



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Emmins

**Respondent:** Lazerbeam Fire & Security Ltd

**Heard at:** London South Croydon

**On:** 19 August 2020

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

## Representation

Claimant: In person

Respondent: Mr P Strelitz, Counsel

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

The Claimant is not an employee and so the Employment Tribunal has no jurisdiction to determine the Claimant's claim of damages for breach of contract. The claim is therefore dismissed.

# REASONS

## The Claim

1. By a claim form received by the Employment Tribunal on 10 April 2019 following a period of Early Conciliation between 26 March and 8 April 2019, the Claimant has brought money claims against the Respondent seeking the balance of his pay in respect of his entitlement to 3 months' notice of termination of employment in the sum of £12,995.20 and outstanding expenses of £3,000.
2. In its response received on 19 June 2019, the Respondent denies liability and brings a counterclaim in the sum of £2,180 against the Claimant in respect of improperly claimed expenses.

3. Standard Case Management Orders were issued and the full hearing was listed for 23 March 2020. However, this was converted to a telephone preliminary hearing on case management in line with the guidance issued by the President of the Employment Tribunals following the outbreak of the COVID-19 virus and pandemic.
4. At that hearing, Employment Judge Hyams-Parrish set a further date for the full hearing (today) and made a number of orders and directions in order to prepare the case for hearing.

#### The nature of the claim

5. The claim has been coded by the Tribunal's administration as one of breach of contract and unauthorised deduction from wages.
6. The Claimant has identified the claim as one of unauthorised deductions from wages. The list of issues within the bundle at pages 219-220 characterises it as an unauthorised deduction from wages claim under section 13 of the Employment Rights Act 1996 (ERA). However, I explained to the parties at the start of the hearing that this cannot be the case because the Claimant is seeking payment of alleged outstanding notice pay and unpaid expenses neither of which falls within the definition of wages within section 27 ERA.
7. The claim is more properly one of damages for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (England & Wales) Order 1994. This requires the Claimant to be an employee of the Respondent at the time his employment ended and this will involve application of the definition within section 230 ERA and the various indicators identified by case law.
8. In addition, the Respondent intends to raise an issue of illegality rendering the claim unenforceable.

#### The Issues

9. The issues to be determined are, put simply: whether the Claimant was an employee; if he was, is any contract between the parties unenforceable by reason of illegality; if it is not, is the Claimant entitled to damages for any shortfall in payment of his entitlement to notice; is the Claimant entitled to damages in respect of reimbursable expenses; and is the Respondent entitled to damages in respect of its counterclaim?

#### **Preliminary Matters**

##### Correct name of the Respondent

10. The Claimant has named Mr Hamid Nejad MD Lazerbeam Fire & Security Ltd as Respondent, but his claim can only be against his former employer which is Lazerbeam Fire & Security Ltd. Mr Nejad is the Managing Director of that limited company. I therefore amended the name of the Respondent to the name of the limited company.

Authenticity of the document at page 152 of the bundle

11. The Claimant raised concerns as to the authenticity of the document at page 152 of the bundle, namely Mr Nejad's notebook containing a transcript of a meeting held on 20 August 2018. The Claimant believes that this document has been manufactured and he wanted to see the original of the notebook. Mr Strelitz has brought the notebook to the hearing for the Claimant to inspect along with a video recording of the meeting. He agreed to allow the Claimant to view the recording on the Respondent's laptop during my reading adjournment. I said that I would deal with anything arising from this as and when it became appropriate during the hearing.

Disclosure

12. Mr Strelitz stated that the Claimant has not provided full disclosure of documents relating to his tax position. The Claimant stated that he has done so. Mr Strelitz responded that the Claimant had not made full disclosure and so the matter remains a live issue which he will leave for cross examination.

**Evidence**

13. The Respondent provided a bundle of documents running to 220 pages plus an additional document sent under separate cover which I inserted as page 42A. The Claimant provided two extra documents which had been omitted from the bundle. I placed these documents at the back of the bundle and numbered them as pages 221 to 223. I refer to the bundle as "B" followed by the relevant page number.
14. I heard evidence by way of written statements and in oral testimony from the Claimant and from Mr Nejad on behalf of the Respondent.
15. The Claimant also provided witness statements from Ms Jeanette Poole, Mr Manister, Mr Fordham and Mr Penny. However, none of these people attended the Tribunal hearing to give evidence. The Claimant stated that he had been told at the preliminary hearing that he did not need to bring them along to give evidence. Mr Strelitz said this was not the case. I explained to the Claimant that this was not reflected in the case management summary of that hearing and I cannot go behind that to determine whether or not it was something that was said. I further explained that witnesses have to attend to give evidence and if they do not it can affect the amount of weight if any that the Tribunal will attach to their evidence. I explained that this is because they are not here and neither the Tribunal nor the Respondent can ask them questions. I added that the Tribunal always takes into account whether the evidence was contested and the reasons for non-attendance.
16. Mr Strelitz provided me with copies of the following authorities which he intended to refer to in closing submissions: **Salvesen v Simons** [1994] IRLR 52, EAT; **Okedina v Chikale** [2019] IRLR 905, CA; and **Hall v Woolston Hall Leisure Ltd** [2000] 598, CA.
17. I explained the Tribunal procedure and order of events mainly for the benefit of the Claimant who is not legally represented. I then adjourned to read the

witness statements and the documents referred to in the bundle.

