EMPLOYMENT TRIBUNALS

Claimant: **Mr K Hayter**

Respondent: **Dearden Motorcycles Ltd**

Heard at: **Southampton, by telephone** **On: 1 May 2020**

Before: **Employment Judge Dawson**

Representation
Claimant: In person
Respondent: Mr Hewitt and Mr Hewitt, directors.

JUDGMENT

The claimant's claims are dismissed.

REASONS

Preamble to the Reasons.

The hearing was conducted by the parties attending by telephone. It was held in public in accordance with the Employment Tribunal Rules. The Judge was at the Southampton Employment Tribunal and no members of the public attended. It was conducted in that manner because a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restriction)(England) Regulations 2020 and it was in accordance with the overriding objective to do so. Both the claimant and the respondent sought to have an additional person present throughout the hearing (in the case of the claimant his witness, Mrs Howell and in the case of the respondent, its accountant), they were joined to the hearing by telephone,

Background & Conduct of the Hearing

1. By a Claim Form presented on 30 August 2019, the claimant has presented a claim for £30,000, which he described as being made up of £10,000 for a bonus, originally payable in 2009/10 and £20,000 for non-payment of holiday pay over the years 2010 to 2018.

2. In box 8.1 of the Claim Form, where the claimant was asked to indicate which types of claim he was bringing, he ticked boxes to say that he was owed holiday pay and arrears of pay. He did not say that he was making another type of claim which the tribunal can deal with. The Claim Form did not expressly suggest that the claimant was bringing a breach of contract claim although box 8.2 did refer to an agreement in December 2018, followed by a confirmatory email. For case management purposes the tribunal had not treated the claim as being one of breach of contract.

3. At the outset of the hearing, I asked the claimant whether he was intending to bring a breach of contract claim. After some discussion, in which he initially said that the tribunal had decided how his claim should be put and I invited him to look at box 8.1 of the ET1, the claimant explained that he did not have a breach of contract claim in mind until I had mentioned it, but that he thought that, maybe, his claim was one breach of contract. He had intended to only bring a claim for arrears of pay and non-payment of holiday pay as set out in the ET1.

4. I asked the claimant whether he was applying to amend his claim to bring a breach of contract claim but, explained, that if he did so, the respondent may be given the opportunity to present a counterclaim against him, if it wanted to. Although, at that stage, I had not, in mind, any particular counterclaim which the respondent might want to bring, as the hearing unfolded it became apparent to me that there was an issue between the parties as to whether the claimant owed the respondent certain sums in respect of an R1 motorbike to a value of £18,950 and, possibly, for an earlier motorbike which the claimant had taken possession of. In any event, the claimant told me that he did not wish to apply to bring a breach of contract claim and the case proceeded on that basis.

5. As indicated above, the case was conducted by way of telephone hearing having regard to the restrictions on movement due to the coronavirus pandemic. I heard evidence from the claimant, Mrs Howell for the claimant and Mr A Hewitt for the respondent. The respondent was represented by both Mr A Hewitt and Mr N Hewitt.

6. The claimant had not complied with the tribunal's directions of 14 November 2019 which had required him to set out a schedule of loss within 28 days. The claimant had, however, sent an email dated 29 April 2020 in which he had set out some figures which are an apparent attempt to explain why the claim of £30,000 is reasonable.

7. The directions also required witness statements to be exchanged no later than 7 days before the hearing. The email dated 29th of April 2020 might be said to amount to a witness statement from the claimant. He had also sent some documents attached to an email on 29 April 2020. There was an email which did amount to a witness statement from Mrs Howell dated 29 April 2020.

8. The respondent had provided no witness statements. It had sent a bundle of documents running to 28 documents.

9. Neither side objected to the other giving evidence and I heard evidence from Mr Hayter which went beyond his witness statement, evidence from Mrs Howell and also evidence from Mr A Hewitt.

10. The witnesses gave evidence after taking the Affirmation and were cross-examined. I imposed a timetable on the cross examination of the witnesses, although as the hearing progressed I did not insist that it was stuck to. Cross examination of the claimant went beyond the time permitted. Cross examination of Mrs Howell and Mr Hewitt finished before the timetabled time.

