Case Number: 1800992/2020

1801051/2020

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. P. Evans (1)	v	**Central Point Recruitment Limited**
Mrs. T. Cahill (2)		

Heard by CVP **On: 17 & 18 December 2020**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant (1): **In Person**

Claimant (2) : **In Person**

Respondents: **Miss. H. Nicholson, H.R. Manager**

JUDGMENT

1. The name of the Second Claimant is amended to Mrs. Tina Cahill;

2. The First Claimant's clams are well founded and he is awarded a total of £11,395.12 calculated as follows: -

   (a)unpaid wages £6,361.37 gross;

   (b)6.9 holiday pay £1,531.18 gross

   (c)one weeks' notice £1,109.54 gross;

   (d)ACAS uplift on the award of 25% £2,250.53

   (e)Consequential losses £142.50.

3. The Second Claimant's claims are well founded and she is awarded a total of £4,455.68 calculated as follows: -
   (a) unlawful deduction of wages £666.68;
   (b) breach of contract; failure to pay pension £242.46;
   (c) 7.1 days of holiday pay £655.40;
   (d) one months' notice £2,000
   (e) ACAS uplift on award of 25% £891.14.

4. The respondent's counterclaim is dismissed.

REASONS

Claims and Issues

1. The First Claimant, Mr. Paul Evans ("C1"), brings complaints of unauthorised deductions from wages relating to his pay from 1 to 31 December 2019 and from 1 to 10 January 2020, holiday pay of 6.9 days and one weeks' notice pay.

2. The Second Claimant, Miss. Cahill ("C2') brings complaints of wrongful dismissal (one month's salary), holiday pay of 7.1 days and arrears of pay £666.68 and pension contributions £242.46.

3. The respondent has brought a counter claim against the first claimant for breach of contract and seeks repayment of the amounts that the respondent states that the first claimant must repay (sums in excess of the national minimum wage were repayable to the respondent pursuant to a director's loan agreement).

4. The agreed list of issues are set out in Employment Judge Deeley's order dated 03/06/2020. The issues in the case are as follows:

Employment terms

1. What were the terms of the claimant's contract with the respondent? In particular:

    1.1. What were the terms relating to the claimant's pay?
    1.2. What were the terms relating to any deductions from the claimant's pay and/or over-payments of wages?
    1.3. What were the terms relating to the claimant's accrual of annual leave?
    1.4. How much notice was the claimant entitled to receive from the respondent?

Unauthorised deductions from wages (s13 Employment Rights Act 1996)

Monthly pay

2. Was the claimant paid less in wages than he was entitled to be paid in relation to:
    2.1. his pay from 1-31 December 2019; and
    2.2. his pay from 1-10 January 2020?

3. If so, how much less was he paid?

Holiday pay

4. How much annual leave had the claimant accrued during his employment?

5. How much annual leave had the claimant taken during his employment?

6. How many days remained accrued but not taken?

7. What is the relevant daily rate of pay?

8. How much pay is outstanding to be paid to the claimant on termination?

Wrongful dismissal (notice pay) (Employment Tribunals (Extension of Jurisdiction) Order 1994

9. Did the claimant's resignation with immediate effect on 13 January 2020 amount to a dismissal by the respondent? In particular:

   9.1. The claimant relies on the following fundamental terms of his employment contract:

      9.1.1. the right to be paid wages during his employment; and/or
      9.1.2. the implied term of mutual trust and confidence;

   9.2. Did the respondent breach either (or both) of these terms?

   9.3. If so, did the claimant affirm the contract of employment before resigning?

   9.4. If not, did the claimant resign in response to the respondent's conduct?

10. The conduct the claimant relies on as breaching the trust and confidence term consists of the claimant's allegations that:

   10.1. in November 2019, Mr Shute disputed invoices from the respondent in relation to work carried out by the respondent for SBFM;

