EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Mr A Huddart		**Yvolve Sports Ltd**

Heard at: **London South Employment Tribunal**

On: **18 and 19 September 2019**

Before: **EJ Webster**

Appearances
For the Claimant: Ms C Ibbotson (Counsel)
For the Respondent: Ms D Masters (Counsel)

JUDGMENT

1. The Claimant's claim for unlawful deduction from wages succeeds in part. The Claimant is awarded the gross amount of £8,666.64 unpaid wages.

2. In the alternative the claimant's claim for breach of contract succeeds in part which results in the same award as detailed above.

WRITTEN REASONS

3. Oral reasons were given at the hearing at which the respondent requested written reasons.

The Claims

1. The claimant has brought claims for unlawful deduction from wages in breach of s13 ERA 1996 and in the alternative a breach of contract claim. The respondent denies those claims.

2. In summary, the claim arises from the claimant's assertion that the respondent offered him a promotion, which he accepted and commenced, on the basis that he would be paid an increased salary and become a self-employed contractor. He never received a salary increase or became a contractor. Whether a salary increase had been promised, the amount of that salary increase and the contractual position regarding the claimant's work were all in dispute.

The Hearing

3. I was provided with 4 witness statements and one lever arch bundle of documents. Of the 4 witnesses only 3 gave evidence. Ms Liao resides in China and the respondent decided not to call her in person. I have therefore given her witness statement less weight as the claimant and the tribunal have not been able to challenge that evidence. I heard from the claimant and Mr Connaughton on behalf of the claimant's case and Mr Dohnal (general counsel for the respondent) on behalf of the respondent.

4. On the second day of the hearing the claimant produced additional documents in the form of several pages of emails. His counsel applied for them to be added to the bundle. The respondent had seen one set of the emails during disclosure but not the other. The claimant was unable to properly explain why they had not been included. After a short adjournment respondent's counsel confirmed that she had no objection to the documents being included in the bundle. They were therefore added to the back of the bundle.

Facts

5. I have only made findings of fact that are relevant to my decision.

6. The Respondent is an international company which operates in the wheeled-toy sector designing and selling toys such as scooters and balance bikes for children. It is headquartered in Dublin and employs approximately 45 people with offices in LA and China. The claimant was employed as European Sales Director on 27 June 2016.

7. It was not disputed that the company experienced various shareholder disputes and was suffering significant cash flow issues during 2017. Initially, there were 4 directors – Ms Chen, Ms Liao, Mr O'Connell and Mr Connaughton. In the first part of 2017 three of the directors, Ms Chen Ms Liao and Mr Connaughton developed significant concerns about Mr O'Connell's ability to run the company properly and they suspended him. Shortly after that he left. During the period of suspension, according to the shareholder agreement, the directors were not quorate and could not make decisions requiring 75% or above of shareholders or directors. According to Mr Connaughton, the shareholder agreement was seen as a document that the directors could choose to ignore and they continued running the company without necessarily paying it much attention. I base this finding on the evidence of Mr Connaughton and Mr Dohnal who both accepted that the technical aspects of what the directors did were often done to suit the politics of the situation as opposed to the legal requirements of shareholder and director decision making processes. Whilst this position caused Mr Dohnal concern, he did not dispute that decision making processes were not necessarily by the book at all times.

8. Mr Connaughton, (who gave evidence for the claimant) was the General Manager. He left shortly before the claimant left the company. It was accepted by the respondent's witness Mr Dohnal that during the claimant's employment, Mr Connaughton had authority as General Manager to make decisions regarding who he employed and what salaries they were offered. The other two

directors were based in China and had little to do with the day to day running of the organization. Ms Liao's witness statement also confirms that she only met the claimant twice and had little to do with him.

9. Mr Dohnal also accepted that most employees, including the claimant, would, by December 2017 (i.e. after Mr O'Connell had left), have viewed Mr Connaughton as their boss. The claimant gave evidence confirming that he believed Mr Connaughton was his boss and had authority to make decisions regarding the claimant's employment and salary.

10. During the hearing I was taken to several documents including the shareholder agreement and email correspondence with Mr O'Connell who was subsequently suspended, that any salary increases or offers for a salary over £100,000 ought to have received the permission and 'sign off' from the board and that Mr Connaughton (or the other directors) could not make any such offers without each other's permission. However it was also clear to me that during Mr O'Connell's suspension the board was not quorate and could not have made such a decision in accordance with the rules and that many decisions were made by all the directors without seeking official sign off on all occasions.

