EMPLOYMENT TRIBUNALS

Claimants **Respondent**

Mr. R. Horne V **Checkpal Limited (formerly Crossverify Limited)**

Heard at: London Central **On: 29 May 2019**

Before: Employment Judge Mason

Representation
For the Claimant: Mr. M. Uberoi, counsel.
For the Respondent: No attendance or representation.

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent's application for a postponement is refused.

2. The response is struck out.

3. The Tribunal declares that the Respondent made the following unlawful deductions from the Claimant's wages contrary to s13 Employment Rights Act 1996:

3.1 From 30 January 2017 to 31 May 2017: the Respondent failed to pay the Claimant National Minimum Wage contrary to the National Minimum Wage Act 1998 and National Minimum Wage Regs. 2015 and the Claimant is awarded the sum of **£6,575.66** (gross);

3.2 From 1 June 2017 to 30 January 2018: the Respondent failed to pay the Claimant's salary at the annual rate of £150,000 (gross) and the Claimant is awarded the sum of **£100,000** (gross);

3.3 From 31 January 2018 to 9 April 2018: the Respondent failed to pay the Claimant's salary at the annual rate of £250,000 (gross) and the Claimant is awarded the sum of **£47,916.66** (gross);

3.4 On termination of the Claimant's employment, the Respondent failed to pay the Claimant monies in lieu of 2 days accrued and outstanding holiday contrary to Reg.

13 Working Time Regulations and the Claimant is awarded the sum of **£1,923.07** (gross).

4. The Claimant is accordingly awarded the total sum of **£156,415.39** (gross).

5. Interest on the sums awarded accrues from the day after this Judgment at the rate of 8% per annum unless the full amount is paid within 14 days.

6. The Respondent failed to provide the Claimant with pay statements to reflect payments of salary due to the Claimant contrary to s8 Employment Rights Act 1996. No compensation is payable as the Claimant has been awarded the equivalent of salary and holiday which should have been recorded on the pay statements.

REASONS

Background

1. In this case Mr. Ralph Horne ("the Claimant") claims that the Respondent has made unlawful deductions from his wages, failed to make a payment in lieu of accrued holiday, failed to comply with the national minimum wage legislation ("NMW") and failed to provide pay statements. Significantly, the Claimant does not bring in these proceedings a claim for breach of contract.

2. At the full merits hearing before me, the Respondent did not attend and was not represented. Mr. Uberoi (counsel) represented the Claimant and provided me with a lever arch file prepared by the Claimant's representative ("B1") (pages 1 to 359); he assured me that this contained all the documents provided on disclosure by both parties. I was also provided with (i) a supplementary bundle containing documents relevant to the application to strike out ("B2") (pages 1 to 40) (ii) Mr. Uberoi's skeleton argument and (iii) the Claimant's witness statement.

3. The following facts are not in dispute:

3.1 The Claimant commenced employment with the Respondent on 30 January 2017 as Chief Operating Officer.

3.2 From 30 January 2017 to 31 May 2017 the Claimant agreed to waive salary and it is accepted that he was entitled to be paid at the rate of National Minimum Wage during this period

3.3 The parties signed a Director's Service Agreement ("the Contract") [B1 49-77]. Key clauses for the purposes of these proceedings provide:

(i) Clause 7 "Salary and Bonus" [B1 58]:
From 1st June 2017 the Claimant would be paid at the rate of £150,000 per annum and subject to confirmation by the respondent's Chief Executive Officer (CEO), with effect from 31 January 2018, his salary would increase to £250,000 per annum.

(ii) Clause 8 "Deductions"[B1 58]:
The Claimant authorised the Respondent to deduct from his salary and set off against his salary, any monies due to him including "*any overpayments, loans or advances*

made to him ... or the cost of repairing any damage or loss to the Company's property caused by him..."

(iii) Clause 33 "Alterations" [B1 73]:
"No purported alteration or variation of this Agreement shall be effective unless it is in writing, refers specifically to this Agreement and is signed by the Company"

3.4 On about 17 May 2017 the Claimant was appointed CEO.
3.5 The Claimant resigned on 9 April 2018.
3.6 The Respondent has not paid the Claimant any wages.
3.7 The Respondent has not paid the Claimant monies in lieu of 2 days accrued untaken holiday as at the date of termination of his employment.
3.8 The Respondent has not provided itemised pay statements.

