EMPLOYMENT TRIBUNALS

Claimant: **Mr. J Ashman**

Respondent: **Linear Insulation Limited**

Heard at: **Nottingham**

On: **5th & 6th October 2020 – By Cloud Video Platform**
22nd October 2020 (In Chambers)

Before: **Employment Judge Heap (Sitting Alone)**

Representatives

Claimant: **In person**
Respondent: **Mr. P Nicholson - Solicitor**

RESERVED JUDGMENT

1. The claim of unauthorised deductions from wages is not well founded and it fails and is dismissed.

2. The Respondent failed to provide the Claimant with a statement of initial employment particulars contrary to Section 1 Employment Rights Act 1996. No award is made under Section 38 Employment Act 2002.

3. The Claimant is Ordered to pay costs to the Respondent in the sum of £2,647.40 in respect of case number 2601493.2019.

REASONS

BACKGROUND AND THE ISSUES

1. This is a claim brought by Mr. John Ashman (hereinafter referred to as "The Claimant") against his now former employer, Linear Insulation Limited (hereinafter referred to as "The Respondent").

2. There were originally two claims against the Respondent. The first set of proceedings was commenced whilst the Claimant remained in the employment of the Respondent and was issued by way of a Claim Form dated 30th April 2018. That claim, which is the only one with which I am concerned, was for unauthorised deductions from wages contrary to Section 13 Employment

Rights Act 1996 ("ERA 1996") and a failure to provide a statement of employment particulars contrary to Section 1 ERA 1996 ("The First Claim"). The First Claim was presented following the Claimant having entered into ACAS Early Conciliation on between 27th February 2019 and 10th April 2019.

3. Following the commencement of those proceedings the Claimant presented a further Claim Form on 15th May 2019 after his employment with the Respondent had come to an end following his resignation on 9th November 2018. That Claim Form raised complaints of unfair dismissal and discrimination relying on the protected characteristic of race ("The Second Claim"). The Second Claim was struck out by Employment Judge Jeram by way of a Judgment sent to the parties on 10th January 2020 following hearings on 29th November 2020 and 9th January 2020. That later became the subject of an application for costs made by the Respondent on 14th February 2020. At the direction of Employment Judge Jeram that application was set down to be determined at the conclusion of this hearing. I have therefore heard submissions from the parties on that matter and I deal with it further below.

4. However, I raised with the Claimant at the outset of the hearing that certain parts of his witness statement appeared to deal with matters which were dealt with within the Second Claim and I stressed to the parties that the only matters that I would be dealing with were those within the First Claim.

THE HEARING

5. The hearing was held by way of Cloud Video Platform ("CVP"). That was partly due to the ongoing Covid-19 pandemic and partly because the Claimant had applied to have the case transferred to a region more proximate to his home address in Cambridge. That application was refused but it had been made for various reasons, including the Claimant's childcare responsibilities. Further accommodation was made to take account of those responsibilities by adjourning the hearing between 2.50 p.m. and 4.15 p.m. each day to enable the Claimant to collect his children from school.

6. Whilst I am ultimately satisfied that we were able to undertake an effective hearing, it is fair to say that there was a certain amount of technical difficulty on 5th October with regard to Mr. Nicholson's connectivity onto the CVP platform. That, the need for a morning to be spent on reading into the statements and documents and the adjournments referred to above caused delay so that it was not possible to deliver Judgment orally and it was accordingly reserved.

7. During the course of the hearing I heard from the Claimant who gave evidence on his own account. On behalf of the Respondent I heard evidence from Simon Baker, a Project Manager engaged by the Respondent; from Christopher Fretwell the Respondent's Contracts Manager and from Rebecca Dodsley, the Respondent's Finance Director.

8. I make my observations in relation to matters of credibility in relation to the witnesses from whom I have heard below.

9. In addition to the witness evidence that I have heard I have also paid careful reference to the documentation to which I have been taken to during the course of the proceedings and which includes a hearing bundle running to just over 500 pages. I would observe that despite the bundle being that

voluminous I was in fact only taken to a handful of documents within it and it is a pity that the parties could not have agreed a more slimline bundle.

10. I was also provided by the Claimant with a recording that he had made of a discussion with Mr. Baker. Whilst I listened carefully to that recording, it ultimately had little, if any, relevance to the issues that I was required to determine.

CREDIBILITY

11. One issue that has to some degree informed my findings of fact is the matter of credibility and I therefore will say a word about that matter now. I begin with the Respondent's witnesses. On the whole I considered all three witnesses to be reliable and credible witnesses. Their evidence was to the point and consistent both with their witness statements and with the contemporaneous documentation. The Claimant suggested that there had been collusion in respect of preparation of the Respondent's statements and put that position to Messrs. Baker and Fretwell. I accept their evidence that they made their witness statements independently and the matters relied upon by the Claimant as to dates and the use of certain terms did not suggest to me any collusion. They simply reflected a recollection of the period of time in question.

12. I turn then to the position with the Claimant. I found him to be a less impressive witness. His evidence was at times evasive when difficulties with his case were pointed out; often at odds with both the documentation in the hearing bundle and, on occasion, his own case. I say more about those matters below. I also found some aspects of the Claimant's evidence to lack credibility. That included a suggestion never made before that he had had price work taken away from him either because he had brought the First Claim or because the Respondent believed that he would do so. That, however, cannot possibly be correct because the First Claim was all about having work taken away from him and so that could not possibly be the cause of the very event about which he was complaining. It was also wholly inconsistent with how he had put the case previously. Again, I say more about that below.