## **Findings**

18. I set out below the findings of fact I considered relevant and necessary to determine the issues that I was required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.
19. The Claimant was employed (this term used loosely given that the Claimant's employment status is at large) by the Respondent as Managing Director from 24 June 2017 until 25 February 2019. He claims that he was an employee, employed to work 50 hours a week from home, received payment of £4999 per month gross as a salary, was entitled to 3 months' notice of termination of employment and was entitled to reimbursement of expenses.
20. The Respondent is an electronic security business with a headquarters based in Surbiton which provides electronic security services to commercial and residential premises and companies around Greater London. Mr Nejad is the Managing Director and "owner" of the Respondent company with his wife, Mrs Nejad. The Respondent employs approximately 30 people at any one time.
21. The Claimant's claim is essentially as follows. He alleges that he was entitled to a period of three months' notice of termination of employment ending on 10 May 2019. He was only paid for notice for the period 11 to 23 February 2019. The amount he claims is £12,995.20 in respect of the shortfall in the notice period. He further alleges that he is owed £3,000 in respect of outstanding expenses, this representing a payment he made for a box at Ascot which Mr Nejad had asked him to bid for at a charity auction.
22. The Respondent's position is essentially that the Claimant was not an employee but engaged on a self-employed basis as a consultant, at the time of his dismissal he was engaged for a 6 month period subject to review with no entitlement to notice if not extended and is not entitled to reimbursement of the expenses he claims.
23. Prior to the commencement of his employment with the Respondent, the Claimant had discussions with Mr Nejad as to the terms on which he was to be employed. It is fair to say that these discussions were never completely reduced into writing. There are a number of draft contracts none of which are complete and none of which have been signed by the parties.
24. In March 2017, following a serious health issue, Mr Nejad was advised by his doctor to take at least a year out of the business in which to recover. Mr Nejad decided that he needed to appoint someone to continue running the business.
25. At a business gathering in April 2017, he met the Claimant and this led to discussions as to the possibility of the Claimant working for the Respondent.

26. The two men met on 2 May 2017 and the following day, the Claimant emailed Mr Nejad confirming the basis on which he would consider working for the Respondent. This email is at B38. The proposed terms included a salary over a three-year period, provision of shares and a bonus scheme. I note in particular the following:

*“on the salary year 1 £100,000, year 2 £120,000 and year 3 negotiable min £120,000 this well (sic) be invoiced by my company.”*

27. In oral evidence, the Claimant confirmed that this was a reference to his company SGE Security Consultancy Ltd.
28. Mr Nejad replied later that day by email (at B38-39), in which he agreed to the terms, in particular the invoicing for years one, two, and three respectively. He stated that he would contact his solicitor in order to draft a contract.
29. On 6 June 2017, Mr Nejad sent an email to the Claimant attaching a draft contract of employment which he had received from his solicitor (at B42 and 43-63 respectively). He asked the Claimant to have “a read” and to let him know what he thought. I note that the draft contract is between the Claimant and Exionfire Ltd and is clearly set out as a contract of employment in which the Claimant is referred to as an employee and was intended to be for a fixed term. I also note clauses 7 (as to payment of expenses) and 13 (as to termination of employment). I was advised by Mr Strelitz that Exionfire Ltd was the previous name of the Respondent company.
30. The Claimant replied by email later that day (at B41). In that email he set out his thoughts about the bonus scheme. In addition, he suggested that the contract should be open ended rather than for a fixed term and with a provision for three months’ notice of termination. Further, in the context of querying clause 13 as to termination and the tax position of payment in lieu of notice he stated:

*“I believed I was invoicing you under contract in the initial three years then discussed after”*

31. The email concludes with the following:

*“So the main issues for me (without me going to a solicitor) is (sic) the shares are not worth anything to me and no protection prior to receiving them in 3 years, and only if I hit 3 years targets. You being able to terminate me any time with no notice or any circumstances.*

*Sorry Hamid doesn’t look good, let me know what you think of how I am looking at the contract and Bonus scheme?”*

32. In oral evidence Mr Nejad stated that it was the Claimant who first brought up the issue of invoicing the Respondent.
33. Mr Nejad replied on 7 June 2017 (at B42) agreeing to the Claimant’s suggestions as to the bonus scheme, making the contract open ended and stated that “three months’ notice seems more than reasonable”. With regard to invoicing Mr Nejad stated:

*“... I did not go through that with Jonathan (his solicitor) at this stage as I didn't want to complicate things, but yes I have no problem with that. I will pass your comments onto him in order to revise the contract.”*

34. His email ended with the suggestion of a meeting so that they could both go through the contract together and come to *“a mutually beneficial agreement”*.