   10.2. at a meeting on 20 December 2019, Mr Shute gave the claimant 'verbal ultimatums' which are set out in the second to last paragraph of the first page of the claimant's attachment to his ET1 as follows:

      10.2.1. "To terminate the employment of Janet Wilks and Tina Cahill from their roles, and for me to work at SBFM Head Office in Harrogate;

      10.2.2. We all worked from SBFM Head office in Harrogate, but Tina and Janet would only be short term;

      10.2.3. Bring in new large client before 24th December 2019; or

10.2.4. To close the business."

10.3. the respondent did not pay the claimant's wages for December 2019; and/or

10.4. Mr Shute removed the claimant's access to company systems on 10th January 2020.

Respondent's counter-claim *[draft issues, subject to further clarification by the respondent]*

11. Is it a term of the claimant's contract of employment that the respondent may either:

11.1. deduct any overpayments of wages from the claimant's pay; and/or
11.2. otherwise require the claimant to repay any such payments?

12. If so, did the respondent make any overpayments to the claimant?

13. If so, how much should be awarded to the respondent?

The Hearing

5. The Tribunal was provided with an agreed bundle of 471 pages. None of the parties had fully complied in time with the case management orders. The respondent disclosed documents and an additional witness statement of Mr. Shute one day prior to the first day of the hearing. Neither claimant wished to adjourn or exclude the documents stating that they were able to deal with the documents in evidence.

6. The First Claimant relied upon his two witness statements and the statement of Miss. Cahill (who gave evidence) and Janet Wilks (who gave evidence). The First Claimant also submitted the following statements as written representations; Susan McDonald and William Farrell. The weight to be attached to the written representations were minimal on the basis they did not attend to give evidence and were not cross examined.

7. The Second Claimant relied upon her two witness statements and a statement from Mr. Paul Evans (who gave evidence).

8. The respondent relied upon two statements from Mr. Shute; who is the main shareholder and director of the respondent; one of which was disclosed the day before the commencement of the first day of the hearing along with additional documents.

9. Initially, the Tribunal was informed that Mr. Shute was unable to attend the hearing to give evidence because he was in or travelling to meetings. The

Tribunal clarified that in the absence of Mr. Shute to provide witness evidence, his witness statement could be submitted as a written representation with limited weight being attached to it, in the absence of him being cross examined by the claimants. Later the Tribunal was advised Mr. Shute would be available to give evidence. Mr. Shute initially dialed into the hearing but the claimants objected and the Tribunal determined it was not a fair or proper way for Mr. Shute to participate in the hearing. Mr. Shute later appeared on his mobile telephone parked in a car park but in these circumstances, it was difficult to clearly hear him. Mr. Shute stated that he was in a quiet place and he would not be disturbed but there was a significant amount of interference on the line so time was given for him to go home to his office to give his evidence. He did so and participated using the video platform.