4. The Claimant contacted ACAS on 10 April 2018 and an Early Conciliation Certificate was issued on 10 May 2018 [B1 1]. The Claimant then presented this claim on 8 June 2018 [B1 3-20]. On 15 August 2018, the Tribunal issued a Notice of Hearing of 29 November 2018 and sent the ET1 to the Respondent advising a response ("ET3") must be received by 12 September 2018. The Tribunal also made various case management orders.

5. The Respondent requested an extension of 28 days for lodging the ET3; the Claimant objected and on 12 September 2018 the Tribunal granted an extension of 14 days i.e. until 26 September 2018. The Respondent then lodged the ET3 [B1 21-32]:

5.1 The Respondent admitted that the Claimant was entitled to NMW.
5.2 It denied that it had made any unauthorised deductions from the Claimant's wages as the wages claimed were not payable under the Contract as a result of the Claimant's misrepresentations and/or breaches of fiduciary duty.
5.3 Alternatively, any sums due under the Contract were wholly extinguished by contractual deductions under clause 8.1 "*that the Respondent would be authorised to make in repairing the damage and or loss caused by the Claimant to the Respondent's intellectual property".*
5.4 Further, the Claimant's acceptance of his promotion to CEO "*constituted a written agreement/consent to not receiving any wages*".
5.5 With regard to the holiday pay claim, the ET3 states the Respondent "*neither admits or denies*" this and similarly pleaded with regard to pay statements.

6. At the Respondent's request, the full merits hearing was extended to 3 days and on 18 October 2018, the Tribunal wrote to the parties to advise that the full merits hearing would take place on 29 November, 30 November and 3 December 2018.

7. On 19 October 2018, the Respondent's representative requested a postponement because one of its witnesses, Mr. Marcus Andrade, was unavailable to attend for health reasons. The Claimant objected and applied for a strike out or deposit order. On 5 November 2018, the Tribunal wrote to the parties advising that the full merits hearing was postponed and a Preliminary Hearing (PH) would take place on 29 November 2018 to consider (1) the Claimant's application to strike out the response or for a deposit order and (2) further case management as necessary.

8. The Preliminary Hearing (PH) on 29 November 2018 was conducted by EJ Isaacson; both parties were represented by counsel; EJ Isaacson made the following orders [B1 33-41].

8.1 The Respondent was ordered to deposit £2,000 on the basis it had little reasonable prospect of success in arguing that:

(i) the Claimant's Contract permitted the Respondent to make deductions; and

(ii) the Claimant's Contract is unenforceable in relation to claims for wages, NMW, holiday pay and itemised pay statements.

8.2 The following arguments by the Respondent were struck out:

(i) that sections 13, 14 and 15 ERA allows deduction of wages by reference to the Misrepresentation Act 1967 and the Companies Act 2006; and

(ii) any alleged poor performance is a defence to unlawful deduction from wages.

8.3 The Respondent's arguments about estoppel and the equitable doctrine of laches were dismissed on withdrawal by the Respondent.

8.4 EJ Isaacson than set down this case for a full merits hearing, 5 days to start on 28 May 2019 (having agreed these dates with the representatives) and made various case management orders including:

(i) agreement of a List of Issues by 10 January 2019;

(ii) disclosure of documents by 24 January 2019;

(iii) the Respondent to prepare the bundle and provide the Claimant with a copy by 21 February 2019;

(iv) witness statements to be exchanged by 7 March 2019.

8.5 These orders were sent to the parties on 30 November 2018.

9. On 21 December 2018, the Tribunal received confirmation that the Respondent had paid the deposits.

10. On 20 February 2019, a Notice of Hearing was sent to the parties.

11. On 25 April 2019, the Claimant applied for an order under Rule 30 for an "unless order" with regard to the Respondent's failure to comply with the Tribunal's order dated 29 November 2018 to agree the List of Issues [B2 1-2]; this was copied to the Respondent's representatives.

12. The Tribunal wrote to the Respondent on 29 April 2019 directing it to explain by 6 May why it had not complied with the order [B2 3]. The List of Issues was subsequently (belatedly) agreed (Appendix A).

13. On 3 May 2019, the Respondent's representative wrote to the Tribunal requesting a further adjournment of the hearing *"because additional documents for disclosure"* had *"recently come to light*" [B2 4-5]; these were in fact the Respondent's own documents. The Claimant objected strenuously to a further postponement and on 16 May 2019 EJ Glennie refused the request [[B2 16-17] and concluded:
"*The Employment Judge assumes that the bundle has now been finalised and varies the date for exchange of witness statement to 4pm on 17 May 2019. The Employment*

Judge also reminds the parties that the Tribunal has the power to strike out for breach of the order and that an unless order is not an essential precondition.
*The case remains listed for hearing on **28 May 2019 to 3 June 2019**".*

14. On 15 May 2019, the Claimant's representative wrote to the Respondent's representative asking for a new joint bundle to incorporate the documents disclosed late by the Respondent.