35. The Claimant replied later that day (at B42A) as follows:

*“Yes on your comments all good and will be perfect, as discussed on the phone not worried about tax and NI as we know what we are doing.*

*Happy to meet to finalise.”*

36. In oral evidence, the Claimant accepted that by this he meant that he knew what he was doing in using SGE Security and Consultancy Ltd for invoicing, having done this before with his last employer. He also confirmed that the bank details provided on the invoice were that of SGE Security and Consultancy Ltd and not his own.

37. Mr Nejad and the Claimant met on 9 June 2017 in a café (referred to by the parties as the “caff”), although to be fair whilst accepting that they met the Claimant did not recall the exact date. Mr Nejad's evidence is that this meeting was for the purposes of finalising a contract.

38. In oral evidence, Mr Nejad stated that whilst he may have expressed that he was happy with the discussions as to the contract terms, the reason he asked to meet was that he needed to talk to Mrs Nejad, the other Respondent shareholder, first and that having spoken to her she was not happy with the three month notice period and had instructed their solicitor to put one month in the contract. Mr Nejad further stated that he explained all of this to the Claimant in their meeting. The Claimant denied that such a discussion ever took place. Mr Nejad accepted that he had not mentioned the need to speak to Mrs Nejad as to the period of notice in his email at B42 but nevertheless he still had to put it to her. In response to questions from me, Mr Nejad explained that when Mrs Nejad saw the revised contract she stated that three months was not acceptable and it was changed to one month and that it was after this that he spoke to the Claimant in the caff.

39. By an email dated 19 July 2017 (at B64) , the Claimant wrote to Mr Nejad attaching a sample invoice. The email included the words:

*“... as discussed happy to get cash to keep the annual salary figure down.”*

40. The attached invoice is in favour of a company called SGE Security Consultancy Ltd at the Claimant's home address (B65). There is no dispute that this is the Claimant's company which he has used in the past to invoice other companies for his services. The Claimant was appointed as a statutory director of that company on 8 May 2013 as the Companies House records reflect at B125.

41. The Claimant submitted the first invoice from his company in respect of his Managing Director services on 23 July 2017 (B82). Mr Nejad's evidence is that following this, the Claimant asked him to arrange for a new contract to

be created which removed all references to employment and made it clear that it did not create a contract of employment.

42. By an email dated 31 July 2017, Mr Nejad wrote to the Claimant asking him to have a look at the attached draft contract and to revert with his thoughts/comments (B66). The attachment is at B67-81. It is a draft contract for services again between Exionfire Ltd and the Claimant. It is clear from the wording of the document that the Claimant is a contractor providing the duties of a sales director as set out in schedule 1 on a fee of £100,000 rising to £120,000 per annum and that the contract is for an unspecified fixed term which can be terminated on one month's notice either way. I note in particular the following clauses in this document: clause 2 Term of Appointment; clause 4 Place of Work; clause 6 Fees; and clause 7 Expenses.
43. The Claimant replied by email dated 2 August 2017 (at B66) in which he stated that he only had a couple of points: as to the share provision; as to the agreed 3 months' notice of termination of the contract; and as to the amount of holiday. The email ends with the words:  
  
*"Otherwise all looks ok"*
44. In oral evidence, the Claimant was asked why he did not query his status as a contractor and his place of work as being in the office. In response he stated that he made the mistake of not going into all of the contract and simply went on the basis of what was discussed. It did strike me that on a balance of probability this was not an approach that the Claimant had exhibited in his dealings with Mr Nejad thus far.
45. Mr Nejad's evidence was that whilst there had been discussion as to a three-month notice period and that it was something he was prepared to consider, none of the contractual documents included anything more than a one month notice period.
46. Mr Nejad's further evidence was that this was as far as the parties got in terms of seeking to finalise the contractual terms on which the Claimant worked for the Respondent.
47. It is clear from the documents that the Claimant presented invoices from his company, SGE Security Consultancy Ltd, to the Respondent in respect of his duties as Managing Director. These are at B82-102. The invoices are for services provided in the previous month (although there do appear to be two invoices for the same period at B95 & 96). The invoice dates run from 23 July 2017 to 1 March 2019. The invoices to 30 July 2018 are each in the sum of £9999.99 per month inclusive of VAT. The invoices from 31 August 2018 to 31 January 2019 are each in the sum of £4999.87 per month inclusive of VAT, which represents half the previous monthly amount that was invoiced. The final invoice dated 1 March 2019 (at B102) is for the period 24 February to 10 May 2019 and is in the sum of £12,995.20 inclusive of VAT.
48. The Claimant confirmed in oral evidence that no PAYE income tax or National Insurance contributions were ever deducted by the Respondent from the payments made to him via SGE Security Consultancy Ltd.