13. Similarly, I found the Claimant to lack credibility in respect of the fact that his own schedule of loss set out that his last week on price work had been the week commencing 14th January 2018 but his evidence was that in fact that he undertook and claimed for price work in the following week and possibly for some time thereafter. His explanation for why he had written "outstanding" metreage on his invoice for the following week was that this was for metreage in the week commencing 15th January but did not come up to scrutiny when he had never written that previously and it also included a claim for an hourly rate of pay. Again, I say more about that below.

14. Therefore, unless I have expressly said to the contrary, I have preferred the evidence of the Respondent's witnesses to that of the Claimant.

THE LAW

15. Before turning to my findings of fact I remind myself of the law which I am required to apply to each of those facts as I have found them to be.

Unauthorised deductions from wages – Section 13 ERA 1996

16. Section 13 ERA 1996 provides for protection of the wages of a worker as follows:

“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.”

FINDINGS OF FACT

17. I turn now to my findings of fact based on the evidence that I have seen and heard during the course of this hearing. I should observe that I have confined my findings of fact to those matters which are relevant in order to make a proper determination of the claim. I have not therefore dealt with each and every point in dispute between the parties if those matters are not necessary for that proper determination.

Project Capella and the Claimant's introduction to the Respondent

18. The Respondent is involved in the thermal installation industry. As part of the work that it undertakes the Respondent operates on commercial construction projects. One such project was Project Capella which was a biomedical campus development for the University of Cambridge. The Respondent was one of a number of contractors working on that particular project.

19. The Claimant was already working on the project for another contractor, Cambridge Piped Services ("CPS"), at the time that he came across the Respondent. The site manager for Project Capella for the Respondent was Simon Baker. Mr. Baker had observed the Claimant in his work for CPS and considered him to have a good work ethic and be a hard worker. Particularly, Mr. Baker had seen a number of other workers come and go but the Claimant had been a constant and he saw him as one to get on with his work.

20. Mr. Baker was aware that the Respondent had a lot of "foiling" work coming up and thought that the Claimant would be a good fit to undertake that work because of his aforementioned work ethic. "Foiling" is the term used for the application of foil tape to lengths of stainless steel pipework. I accept the evidence of Mr. Baker and Mr. Fretwell that it is a relatively straightforward operation for which no particular trade skills or qualifications are needed. However, the Claimant was good at that work and Mr. Baker had seen that first hand during the time that he had observed him on site working for CPS.

21. Mr. Baker therefore approached the Claimant to see if he would be interested in joining the Respondent. I accept the evidence of Mr. Baker and Mr. Fretwell that it was envisaged that the Claimant would be required to do work usually done by labourers, although no specific job title was agreed at this time or any other. Much has been made by the Claimant of a job title which was put on a draft contract of employment sent to him via ACAS following the commencement of early conciliation in this claim.

22. However, I am satisfied from the evidence of Ms. Dodsley that that contract was sent out by a junior member of staff without her having seen it and that it contained a job title of Thermal Installation Engineer. That was not a job title agreed with the Claimant during discussions prior to or at the commencement of employment and I am satisfied that the intention was that he would be doing unskilled work more akin to that of a labourer. He would not and did not undertake skilled insulation engineering work.

Meeting with Mr. Fretwell and the offer of employment

23. Following discussions with Mr. Baker in September/October 2017 the Claimant expressed an interest in joining the Respondent. I am satisfied that that was largely on the basis that the work that he was doing for CPS was coming to an end. Mr. Baker therefore went to discuss the situation with Mr. Fretwell who would ultimately need to discuss and agree terms with the Claimant. Mr. Baker provided Mr. Fretwell with contact details for the Claimant and, following discussions with one of the Directors of the Respondent about potentially engaging the Claimant, Mr. Fretwell arranged a meeting with him at the Project Capella site.

24. The Claimant appeared to suggest in cross examination of Mr. Fretwell that Mr. Baker had also been present at that meeting. I am satisfied from the evidence of Mr. Fretwell that he was not although it is possible that he made brief introductions outside the site hut before the meeting. He also appears to have joined Mr. Fretwell and the Claimant at the close of the meeting.

25. After discussions between the Claimant and Mr. Fretwell, the latter decided to offer the Claimant work. I accept that the Claimant said that he wanted that to be an offer of employment rather than the usual contractor arrangements that the Respondent would offer. That issue is relevant to the failure of the Respondent to provide the Claimant with a statement of main terms and conditions of employment and I say more on that below. Despite the fact that the Respondent did not usually directly employ people, Mr. Fretwell agreed to the Claimant's request that he be an employee.

26. The offer of employment was that the Claimant would work on price work foiling the lengths of stainless steel pipework and that for doing so he would receive £1.25 per linear metre. It does not appear to be in dispute, and in all events I accept, that the reason for placing employees on price work on the early stages of a project is to enable them to earn more than they would receive if they were on an hourly rate of pay. As well as benefiting the workers, that also is of benefit to the Respondent because it increases productivity and helps the Respondent keep to the timescales agreed with its clients on the various projects that it is engaged on.