15. On Friday 17 May 2019, the Claimant's representative attempted to exchange witness statements with the Respondent's representative but was advised (at 15.59) that they were not in a position to exchange that day [B2 18]. At 17.22 the Respondent's representative wrote to the Tribunal requesting exchange of witness statements be postponed until 24 May 2019.

16. Later on 17 May 2019, the Claimant's representative wrote to the Tribunal applying *"for an order striking out the Respondent's response pursuant to Rules 37(1)(b) and (c) on the grounds that the manner in which the proceedings have been conducted by the Respondent has been scandalous, unreasonable, and/or vexatious and that the Respondent has failed to comply with orders of the Tribunal"* [B2 20-22]. The Claimant argued that the Respondent had not complied with orders of the Tribunal including exchange of witness statements and preparation of the bundle. That email was copied to the Respondent's representative.

17. On 23 May 2019, the Tribunal wrote to the Respondent's representative asking for "*observations by return*" on the Claimant's letter of 17 May 2019 [B2 23].

18. On 24 May 2019 the Respondent's representative replied to say they were taking instructions and would respond later that day [B2 24].

19. On 25 May 2019, the Respondent's representative emailed the Tribunal: "*We are unable to make any observations on the Claimant's strike out application as we are bound by our duty of confidentiality".*[B2 27 and 31].

20. On 27 May 2019 at 16.34, Mr. Marcus Andrade on behalf of the Respondent forwarded to the Tribunal an email he had sent to the Respondent's solicitor that morning in which he indicated that there had been a breakdown in their professional relationship and that the Respondent required a postponement in order to "*find other counsel*".

21. On 28 May 2019, the Respondent's representative emailed the Tribunal to advise that as of 27 May, they were no longer instructed by the Respondent [B2 30]. Mr. Andrade of the Respondent then oddly wrote to the Claimant's solicitor asking her to represent the Respondent at the hearing and to request a 30 day extension so that he could *"hire another solicitor*"; he said he was unable to attend the hearing as he was "*blessed with a new born baby*" [B2 36-37]. The Claimant's representative replied the same day explaining that she acted for the Claimant [B2 35].

22. Having heard from Mr. Uberoi and having considered the Respondents reasons:
22.1 I refused to postpone the hearing for the reasons set out below [paras. 23 to 26].
22.2 Mr Uberoi then applied for an order striking out the Respondent's response which after careful consideration, I agreed to for the reasons set out below [paras. 27 to 35].
22.3 Having struck out the response, I then heard from the Claimant, Mr. Horne, who adopted his witness evidence as his evidence in chief. Having considered all available material, I now give judgment in favour of the Claimant in accordance with Rule 21 for the reasons set out below (paras 36 to 41).

Refusal of Respondent's application to postpone the hearing

23. The Law
23.1 Employment Tribunals (Constitution and Rules of Procedure) ("the Rules"):
(i) Rule 30 sets out the relevant conditions for an application for a postponement; an application may either be made at a hearing or in writing. In accordance with Rule 92, an application for a postponement in writing, must be made to the Tribunal and copied to the other party along with notification to the other party of how to object. These obligations apply whether or not the party seeking the postponement is legally represented
(ii) Rule 29 allows an Employment Judge to make case management orders including an order that a hearing should be postponed.
(iii) A postponement must be in accordance with the "overriding objective" in Rule 2 which provides:
"*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with cases fairly and justly includes, so far as practicable –*
(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as is compatible with proper consideration of the issues; and (e) saving expense."
23.2 Presidential Guidance
Presidential Guidance on matters of practice is not binding on tribunals but they are required to have regard to it. Presidential Guidance given on 4 December 2013, sets out the procedural steps and requirements when applying for a postponement which include the following:
(i) An application should be made in writing to the relevant Tribunal office;
(ii) The application should state why it is being made and explain why it would be in accordance with the overriding objective for the Tribunal to grant the postponement;
(iii) If an application is in writing, the party making the application must notify all other parties that any objections should be sent to the Tribunal as soon as possible;
(iv) The party making the application should provide all relevant documents;
(v) If any of these requirements are not complied with, the application will not ordinarily be considered unless there are exceptional circumstances, in which case an explanation of the exceptional circumstances should be given;
(vi) If a party or witness is not available the application for a postponement should be made as soon as it becomes clear that there is a difficulty and should: state why the person is not available; state when the difficulty first came to light; state, in the case of

a witness, why his/her evidence is considered to be relevant and important to the case; if the hearing is scheduled to last for more than one day, state whether a change in the normal order in which evidence is heard might deal with the problem and include any supporting evidence available;

(vii) Where the hearing in question has been fixed by agreement with the parties, that fact will be taken into account by the employment judge considering the application; generally parties are expected to give a Tibunal hearing priority over most other matters;

(viii) If a representative has withdrawn from acting, the application for a postponement should state: when that happened and whether the party affected intends to seek alternative representation and, if so, what steps have been taken to obtain such representation and when it is anticipated that a new representative will be appointed.