10. The parties were informed the Tribunal would only consider documents which were referred to in the hearing.

FACTS

11. There was a significant divergence of evidence between the claimants and the respondent's cases. The Tribunal having heard all of the evidence found the respondent's evidence lacking in credibility. The Tribunal found Mr. Shute's evidence unreliable and unsatisfactory. He had provided two witness statements to the Tribunal. The two statements were contradictory. At paragraph 5 of Mr. Shute's witness statement he stated that there was an agreement Mr. Evan's renumeration would be based on a salary equal to the national minimum wage of £17,076.80 per annum and a director's loan which would increase Mr. Evans monthly take home pay to £3,500. He stated that as the respondent was a new business there was not enough funds to be able to pay a salary of £50,000 which is what Mr. Evans had requested. In contradiction to this in Mr. Shute's second witness statement he stated that Mr. Evans would receive "cash flow transition funds" as a directors loan on the principle that "our new start business with no clients other than my core business would need a cash injection that I would provide". This was also in contradiction with Mr. Shute's failure to dispute Mr. Evans assertion to Mr. David Barber, financial director, in an email at page 252 that the claimant was actually to receive a salary of £58,500. Further, in Mr. Shute's first statement he suggested at paragraph 6 that the money paid to Mr. Evans above national minimum wage would be a loan and this would be reconciled at the end of the year against the profitability and performance of the business. This was not included in the second statement of Mr. Shute. The Tribunal was not persuaded by Mr. Shute's evidence that these discrepancies occurred because he did not have all the documents available to him whilst drafting each witness statement. The Tribunal reached the conclusion that these discrepancies were significant and appeared a fundamental change in evidence. Mr. Shute was unable to inform the Tribunal when he provided his first statement; he had provided his second statement very recently. In comparison, the tribunal found the First and Second Claimants to be credible and honest. The Tribunal was particularly impressed by the evidence of Miss. Wilks for the first claimant who was careful and measured in her evidence. Further the respondent's position in respect of Mrs. Cahill's dismissal from her employment with them was unsatisfactory and lacked veracity. The respondent purported to have dismissed

Mrs. Cahill on 31 December 2019 and stated it sent her a letter of dismissal. Mrs. Cahill stated that this was a total fabrication. The letter of dismissal was not included in the tribunal bundle but was referred to in the respondent's evidence. The respondent's representative told the tribunal that the letter had been drafted but actually was not sent and therefore it was not included in the bundle. The suggestion that Mrs. Cahill had been sent a dismissal letter was in contradiction to contemporaneous email correspondence which demonstrated the claimant resigned by her letter dated 13 January 2020 which was now not disputed by the respondent.

12. The Tribunal found Mr. Evans was employed by the respondent between 1 May 2019 and 13 January 2020 as a company director. He had previously been employed by Blue Arrow, a recruitment agency, with an annual salary of £35,000 and had earned £30,000 annual bonus commission. In late October 2018, he engaged in initial conversations with Mr. Colin Shute (Managing Director of SBFM Limited, SBFM Group).about setting up an employment business/recruitment agency.

13. On 28 October 2018, Mr. Evans emailed Mr. Shute an overview of his wishes and branding (see page 235). From this date Mr. Evans and Mr. Shute had continued discussions about a future business. On 27 March 2019 he emailed Mr. Shute, requesting further information about a service agreement as he was due to resign from his current employment imminently. On 29 March 2019 he received a draft director service agreement from Mr. Shute.

14. The draft service agreement stated that the claimant was an employee. The first claimant responded to that draft with various queries including the proposed salary. Mr. Shute responded to the first claimant's enquiries (page 240) that the salary £3,500 net pay per month. The first claimant wanted the reassurance of this level of salary before leaving secure employment with Blue Arrow. Mr. Shute further replied to the enquiries raised by Mr. Evans; Mr. Shute confirmed in terms of shares that the percentage would be a ratchet mechanism based on profit increasing with growth. He said he would not break the loan/national minimum wage down in the email because he stated it before and he did not need to repeat the information.

15. There was a discussion between Mr. Evans and Mr. Shute about a director's loan. On 9 April 2019 Mr. Evans the first claimant emailed Mr. Shute an action list that needed to be arranged before he started on 1 May 2019 including a request for a revised final service agreement which he did not receive. Under cross examination, Mr. Shute stated that he didn't know why he didn't respond to the first claimant's enquiry but his understanding was that the foundation was a director's loan account. Mr. Evans understanding it that he was an employee of the respondent with an annual salary with full employment rights.

16. The draft director's service agreement indicated that the claimant was an employee with an annual salary and full employment rights. On 16 April 2019 Mr. Evans stated that the director's loan and dividend "made sense" and was appealing. However, this was never formalised nor signed nor did Mr. Evans

acknowledge that he would be drawing down money out of the business as a loan and not a salary. There was no concluded agreement that salary would be paid in this way.