11. In closing submissions, Respondent's counsel confirmed that they did not take a point as to whether or not Mr Connaughton had ostensible authority to bind the respondent. They accepted that the claimant was entitled to believe that Mr Connaughton had the ostensible authority to make decisions on behalf of the respondent. Counsel accepted that he did. In any event, even if I am mistaken in my understanding of her submissions, I find, as a matter of fact, that it was reasonable for the claimant to conclude that Mr Connaughton, the managing director and the claimant's boss and a shareholder, had authority to bind the respondent.

12. I therefore find Ms Liao's evidence and the various points that appeared to be made in cross examination about the fact that Mr Connaughton ought to have sought the other directors' permission before making any promotion or pay rise promise irrelevant. I find that it was reasonable for the claimant to believe that Mr Connaughton had the authority to award promotions and offer pay rises because Mr Connaughton was his line manager and was in charge of the day to day running of the business and made similar decisions all the time.

13. In any event I also find that Mr Connaughton had actual authority to make day to day management decisions about how the company was run. I rely on Mr Dohnal's evidence in this regard where he accepted in cross examination that as managing director, Mr Connaughton was expected to take care of the day to day running of the company. In addition it was agreed that the board was not quorate whilst a fourth director was suspended so 'official' signing off could not have taken place in any event.

14. In that context, in December 2017, Mr Connaughton offered the claimant a promotion to become Head of Global Sales. It was accepted by Mr Dohnal that this represented a significant increase in responsibilities including going from one direct report to eight, increased global travel and a significant increase in the sales turnover for which he would be responsible. It was also recognized by

Mr Dohnal that this was an important role within the company. He disagreed with Mr Connaughton's evidence that it was possible the most important position in the business but he did accept that Head of Sales was important even at a time of financial difficulties for the company. Given that Mr Dohnal agreed that the role was important and that sales were an important part of the business model, I accept Mr Connaughton's evidence that increasing sales and getting a good sales team in place was crucial to the survival of the company at that time. I therefore conclude that Head of Global Sales, with its increase in responsibilities, line management, budgetary responsibility and travel requirements was a significant promotion for the claimant and an important job within the respondent.

15. Mr Dohnal disagreed that such a promotion necessarily came with the presumption of a payrise. The respondent's first position was that no offer of a pay rise was made by Mr Connaughton during the conversations about the new role. They said that it was unrealistic given the financial position of the company at the time (its main customer in the US had just gone into administration) and that the claimant and Mr Connaughton were making this up after having left the company.

16. It was put to the claimant at various points that his entire case was based on his personal assumptions as opposed to the reality of what had been offered or actually said or agreed. With regard to the issue of whether a pay rise could be presumed to accompany such a promotion, I disagree with Mr Dohnal in the context of the claimant's position and the company at the relevant time.

17. I accept the evidence of both Mr Connaughton and the claimant that it would have been highly unusual if the offer of such an increased role would not be accompanied by either the offer or the request for a pay rise. I do not accept either that the prospect of the company paying £108k to a senior employee in a crucial role would have been outside the realms of reasonableness. Mr Donahl accepted that other senior positions were paid more at around that time and that this was not a salary outside the realms of possibility even with the cashflow problems at the time.

18. Even if a payrise cannot always be assumed, it is clear from the emails between the claimant and Mr Connaughton that pay was a key issue that was discussed, and it is clear that the claimant wanted more money and Mr Connaughton agreed that more money ought to be received by the claimant in return for doing this new job.

19. I accept that there followed a few discussions, over a few days, regarding the role and the salary attached to that role as opposed to there being a 'bright line' on 15 December. I do not believe that the fact that both witnesses accepted that there was more than one conversation about the issue renders the fact of what was discussed unreliable or their entire version of events unreliable. Nor do I conclude that it means that what was agreed was non specific or just the start of negotiations. I find that they agreed a settled, specific arrangement.