(ix) The decision is a matter of discretion for the judge concerned who will take account of all relevant circumstances in the individual case (including the timing of the request).

23.3 Article 6(1) of the European Convention of Human Rights

This provides:

"*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*."

23.4 Case law:

(i) In Teinaz v London Borough of Wandsworth [2002] ICR 1471 the Court of Appeal held that the tribunal's discretion is broad and must be exercised judicially.

(ii) In Pye v Queen Mary University of London UKEAT0374/11, Langstaff J, President, held that the discretion must be exercised with "*due regard to reason, relevance and fairness*" and subject to the overriding objective..

24. The Respondent has not complied with the procedural requirements for seeking a postponement in a number of respects including:

24.1 The Respondent did not attend the hearing and has not written directly to the Tribunal seeking a postponement with a copy to the Claimant along with notification of how to object.

24.2 The Respondent has not provided all relevant documents.

25. However, I am prepared to infer an application for an adjournment from the Respondent's conduct, specifically:

25.1 Mr. Andrade appears to have authority to take decisions on behalf of the Respondent as he is a partner in Fintech Fund, a family limited partnership which owns a controlling share in the Respondent company.

25.2 Mr. Andrade forwarded to the Tribunal his email of 27 May 2019 to the Respondent's solicitor in which he indicated that there had been a breakdown in their professional relationship and he required a postponement so he could "*find other counsel*".

25.3 On 28 May Mr. Andrade mistakenly wrote to the Claimant's solicitor asking her to represent him and to request a 30 day extension so that he could *"hire another solicitor*" and he was unable to attend the hearing as he was "*blessed with a new born baby*".

26. Having considered all the circumstances of this case, the law and the Presidential Guidance, I have exercised my discretion and declined the Respondent's application for a postponement having taken into account the following factors:

26.1 With regard to Mr. Andrade's presence in the US, he has not provided a satisfactory explanation as to why he is unable to travel to the UK to attend the hearing:

(i) He refers to having had a child but does not say when the child was born or why this precludes him from travelling to the UK.

(ii) It is reasonable to assume his child's birth was anticipated for some time but this was not mentioned in the first application for an adjournment made by his (former) solicitors on 3 May 2019 and he does not explain why an application on these grounds was not made sooner.

(iii) He has not explained why he could not give evidence by videolink.

(iv) The hearing is scheduled to last for more than one day, and he has not stated whether a change in the normal order in which evidence is heard might deal with the problem.

26.2 With regard to the Respondent's representatives' withdrawal from acting, Mr. Andrade has not explained what steps have been taken to obtain alternative representation and when it is anticipated that a new representative will be appointed.

26.3 I am satisfied that refusal of a postponement is in accordance with the overriding objective which includes "*avoiding delay*" and "*saving expense*":

(i) There has been a previous adjournment of the full hearing back in November 2018, again at the Respondent's request; these new dates were then fixed by agreement with the parties at the PH back in 29 November 2018 and generally parties are expected to give a Tribunal hearing priority over most other matters.

(ii) The parties have had 6 months notice of these dates (since 29 November 2018);

(iii) The Claimant has attended fully prepared for the 5 day hearing and costs will be wasted if the hearing is postponed;

(iv) The proceedings were issued almost 12 months ago and relisting for a further 5 day hearing would almost certainly mean a delay until 2020 due to the Tribunal's own limited resources; this means that the evidence becomes more distant from the events in the case;

(v) I am satisfied that I have sufficient material available on which to make an informed and fair decision given that:

a. bundle B1 includes all the documents the Respondent wishes to rely on;

b. the Respondent makes certain concessions in its response; and

c. substantial parts of the response have already been struck out.

Decision to Strike out the response

27. The Law

27.1 Employment Tribunals (Constitution and Rules of Procedure) ("the Rules"):

Rule 37 provides:

"(1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –*

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or otherwise vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented out as set out in rule 21 ..."