49. The Claimant's position is that an official contract was never signed between the parties and that after August 2017, the issue of the contract got left and was never discussed or brought up again and so he was acting on what had been agreed verbally and in the emails between the parties. His further position is that it was Mr Nejad who asked him to invoice the Respondent for the first three years after which he would be employed on a PAYE basis as this was better for both parties and to which he agreed. In oral evidence, the Claimant accepted that this was an arrangement that best suited him.
50. The Respondent has been seeking disclosure from the Claimant of the tax position relating to the payments received by SGE Security Consultancy Ltd in respect of his services. The Claimant has refused to provide this information on the basis that this matter was about him and not his company and unless he was provided with a legal reason to do so he would not disclose such documents.
51. However, at the start of this hearing the Claimant did provide a letter from accountants acting for both him and SGE Security Consultancy Ltd dated 1 July 2020 (at B222). This states that both the Claimant's and the company's tax returns have "*all been completed and on time and submitted to both HMRC and Companies House*". It further states that the company charged VAT at the rate of 20% and confirmed the company's VAT number was the one shown on the invoices to the Respondent. The Claimant accepted in oral evidence that this letter provided no details of how the payment of tax was dealt with by SGE Security consultancy Ltd in respect of payments made to him.
52. The Claimant's evidence is that throughout his employment, he was based from home with Mr Nejad's agreement and was paid for all his holidays including bank holidays and sickness, his monthly salary being paid to his SGE Security Consultancy Ltd company's account. In addition, he was entitled to be paid for expenses which he was to claim monthly. However, he said that these were paid on an ad hoc basis as and when he chased them up with Mr Nejad's wife who handled all the banking. In oral evidence, he maintained that he was under the Respondent's control although he accepted that there were no written reports of what he was doing on a daily basis. He did not accept that the Respondent and Mr Nejad in particular had no idea of what he was doing on a daily basis and stated that he provided daily verbal reports.
53. In answer to my questions, Mr Nejad stated he never agreed that the Claimant could work from home. He added that you cannot run a business from home because it does not work. With regard to control over the Claimant, he stated that he did not speak to the Claimant on a daily basis and sometimes did not speak to him for a week. He further stated that whilst he should not say this, the Claimant was the boss and he was free to do whatever he wanted and that he and the Respondent were nervous to raise the matter with him, for example as to why he was late, why he was doing this, just in case he got upset. I said to Mr Nejad that he did not strike me as the sort of person that would be slow to speak up. Mr Nejad responded that he was still recovering from his ill-health in 2017. He added that the reason matters got out of hand was because no one asked the Claimant what he



was doing or where he was going, but when it came to his attention in August 2018 from Mrs Nejad and from Tracy, and they showed him documentary evidence in support, he was quite shocked. Mr Nejad further explained that he knew that the Claimant was a family man and he gave him another opportunity, he him gave another six months, and then the Claimant went to others and bad-mouthed the company (matters which the judgment will come to).

54. Mr Nejad's evidence as to the Claimant's performance as Managing Director was as follows.
- a. The Claimant was appointed to run the Respondent company so as to increase productivity and revenue as he had promised. Mr Nejad had complete trust and faith in the Claimant and he was allowed to move freely without any questions as he had indicated he would be bringing in £1.5 million worth of new business within the first year and £2.5 million in the second year (in his email at B38);
  - b. However, approximately eight months into the Claimant's engagement, he began to doubt the Claimant's abilities to do what he had been brought in to do as well as what he had promised he would do.
  - c. The Claimant went on annual leave in August 2018. Mr Nejad knew that on his return, the Respondent would need to review the Claimant's performance as it was at the end of his first year of engagement. With this in mind he began analysing the Claimant's movements and found a number of matters of concern. These are set out in some detail at paragraph 21 of his witness statement. They essentially relate to the following matters: concerns about the amount of annual leave that the Claimant had taken; concerns as to the amount of time the Claimant was spending on involvement with other bodies of which he was either director, committee member or officer; concerns as to the costs in respect of a mobile phone and laptop provided by the Respondent to the Claimant; the limited profit margin generated by the Claimant which amounted to a loss of at least £20,000.
55. Mr Nejad's further evidence was as follows. He called a meeting with the Claimant on the first day of his return from holiday, on 20 August 2018 at which he raised the matters of concern set out within his witness statement at paragraph 21 as summarised above. He informed the Claimant that based on these matters he could no longer continue to utilise his management services and that the Respondent was terminating the arrangement. The Claimant sought to persuade Mr Nejad that the Respondent would benefit from the ongoing input of his management services and there was discussion as to the basis on which the relationship could continue. Mr Nejad proposed that the Claimant's services could be retained on a commission basis only. The Claimant stated he had a family and that this was not a viable option for him and that he needed some form of financial certainty each month. In the end the parties agreed that the Claimant's services would be maintained on the basis that he would now instead invoice £50,000 per annum and he would be retained on a six-month trial basis, to improve his productivity and increase revenue. The Claimant enthusiastically promised that sales would increase

as he had previously promised and that he would part company with the Respondent immediately at the end of the six-month period if he had not achieved this.