27. It was therefore verbally agreed with the Claimant that he would be paid £1.25 per linear metre for foiling the stainless steel pipework on the work that the Respondent had on Project Capella. There appears to be a consensus that approximately 90% of that pipework was comprised of long straight sections which could be foiled with ease and expeditiously. The remainder was comprised of what has been described in these proceedings as the "fiddly bits" which had to be done later and which took longer to do because they were jointed sections and the like. However, I am satisfied that the requirement was for the Claimant to foil all of the sections of stainless steel pipework on the project, including the "fiddly bits".

28. I accept that the Claimant was not given exclusive rights over all steel pipework on the project and there were some areas, for example in the roof, that it is common ground that he would not have been engaged upon.

29. I also accept the evidence of Mr. Fretwell that all that was discussed at his meeting with the Claimant was the foiling of the stainless steel pipework and that there was no mention of insulating plastic pipework or lagging ductwork, although the Claimant may have undertaken some limited work in that regard at the request of Mr. Baker as and when the need arose. The Claimant accepted that to be the position in cross examination.

30. There was no discussion or agreement reached between the Claimant and Mr. Fretwell about what would happen once the available price work came to an end.

31. However, it is common ground between the Claimant and Respondent that the industry norm is that once such price work has been exhausted then those undertaking that work move onto a paid hourly rate provided that there is additional work to be done. That is because once the more straightforward work has been completed an hourly rate is fairer for the workers because those parts which are time consuming would not be viable to undertake on a price rate and may see workers ultimately fall below the National Minimum Wage.

32. It is common ground that no formal offer of employment was sent to the Claimant nor did he receive a statement of main terms and conditions of employment. The nearest that the Respondent came to putting anything in writing with the Claimant was a letter dated 19th October 2017 which merely set out the method and arrangements for completing time sheets; a personal information sheet and a training record sheet.

33. I am satisfied from the evidence of Ms. Dodsley that the Respondent had not employed people directly before with the exception of apprentices and in those circumstances the college provider had supplied them with the necessary paperwork. There was at the time no dedicated Human Resources function and the need to give the Claimant a contract of employment was therefore overlooked until he asked for one following his resignation.

34. The arrangement was that the Claimant would complete and submit a timesheet detailing the hours that he had worked and the linear metres that he had foiled each week and that would then be used to calculate his remuneration.

35. I am satisfied that Mr. Baker would check the amount of linear metres that the Claimant and other workers on site had foiled against the timesheets that had been submitted. That of course makes sense as Mr. Baker was the site manager responsible for such matters and merely taking matters on trust could have left the Respondent open to inflated timesheets by some workers. I am satisfied that Mr. Baker checked the timesheets of all relevant price workers and not just the Claimant as he appeared to suggest.

<u>The Claimant's hours of work and the school run</u>

36. I am satisfied from the evidence before me that the expectation of both Mr. Fretwell and Mr. Baker was that the Claimant would commence work at 7.30 a.m. and that was made plain by Mr. Fretwell when he met with the Claimant.

37. Mr. Fretwell also told the Claimant that Mr. Baker was on site from 7.00 a.m. to deal with any issues or queries and that he would be required to work 38 hours per week Monday to Friday with the possibility of working additional hours if necessary. It was agreed that he would commence employment on 23rd October 2017.

38. I do not accept the Claimant's evidence that he told Mr. Fretwell that he was solely responsible for dropping off and collecting his children from school and so that effectively dictated the parameters of the hours that he was able to work. He was not, as he maintained, free to come and go as he pleased. I am satisfied from the evidence of Mr. Fretwell that whilst there may have been able to be some accommodation on occasions for childcare, he would not have agreed to that being a regular arrangement because it would not have been viable for the Respondent to do so and still be sure that the project could be completed on time. There needed to be certainty about when the operatives were on site so that the project could be kept on track and I am satisfied that Mr. Fretwell did not agree that the Claimant could effectively come and go as he pleased.

39. I am also entirely satisfied that there was no agreement with Mr. Baker to that effect. Although he may have been aware whilst the Claimant was working for CPS that he collected his children from school he would not of course have known any specifics about that because he was not engaged by CPS.

40. I do not accept that the Claimant mentioned anything about childcare and certainly not as a regular arrangement. Indeed, his own Claim Form is contradictory as to what he said he had told Mr. Fretwell and Mr. Baker as that sets out that that could be on "certain days" (see page 7 of the hearing bundle) whilst his evidence before me was that this was something that he had to do every day and he had told the Respondent that at the outset.

41. That evidence is also contradicted by the Claimant's own timesheets in the hearing bundle. For example, the timesheets show that the Claimant worked the following hours on the following dates which cannot have fallen within the school holiday periods and would, if they were accurate, render it impossible for him to have done the school run on those particular dates:

    a. 30th October 2017 – 9 a.m. to 7 p.m. (page 42 of the hearing bundle);
    b. 31st October 2017 – 7 a.m. to 6 p.m. (page 42 of the hearing bundle);
    c. 1st November 2017 – 7 a.m. to 6 p.m. (page 42 of the hearing bundle);
    d. 2nd November 2017 – 7 a.m. to 6 p.m. (page 42 of the hearing bundle);
    e. 3rd November 2017 – 7 a.m. to 6 p.m. (page 42 of the hearing bundle);
    f. 6th November 2017 – 7 a.m. to 6 p.m. (page 46 of the hearing bundle);
    g. 8th November 2017 – 7 a.m. to 6 p.m. (page 46 of the hearing bundle);
    h. 9th November 2017 – 7 a.m. to 6 p.m. (page 46 of the hearing bundle);

i. 10th November 2017 – 7 a.m. to 6 p.m. (page 46 of the hearing bundle);
j. 13th, 14th, 15th and 16th November 2017 – 7.00 a.m. to 6 p.m. (page 50 of the hearing bundle; and
k. 17th November 2017 – 7 a.m. to 5 p.m. (page 50 of the hearing bundle).