27.2 Case law

(i) I have considered guidance given in the following cases: HM Prison Service v Dolby [2003] IRLR 694, Bolch v Chipman [2004] IRLR 140, Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, [2006] IRLR 630 which establish the following principles with regard to the striking out process under 37(1).

(ii) The Tribunal must first find that one of the specified grounds for striking out has been established.

(iii) If the Tribunal finds that one of the specified grounds for striking out has been established, Tribunals should bear in mind that striking out claims is a draconian sanction and must be a proportionate response which involves consideration of the following:

a. The "overriding objective" (para. 23.1(iii) above).
b. whether there is a less drastic means to the end for which the strike-out power exists, such as waiving or varying the requirement, barring or restricting a party's participation in the proceedings, or making a costs or deposit order;
c. the seriousness of the breach; has the unreasonable conduct taken the form of deliberate and persistent disregard of required procedural steps?
d. the circumstances in which the breach comes about;
e. whether a fair hearing is impossible;
f. any prejudice to the Claimant and Respondent in striking out the claim; and
g. any other relevant factors

28. I have reminded myself that strike-out is a draconian step but applying these principles, I have concluded that the Respondent's response should nevertheless be struck out as I am satisfied that (i) grounds for striking out have been established and (ii) that striking out is a proportionate response.

29. Response no reasonable prospect of success (Rule 37(1)(a):
I am satisfied that the response has no reasonable prospect of success for the following reasons:

29.1 Significant parts of the response have already been struck out (para. 8.2 above) or withdrawn (para. 8.3 above).

29.2 The Respondent makes certain concessions/admissions in the Grounds of Resistance specifically:

(i) Deductions in respects of NMW were "*made in error*".

(ii) The Respondent does not dispute that the Claimant had accrued 2 days outstanding holiday as at the date of termination of his employment.
(iii) The Respondent admits that it did not provide the Claimant with monthly pay statements.
29.3 The remaining grounds of resistance have no reasonable prospect of success for the following reasons.

30. The issues
I have considered the agreed List of Issues (Appendix A) but these are not binding on the Tribunal and it is clear that some of those issues fall away in accordance with the previous strike out order of EJ Isaacson. The issues in this case are more straightforward and are as follows:
30.1 Unauthorised Deduction of Wages
(i) 30 January 2017 to 31 May 2017: did the Respondent fail to pay the Claimant at the rate of NMW?
(ii) 1 June 2017 to 30 January 2018: did the Respondent fail to pay the Claimant at the rate of (i) NMW of (ii) £150,000 (gross) per annum?
(iii) 31 January 2018 to 9 April 2018: did the Respondent fail to pay the Claimant at the rate of (i) NMW (ii) £150,000 (gross) per annum or (ii1) £250,000 (gross) per annum?
(iv) If so:
a. were such deductions required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract, or
b. did the Claimant previously signify in writing his agreement or consent to the making of the deductions?
30.2 Pay Statements
(i) Was the Claimant entitled to receive pay statements between 30 January 2017 and the date when his final pay statement was due in May 2018? [the Respondent concedes that no pay statements were provided].
(ii) If the Claimant was entitled to receive pay statements, what particulars ought to have been included or referred to in the pay statements so as to comply with the ERA?
30.3 Holiday Pay
(i) Was the Claimant entitled to a payment in lieu of any statutory holiday accrued but not taken as at 9 April 2019?
(ii) If so, how much is he owed?

31. Unauthorised deductions from wages claim:
31.1 The issues are set out above (para. 30).
31.2 The relevant law:
(i) The Claimant is not claiming breach of contract but unauthorised deductions from wages and any "defence" is limited to s13 ERA which provides:
"13 (1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

(ii) The Tribunal has jurisdiction to resolve disputes about the construction of the employment contract when considering claims for unlawful deductions from wages under section 13 ERA (Agarawal v Cardiff University [2018] EWCA Civ 2084).

(iii) Workers are entitled to be paid the national minimum wage in accordance with the National Minimum Wage Act 1998 and National Minimum Wage Regs 2015.

31.3 30 January to 31 May 2017:

The Claimant's claim for NMW for this period must succeed:

(i) The Respondent accepts that it was an error not to pay NMW for this period.

(ii) The Respondent has not challenged the number of hours the Claimant says he worked during this period which are set out in para. 5 of Grounds of Claim [16].

31.4 1 June 2017 to 29 January 2018

The Claimant's claim for salary at the annual gross rate of £150,000 for this period must succeed even taking the Respondent's case at its highest:

(i) It is not in dispute that the Claimant's contract of employment (clause 7) provides for salary to be paid at this rate from 1st June 2017 [B1 58].