56. I was referred to Mr Nejad's handwritten notes of the meeting which he made in his diary at B152-155. In oral evidence Mr Nejad explained that the handwriting in blue at B153-154 relates to the meeting. He further explained that the blue writing at the top of B153 was written for him by a member of staff called Tracy, as she usually does for meetings, and the handwriting lower down the page (and the date and the words "meeting with Steve" at the top of the page) were written in by him as the meeting proceeded. This process continues over the page at B154.

57. In essence, the note of the meeting records the bullet point concerns, additional comments by Mr Nejad, proposals for the way forward and ends with the words:

*"I have agreed to reduce the salary from £100k to £50 (sic) for the next 6 months without any notice period!"*

58. The Claimant's position is that on his first day back from holiday in August 2018, Mr Nejad called him into his office and informed him that the Respondent did not have the money to keep paying him and he did not think he had sold enough to warrant his current salary. Mr Nejad offered to employ the Claimant on a commission only basis but he refused. However, he did agree to a 50% pay cut until business improved. He informed Mr Nejad that he was looking at the bigger picture of developing the company and going forward. During the meeting Mr Nejad had his notebook open and was showing the Claimant his workings out, reducing his sales figures by taking off all running expenses of the company. However, nothing was discussed or put in writing in the notebook regarding the change of the notice period or as to holiday or sickness, etc. In oral evidence, the Claimant did not accept that Mr Nejad had terminated his employment and that he fought his corner and persuaded Mr Nejad to let him stay but on a 50% salary subject to a six-month review as to his performance.

59. The Claimant disputes the authenticity of the notebook, by which he means that the notes of the meeting do not reflect what was actually discussed. He requested to see the original notebook and this has been provided to him at today's hearing. In oral evidence, he stated that he had taken notes of the meeting but did not bring them with him to this hearing because they do not record anything that Mr Nejad alleged happened at that meeting.

60. Thereafter the Claimant's company provided invoices to the Respondent in the reduced monthly amount of £4999.87 inclusive of VAT.

61. Mr Nejad's further evidence was that unfortunately circumstances still did not improve and the Claimant's productivity did not increase. This is set out in some detail at paragraphs 27 and 28 of his witness statement. In essence, this refers to: concerns about the Claimant's whereabouts evidenced from his Oystercard reports from 20 August 2018 to 14 January 2019 (at B156-165); concerns about the level of socialising by the Claimant evidenced by his calendar (at B103-104); concerns which Mr Nejad became aware of in

February 2019 on learning through clients that the Claimant was actively stating mistruths about the Respondent as to its financial position, its stability and its relationship with a particular client.

62. On learning of these matters, Mr Nejad stated that he felt compelled to email the Claimant on 8 February 2019 raising his concerns (B166-169). This email outlined the concerns and the improvements sought as well as what was expected from the Claimant. The email requested the Claimant's comments and what action he proposed to take to rectify the position with immediate effect. Mr Nejad's evidence is that in the absence of an apology for the Claimant's behaviour and a faithful promise as to his services going forward, he did not see any future need for the Claimant's services.
63. The Claimant requested a meeting with Mr Nejad on the morning of 11 February 2019. This appears to be another meeting which took place in the caff.
64. At that meeting Mr Nejad told the Tribunal that he expected the Claimant to go through the concerns he had raised in his email of 8 February 2019. However, the Claimant presented Mr Nejad with a letter of resignation (at B170). This is set out below:

*"Following the changes to my terms and conditions in my role within the company, I regret I have to submit my resignation from today's (sic) date giving the agreed 3 months (sic) notice period agreed in your email 7/6/2017 @ 08:46. The 3 months (sic) notice period is 11<sup>th</sup> February to 10<sup>th</sup> May 2019.*

*My monthly payment is from 24<sup>th</sup> (the day I started in the month, and was getting paid to 23<sup>rd</sup> of each month) so to bring it in line with 3 months (sic) notice should be paid six days up to 31<sup>st</sup> January. Then February, March and April full month's money, then 8 days in May.*

*I also want my outstanding expenses from November 2017 for the £3000 for the Ascot Box you wanted me to bid on and we won and we took clients on 14<sup>th</sup> July 2018.*

*I would like to thank you for the opportunity of working together and would also like us to have a good industry relationship once I worked my 3 months (sic) notice."*

