Mr Van Der Werff's estimate was that after the first month, the time required by the claimant to do his job was in the region of fifteen to twenty hours per week maximum; that comprising two or three hours on a Monday (but even that fell away) and the accepted long hours on a Tuesday. He was clear that while the claimant had been an employee he had never worked more than 30 hours a week

17. Mr Hartley's evidence was similar in material respects. He too confirmed (as did Mr Healy) that at least initially the directors were willing to work as needed to get the paper up and running but as the business progressed those hours came down

fairly rapidly. He had not asked the claimant give an account of his hours of work but "I saw what he was doing", "I saw the pages every week and knew who did what". He estimated that the people who had been brought in to help the claimant ended up doing 75/80% of his work. Like others, he confirmed that in the later stages of the claimant's employment he was responsible for only four pages a week. His estimate was that it would take approximately 15 to 20 minutes actually to finish the design of a page with a similar amount of time being taken to address issues with regard to alterations etc. The claimant was not involved in any production of stories and would place a story or picture on a page, set up a headline and generally tidy up the copy, deal with the production of advertisements and designs of advertisements and the layout of the page. On that basis it was simply not possible to spend the amount of time that the claimant alleged he had spent designing the work that was allocated to him. All in all, Mr Hartley estimated that the editorial page design role element of the claimant's job (which is separate from that he undertook for Mr Healy and his work in sending pages on a Tuesday) would have taken him no longer than five hours each week. In support of his assessment, Mr Hartley stated that he saw every page that was done and approved every page that was done so he was particularly familiar with the work that the claimant was carrying out.

18 The respondent's witnesses generally accepted that the claimant was at work all day Tuesday because that was production day but noted that the reason for that was often that he was behind in what he had been doing and had to catch up with everything having to be rushed at the last minute.

The law

19. In essence the claimant's claim is that he worked so many hours each week that when the pay he received of £1,000 per month is divided by that number of hours it results in him having received less than the national minimum wage. In that context the following statutory provisions are of relevance:

NMWA

1 Workers to be paid at least the national minimum wage.
(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

9 Duty of employers to keep records.
For the purposes of this Act, the Secretary of State may by regulations make provision requiring employers—
(a) to keep, in such form and manner as may be prescribed, such records as may be prescribed; and
(b) to preserve those records for such period as may be prescribed.

28 Reversal of burden of proof
……
(2) Where—
(a) a complaint is made—

(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages), or …….

it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.

NMWR

6 Pay reference period

A "pay reference period" is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

21 The meaning of salaried hours work

(1) "Salaried hours work" is work which is done under a worker's contract and which meets the conditions in paragraphs (2) to (5) of this regulation.
(2) The first condition is that the worker is entitled under their contract to be paid an annual salary or an annual salary and performance bonus.
(3) The second condition is that the worker is entitled under their contract to be paid that salary or salary and performance bonus in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with their contract ("the basic hours").
(4) The third condition is that the worker is not entitled under their contract to a payment in respect of the basic hours other than an annual salary or an annual salary and performance bonus.
(5) The fourth condition is that the worker is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month—
(a) in equal weekly or monthly instalments, or
(b) in monthly instalments that vary but have the result that the worker is entitled to be paid an equal amount in each quarter.

44 The meaning of unmeasured work

Unmeasured work is any other work that is not time work, salaried hours work or output work.

45 Determining hours of unmeasured work in a pay reference period

The hours of unmeasured work in a pay reference period are the total number of hours—
(a) which are worked (or treated as hours of unmeasured work in accordance with regulations 46 and 47) by the worker in that period; or …..

Submissions

20. After the evidence had been concluded the parties' representatives made submissions, in the case of the respondent by reference to a brief written skeleton argument. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below and comments that I have made above. Suffice it to say that I fully considered all the submissions made and the parties can be

assured that they were all taken into account into coming to my decision. That said, I record the key aspects of the representatives submissions below.