(ii) The Respondent relies on clause 8 in the Claimant's Contract of Employment [B1 58] as authority for making the deductions.

The Respondent says it was authorised to make deductions because of the cost of repairing damage and or loss cause by the Claimant to the Respondent's intellectual property. The Claimant denies he has caused any such damage or loss. The Respondent's argument must fail, as regardless of whether the Claimant has damaged the Respondent's (intellectual) property (and I make no finding on this point), the damage or loss must be quantified and there is no attempt to do so in the Grounds of Resistance and there is no evidence of any damage or loss in the documents in B1; any alleged damage or loss is therefore completely unquantifiable. The Respondent's appropriate course of action is to claim against the Claimant for unliquidated damages for breach of contract, not to refuse payment of salary.

(iii) With regard to illegality, the Respondent has not pleaded that wages were not properly payable to the Claimant because the contract was void due to illegality. In any event, such an argument has no prospects of success:

a. EJ Isaacson back in November 2018 judged that this argument "*put at its highest had little prospect of success"* and commented that "*it is difficult to see how a Tribunal would reach a decision that the whole contract is null and void due to illegality when considering a decision that the whole contract is null and void due to illegality when considering the type of cases where the argument of illegality has been successful*". EJ Isaacson took this view on limited information whereas I have had the benefit of sight of all the documents relied on by both sides and with that advantage I am entirely satisfied that an argument of illegality has no prospects of success.

b. I accept that a claimant cannot found a claim on an unlawful act but the documents in B1 are insufficient evidence of the alleged illegal acts (List of Issues Appendix A para. 5) and in accordance with the decision of the EAT in Coral Leisure Group Ltd. v Barnett [1981] I.C.R. 503, any taint of illegality affecting part of a contract does not necessarily render the whole contract unenforceable by a party in the case of a contract not for an illegal purpose or prohibited by statute; the fact that the employee in the course of his employment committed an unlawful act does not prevent him from asserting thereafter his contract of employment against his employer.

31.5 31 January 2018 to 9 April 2018
The Claimant's claim for salary at the annual gross rate of £250,000 for this period must succeed even taking the Respondent's case at its highest:

(i) Again it is not in dispute that the Claimant's contract of employment provides for salary to be paid at this rate with effect from 31 January 2018.

(ii) The Respondent says the Claimant's acceptance of promotion to CEO constituted a written agreement/consent to not receiving any wages (s13(1)9b). However, there is no evidence in B1 that the Claimant previously signified in writing his agreement or consent to waive his salary and it is not reasonable to infer consent from his acceptance of promotion to CEO. Furthermore, the Contract itself states at clause 33 [B1 73] that "*No purported alteration or variation of this Agreement shall be effective unless it is in writing, refers specifically to this Agreement and is signed by the Company*"

(iii) Reliance on clause 8 of the Contract fails for the same reasons set out above.

(iv) Any reliance on illegality must also fail for the same reasons set out above.

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32. Holiday pay
The Claimant's claim for monies in lieu of 2 days accrued untaken holiday must succeed even taking the Respondent's case at its highest:

32.1 It is not in dispute that the Claimant had accrued 2 days untaken holiday as at 9 April 2019

32.2 The Respondent was not entitled to refuse to pay this for the same reasons set out above.

33. Itemised Pay Statements
The Claimant's claim that he was entitled to receive pay statements between 30 January 2017 and the date when his final pay statement was due in May 2018 must also succeed as the Respondent concedes that no pay statements were provided.

34. The manner in which proceedings conducted by or on behalf of the Respondent has been unreasonable and there has been non-compliance with Tribunal orders
I am satisfied that the manner in which the proceedings have been conducted by or on behalf of the Respondent has been unreasonable (37(1)(b)) and that there has been significant non-compliance with Tribunal orders (37(1)(c) for the following reasons:

34.1 On 29 November 2018, EJ Isaacson ordered that a List of Issues was to be agreed by 10 January 2019 but the Respondent delayed to the extent that the Claimant's representative felt compelled to apply on 25 April 2019 for an "unless order" .

34.2 On 29 November 2018 EJ Isaacson ordered the Respondent to prepare the bundle and provide the Claimant with a copy by 21 February 2019. This then was the deadline for the final bundle. But in May, the Respondent's very belatedly disclosed a further 100 pages or so of documents and then failed to comply with the Claimant's requests to prepare a new bundle incorporating these documents.