20. The respondent placed weight on the fact that the claimant had said it was all agreed on the 15th and then stepped back from that and said that the conversations took place over several days as going to credibility. I disagree. I conclude that based on Mr Connaughton and the claimant's evidence, several conversations were had regarding the role and how the claimant would be remunerated but that it is perfectly normal for such a discussion to take a little time and that it was finally agreed on 15th December.

21. I find that the pay discussions were along the lines of the fact that the claimant would like to receive as much pay as that which he had earned at the company he worked for before the respondent. We heard from Mr Connaughton that the claimant was 'obsessed' with getting the same amount in his pocket as he had previously received. I believe that it was for this reason that the claimant obtained advice from an accountant as to what this would mean for the company. In light of the advice and information obtained by the claimant the two agreed that the claimant would become a contractor and get paid £108,000. I find that this is confirmed by the evidence I was provided with about what happened next namely:

    (i) Emails at page 374 where the tax implications of the proposal are discussed and Mr Connaughton responds 'ok cool will your build the KPI's and targets in to your spreadsheet too";
    (ii) The claimant set up his own company as a result of the agreement;
    (iii) The claimant started invoicing the respondent for his services;
    (iv) Mr Connaughton sends an email to the finance department confirming that he agreed a £108,000 a year with the claimant for in his new role (p228).
    (v) Mr Connaughton emails Mr Whelan, 'Drew [the claimant] will invoice us in sterling for GBP 9,000 per month.' (p229)
    (vi) Darren Smith emails Kate Foy and Mr Whelan asking "Cormac, do we pay him his increased salary of £108k?" (p238)
    (vii) Mr Connaughton sends another email which says "I want to pay Drew as I agreed 3 months ago."
    (viii) Mr Donahl's witness statement says that Mr Connaughton shouted at him and hit the desk to say that this situation [regarding the claimant's pay and status] had to be rectified. This supports the fact that Mr Connaughton had promised the claimant a payrise and was frustrated that it had not been enacted. I find it implausible to think that Mr Donahl would have witnessed this behaviour had Mr Connaughton not promised the claimant a pay rise.
    (ix) Mr Connaughton's subsequent email to Ms Liao stating that he wanted to pay the claimant £108,000 as a contractor but that the alternative was £160,000 as an employee. (p292).

22. There are more examples in the bundle where it is clear that both Mr Connaughton and the claimant demonstrate that they had agreed, before the claimant took the role, that he would be paid £108,000 by the company.

23. I do not accept the respondent's arguments that the claimant's original claim or Further and Better Particulars of claim are inconsistent with this and show

simply that the claimant assumed he would get a pay rise as opposed to actually being promised one. I do not accept that the inconsistencies relied upon by the respondent's counsel amount to anything which undermines the fact that the claimant believed that Mr Connaughton had offered him a promotion and a pay rise on the basis that it would cost the respondent £108,000.

24. I find that the aim of the agreement was to ensure that the claimant had more money in his pocket but it was also an attractive solution for Mr Connaughton that the claimant got more but cost the respondent approximately the same. It appeared to be a win/win. And when considered in this light it is entirely plausible that this is what Mr Connaughton offered and the claimant accepted.

25. What occurred next is that the claimant never got paid as a contractor because the management committee and the finance department and Mr Donahl would not agree to a change in the claimant's employment status and refused to allow him to be a contractor. There is however no evidence that they objected to him being paid £108,000. Nowhere is there any evidence that this part of the situation caused them concern.

26. There are no clear reasons given in the emails and correspondence at the time as to why parts of the respondent would not agree to the claimant becoming a contractor other than reference to the fact that from a tax point of view this could not be sustained. There was no real reference at the time to the fact that employees cannot just become contractors when everything, apart from how they are paid, remains exactly the same and therefore a contract and pay system that said the claimant was a contractor would not necessarily have had that legal effect. I believe that this is the gist of the objections raised by Mr Donahl though employment status and the issues around it do not appear to be discussed in the emails at the time. The tax implications appear to be everyone's focus.

27. Mr Connaughton refused to accept the arguments around tax and relied upon the advice that the claimant had received that it would not be a problem. Even before the tribunal he could not understand what was wrong with that arrangement. I find that in light of the obstacles put in Mr Connaughton's way, Mr Connaughton adapted his stance to the company and the other directors to try and implement something else other than that which had been agreed with the claimant. He stated that if the company would not make the claimant a contractor it would have to pay him £160,000 to put the claimant in the same position financially as that which he had promised him. This figure seems to come from the accountant's calculations provided to the claimant which state that the cost to the firm of having an employee who earned the equivalent of £9,000 per month. However I accept the respondent's evidence on this point that the calculations seem to lack specificity or any recognition that the claimant, even if he was a contractor, would have had to pay tax on his income.