The Issues

11. At a high level, and based on the ET1 and ET3, the issues in this case are

    a. whether the claimant was owed the sums that he asserts of £10,000 and £20,000,

    b. whether he was paid those sums,

    c. if not, when they should have been paid to him,

    d. whether those sums are recoverable in the employment tribunal as wages and/or holiday pay.

12. The claimant's email of 29 April 2020 might be read as raising more claims than those for £10,000 and £20,000. At the outset of the hearing, Mr Hewitt sought clarification as to precisely what claims the claimant was pursuing. Mr Hayter thought his position was plain but clarified that the claim was for the £10,000 and £20,000 referred to in an email of 23 December 2018 (document no. 4 of his documents).

13. At a more detailed level, as the hearing went on, it became apparent that there was a dispute as to;

    a. how much the claimant had been paid over the years,

    b. what dividends had been paid to the claimant over the years,

    c. whether a bonus of £10,000 (or £10,750) had been paid to him in 2009/2010,

    d. what salary entitlement the claimant had since 2009,

    e. whether the claimant had taken an R1 motorbike without paying for it from the respondent.

14. However, as is apparent from the reasons below. It has not been necessary for me to resolve all of those issues

Approach to the Evidence

15. All of the witnesses that I heard from were credible. They were all, seemingly, convinced by the truth of what they were saying and I do not believe that would have been different had the hearing taken place face-to-face rather than over the telephone.

16. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J gave the following helpful guidance

> *Evidence Based On Recollection*
>
> **[15]** An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> **[16]** While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> **[17]** Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called “flashbulb” memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description “flashbulb” memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> **[18]** Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been “refreshed” by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

[21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

[22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and

> known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

17. I have approached the evidence in that way, whilst reminding myself also, that one may find less contemporaneous documents in an employment relationship than a commercial one.

Findings of Fact

18. The claimant has worked for the respondent since 1 December 2007. He did not take a significant number of holidays during the period he worked for it. Mr A Hewitt and Mr N Hewitt were directors of the respondent.

19. I find that until 2009 the claimant was paid an annual salary of £40,000 per annum. In 2010, an increase in the claimant's salary was agreed so that he was paid £43,333 per annum. That was the claimant's evidence and is consistent with the respondent's document number 9.

20. The claimant says that for 2009/2010 it was agreed that he would be paid an additional bonus of £10,750 and that thereafter a salary increase was agreed of the same amount. That, it seems to me, is consistent with the email dated 28 February 2010 (respondent's document 3) which shows that Mr Nigel Hewitt was suggesting that for the year 2009-2010 a bonus of £10,750 would be paid as a one off payment. It states "2009 – 2010 Financial year (just closing). Salary approx 43K pounds, so far no holiday taken and no holiday pay compensation, and no bonus awarded. My suggestion for 2009 – 2010 is bonus is 25% of salary i.e. £10,750 as a one-off payment based on the over performance against budget for the year"

21. The email goes on to state "going forward in 2010/2011 financial year we should just roll the bonus above into your salary and pay this monthly. The assumption being is that we will achieve growth and budget each year as we have so far. We need to make an offer for the 5 weeks holiday you haven't taken in 2009 – 2010. Based on the fact that we haven't sold the 2008 R1 yet that you purchased in 2008 it is difficult to understand how we offer the same deal this year with a 2010 R1 trade in… What we do need to ensure is you are getting your holiday going forward!!. That email ends "I confirm that we are getting some legal documents to finalise for you a 2% ownership of the business."

22. Document 9, in which the respondent has set out what it says the claimant was paid, shows that for;

a. the year ending 31 March 2010 (i.e. the financial year 2009-2010) the claimant was paid £43,333,

b. for the year ending March 2011 (i.e. 2010 – 2011) the claimant was paid £54,700

c. for the years ending March 2012 & 2013 the claimant was paid £54,700.

23. That document does not show that the claimant was paid a bonus of £10,750 for the year ending 31 March 2010. I find that the bonus was never paid.

24. On 23 December 2018, Mr A Hewitt, for the respondent, wrote to the claimant stating "Dear Kevin I can confirm that Dearden Motorcycles will pay you via dividend payments

    1/ £10,000 bonus going from 2009/2010

    2/£20,000 holiday pay not taken 2010 to 2018 inclusive.