42. There are many more examples of that – for example certain dates at pages 68, 72, 79, 82 and 88.

43. It was not until around late November and early December 2017 when the Claimant's hours began to fluctuate with some later start times and earlier finishing times, generally at around 3.00 p.m., although even on those occasions more often than not the Claimant would still have some days where he would start early (7.00 a.m. or 7.30 a.m.) and finish late (often around 5.00 p.m. or 6.00 p.m.) which would again suggest that he was still not undertaking the school run every day.

44. In or around late November 2017 or early December 2018 there was a conversation between Mr. Baker and Mr. Fretwell about the hours of work that the Claimant was keeping. That arose from concerns that the Claimant was often arriving on site late – generally around 9.00 a.m. to 9.30 a.m. but sometimes as late as 11.00 a.m. (see page 57 of the hearing bundle); frequently leaving early – for example at 2.00 p.m. or 3.00 p.m. and sometimes spending less than two hours a day on site (see for example on 8th December 2017 – page 68 of the hearing bundle).

45. I accept the evidence of Mr. Fretwell that he discussed that with the Claimant because he did not want it to set a precedent for other workers on the site. That was an obvious step to take because Mr. Fretwell had to keep the project on track and that would not happen if the Claimant and the other contractors were keeping their own hours. I do not accept the Claimant's account of that conversation and that Mr. Fretwell had agreed with him that there had been an agreement at the outset that his hours of work would be dictated around the need to do the school run.

46. It is unclear when that conversation took place although the Claimant's position is that it was on 22nd February 2018. The Claimant's case is that he had a conversation earlier that day with Mr. Baker who in turn asked him to contact Mr. Fretwell by telephone.

47. However, what is key is that there is no reference in the Claimant's witness statement to a disagreement with Mr. Baker in January 2018 which he told Employment Judge Jeram at an earlier Preliminary hearing had been the catalyst for the removal of price work from him.

48. It is timely here to say a word about the somewhat changing nature of the Claimant's case insofar as the reason(s) why he says that he was changed from price work to an hourly rate is concerned. I have made separate findings on why that was actually the case below.

49. I found the Claimant's case was at best confused and at worst built on shifting sands. There was a Preliminary hearing before Employment Judge Jeram on 25th November 2019 and 9th January 2020 at which, as the Orders make plain, she spent some time understanding the factual basis of the Claimant's claims. The Claimant made it plain at that hearing that the price work arrangement had been changed by the Respondent in January 2018 (see paragraph 16 at page 27(f) of the hearing bundle). He also made it plain at the same hearing and in his ET1 Claim Form (see page 7 of the hearing bundle) that the catalyst for the change from price work to an hourly rate was a disagreement that he had had with Mr. Baker about his hours of work and the need to undertake the school run.

50. However, that position changed during cross examination and at this stage, for the first time, he maintained that the fact that he had issued this claim was the reason why he had had "his work" taken away from him. Given that this claim in fact concerned the very issue of work being taken away, that of course cannot possibly be the case. The Claimant's evidence was that he had lost the work after bringing the claim and that this had been *"in the beginning of January or February"*. When the Claimant was taken to the fact that the position had changed with effect from the week commencing 15th January 2018 his evidence again changed that the work had been taken from him because the Respondent knew that he was going to bring a claim because he had told Mr. Fretwell and that he had spoken to ACAS in January or February 2018. He also maintained that he had been undertaking price work after 15th January 2018. Again, I say more about that below.

51. It was also put to the Claimant that at best even if his evidence was correct then after 22nd January 2018 he did not do any more price work and so the fact of bringing the claim could not be anything to do with the matter. The Claimant's evidence was that he believed that he had done price work after that date. None of the documents in the bundle supported that position at all.

52. In all events, it remains nonsensical that the price work was taken from the Claimant because he was going to bring a claim when the very substance of the claim was removal of the price work itself and that was not the way that he put his case either to Employment Judge Jeram or in his own Claim Form.

53. When the discrepancy was pointed out to the Claimant in cross examination by Mr. Nicholson, the position changed again and the Claimant said at that stage that it was a mixture of reasons, including the matter of doing the school run, that had caused the Respondent to take "his work" from him.

The reason for the change from price work to an hourly rate of pay

54. I accept the evidence of the Respondent's witnesses – and Mr. Baker particularly – that by mid January 2018 the price work was coming to an end and that all that was left as to foiling at that stage were the "fiddly bits" which would not be profitable on price work and work which the Claimant was unable to carry out because it did not match his skills set – for example work up in the roof of the building.