28. I do not however conclude that this means that the figure of £160,000 as a salary was promised to the claimant as a salary if he remained an employee. Whilst the intention of Mr Connaughton and the claimant was to find a way to ensure that the claimant had more in his pocket, what was agreed was that the

claimant would be paid £108,000. Neither of them, at the time of reaching this agreement, anticipated that there would have been any problem with making him a contractor. I therefore do not find that they agreed that there would be an alternative if the company refused to agree to the contractor status. This is not plausible when these two individuals were not contemplating any problem with him becoming a contractor when the agreement was reached.

29. Although no evidence was given on this point, I suspect that there were conversations where Mr Connaughton stated that the company could not afford the £160,000 that the claimant had previously earned, or that he was unlikely to be able to sell that to the board and that this is why the solution of contractor status was suggested – but that is conjecture and not a factual finding. Nonetheless, my finding is that what was agreed was that the company could and would pay the claimant £108,000 as payment for him performing the role of Global Sales Director.

30. At the point that Mr Connaughton's attempts to move the claimant to being a contractor were thwarted, I find that he then attempted to negotiate with the other board members, to have the claimant's salary increased to £160,000. He wants to provide the claimant with a pay rise and is trying to give them alternatives as the contractor status appears to be the sticking point. However I do not find that this was the agreed wage in October 2017 when the claimant took the job. I think that these emails demonstrate Mr Connaughton trying to exert pressure on his fellow directors to get them to shift their position. I do not believe that this new proposal was ever agreed to by Ms Liao or Mr Jiang nor that it was what was agreed between Mr Connaughton and the claimant as there is no evidence to support this.

31. I do not accept the claimant's case that the email exchange between Mr Connaughton and Ms Liao (p290), dated 9th and 12 April 2018 is proof of agreement by Ms Liao to that arrangement. I accept that she states that the claimant should remain on payroll but not the amount that was outlined by Mr Connaughton. She says that she will set out the reasons for her response later – though it appears that this did not happen. Certainly, the claimant was never put onto the payroll at this amount and there is no further written evidence of what Ms Liao's intentions were.

32. It is also clear that Mr Connaughton did not believe that Ms Liao had unequivocally agreed to that being the salary because he then emails Mr Jiang at page 305 in or around 25 April and asks for his approval – reverting back to the original agreement that the claimant become a contractor.

33. I also conclude that this 'alternative' arrangement of paying his as an employee at £160,000 was implausible based on the respondent's argument that such a significant pay rise was not likely in the circumstances, (even by Mr Connaughton to a friend) against the financial backdrop of the company at the time. I agree that this level of pay rise is huge and was unlikely in the circumstances. This is another reason as to why I do not find it formed the basis for the agreement between the claimant and Mr Connaughton on or around 15 October 2017 when the claimant accepted the job.

34. I find that the settled position, that commenced from when the claimant took the new job on 1 January 2018 was that the claimant would be a contractor on £108,000 but when the contractor status was rejected by the company, Mr Connaughton tried to find alternative ways to pay the claimant more. Those attempts were never agreed to nor were they communicated to the claimant has having been agreed. There is no evidence that Mr Connaughton told the claimant that he would be paid £160,000 as an employee if the contractor position fell through either at the time the agreement was reached or subsequently.

Conclusions

35. Both counsel gave written and oral submissions. The claimant's claim stated that he was entitled to the salary of £160,000 as an employee and that these were wages properly payable. Ms Ibbotson submitted that Mr Connaughton had authority to bind the respondent. The submissions outline that the entitlement was to £160,000 but no alternative argument was made as to what would happen if, as I have found, the agreement was for the company to pay £108,000 as opposed to £160,000. I put this to Ms Ibbotson who stated that this would simply mean that the claimant had still suffered unlawful deductions from his wages, but a lesser amount.