    Dearden Motorcycles will endeavour to pay this through 2019"

25. On the face of the claimant's document number 4 (on which this email appears), the email was written in response to an earlier email sent by the claimant in which he wrote "Hi Andy, thank you for my gift and for getting the wages done. If you get a minute could you email me what was agreed taking into account what I said about the 9K for my bike that was sold, thank you. Have a great Christmas"

26. Those sums were not paid and, in June 2019, the claimant resigned.

27. On 23 July 2019 Mr Hewitt wrote to the claimant stating "On reflection, Nigel and I have decided not to pay you any other monies… Over the years you were managing the company, we have given you 3 Yamaha… motorcycles as incentive payments on top of your annual wage..."

28. Mr Hewitt told me, today, that he had only sent the email of 23 December 2018 because he felt badgered by the claimant to do so, particularly on the day before he sent it. However, once he had sent it, in February 2019, he had a meeting with his accountant who told him that the bonus had already been paid. He also, he says, realised that the claimant had taken an R1 motorbike with a value of £18,950 on 15 December 2018 without accounting for it. However, Mr Hewitt told me that he had not raised those matters with the claimant at all before his resignation.

29. In answer to the point about the R1 motorbike, the claimant told me that, in fact, Mr Hewitt had agreed to him taking that motorbike because money which should have been paid to Mr Hayter, in respect of a previously sold motorbike, had not been paid to him and had been left in the company. The claimant adduced an invoice from 15 December 2018 which had, handwritten on the bottom, "payment in full authorised by Andy Hewitt" and a signature. Mr Hewitt says that is not his writing, he was unaware of it and it is not his signature.

30. Having regard to the documentation, I am unpersuaded by Mr Hewitt's evidence. Whilst I do not go as far as finding that he has not been honest with me, I think his recollection has changed over time, probably in the light of the claimant's resignation. I cannot reconcile the silence from Mr Hewitt towards the claimant between 23 December 2018 and July 2019 about the sums that Mr Hayter claims with what Mr Hewitt says was going on. If Mr Hewitt had felt badgered into sending the email of 23 December 2018 and had then been told by his accountant that the bonus had, in any event, already been paid, it is surprising that he did not write to the claimant retracting the email of the 23 December 2018. Not only did he not write to the claimant but, on his own evidence, he did not discuss it with the claimant. The letter which he sent on 23 July 2019 makes no reference to either being badgered to send the earlier email or to having already paid the bonus which dated back to 2009/10.

31. On the evidence before me, I find that the respondent's email of 23 December 2018 recorded a voluntary agreement whereby the respondent agreed to pay to the claimant a £10,000 bonus, based on the unpaid bonus from 2009/10 and the sum of £20,000 representing untaken holiday. However, that email did not simply record the sums which were owed to the claimant at that time in respect of the bonus from 2009/10 or untaken holiday. It is clear that the sums which the respondent agreed to pay were reached as a result of discussions between the claimant and the respondent. The agreement in respect of the bonus was, in fact, £750 less than had originally been agreed for the year ending March 2010 and it is not suggested by either party that any detailed calculations were carried out in respect of the untaken holidays between 2010 and 2018. Indeed, during the course of the hearing, Mr Hewitt stated (and I accept) that no detailed records existed in respect of Mr Hayter's holiday. Moreover, as is clear from the earlier email sent by the claimant on 23 December 2018 the agreement took into account "9k for my bike that was sold"

32. Whether a claim in respect of the bonus and holiday pay would have been legally enforceable by the claimant at that time might be doubtful. The claim in respect of a bonus may have been statute barred, even in the County Court, and the Working Time Regulations 1998 only allow for leave to be taken in the year in which it is due and do not allow pay in lieu of holiday not taken, except where the worker's employment is terminated.

33. Nevertheless, enforceable or not, I find a contract agreement was reached in December 2018 whereby the respondent agreed to pay the claimant the sum of £30,000.

34. Mr Hewitt confirmed in his evidence that no part of the £30,000 was paid in 2019 and I find that no payment of it has been made.

35. Importantly, for the purposes of this judgment, the agreement states that the sums will be paid via dividend payments.

36. It is necessary to make findings on, and explain, the statement of "pay you via dividend payments" in the email of 23 December 2018.