21. The respondent's representative relied upon his skeleton argument and made additional submissions including as follows:

    21.1 The respondent disputes the number of hours the claimant worked at all and, even if he did those hours of work, that those hours were done pursuant to his contract of employment or as a worker. In accordance with section 54(3) of the NMWA there must be a contract, which must be certain in respect of which there must be a meeting of minds between the employer and the employee

    21.2 The claimant cannot be paid for hours he did not do, for hours done in a private capacity or for work done as a shareholder. Anyone who enters into a business as an entrepreneur and shareholder will work long hours to make it go. Although the claimant thought he was a shareholder in fact he was not and now he has attempted to shoehorn his grievance that he is not a shareholder into a Wages Act claim.

    21.3 The claimant now accepts that he cannot claim in respect of time when he was a partner and the respondent has conceded that he was owed £2,960, which has now been paid. That apart, the amount the claimant says that he is owed remains woefully unclear and it is no answer to say that, given the reverse burden of proof, it is up to the respondent to say what he is owed.

    21.4 It is clear that there is bad feeling between the claimant and the respondent's witnesses. He has brought a significant claim only after dismissal; there was no issue while he was working. The claimant received pay slips (page 75 onwards) and at no point did he say that he was underpaid.

    21.5 There are issues of credibility. The welter of evidence before the Tribunal does not support the claimant. The respondent's four witnesses worked with the claimant and can say what he did; obviously not while he was at home and the claimant says he did 70% of his work for the respondent at home. That is convenient because the respondent cannot dispute it but the claimant cannot put together a rag bag of work such as waiting for work to come in, engaging in social media and attending meetings of outside bodies such as the Carnival Committee. Further, the claimant said that his workload was more or less consistent, which cannot be the case given that others were appointed to undertake some of it and that he was working for the Trust from October 2017.

    21.6 The only agreement was that he was to be paid £1,000 for doing the work that he did. There was no contract beyond that and he was paid that.

    21.7 The Tribunal cannot be satisfied that the claimant worked the hours claimed and if he did it was not pursuant to his contract; ie. as a worker or an employee and not as a putative shareholder.

21.8 The claimant's claim for holiday pay is not being pursued.

21.9 The respondent accepts the section 38 claim in respect of which the claimant might be entitled to an award of either two or four weeks' pay.

22. The claimant's representative made submissions including as follows:

22.1 The claimant asserts that his work was "unmeasured work". It cannot have been "salaried hours work" because of the condition contained in Regulation 21(3) of the NMWR that the worker is paid a salary etc in respect of a number of hours in a year "whether those hours are in or ascertained in accordance with their contract". In short, the employer needs to stipulate the hours. As such, the claimant's work must be unmeasured work under Regulation 44 determined in accordance with Regulation 45(a).

22.2 So the question is what were the hours that the claimant worked? He was never provided with a contract of employment, even the document Mr Bouabda said that he produced. The respondent has produced no evidence of what was agreed, only that the claimant, like the others, had to do what was necessary and the claimant says that that is what he believed he was doing. That is common in a senior position and there was no close control of line management. The respondent's witnesses accepted that they can only say what the claimant did in the office and not what he did at home. The respondent has a patchwork of experience but no understanding of the large number of things the claimant was doing without reference to them. Regulation 59 imposes a strict requirement on the employer to keep records, which the respondent did not do. It is agreed that it is only in rare cases where the burden of proof plays a part and, given the lack of corroborative or documentary evidence, this case is so finally balanced that it is best to rely upon the burden.

22.3 The claimant thought he was a shareholder and director and worked his socks off. The respondent says that he struggled. He may have done but as a consequence he took longer. That was still work and even if it was not done as efficiently as others it does not mean that it does not count.

22.4 On the respondent's account the claimant was involved in, at a conservative estimate, fifty e-mails a day. In desperation Mr Van Der Werff said that at the end the claimant was working next to no hours and that cost the respondent a fortune. If that were true why were no steps taken to address that with the claimant, for example by dismissing him?

22.5 The claimant says that the work that he did was pursuant to his contract. The only specific evidence from the respondent is that the claimant never worked more than thirty hours. That produces an hourly rate of just over the national minimum wage. Is that mere coincidence or to ensure that the claimant was paid the national minimum wage?