17. At page 241 Mr. Shute agreed to pay Mr. Evans the sum of £3,500 net. Mr. Evans commenced work along with Miss. Cahill for the respondent on 1 May 2019. They sourced offices in Leeds and moved into the premises. Payments for salary from the respondent were paid to both claimants and described as "wages" into their bank accounts. Mr. Evans emailed Mr. Barber on a monthly salary to confirm the wages for payroll. Mr. Evans was paid on 10th of each month

18. On 4 June 2019 (page 251) Mr. Barber, financial director for the respondent sought information from Mr. Evans about the correct salaries for pay roll. By email dated 4 June 2019, Mr. Evans emailed Mr. Barber copying Mr. Shute stating that his salary was £58,000 per annum net; £3517 approx. He also stated in another email of the same date that Colin was "doing mine differently to normal payroll". The specifics of this are unclear. His evidence was that his salary expectation was £58,000. He confirmed Ms. Cahill was to be paid £20,000 gross. Mr. Shute was copied into this correspondence and did not dispute these figures; nor did he assert that the claimant was being paid by way of director loan. The Tribunal rejected Mr. Shute's explanation that he failed to dispute this or in fact say anything at all about it because he claimed there was an agreement in place with the first claimant. The Tribunal finds although there were discussions about a director's loan, but there was no concluded agreement to pay Mr. Evans by way of director's loan.

19. On 2 July 2019 in response to Mr. Barber's enquiries about the respondent's payroll for June 2019, the first claimant confirmed his pay at £3,500 net sum and Mrs. Cahill's payment of £2,131.67 gross. By email dated 3 August 2019 the salary stated by himself is £3,500 net. There was no explanation he was liable to tax/national insurance. He just knew that was the agreed net figure. He continued to receive that sum from the respondent. Mr. Evans believed that as an employee national insurance would be paid at the end of the year. He was unfamiliar with HMRC and how this would be paid.

20. By email dated 5 August 2019 the first claimant asked Mr. Barber about paying national insurance; he stated this was part of net pay and asked how does it work and do you keep this aside to pay at the end of the year. On 4 September 2019 Mr. Evans confirmed to Mr. Barber payroll for the respondent was £3,500 net to him and £1,768.56 gross for Mrs. Cahill.

21. Mr. Barber sought confirmation from Mr. Evans about the second claimant's pay in October 2019 and requested confirmation he could process £120.59 for employee pension for Mrs. Cahill. On 4 October 2019 page 259 the first claimant confirmed his payment should be £6,000 net. This was a payment for his salary and expenses for attending an exhibition to promote the business. By email dated 5 November 2019 Mr. Evans confirmed his salary that month was £3,500 net and £1,666.66 gross pay for Mrs. Cahill.

22. By November 2019 there were discussions about a director's loan. On 4 November 2019 (page 260) Mr. Evans emailed Mr. Shute as to whether a nominal salary should be put forward for him. At about this time, Mr. Evans became concerned as to how Mr. Shute was operating. He sent a message to Mr. Evans to serve notice on the office as he claimed to have found another office in central Leeds which could accommodate both Central Point Recruitment and SBFM.

23. On 13 December 2019 Mr. Shute sought to meet with Mr. Evans to discuss a number of issues including the loss-making position and lack of clients and "your directors loan position in the light of the above". Mr. Evans responded to this stating he had taken advice recently and also wished to discuss issues and listed as a concern "directors loan position, salary, tax and national insurance".

24. At the meeting on 17 December 2019 between Mr. Shute and Mr. Evans the Tribunal did not find contrary to the respondent's case that Mr. Evans was dismissed. Instead, the Tribunal finds that Mr. Evans raised his concerns about the way the business was operating financially. Mr. Shute gave Mr. Evans a number of ultimatums and wanted a decision before 20 December 2019. The options given to Mr. Evans were (a)to terminate the employment of Janet Wilks and Tina Cahill from their roles and for the Claimant to work at SBFM, Head Office, Harrogate (b)the claimant, Miss. Cahill and Miss. Wilks work from SBFM Head Office but Tina Cahill and Janet Wilks would only be short term employees (c) bring in a large new client before 24 December 2019 (d) close the business.