65. In oral evidence, Mr Nejad was asked why he did not query the three-month notice period when he was presented with the Claimant's letter of resignation. Mr Nejad answered that at that meeting he was expecting the Claimant to tell him what he was going to do about the matters he had complained about in his email. But instead the Claimant handed him his resignation. Mr Nejad further explained that he was shocked, he put it in his pocket, they shook hands and parted. He did not even open the envelope, he took it back to the office and gave it to Tracy. The Claimant denied that this happened.
66. The Claimant's position is that throughout the rest of the year into the beginning of 2019, the Respondent company was successfully growing at year end at a rate that exceeded the previous year's figures. However his circumstances did not change and so on 11 February 2019 he decided that his position had become untenable and he submitted his resignation giving three months' notice, as had been agreed by Mr Nejad in the email dated 7 July 2017 (at B 170). In oral evidence, the Claimant explained that Mr Nejad's email of 8 February 2019 was the last straw for him on top of the way Mr Nejad treated him and the way the company was going and so he resigned.

He further explained that he did not respond to Mr Nejad's email, his response was to resign because he had had enough. He accepted that prior to this he had put nothing in writing complaining about his treatment, explaining that this was not his style and there was no point because Mr Nejad was set in his ways.

67. Mr Nejad's evidence was that he needed to consider what happened at the meeting and he also asked the Claimant to respond to his email of 8 February 2019.
68. By an email dated 12 February 2019 (B166-167), the Claimant wrote to Mr Nejad setting out his response to the points raised in the email of 8 February 2019.
69. On reflection, Mr Nejad stated that he concluded, for the reasons set out at paragraph 33 of his witness statement, that he had no choice but to end the Claimant's engagement through his company at the end of the six-month trial period that had been agreed.
70. On 21 February 2019, Mr Nejad called the Claimant into his office and told him he wanted him to work in the office every day and not from home and he did not want the Claimant to see any clients until his notice period ended. The Claimant agreed to this.
71. On 22 February 2019, Mr Nejad asked the Claimant to hand over his company phone, which the Claimant did after being allowed to remove personal data from it. This appears to be the last day that the Claimant worked for the Respondent.
72. On 24 February 2019, Mr Nejad met with the Claimant. This meeting was recorded by a CCTV camera in Mr Nejad's office and the Respondent's transcript of the discussion is at B171. Mr Nejad's evidence is that at this meeting the Claimant recognised that he was only able to claim monies for the period up to 24 February 2019 at the end of the six-month contract and made a loose referral to a conversation in a coffee shop (the caff, presumably) as to his alleged entitlement to 3 months' notice. The Claimant's evidence is that Mr Nejad said that he had spoken with his solicitor who advised that he was not obliged to pay him any notice. He asked the Claimant what he wanted and the Claimant said he wanted the money that is owed to him. Mr Nejad said he would pay the expenses. There was a discussion as to the Claimant retaining the company laptop pending payment and Mr Nejad insisting that it was company property and to return it. In the end the Claimant agreed to return the laptop. Whilst the Claimant's evidence refers to this meeting as having taken place on 25 February 2019, it appears to me they are talking about the same meeting and the exact date is of no consequence.
73. The Claimant denies the authenticity of the transcript of the meeting, by which he means he does not accept that it is accurate. He has requested viewing the CCTV recording of the meeting and a full transcript of what was said. This recording was made available to him at this hearing. In oral evidence, the Claimant accepted that the transcript provided was correct albeit it was only part of a longer meeting.

74. In answer to my question as to why the Respondent had not produced the full recording of the meeting, Mr Nejad replied that he told one of the Respondent's engineers to listen to the recording and to save the part about the three-months' notice. He added that the engineer had done so and that the rest of the recording was not relevant. I said to him that if there was a dispute about the £3,000 expenses, why not save that part as well? Mr Nejad replied that he did not know. However, in re-examination, Mr Nejad was taken to an email he received from the Claimant dated 1 March 2019 (B173-175) setting out his position and his legal claims which does not mention the £3,000 expenses claim. He stated that at this point in time he considered the Claimant's main concern to be the three-months' notice claim. I do note from Claimant's interjection at this point that B175 does mention the Claimant's outstanding expenses entitlement.
75. In oral evidence, Mr Nejad admitted that he should have dealt with the situation differently, having found out that the Claimant had been bad-mouthing him, and taken action sooner rather than allowing him to continue to work in the office. However, he wanted the Claimant to finish work that month.
76. I heard conflicting evidence as to the position regarding the amount of £3,000 which the Claimant alleges is owed to him by way of reimbursement for payment on behalf of the Respondent in respect of a box at Ascot. Mr Nejad gave another explanation, that the Claimant had requested a loan of £3,000 which he intended to give as a wedding present to a friend (who at the time was also a client of the Respondent business) and so the £3,000 payment made by the Claimant for the Ascot box settled that loan. The Claimant denied this and then gave a further explanation of what appeared to be an improper payment being made by Mr Nejad to the Claimant's friend. Mr Nejad denied this and gave a further explanation. I do not propose to go into these matters any further detail given the nature of these allegations and given my conclusions as set out below.