55. I accept the evidence of Mr. Baker that he would have discussed with the Claimant that the price work that he had been engaged to do was coming to an end and that, in all events, that would have been obvious to the Claimant who would have been well aware what was left to do in terms of foiling.

56. I do not accept that any of the straightforward foiling work that the Claimant had been employed to do was either removed from him or given to anyone else in preference to him. In reality, there was nothing of that work left for anyone by mid January 2018.

57. I accept that it is more likely than not that there was a conversation between the Claimant and Mr. Baker at which the end of the price work was discussed and it was said that Mr. Baker would try to find the Claimant other suitable work on an hourly rate. That would explain why the Claimant's time sheet for the week commencing 15th January 2020 set out his hours of work for that week with an hourly rate of £8.50 and the calculation of pay based on those hours (see page 92 of the hearing bundle). If no discussion had taken place, the Claimant would not have completed his timesheets, for the first time, in this way.

58. As I have already touched on above, I found the Claimant's evidence in relation to that timesheet to be lacking in credibility. He maintained in evidence that during the week commencing 15th January 2018 he was still undertaking price work and that this was evident from the fact that his timesheet at page 92 of the hearing bundle made a claim for work done on linear metres. However, that was a reference to "outstanding" linear metres, yet the Claimant maintained that it was for that particular week. He was not, however, able to provide any convincing explanation as to why he had phrased that as "outstanding" linear metres when that had never before featured on his timesheets. I find that that reference was to payment from an earlier period that the Claimant believed had not been paid to him and his evidence on this point was to try and fit with his assertion that the work had been taken from him either because of or in anticipation of the First Claim.

59. The Claimant was also taken to his own schedule of loss (see page 28 of the hearing bundle) which made a claim for unauthorised deductions from wages referencing a unilateral variation in terms and conditions as from 14th January 2018. The Claimant maintained that that was wrong because it had been drafted by his former solicitor. I consider it unlikely that that would not have been prepared on the Claimant's instructions and at no time previously had he sought to correct it. I find that that schedule is consistent with the timesheet at page 92 and the fact that by the week commencing 15th January 2018 the position was that there was no more price work and the Claimant was now working on an hourly rate of £8.50 per hour in accordance with the usual industry arrangements.

60. The rate of £8.50 per hour appears to have come from a rate previously applied on the Claimant's wage slips whilst on price work. Although in reality the pay received by the Claimant was calculated at £1.25 multiplied by whatever linear metreage he had foiled that particular week, his payslips were broken down into a basic rate of pay calculated at £8.50 per hour and a "bonus" payment to bring the figure to the amount payable on the linear metres calculation.

The Claimant's first resignation from employment with the Respondent

61. On 22nd February 2018 the Claimant resigned from employment with the Respondent. He sent an email setting out that position to Mr. Fretwell and it said this:

    "Further to our telephone conversation this morning I wish to give Linear Insulation that I am handing in my notice, please confirm the notice period, Chris I would like to take this time to thank you and Linear for a great learning experience".

62. The Claimant contends that by this stage he had already noticed that "his work" was being given to other people but it is curious, given that he then brought these proceedings, that that issue was not referenced at all in the resignation email or, indeed, at any point before that. The Claimant is perfectly able to raise complaint when he considers it necessary to do so and I have no doubt that if he genuinely believed at the point of his resignation that his work was being taken away from him and that it was still available that the letter would have made clear reference to that position. In fact, expressing his thanks to Mr. Fretwell and the Respondent is somewhat inconsistent with the position that the Claimant believed that work that had been contractually promised to him was being unfairly taken away and given to others.

63. Mr. Fretwell acknowledged the Claimant's resignation and accepted it on the same day. He indicated that the Claimant should work a weeks' notice ending on 2nd March 2018 but that if he wanted to leave earlier then he should let him know.

64. The Claimant replied to ask for a copy of his contract of employment. That was said to be on the basis that he said that he needed that to *"ensure that the correct notice period is given by both parties under the employment contract"*. That is a somewhat unusual statement given that it was only the Claimant actually terminating employment and so only he would be giving notice.

65. The remainder of the Claimant's email said this:

    "I have enjoyed the time working with such a good company but as of today I am not sure of the Notice period required to be given.

    When I started to work for the company you where (sic) *informed that on certain days I had to do the School run and you confirmed to me that this would not be an issue, you have now changed that statement and requested that I must come to work at 7.30 a.m., as this is not possible I have to give the company the required Notice Period.*

    I wish Linear all the best in their future endeavours."

66. Again, the Claimant did not make any reference to "his work" being taken away from him and it is both curious that he chose not to do so and referred to enjoying his time with the Respondent. That is despite his evidence before me that the issue was making his "blood boil". The sole issue was about undertaking the school run and I again note that the Claimants reference to

having to do that on "certain days" is consistent with his Claim Form but not with his evidence at this hearing.

67. In cross examination the Claimant's evidence was that he had raised issue about the price work being taken from him at the time and that evidence of that was in the hearing bundle. The Claimant was not able to take me to any document in that regard and his position then changed to say that he had not checked the hearing bundle and the evidence that he referred to was in fact his witness statement. He indicated that he would check the bundle overnight, but he took none of the Respondent's witnesses to any such timely complaint about the removal of price work in his own cross examination of them. His evidence on this point was wholly unsatisfactory and I do not accept that at any point the Claimant raised either verbally or in writing any timely complaint about "his" price work being taken away from him until 27th February 2018 when he contacted ACAS and commenced a period of early conciliation.