22.6 The claimant acknowledges a reduction in his hours after he started working for the Trust.

22.7 The claimant withdraws his claim for payment in lieu of untaken holiday.

22.8 As to section 38 there has been an emphatic failure on behalf of the respondent to provide a statement of terms and therefore an award of four weeks' pay is appropriate.

Application of the facts and the law to determine the issues

23. The above are the salient facts and submissions relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law, the principal elements of the statutory law being set out above.

24. As was accepted by both parties, the key question in this case is the number of hours that the claimant worked for the respondent each week as a worker; the secondary question being whether when the pay he received of £1,000 per month is divided by that number of hours it results in him having received at least the national minimum wage. I repeat that the difficulty for the parties in this case, and therefore for me, is that neither party can state with any clarity the number of hours that the claimant did work for the respondent.

25. Primary responsibility for that situation falls upon the respondent given that it has failed to comply with the duty imposed by section 9 of the NMWA to keep and preserve records, as detailed in regulation 59 of the MMWR. As mentioned above, however, for much of the relevant time the claimant was a director of the respondent with responsibility in this regard. A similar point good be made with regard to the claimant's complaint that he was not given a written statement of particulars of employment.

26. A further consideration arising out of the NMWR is how the work undertaken by the claimant is to be categorised. The submissions on behalf of the respondent clearly indicated that it regarded the claimant as undertaking "salaried hours work". I accept the submission on behalf of the claimant, however, that the definition of that term in regulation 21 is not met as what is referred to as "the second condition" is not satisfied as the number of hours worked by the claimant in a year are not "specified in or ascertained in accordance with" his contract.

27. It is not suggested that the claimant's work was time work or output work and, therefore, it follows that, in accordance Regulation 44, it must be unmeasured work. Further, in accordance with Regulation 45, the hours of unmeasured work in a pay reference period was simply the total number of hours "which are worked …. by the worker in that period".

28. This, of course, leads back what I have referred to above as "the key question" in this case of the number of hours the claimant worked for the respondent as a worker each week. In this regard, the "reversal of the burden of proof" contained in section 28 of the NMWA comes into play as it is provided, "it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national

minimum wage unless the contrary is established". This is clearly an important provision but it is important to note that it does not create a situation akin to one of 'strict liability' given that it is clearly subject to the caveat "unless the contrary is established".

29. In this regard, it would be difficult for the difference between the respective parties to be more stark. On the one hand, the claimant maintained that he worked 72 to 100 hours each week, as more particularly set out in paragraphs 16 and 17 of his witness statement, and that that was consistent, "a flat line", throughout his employment from start to finish. The respondent's witnesses accepted that everyone worked long "crazy" hours in the pre-production stage of the newspaper and in respect of issues one and two but that that eased off as everyone became more familiar with their roles, more staff and contractors were recruited and templates were developed making the production of the newspaper easier and quicker. Given the relative clarity of their evidence and its consistency, and the fact that the evidence of one was corroborated by the evidence of others, I accept the evidence of the respondent's witnesses that the excessive hours that were required of the directors were worked at the beginning of the enterprise and that by the time the company was incorporated on 9 May 2017 and the claimant became an employee (which is the relevant start date for the commencement of his claim) his input was significantly less.

30. The claimant's representative submitted that, given the lack of corroborative or documentary evidence, this case is so finally balanced that it is one of the rare cases where it is best to rely upon the burden of proof. I accept that there is a lack of documentary evidence but repeat that I consider that there is corroborative evidence provided by the respondent's witnesses. It is clear that, with the exception of Mr Bouabda, they are all what might be described as 'seasoned newspaper men'. I found their evidence clear and persuasive and although they were unable to say what hours of work claimant did at home and in other remote locations, such was their experience that they knew from the work produced the amount of time that he would have taken to produce it. This point was made on a number of occasions, quite forcibly by Mr Van Der Werff and less so by Mr Hartley. I was left in no doubt that the former did "know how long it takes to produce a paper", and that the latter, as editor, saw every page and could assess what the claimant and others were doing.