37. As the respondent's document 9 shows (and the claimant agrees) sometime between 2010 and 2013 he was given a shareholding in the company. From 2013 a small part of the money which the claimant was paid each month was paid by salary (and is shown at document 9 as PAYE) and the larger part was paid by dividend payments of £2500 per month (except in respect of 3 months when the claimant was not given any dividend payments but had an increase in his PAYE payments to assist him in remortgaging a property.)

38. The claimant told me, and I accept, that being paid in that way was advantageous to the company. He also told me that, as a consequence of the way that he was taxed, his gross pay declined. That can be seen from document 9 which shows that for the year ending March 2013 his gross payments amounted to £54,700 but for the year ending 31 March 2014 his gross payments totalled £39,600. He told me that the net amount of money he received did not change because he was taxed differently in relation to dividend payments than he would have been in relation to PAYE payments. Thus, it is apparent that both parties treated the sums being paid to the claimant differently for the purposes of accounting to HMRC depending upon whether they were classed as salary (PAYE) or dividend payments..

The Law

39. The Employment Rights Act 1996 contains the following relevant sections

> **13.— Right not to suffer unauthorised deductions.**
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> (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.
>
> …
>
> (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.

23.— Complaints to employment tribunals.

(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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an [employment tribunal][2] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under

section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

…

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint

27.— Meaning of "wages" etc.

(1) In this Part *"wages"*, in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,
(c) statutory maternity pay under Part XII of that Act,
(ca) [statutory paternity pay][2] under Part 12ZA of that Act,
(cb) statutory adoption pay under Part 12ZB of that Act,
(cc) statutory shared parental pay under Part 12ZC of that Act,
(d) a guarantee payment (under section 28 of this Act),
(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),
(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,
(fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act,
(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,
(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and
(j) remuneration under a protective award under section 189 of that Act,
but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a

loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker.

40. The following regulations are in the Working Time Regulations 1998

13 Entitlement to annual leave

…

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) [subject to the exception in paragraphs (10) and (11),] it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated

14 Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

16 Payment in respect of periods of leave

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.

30 Remedies

(1) A worker may present a complaint to an employment tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—

…

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) [Subject to [regulations 30A and [regulation] 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

41. In *Nosworthy v Instinctif* [UKEAT/0100/18/RN], a claim was made in respect of deferred consideration for shares by an employee. The EAT held

"[**52]** However, in our judgment the claim of the Claimant for payment of or in respect of her earn-out shares and loan notes does not fall within *ERA s* 23 as a deduction from wages within the meaning of s 27. Section 27 provides that wages mean:

"… any sums payable to the worker in connection with his employment …"

including "any fee, bonus, commission, holiday pay or other emolument referable to his employment" but excluding by reason of s 27(2)(e) "any payment to the worker otherwise than in his capacity as a worker". Whilst the claim in respect of earn-out shares and loan notes could be said to be payable in connection with employment, they are deferred consideration for the sale by the Claimant of her shares in COL. They were provided to the Claimant as a vendor of shares, not in her capacity as a worker.

42. Foskett on Compromise provides as follows “An unimpeached compromise represents the end of the dispute or disputes from which it arose. Any issues of fact or law that may have formed the subject matter of the original dispute are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action” (9th edition, para 6-01) .

43. Regulation 35 of the Working Time Regulations 1998 and section 203 Employment Rights Act 1996 restrict the ability of parties to contract out of the right to bring a claim in the employment tribunal.

Conclusions

44. Both the initial claim for a bonus and the initial claim for holiday pay for the period 2010 to 2018 were claims made by a by the claimant in his capacity as a worker. However, leaving aside for a moment the impact of regulation 35 of the Working Time Regulations 1998 and section 203 Employment Rights Act 1996, the effect of the agreement reached in December 2018 would be to compromise those claims into a new contract. That contract did not simply record the sums that were due to the claimant in his capacity as a worker but, instead, agreed different amounts which would be payable to the claimant, taking into account what the claimant had said about £9000 for his bike that was sold.

45. Significantly, that contract provided that the sums would be paid to the claimant as dividends. Dividend payments could only be paid to the claimant in his capacity as a shareholder.

46. Thus, the sums payable under the agreement of 23 December 2018 were not sums payable to the claimant in his capacity as a worker. They are the product of a compromise and are sums due to him in his capacity as a shareholder.