68. It is common ground that Mr. Fretwell did not reply to the Claimant's second email and I accept his evidence that in hindsight it would have been better for him to have done so but that shortly after it was received the Claimant commenced early conciliation via ACAS and that the matter was passed to Ms. Dodsley to deal with. That is consistent with an email that Mr. Fretwell sent to Ms. Dodsley on 6th March 2018 providing details of his email communications with the Claimant (see page 118 of the hearing bundle). I also accept his evidence that in all events he could not have provided the Claimant with a copy of his contract of employment as he was requesting because he did not have access to one. In all events, none had been issued of course and so there was nothing to supply.

<u>Continuation of the Claimant's employment</u>

69. I accept that the Respondent believed that the Claimant's employment would therefore be coming to an end on Friday, 2nd March 2018 in accordance with the arrangements set out in Mr. Fretwell's email of 22nd February 2018. However, despite that the Claimant attended work on Monday, 5th March 2018 as if nothing had happened. Whilst finding that somewhat unusual, Mr. Baker allowed the Claimant to stay because he was a good worker so there was no reason to send him away. Equally, Mr. Fretwell had no issue with the Claimant continuing in employment as he considered them to be on good terms.

70. After that point, the Claimant continued to submit timesheets based on an hourly rate of £8.50 per hour. He was paid in full for the hours worked.

71. Again, I found the Claimant's evidence in respect of the reason why he continued in employment lacked credibility. He maintained that he could not leave employment with the Respondent without a copy of his contract of employment so that he could check that the notice period was correct.

72. However, it was of course the Claimant that was giving notice and wanting to leave employment. It was not a situation where the Respondent had terminated his employment and he wanted to check that the notice that he had been served was correct. There was no reason not to simply accept what Mr. Fretwell had said given that he wanted his employment to end.

73. It is inexplicable that the Claimant continued working simply because he was awaiting a copy of his contract of employment. Taking that logic to its conclusion, if no copy was ever provided then the Claimant would have had to remain working for the Respondent indefinitely which was wholly inconsistent with his (then at least) desire to leave.

74. Moreover, the Claimant was well aware that he had never been issued with a contract of employment and so it is curious what he was actually waiting to be supplied to him.

The Claimant's second resignation

75. The Claimant then worked for the Respondent, being paid on the hourly rate of £8.50 per hour, until he resigned once again with effect from 9th November 2018. Again, that email resignation made reference to the required notice period, but it is notable that on that occasion the Claimant did actually leave employment unlike the position following his earlier resignation.

CONCLUSIONS

76. Insofar as I have not already done so, I now deal with my conclusions in relation to each of the complaints before me.

77. The first issue to determine is what was "properly payable" under the contract. Whilst the Claimant asserted in cross examination of Ms. Dodsley that he was on a salary whilst employed by the Respondent, that was plainly not the case and he was paid his wages firstly on the price rate until that came to an end on 14th January 2018 and thereafter at an hourly rate.

78. I am satisfied that the agreement between the Claimant and the Respondent at the outset was that he would be paid £1.25 per linear metre for as long as price work was available. The Claimant was paid in full in accordance with that arrangement until 14th January 2018. I am satisfied from the evidence before me that by that point there was no more price work available after that time and, as such, the arrangement under which the Claimant would be paid £1.25 per linear metre had come to an end. There was nothing left to foil under the terms of the initial agreement and so the arrangements on which the Claimant would undertake further work had to change.

79. I am satisfied that the Claimant was well aware that that would be happening from his discussions with Mr. Baker; his own knowledge of what was left to do on site and the fact that he knew and accepted that it was industry standard (or custom and practice) that after price work was exhausted he would move to an hourly rate.

80. For the avoidance of doubt, I am entirely satisfied that there was no price work available on site after 14th January 2018 that the Claimant was skilled to undertake and which could or should have been offered to him. I am also entirely satisfied that at no point was any work that the Claimant had been engaged to undertake taken from him and given to other operatives to do. If that was genuinely the case, I am satisfied that the Claimant would have raised that in his resignation letter on 22nd February 2018 if not before that.

81. He had, in this regard, the email addresses of both Mr. Baker and Mr. Fretwell to raise any concerns if he believed that that work was being taken away from him.

82. In accordance with the industry norms, of which the Claimant was well aware, the amount properly payable to him from 15th January 2018 onwards was £8.50 per hour. The Claimant was paid that sum until his employment ended by reason of his second resignation on 9th November 2018. There were therefore no deductions made from the Claimant's wages by the Respondent during the period 15th January 2018 to 9th November 2018 because the Claimant was paid what was "properly payable" to him. The claim therefore fails on that basis.

83. However, even if I had found that the Respondent had unilaterally varied the Claimant's contract of employment in respect of the change from price work to hourly pay, then I would have found that the Claimant affirmed the contract by firstly raising no issue about that at all until 27th February 2018 when he commenced early conciliation via ACAS and, more importantly, returning to work on 6th March 2018 after his first resignation and continuing to work to the terms set by the Respondent of £8.50 per hour.