31. In contrast, I did not find the claimant's evidence in respect of the hours he worked as an employee or worker of the respondent to be entirely credible. I have mentioned above that he considered that the hours he worked had been "a flat line" throughout his employment. I find that that is not consistent with the evidence of the respondent's witnesses of others being engaged, as either employees or independent contractors to assist the claimant or completely takeover areas of his work. Details are set out in my findings of fact but, in summary, include Mr Moran and Ms Langthon being employed as graphic designers, Ms Gough providing guidance to the claimant in respect of issues one and two, the design of the centre pages and the four sports pages of the newspaper being contracted out to Spark Media from weeks two to thirty-five onwards and, from week three, Mr McCaffery being brought in as a sub-contractor to design 50% of the editorial pages of the newspaper, his input of the leaving the claimant with perhaps four or five pages to work on. This is also borne out by the evidence of Mr Healy that I have accepted

that the suspension of the claimant in April 2018 resulted, on average, in Mr Moran's hours being increased by 10.72 per week and Mr McCaffery not being paid anything in respect of extra work.

32. In this connection, the copies of invoices submitted by Mr Moran (87 to 97) and Mr McCaffery (98 to 108) are informative. It can be seen that from January to March 2018 (the claimant being suspended on 11 April 2018) Mr Moran worked 50, 58.5 and 51 hours per month. For his part, Mr McCaffery worked 63, 48.25 and 57.25 hours in each of those months. On this basis alone, I cannot accept the appellant's evidence that his workload remained consistent throughout.

33. Additionally, I do not find the claimant's evidence credible that following his commencement of part-time employment with the Wharton Trust Annexe on 11 October 2017 (working Wednesday, 9-to-5, and on Thursday and Friday morning) that only reduced his hours of work for the respondent from 80.5 hours to 75 hours a week and that he was "still working seven days a week for the respondent"; this including on Wednesday (when he was working all day at the Trust) three hours which he said he did early in the morning, during breaks and when he returned home. I similarly do not find it credible that the claimant worked on each of Saturday and Sunday from 10.00am until 1.00am the following morning; especially in light of the birth of his daughter on 27 February 2018. Finally, although accepting, as did the respondent's witnesses, that the claimant did work at home I do not find that sufficient evidence is before me to support his contention that some 70% of his work for the respondent was undertaken at home or in other remote locations such as a coffee shop.

34. A further aspect that impacts on credibility is the claimant's insistence that it was agreed that he would be paid £350 per week. That is not supported by any of the other evidence before me and I found confused and confusing his explanation that the difference between that £350 and the £1,000 a month that was paid from July 2017 would be paid into what he described as being his "loan account" or his "current account". In this regard the claimant also appeared to be somewhat confused when he sought to differentiate between what he referred to as his "salary", which he defined as being the entitlement that he should have received (ie. £350 a week), and "drawings", which he defined as being the amount that he did receive (ie. £1,000 a month). I accept the evidence of the respondent's witnesses that it was agreed that from July 2017 each of the directors could be paid £1,000 per month if they wished to take that. In this connection I accept the evidence of Mr Hartley that this sum was to be a payment in respect of work done and was not intended to be a reflection of precise hours which, in any event, came down fairly rapidly.

35. There is also the point that the claimant received payslips from July 2017 to June 2018 inclusive (75 to 86). Throughout that time he never questioned the amount of £1,000 (gross) that he was paid or objected to the fact that it did not reflect either £350 per week that he says the other directors had agreed he would be paid or the national minimum wage. In oral evidence the claimant said that when he received the first payslip in July 2017 he did send an email of complaint but he has not disclosed that and did not refer to it or indeed any complaint that he made in this respect in his witness statement. I find that the claimant neither made a formal

complaint nor raised a formal grievance as might have been expected if the evidence that he now gives accurately reflects the agreement at the time.