47. In those circumstances they are not recoverable under section 23 Employment Rights Act 1996 since section 27(2) of the Act provides that payments to a worker otherwise than in his capacity as a worker are excluded from the definition of wages for the purpose of section 23 of the Act.

48. Moreover, although the sum of £20,000 referred to in the email 23 December 2018 has been calculated by reference to holiday not taken between 2010 and 2018, the claim before this tribunal for that sum is not properly characterised as a claim under the Working Time Regulations. It is a claim for the sums agreed in compromise of the claimant’s claim for compensation for untaken holiday. In the words of Foskett, the issues of fact or law that may have formed the subject matter of the original claim for holiday pay are buried beneath the surface of the compromise.

49. Although the claimant did not put his claim in this way, I have considered the impact of regulation 35 of the Working Time Regulations 1998 and section 203 Employment Rights Act 1996 (which restrict the ability of parties to contract out of the right to bring a claim in the employment tribunal). The effect of those sections would enable the claimant to ask the tribunal to

ignore the compromise agreement of 23 December 2018 and simply consider his actual claims in respect of a bonus and for holiday pay.

50. If I were to ignore the compromise agreement, the claimant's claim for a bonus would be as a worker but it would date back to 2009/10. In those circumstances, at the point where the claim was presented, it would have been very significantly out of time, in that it was not presented within 3 months of the date when the payment was due. The claimant has not suggested that it was not reasonably practicable for him to prevent the claim in time. Thus, a claim under section 23 Employment Rights Act 1996 in respect of a bonus from 2009/10 could not succeed because the tribunal lacks jurisdiction to determine it. Moreover s23(4A) of the Act prevents the tribunal considering so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of 2 years ending with the date of presentation of the complaint. That would be the case here.

51. In respect of the claim in respect of holiday pay, the claimant has presented no calculation of how the claim for £20,000 is made up. The email of 29 April 2020 sets out an "illustration" of holiday that the claimant has not taken since 2016, but the sums set out there do not amount to £20,000 and include a sum for 2019. The claimant's evidence was that he rarely took holiday and his claim was in respect of untaken holiday, rather than taken but unpaid holiday. However, as indicated above, under the Working Time Regulations, the basic holiday entitlement must be taken in the leave year in which it is due; it cannot be carried forward. There is no suggestion that, in relation to additional statutory leave, there was any agreement which allowed holiday to be carried forward Indeed the letter of 28 February 2010 (respondent's document 3) suggests that the respondent's intention was to pay for untaken holiday rather than allow it to be carried forward, notwithstanding that under the Working Time Regulations, a payment cannot be made in lieu of untaken holiday,

52. A claim must be presented to the tribunal within 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted. There is no basis under the Regulations to have regard to a series of deductions. Although there is some jurisprudence to suggest that a tribunal may need to adopt a purposive construction to the Regulations if an employee is prevented from taking leave or his/her employer will not pay holiday pay, the claimant has no suggested that. Indeed, as indicated, the letter of 28 February 2010 suggests that, if anything, the employer was encouraging the claimant to take his leave and be paid for it.

53. In those circumstances, as the Working Time Regulations stand, except in relation to untaken holiday in the year in which the claimants' employment terminated, no claim could succeed in this tribunal.

54. The claimant resigned in June 2019. As he made clear at the outset of the hearing, his claim is only in relation to sums set out in the agreement of 23 December 2018. That agreement only relates to holiday up to 2018. It does not relate to holiday in 2019. Indeed, the claimant's email dated 29 April 2020 states that he had 2 days of unused holiday in 2019 and on his own

case he was paid for 5.5 days in his final pay slip, suggesting that there is no claim in respect of 2019.

55. Thus a claim under the Working Time Regulations could not succeed.

56. In those circumstances, the claim must be dismissed. However, I observe that does not mean that the claimant has been deprived of the benefit of a remedy in this case. He has chosen, at this stage, to not bring a claim for breach of contract. Such a claim could have been bought in either the County Court or the Employment Tribunal. Whilst there may be various procedural hurdles to bringing a breach of contract claim in the Employment Tribunal now (and any claim would be limited to £25,000 in any event), the limitation period for bringing contract claims in the County Court is 6 years.

Employment Judge Dawson

Date: 11 May 2020