36. The respondent gave submissions which covered a number of points. Their primary position was that no such agreement had been reached between the claimant and Mr Connaughton and that the negotiations had been vague, that a pay rise of that magnitude would not have been agreed to by the respondent given the financial circumstances. In the alternative, Ms Masters stated that if I made the findings of fact that I now have, because the claimant remained an employee, the contract binding the respondent to pay £108,000 was never completed because an essential part of the contract was that the claimant became an employee. The payment of £108,000 was conditional on the claimant becoming a contractor which had never transpired. there is no breach because the contract was never finalized.

37. I also gave Ms Masters the opportunity to comment on the possibility that if I found that the agreement was that the company would pay £108,000 what would that mean. Her response was outlined primarily at paragraphs 20-25 of her closing submissions. Namely that whilst there may have been an agreement in layman's terms there was not finalized agreement in a contractual sense so as to give rise to a pay rise. Had there been, and the claimant had become a contractor, then she would have addressed me on illegality arguments because of the suggestions by the respondent that the intention of the agreement was to avoid tax by both the respondent and the claimant. However she did not make those illegality arguments because the contract had never occurred.

The Law

38. A binding contract is formed between two parties if there is an offer by one party, acceptance by the other and consideration provided.

39. An offer is a promise by one party to enter into a contract on terms. It must be specific, complete, capable of acceptance and made with the intention of being bound by acceptance. Acceptance is a final and unqualified assent to an offer. Consideration is the something given in return by a promise in return for the offer he has been made.

40. *Section 230(1)* of Employment Rights Act (ERA) 1996, an employee is defined as:
"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

41. *section 230(2)* of ERA 1996, a contract of employment means:
"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

42. s 13 **ERA 1996 -** Right not to suffer unauthorised deductions.

(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.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Analysis and conclusions

43. I have found as a matter of fact that the claimant was offered the role of Global Head of Sales at the rate of pay of £108,000 per annum. It is not in dispute that he never became a contractor and remained an employee.

44. The law of contract requires there to be an offer, acceptance and consideration to form a binding contract. The claimant was offered the new role at a certain pay rate, he accepted that role on that basis and gave consideration to that contract by starting the job and carrying it out until his resignation 5 months later.

45. I believe that the correct approach is to consider whether the claimant's employment status was an indivisible part of the contract that could not be separated from the pay. Were the two parts of the contract entirely reliant upon each other as argued by the respondent or can the pay part of the contract be separated from the claimant's employment status?

46. If there was, as I have found, a completed and settled agreement that the claimant was to be paid £108,000 does it matter that the claimant's employment status did not change? I conclude it does not. I have found that Mr Connaughton agreed to the pay increase because it would cost the company £108,000. Although the aim was also that the employee would increase the take home pay in his pocket, Mr Connaughton's offer was based on how much it was going to cost the respondent and what they could reasonably afford in all the circumstances. I have found that he did not agree to pay the claimant £160,000 either at the time at which the contract was agreed in October 2017 or subsequently. His approaches to the fellow directors and others within the respondent to pay the higher amount were initially him changing tack to try and ensure that the claimant did become a contractor and because he knew that this is what the claimant was hoping to achieve – not because this was the amount that he had promised to the claimant. That amount was an unrealistically high pay rise for the role and for the company in taking into account the pay rates of everyone else within the company and the company's financial situation at the time. Mr Connaughton had told the claimant that the

respondent agreed to pay £108,000. The claimant accepted this offer and gave consideration by starting the job. The fact that the claimant's employment status did not change does not undermine that contractual promise to the claimant that the new role of Global Sales manager would be paid £108,000 by the company.

47. I reach this conclusion for two reasons. Firstly I do not find that either the claimant or Mr Connaugton were aware that switching to a contractor status was not possible in the circumstances. The Claimant's accountant had advised them that it was possible and neither had any reason to doubt it as others within the company also worked as contractors. They did not know that simply signing a contract that called the claimant a contractor would not necessarily change the claimant's employment status. This is clear from the level of frustration demonstrated by Mr Connaughton both at the time and in front of the tribunal as to why this arrangement had never been enacted by the respondent.

48. The second reason I reach this conclusion is that the claimant would have remained an employee even if he had signed a self-employment contract. So even if the respondent had honoured the entirety of the promise to pay the claimant £108,000 as a contractor, the claimant would lawfully have been an employee and both the company and the claimant would lawfully have been liable to pay the relevant PAYE tax and other deductions in any event.