34.3 On 29 November 2018, EJ Isaacson ordered that witness statements be exchanged by 7 March 2019. On 16 May 2019 EJ Glennie varied the date to 17 May 2019 and reminded the parties that the "T*ribunal has the power to strike out for breach of the order and that an unless order is not an essential precondition*". Despite this, the Respondent has failed to exchange witness statements with the Claimant and only told the Claimant's representative at 15.59 on the final day for exchange (17 May) that they were not in a position to exchange. On 18 May, the Respondent's representative wrote to the Tribunal requesting exchange of witness statements be postponed until 24 May 2019; this was an unreasonable request given that this would allow only one clear working day between the 24 May and the first day of the full hearing.

35. <u>Striking out the response is a proportionate response</u>

I am satisfied that striking out is a proportionate response for the following reasons:

35.1 It is in accordance with the "overriding objective" (para. 23.1(iii) above).

35.2 I have considered various other means such as barring or restricting the Respondent's participation in the proceedings, or making a costs or deposit order. However, having concluded that the response has no prospect of success, any such lesser order would simply delay a hearing which would inevitably go against the Respondent and only serve to delay the payment of substantial monies due to the Claimant.

35.3 The Respondent's breaches of the Tribunal's orders are serious and persistent; failure to provide a bundle and exchange witness statements are fundamental.

35.4 I have considered the circumstances in which these breaches came about and taken into account the Respondent's last minute fall out with its representatives; however, this does not explain why the bundle and the witness statements were not prepared well before this, in accordance with the Tribunal's various orders.

35.5 I accept that if I did not strike out, a fair hearing would be possible but as I have concluded the Respondent had no chance of success in any event, a fair hearing would go against the Respondent and I cannot therefore identify any prejudice to the Respondent in striking out.

35.6 The Respondent was given ample notice of the possibility of a strike out:

(i) EJ Isaacson stated at the foot of the Orders she made on 29 November 2018 that if any Order was not complied with "the Tribunal may take such as it considers just which may include ... b) striking out the claim or the response, in whole or in part, in accordance with rule 37" [B1 33-34].

(ii) The Claimant copied to the Respondent's representative its application to strike out dated 17 May 2019 [B2 20-22].

(iii) On 23 May 2019, the Tribunal asked the Respondent's representative for "*observations by return*" on the Claimant's letter of 17 May 2019 [B2 23]. The Respondent's representative declined the opportunity to comment and on 25 May

2019 emailed the Tribunal: "*We are unable to make any observations on the Claimant's strike out application as we are bound by our duty of confidentiality"* [B2 27].

Decision on the substantive issues in accordance with Rule 21

36. In accordance with Rule 21, I am required to consider whether on the available material, a determination can properly be made of the claim or part of it and issue a Judgement and make detailed provisions to that effect. As previously stated, I am satisfied that I have sufficient material available on which to make an informed and fair decision (on both liability and remedy) given that:

(i) bundle B1 includes all the documents both parties wish to rely on;
(ii) the Respondent has lodged a legally drafted response;
(iii) the Respondent makes certain concessions in its response; and
(ivi) substantial parts of the response have already been struck out.

37. I have also considered the Presidential Guidance (rule 21 Judgement (2013):

37.1 The claim is clearly stated; I am not in any doubt as to the whole or any part of the matters claimed.
37.2 There are no matters which might affect whether the Tribunal has jurisdiction to hear the claim.
37.3 I have considered all the details contained in the written matters before me.
37.4 I have considered any obligation or burden on either of the parties in relation to proving such matters.
37.5 I have considered any case management orders that have previously been made, and any response.

38. For all the same reasons I have found that the response has no prospect of success (para. 29 -33 above), I conclude that all the Claimant's claims must succeed and all that remains is to address remedy.

Remedy

39. Unlawful Deduction from Wages

39.1 Relevant law:

(i) Sections 23-24 ERA 1996:

"*23(1) A worker may present a complaint to an employment tribunal —*
(a) that his employer has made a deduction from his wages in contravention of section 13 …"

"*24(1) Where a tribunal finds such a complaint under section 23 well-founded, it shall make a declaration to that effect and order the employer –*
(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of the deduction made in contravention of section 13."

(ii) S17 National Minimum Wage Act 1998 provides for underpaid workers to be paid arrears calculated according to a formula using current minimum wage rates. This means workers will be due more arrears than they were originally underpaid if current rates are higher than the rates that applied at the time of the underpayment.

39.2 30 January 2017 to 31 May 2017:

(i) The Respondent made a deduction from the Claimant's wages at the rate of NMW.