84. Therefore, and for all of those reasons the claim of unauthorised deductions from wages contrary to Section 13 Employment Rights Act 1996 is not well founded and it fails and is dismissed.

85. On a final note, even had I not dismissed the claim for the reasons given above then I would have dismissed it on the grounds that I accept the argument of the Respondent that the claim that the Claimant is advancing is essentially for a failure to provide work (or as he termed it "his work") and not that he was not paid (or not paid properly) for work that he had actually undertaken. That would therefore be a complaint not of unauthorised deductions from wages but of breach of contract (see **Besong v Connex Bus (UK) Ltd, UKEAT/0436/04/RN**) and the Tribunal has no jurisdiction to entertain such a complaint here because at the time that it was presented the Claimant was still an employee of the Respondent and as a result the claim does not fall within the provisions of Article 3(c) Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

86. Although it is common ground that the Respondent was in breach of the provisions of Section 1 Employment Rights Act 1996, no award of compensation can be made under Section 38 Employment Act 2002 because the complaint of unauthorised deductions from wages has failed.

APPLICATION FOR COSTS

87. On 14th February 2020 the Respondent made an application for costs in respect of the dismissal of the Second Claim by Employment Judge Jeram on 9th January 2020. She directed that the application would be determined at this full merits hearing.

88. In short terms, the position of the Respondent is that the Second Claim had no reasonable prospect of success (because of the conclusions of Employment Judge Jeram when she struck it out) and also that it was unreasonable for the Claimant to have pursued it. The Respondent relies in this regard on a costs warning letter sent on 14th October 2019 and a reminder on 14th November 2019. The Claimant did not engage with either of those letters.

89. I heard submissions from the Respondent at the close of the hearing and having explained to the Claimant the discretion of the Tribunal to Order costs to be paid invited his representations on those matters, including on the issue of his means and ability to pay any costs Ordered to be paid.

90. The Claimant's primary position was that he had received an email from the Tribunal which had said that a Judge had made it plain that there was a case to answer in respect of the Second Claim. The Claimant was not able to identify that email during the course of the hearing.

91. Given that my decision was to be a reserved one I afforded the Claimant a further 7 days after the hearing to locate the email that he wanted to rely on and to make his representations about why there should be no Order for costs and any issue about his means and ability to pay one.

92. The Claimant made representations on 8th and 15th October 2020. In the first set of representations the Claimant made reference to not earning any income from a Company of which he was named as a director and the fact that he was on Universal Credit. He did not make any representations about why a costs order should not be made. The only attachments sent at this time was a copy of an annotated contract of employment from the Respondent which was not relevant to the costs application and a copy of a letter from the Tribunal dated 26th June 2019 allowing the Respondent an extension of time to present their Response. I presume this to be the email that the Claimant referenced at the hearing before me. The relevant parts of that letter said this:

    *"I refer to the Claimant's letter of **13/06/2019**.*

    *Employment Judge **Ahmed** has stated the following:*

    "This issue will be considered in due course. For the present, the Unfair Dismissal claim is not struck out".

93. The Claimant's letter of 13th June 2019 had been his reply to a strike out warning sent by the Tribunal given that the Claimant lacked two years continuous service to bring his claim of unfair dismissal. The Claimant set out in that letter that he wanted to pursue complaints of automatically unfair dismissal and therefore contended that the unfair dismissal claim should not be struck out.

94. The parties were later notified that a Preliminary hearing would take place on 25th November 2019 to deal with jurisdictional issues and whether the Second Claim should be struck out for those reasons; on the basis that it had no reasonable prospects of success or whether Deposit Orders should be made.

95. The Claimant's second email of 15th October 2020 did not engage with the issue of the costs application at all but made further representations about the First Claim. I have not paid regard to those representations because the Claimant had not been given leave to file further submissions and in all events many of the matters set out therein had not been put in evidence.

96. In view of those matters I gave the Claimant a further opportunity to make additional representations on the costs application. The Claimant made brief representations on 20th October 2020. That did not deal with the question as to why a costs order should not be made but submitted the same documents as previously along with evidence that he was in receipt of Universal Credit and made a brief statement about his means.

97. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

98. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs and the relevant parts of that Rule provide as follows:

> "***When a costs order or a preparation time order may or shall be made***
>
> ***76.***— *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success."*

99. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence is being pursued which is "misconceived".

100. With regard to unreasonable conduct it is necessary for the Tribunal to consider *"the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."* (**Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78)**

101. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made.

102. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

103. In accordance with Rule 84, a Tribunal is entitled to have regard to an individual's ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

104. I begin by considering whether the tests contained within Rule 76(1)(a) or (b) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 are met.

105. The first question is whether the claim against either Respondent had no reasonable prospects of success. I can deal with that question in very short terms because the conclusion that Employment Judge Jeram reached at the Preliminary hearing was to strike out the Second Claim on precisely those grounds. She struck out the claim of automatically unfair dismissal as having no reasonable prospect of success and the race discrimination complaints because they were substantially out of time. The Tribunal therefore had no jurisdiction to entertain those complaints and by implication they also therefore had no reasonable prospect of success. The first strand of the test is therefore made out.

106. Alternatively, I am also satisfied that the Claimant's conduct was unreasonable in that – as I set out further below – he has never engaged in any material way with the costs warning letter sent by the Respondent which set out the very real difficulties that he had in succeeding in the Second Claim.