49. Regardless of the label the claimant might have been given he was only ever entitled to be paid as an employee because even if Mr Connaughton and the claimant had achieved their aim, the claimant would have in reality remained an employee. All that was changing under their plan was the claimant's label. Although I was not addressed by either party on the law around employment status because it was accepted by everyone that the claimant remained an employee at all times. However I have considered it because I think it is relevant to what would have happened if the claimant had signed a self-employed contract to establish that this part of the contract and whether it was completed is, in essence not relevant to whether the claimant was entitled to a pay rise.

50. The Court of Appeal in Carmichael v National Power Plc [1999] 1 WLR 2042 held that, in establishing the terms of agreement between the parties, the tribunal should be able to look outside the terms of the contract to the "overall factual matrix". In Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC) it was held that a tribunal is also entitled to look at the true agreement between the parties. In Uber BV v Aslam [2018] EWCA Civ 2748, the majority of the Court of Appeal relied on Autoclenz in finding that Uber drivers were workers, contrary to the complex written documentation which indicated that Uber acted only as an intermediary. Autoclenz states that in determining the true nature of the relationship between the parties, the court may disregard the terms of any documents generated by the employer which do not reflect the reality of what is occurring on the ground.

51. In summary, the written contract is not sufficient to determine someone's employment status. Therefore, if the claimant had signed a self employed contract he would only have been entitled to be paid £108,000 as an employee and it is therefore this figure which I have used in calculating his losses.

52. I do not accept the respondent's argument that simply because there was no written 'bottomed' out contract between the respondent and the claimant, it meant that Mr Connaughton could not and had not bound the company to take the claimant on as a contractor and pay him accordingly. They state that the two parts are indivisible and the pay rise was conditional on the change to the claimant's status.

53. I do not agree. Mr Connaughton promised the claimant a pay rise. Whilst I accept that both he and the claimant believed that it would be on the basis of the claimant becoming a contractor, their mistaken understanding of the law around employment status does not mean that the respondent did not offer and the claimant did not accept and start a new job with an agreed pay rise.

54. Further, and in the alternative, if they are indivisible, it is arguable that the respondent has in fact breached the entire contractual promise of enabling the claimant to become a contractor paid at £108,000. They did not deliver on either part of that promise. They are therefore in breach of that 'whole' contract and the claimant is entitled to the losses he has suffered as a result. The respondent stated that any such arrangement would have been unlawful but did not make submissions on this point because they felt that this was never the position that had arisen as the claimant had never become a contractor and remained an employee. I have heard little or no evidence that the contract was unlawful other than the emails in evidence as to why the management committee did not want to make the claimant a contractor. I am therefore not in a position to make that finding as it was not put to either of the claimant's witnesses. Mr Connaughton and the claimant being mistaken about how someone becomes self-employed does not automatically render a contract unlawful.

55. However I do find that the claimant would only be entitled to receive the losses he would have actually suffered as a result of that breach of contract, namely the difference in pay that he would have been entitled to be paid as an employee and the wages he actually received. Given that he remained an employee and would have remained an employee in all possible scenarios, regardless of whether he signed a bottomed out self-employed contract or not, he would only be entitled to the losses subject to PAYE deductions.

56. The claimant was entitled to be paid wages in accordance with s13 ERA. The respondent failing to do so at the agreed increased amount for his new role was an unlawful deduction from wages and in the alternative a breach of contract.

Remedy

57. Based on my above conclusions the parties agreed that the figures set out in the respondent's schedule of loss were correct and could be adopted as the basis for calculating the claimant's losses.

58. It was therefore agreed that on the basis of my conclusions the claimant was underpaid by an annual gross figure of £13,000 based on the difference between £108,000 gross, and the amount he was actually paid namely £95,000 gross.

59. His monthly losses were therefore is 1/12 of £13,000 gross = £1,083.33. He was underpaid between 1 January 2018 and his termination date of 31 August 2019. His gross losses are therefore 8 x £1083.33 = £8,666.64.

60. The Respondent is ordered to pay the claimant the gross figure of £8,666.64 as an unlawful deduction from wages. Such a payment is subject to the normal PAYE deductions.

Employment Judge Webster
17 September 2019