(ii) The current NMW for workers aged 25 and over is £8.21 per hour and therefore the amount due to the Claimant is:

1 February 2017:	18 hours @ £8.21 per hour =	£ 147.78
1 March 2017:	180 hours @ £8.21 per hour =	£1,477.78
1 April 2017:	207 hours @ £8.21 per hour =	£1,699.47
1 May 2017:	189 hours @ £8.21 per hour =	£1,551.16
1 June 2017:	207 hours @ £8.21 per hour =	£1,699.47
	TOTAL:	£6,575.66

39.3 1 June 2017 to 30 January 2018

(i) The Respondent made a deduction from the Claimant's wages during this period at the annual gross rate of £150,000.

(ii) The amount due to the Claimant is £100,000.00.

39.4 31 January 2018 to 9 April 2018

(i) The Respondent made a deduction from the Claimant's wages during this period at the annual gross rate of £250,000.

(ii) The amount due to the Claimant is £47,916.66.

39.5 Holiday Pay

On termination of the Claimant's employment, the Respondent failed to pay the Claimant monies in lieu of 2 days accrued and outstanding holiday. The Claimant's salary during the holiday year in which his employment terminated was £250,000 which equates to £4,897.69 per week, £961.53 per day. He is therefore awarded 2 x £961.53 = £1,923.07

39.6 This was a "series" of deductions as there is a factual and temporal link between the deductions. The gap between non-payments is less than three months.

40. Pay statements

The Respondent failed to provide the Claimant with pay statements to reflect payments of salary due to the Claimant contrary to s8 Employment Rights Act 1996. No compensation is payable as the Claimant is awarded sums equivalent to the deductions. Particulars which should have appeared on the payslips include the amounts awarded and any statutory deductions.

Signed by _____ on 3 June 2019

Employment Judge Mason

Judgment sent to Parties on

3 June 2019

APPENDIX A

LIST OF ISSUES AGREED BY THE PARTIES

National Minimum Wage

1. The Respondent concedes that the Claimant was entitled to the National Minimum Wage from 30 January 2017 to 9 April 2018.

Unauthorised Deduction of Wages

2. It is conceded that subject to the decision of the Employment Tribunal with regard to the points below, the Claimant was contractually entitled to the payment of wages in the sum of £150,000 per annum form 1st June 2017 to 29th January 2018, and it is contended by the Respondent that, subject to the decision of the ET with regard to the points below, the Claimant was entitled to the payment of wages in the sum of £150,000 per annum form 30th January 2018 to his effective date of termination on 9th April 2018.

3. Was the Claimant entitled to the payment of wages in the sum of £250,000 per annum from 30th January 2018?

Illegality

4. Has the Respondent pleaded that wages were not properly payable to the Claimant because the contract was void due to illegality?

5. If so, did the Claimant:
   (i) Fail to declare a directorship with a competitor?
   (ii) Have a meeting with Mr. Carl Weir and others to set up a new company in direct competition with the Respondent prior to or near the start of his employment?
   (iii) Download confidential information near the end of his contract in March 2018?
   (iv) Has the Respondent pleaded that the Claimant:
      a) Used confidential information of the Respondent against the Respondent's own business interests?
      b) Conspired generally to act in breach of his fiduciary duty and/or the general duties of directors as set out in Chapter 2 of Part 10 of the Companies Act 2006?
   (v) If so, did the Claimant do the acts set out at (iv)(a) or (b)?

6. If so, did the above actions cumulatively or individually amount to illegal acts, such as to void the contract ab initio?

7. If so, was the Claimant entitled to the payment of wages between 30th January 2017 to 9th April 2018?

Deductions pursuant to clause 8.1 [of the Employment Contract]

8. Did the Claimant download confidential information from the Respondent's servers in March 2018, and if so, did he thereby breach his contact of employment?

9. If so, was the Respondent required to repair any damage or loss to the Respondent's property as a result of such action by the Claimant?

10. If so, was the Respondent permitted to deduct the cost of such repair from the Claimant's wages between 30th January 2017 and 9th April 2018?

Pay Statements

11. Was the Claimant entitled to receive pay statement between 3oth January 2017 and the date when his final pay statement was due in May 2018?

12. If the Tribunal finds that the Claimant was entitled to receive pay statements as set out above, then the Respondent concedes that no pay statements were provided.

13. If the Tribunal finds that the Claimant was entitled to receive pay statements, what particulars ought to have been included or referred to in the pay statements so as to comply with the Employment Rights Act 1996?

Holiday Pay

14. Was the Claimant entitled to a payment in lieu of any statutory holiday which he had accrued but which he had not taken as at 9th April 2019?

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