36. A different consideration that I bring into account is whether the hours worked by the claimant were undertaken pursuant to his contract of employment or as a worker as referred to in section 54(3) of the NMWA. The respondent's representative sought to differentiate between the work that the claimant did in that capacity and the work that anyone who enters into business as an entrepreneur and shareholder may do to make a go of a business. I consider that is a difficult line to draw but that it can and must be drawn given that section 1(2)(a) of the NMWA clearly provides that a person qualifies for the national minimum wage if he "is a worker". That must be the focus.

37. In this connection, I do not bring into account such hours as the claimant says that he spent attending meetings of the Hartlepool Armed Forces Liaison Group or the Hartlepool Carnival Committee. Even if it is right that he began attending meetings of those bodies after "speaking with other directors", I do not regard that as meaning that those hours were undertaken as a worker for the respondent or that the respondent agreed that they should be. Similarly, I am not satisfied that the amount of time the claimant says that he would engage with social media were undertaken as a worker for the respondent.

38. Neither am I satisfied that it would be right to recognise as work undertaken by the claimant as a worker for the respondent the time that he said he was at home "sat in front of my computer waiting for work that did not come through", adding "I was consistently refreshing the screen to see if new work was coming in", all of which he quantified as taking "a good 15 to 20 hours a week". I do not find that it would be reasonable to categorise merely sitting in front of a computer screen in this way as being work undertaken by the claimant for the respondent as a worker.

39. I consider that on the evidence before me (repeating the above point about the relative clarity of the evidence of the respondent's witnesses and its consistency, and the fact that the evidence of one was corroborated by the evidence of others), an accurate reflection of the time taken by the claimant to undertake his work as a worker of the respondent (making the point that this excludes the frenetic time at the beginning of the venture and the remainder of the period during which it was operated by the partnership until the respondent was incorporated on 9 May 2017) is Mr Van Der Werff's estimate of in the region of fifteen to twenty hours per week maximum.

40. Even if that might be a slight under-estimate, the corroborative nature of the evidence of all the respondent's witnesses demonstrates that during the relevant period the claimant, contrary to his own evidence, never worked more than 30 hours a week. That is a significant figure as the claimant would have had to work in excess of 30 hours if he were to found a successful claim of unauthorised deductions from his wage with reference to the NMWA.

41. I make a final point. On more than one occasion I have referred above to the evidence of the respondent's witnesses being relatively clear, consistent and corroborated by the evidence of others. I am, of course, alert to the possibility that the respondent's witnesses might have conspired together to give such well-

prepared and well-rehearsed evidence. That is always a possibility but is a possibility that I dismiss in this case given, in particular, how each of the respondent's witnesses maintained their respective accounts consistently during cross-examination by a competent and, it would seem, experienced representative of the claimant.

42. In summary, I am satisfied, with regard to the "reversal of the burden of proof" contained in section 28 of the NMWA that the consistent and corroborative evidence provided by the respondent's witnesses has enabled the respondent to meet what I have described above as the caveat that "the contrary is established" and, therefore, the presumption that the claimant "was remunerated at a rate less than the national minimum wage" has been rebutted.

43. In these circumstances, I find as follows:

    43.1 The claimant's complaint under Section 23 of the Employment Rights Act 1996 that the respondent made deductions from his wages in contravention of section 13 of the that Act in that it did not pay him the National Minimum Wage in respect of the hours he worked for the respondent as is required by section 1 of the National Minimum Wages Act 1998 is not well-founded and is dismissed.

    43.2 The claimant's complaint under regulation 30 of the Working Time Regulations 1998 that the respondent failed to pay him the whole or any part of any compensation due to him related to entitlement to leave in accordance with Regulation 14 of those Regulations was withdrawn by the claimant and is dismissed.

    43.3 As was conceded on behalf of the respondent, it was in breach of its duty under section 1 of the Employment Rights Act 1996 to give to the claimant a written statement of initial employment particulars but as the Tribunal has not found in his favour it is unable to make an award to him in relation to that breach pursuant to section 38 of the Employment Act 2002.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23 May 2019