107. Particularly, there was a very detailed costs warning letter sent on behalf of the Respondent dated 14th October 2019 setting out the inherent difficulties with the Second Claim. The letter also set out details of the costs regime in the Employment Tribunal and the intention to make an application if he proceeded to the Preliminary hearing on 25th November 2019. The letter also offered the Claimant a way out by withdrawing his claim against them with no costs consequences. The letter suggested the Claimant seek legal advice. The Claimant did not engage with that at all nor did he engage with a reminder letter sent on 14th November 2019.

108. The costs warning letter provided the Claimant with plenty of time to seek legal advice. Indeed, the Claimant had had prior legal advice including at an earlier Preliminary hearing on 20th November 2018 when he had been represented by a solicitor and specific reference to bringing a further claim (which then because the Second Claim) was made. Nothing would have been easier than for the Claimant to revert to that adviser if he was in any doubt about what he was being told by the Respondent's solicitors.

109. He therefore had the ability to obtain legal advice, as the Respondent suggested in their letter of 14th October 2019. Instead, the Claimant simply ignored matters entirely in that regard. He did not engage at all with why he thought that the Respondent's solicitors were wrong. I am satisfied that

given the circumstances when the Claimant must have known that there were distinct issues with the Second Claim – not least because there was a Preliminary hearing to determine whether it should be struck out - his actions in carrying on regardless were unreasonable.

110. I am therefore satisfied that the first limb of the test for an Order for costs is made out either on the basis that the Second Claim had no reasonable prospects of success or, alternatively, that his actions in pursuing the matter as far as the Preliminary hearing amounted to unreasonable conduct.

111. However, that is not the end of the matter and I must be satisfied that it is appropriate to make a costs Order. The Claimant has offered up only one mitigating factor, despite being given more than one opportunity to do so, to say why I should not make a costs Order. That is that he contends that he was told by an Employment Judge by email that there was a case to answer.

112. I can only assume that that is a reference to the Tribunal's letter of 26th June 2019. However, on any reasonable reading nothing in that letter comes close to a Judge saying that there was a case to answer. It merely set out that for the time being the unfair dismissal claim was not struck out and the issue would be dealt with in due course. By 24th August 2019 at the latest the Claimant can have been under no illusions that there were potential difficulties with his claim because the Tribunal had listed a Preliminary hearing to consider striking out the claim on jurisdictional grounds. The Tribunal later clarified that that hearing would also consider striking out the claim on its merits or Ordering a deposit to be paid.

113. Given that background and the content of the costs warning letter, the Claimant cannot reasonably have taken the Tribunal's letter of 26th June 2019 as reassurance that there was a case to answer. If so, there would have been no need to hold a Preliminary hearing.

114. As such, there are no mitigating factors at play and I am satisfied that I should exercise my discretion to make an Order for costs in favour of the Respondent.

THE AMOUNT OF THE COSTS ORDER

115. The Claimant has not made any representations to suggest that the sum claimed by way of the Respondent's costs application of 14th February 2020 is unreasonable. They also accord with the estimate of costs set out in the Respondent's costs warning letter of 14th October 2019. However, given that the Claimant is a litigant in person I have nevertheless considered the schedule of costs and have discounted the following elements:

   a. The sum of £147.50 in respect of work done reviewing documents by Laura Kearsley, a partner in the firm representing the Respondent. This was a simple matter and one which did not need involvement at anything other than associate level. Duplication by Ms. Kearsley was therefore unnecessary;

   b. A reduction in the hourly rate for Mr. Nicholson to the Solicitors Guideline Hourly rate at Pay Band A for National Grade 1 of £217.00 per hour; and

c. All VAT claimed on the costs. I consider it highly likely that the Respondent is VAT registered such that the VAT element on their legal costs can be reclaimed and therefore does not need to be paid by the Claimant.

116. That results in an Order for costs in favour of the Respondent in the sum of £2,647.40.

117. Finally, I make plain that although I am not obliged to do so I have taken the Claimant's means and ability to pay into account both as to the question of whether to make a costs Order at all and as to the sum of that Order.

118. The Claimant is currently in receipt of Universal Credit in the sum of just under £1,400.00 per month. I accept that there is no evidence of him receiving any income in respect of his directorship of Simramni Ltd, particularly as there is a notice of dissolution in respect of that particular Company.

119. However, whilst the Claimant is currently unemployed, I understand that he has a long employment history in respect of insulation work. Whilst inevitably there may be a downturn in that sort of work as a result of the current pandemic the Claimant has a significant amount of experience in that area. He is diligent and hardworking. Both Mr. Baker and Mr. Fretwell recognised that in him and singled him out for employment, even agreeing that he could continue when he had resigned. I take into account that when the Claimant was undertaking price work for the Respondent he was earning between £500.00 and £1,000.00 per week. Even when he was working on the basis of an hourly rate his earnings were still over £350.00 per week. There is nothing to suggest that the Claimant does not still have that earnings potential in the future and that at some point therefore in the short to medium term at least he will be able to obtain sufficient funds to discharge the costs Order that I have made.

____

Employment Judge Heap

Date: 23rd October 2020

JUDGMENT SENT TO THE PARTIES ON

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....
FOR THE TRIBUNAL OFFICE

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