### Relevant Law

77. The Employment Tribunals (Extension of Jurisdiction) (England & Wales) Order 1994.
78. Section 230 of the Employment Rights Act 1996:
- (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
- (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*
79. In order to claim unfair dismissal (as well as other rights, such as entitlement to itemised pay statements, the right to written particulars of employment, statutory minimum notice of termination and the ability to bring a breach of contract claim in the Employment Tribunal) a person must be employed (ie work under a contract of service). A person who is self-employed (ie working under a contract for services) is not entitled to bring a claim, although she

may still fall within the definition of worker under section 230(3) of the Employment Rights Act 1996 (ERA 1996) for the purposes of a claim of unauthorised deductions from wages. The definitions of employee and contract of employment within the Employment Tribunals (Extension of Jurisdiction) (England & Wales) Order 1994 is identical to section 230 ERA.

80. There is no clear guidance given by case law by which tribunals are able to distinguish between those who are employed and those who are self-employed. An 'employee' is defined simply as someone who has entered into, or works under, a contract of employment (section 230(1) ERA 1996). A 'contract of employment' means 'a contract of service or apprenticeship, whether express or implied, and (if it is express), whether it is oral or in writing' (section 230(2) ERA 1996).
81. There is no single test which determines whether a person is employed or self-employed although there have been a large number of cases which have tried to establish the approach to be adopted to determine this issue. The usual approach taken is referred to as the multiple test which requires all aspects of the relationship to be considered and then to ask whether it could be said that the person was carrying on a business on his/her own account (O'Kelly v Trusthouse Forte plc [1983] IRLR 369,CA). The multiple test requires the consideration of a number of factors.
82. The first consideration is whether there is a mutual obligation to supply and perform work, ie is the employer contractually obliged to provide work and the person obliged to carry it out? This is the most important single factor. If no such obligation exists, then the person is not an employee (Carmichael v National Power plc [2000] IRLR 43, HL).
83. It is also a vital component that the Respondent has a sufficient framework of 'control' over the person, although direct supervision and control is absent in many kinds of employment today (Montgomery v Johnson Underwood Ltd [2001] IRLR 269, CA) If the person controls when, where and how she performs the work, this degree of autonomy would suggest that she is self-employed. However, if the employer has the power to tell the person when, where and how to perform, it would indicate that the person is an employee (Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497).
84. Another factor is that the other provisions of the contract must be consistent with its being a contract of service. We need to consider the purpose of the contract and what the parties intended when they formed it. It is the nature of the agreement and the actual performance of the contract which counts, not simply the label attached to the relationship by the parties. For example, just because a person is told by an employer that she is self employed does not mean that is the true legal position.
85. The method and mode of payment to the person could be a relevant factor. If pay is referable to a period of time rather than productivity, this suggests that the person is more likely to be an employee. She is also more likely to be an employee if she gets paid sick leave and is subject to the usual

disciplinary and grievance procedures. However, again this is not necessarily conclusive of employee status.

86. The above assumes that it is clear what the contract terms are, but this may not be the case. When deciding what terms have been agreed between the parties, the first step is to look at any written contract. This can be a problem. People sometimes sign pro forma contracts which are designed to prevent them from being an employee, eg by stating that there is no mutuality of obligations or that they have the right to send along a substitute (see below). However, if there is evidence of the true nature of the agreement this should be considered (Autoclenz Ltd v Belcher & Ors [2011] IRLR 820, SC; Protectacoat Firthglow LTD v Szilagyi [2009] IRLR 365, CA; Consistent Group Ltd v Kalwak & Ors [2008] IRLR 505, CA; and Redrow Homes (Yorkshire) Ltd v Buckborough & Sewell [2009] IRLR 34, EAT).

### **Submissions**

87. I heard oral submissions from both parties which I have taken full account of.
88. The Respondent essentially submits the following. The Claimant was not an employee. But if I was minded to find that he was, then the contract between the parties is nevertheless illegal (following Salvesen v Simons). If I were minded to find that the contract was not illegal, then the Claimant was not entitled to 3 months' notice or to repayment of his expenses. Finally, the Respondent stands by its counterclaim.
89. The Claimant essentially submits that he was an employee, was entitled to 3 months' notice and to reimbursement of his expenses. He denies the counterclaim.

### **Conclusions**

90. My conclusions are based on the evidence I heard and on balance of probability.
91. It is quite clear from the evidence I heard that the Claimant was taken on as Managing Director in a position which he asserted and it was expected that he would increase the Respondent's sales by a substantial amount. In return, he commanded a substantial remuneration package which included shares, a bonus scheme and a monthly income. Whilst there were discussions and some attempts to agree his contractual status in writing this was not fully achieved.
92. The original terms and conditions of employment put forward by the Respondent were on the basis of an employer/employee status. The Claimant suggested invoicing through his own company which he had previously used for such an arrangement and he even provided a sample invoice for the Respondent. At one point he even suggested that he was happy to be paid in cash to keep the invoices down (although this arrangement never happened). His company then invoiced for his services on a monthly basis. This was an arrangement which the Claimant accepted suited him.

93. As the negotiations as to the terms and conditions of employment continued, it was the Claimant that requested the removal of all references to employee status from the original contract.
94. I find on balance of probability that this is the case given that the email correspondence reflects that it was the Claimant who introduced invoicing into the arrangement and provided the means by which this could be achieved. Indeed, the second iteration of the contract reflects a self-employed/contractor arrangement and the email correspondence at the time indicates that the Claimant found this document acceptable other than as to provisions relating to shares, the length of notice of termination of the relationship and his holiday entitlement.
95. The Claimant was completely autonomous in the performance of his duties. He was allowed to work from home with very little monitoring of his days or hours of work or his actual duties beyond what he reported. Whilst he may have been on holiday or sick, the Respondent would only have been aware of this if he told it. I accept on balance of probability from the evidence I heard and from the lack of any contemporaneous documents reflecting the opposite, that the Claimant did not provide any reports as to what he was doing and where he was. The Respondent was only able to piece this together from the lack of sales, by analysing his expense claims and his calendar, and by looking at his Oystercard reports.
96. I also take into account that the first iteration of the employment contract was specific as to the place of work and the hours of work and the second iteration of the contract of services repeated those clauses albeit with the references to employee being substituted for contractor.
97. In addition, duties were never expressly stated within either of the two versions of the contract. I note that the first iteration of the contract simply refers to being employed as a Director of the company. The second iteration refers to duties as the services to be provided as set out in schedule 1, which states:
- “The Contractor shall serve Exion fire as a sales director responsible for bringing new customers to Exionfire and maintaining relationships with existing customers. Exionfire expects the Contractor to work solely for them during the course of the appointment.”*
98. On balance of probability, I accept that the Respondent allowed this situation to arise and to continue given the promises made by the Claimant as to his expected sales performance. In particular I accepted Mr Nejad’s candid admission that the Claimant was the boss and the Respondent was scared of him and did not want to upset him given his promises. I accepted that given Mr Nejad’s state of health towards the end of 2017 early 2018, he was looking for someone to take on his role as Managing Director and to substantially improve the performance and profitability of the Respondent company.
99. However, it is also clear that by August 2018, the Respondent had major concerns about the Claimant’s performance as Managing Director with regard to his actual as opposed to his promised performance and his actual time spent in the business. This is set out in detail at paragraph 21 of Mr



Nejad's witness statement and the referenced documents. These concerns led to the meeting at which the Claimant was initially told that his services were being dispensed with and after negotiation that his services would continue at 50% of his remuneration for a period of six months subject to review and, at the end of which, if matters had not improved, his engagement would be ended with no entitlement to notice. On balance of probability, I accepted Mr Nejad's evidence and the documentary evidence in support of the concerns he had, the handwritten notes of the meeting and the resultant reduction in the Claimant's remuneration.

100. However, following continuing concerns, Mr Nejad emailed the Claimant on 8 February 2019 raising these further concerns and this ultimately led to the Claimant's resignation on 11 February 2019. Whilst the Claimant sought three months' notice to 10 May 2019, his employment ended on 24 February 2019, his last day of employment being 22 February 2019. On balance of probability I accept Mr Nejad's evidence of the meeting and note that the Claimant did not refer to the email of 8 February 2019 in his resignation letter and did not respond to it until 12 February 2019.
101. Having considered the various tests as to employment status and the statutory definition within section 230 ERA, I have reached the conclusion that the Claimant was not an employee but was a contractor providing services under a contract for service as evidenced by the following:
  - a. the lack of control over the Claimant by the Respondent; the degree of autonomy which he had in his role, albeit he was brought to book during the latter six months of his employment but nevertheless still exercised a level of autonomy which was inconsistent with an employee employer relationship;
  - b. the mode and method of payment which was of a consistent amount of remuneration regardless of the amount of work undertaken by the Claimant, although this was subject to reduction when the Respondent raised its initial concerns as to the Claimant's performance;
  - c. the intention of the parties, it is clear that the Claimant initiated the self-employed arrangement, the Respondent accepted it and the Claimant acknowledged that he benefited from it (although I also recognise that this arrangement was to the Respondent's advantage as well);
  - d. the negotiations and the two versions of the contract are all consistent with what the Claimant intended to be a self-employed relationship and this was the basis on which his services were taken on.
102. As a result, the Tribunal has no jurisdiction to consider his complaint of damages for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994. I therefore make no findings as to his entitlement to notice or reimbursement of expenses. Further, there is no need for me to consider the issue of any illegality raised by the Respondent and I do not have jurisdiction to determine the Respondent's counterclaim.

103. The Claimant's claim is therefore dismissed.

Employment Judge Tsamados

5 November 2020