25. Mr. Evans requested Mr. Shute to set the options out in writing but Mr. Shute refused to. Mr. Shute asked Mr. Evans what he would do if he left the business. Mr. Evans stated he may set up his own company. Mr. Evans who was becoming unhappy and mistrustful of the situation, did on that date incorporate another business.

26. On his return from the meeting with Mr. Shute on 17 December 2019, Mr. Evans shared with his colleagues, Miss. Wilks and Miss Cahill what had been discussed and the list of ultimatums put to Mr. Evans by Mr. Shute. At the tribunal hearing Miss. Wilks and Mrs. Cahill confirmed the evidence of Mr. Evans as to what had been discussed at the meeting.

27. The claimants remained in the business. Due to the recruitment demand they continued to work throughout the festive period. Nothing more was heard from Mr. Shute and they simply got on with their work.

28. On 6 January 2020 Mr. Evans confirmed to Mr. Barber that the respondent's payroll should include £3,500 net salary (gross salary £4,808.07); Tina Cahill's gross salary of £2,000 plus £333.34 missing salary for November and £242.46 nest pension refund as Tina closed the account.

29. Mr. Evans did not receive his wages in December 2019 or for the period of 1 January 2020 to 10 January 2020 when he worked for the respondent.

30. On 10 January 2020 their access to emails and telephone lines were cut off without notice. Mr. Evans resigned (page 357). By email dated 13 January 2020 Mr. Evans resigned from his employment with the respondent stating that his position has been made untenable due to the non-payment of his salary due on 10 January 2020 for £3,500 net; removing him and Mrs. Cahill from the emails on 10 January, removing access to the bank account and giving him three ultimatums on 17 December 2019 which included dismissing two employees. He considered he had been constructively dismissed.

31. Mr. Chute gave evidence that he was unaware that the claimant remained in the business after the end of December 2019 because he was dismissed for gross misconduct. The Tribunal did not accept Mr. Chute's evidence. On 6 January 2020 Mr. Barber, financial director requested Mr. Evans to authorise a number of the company's transactions. This was inconsistent with Mr. Evans being no longer in the respondent's business. No process was adopted to dismiss Mr. Evans and no explanation was given by the respondent as to why this was not the case.

32. The unsigned directors service agreement states the holiday year runs from 1 January to 31 December. The first claimant relies upon the statutory annual leave entitlement of 5.6 weeks of holiday. He was not challenged in cross examination about this or his claim for calculated outstanding holiday of 6.9 days.

33. No notice period was expressly agreed between the parties. Mr. Evans relies upon the statutory minimum period of one week. He was not challenged about this under cross examination or his entitlement to it.

34. Mrs. Cahill worked as a resourcing consultant alongside Mr. Evans from 1 May 2019 to 10 January 2020. Mrs. Cahill was provided with terms and conditions of employment dated 2 May 2019 (page 265). Her duties included assisting Mr. Evans in the day to day running of the business namely recruitment, administration, interviewing of candidates and staffing. She was recruited to the position by Mr. Evans via a whatsapp conversation. It was agreed she would be recruited at a salary of £20,000 per annum and then move to an increase of £24,000 per annum. Mr. Evans informed Mr. Barber about this by email on 3 December 2019 (page 262). Although Mr. Shute disputes this, as the first claimant was a director of the respondent, the first respondent had authority to agree this. Mrs. Cahill was also entitled to be enrolled in the company's pension scheme (clause 11 of her contract). Her holiday entitlement was for 28 days (including 8 bank holidays) and her holiday year commenced on 1 April to 31 March. Pursuant to clause 8.3 of the contract if Mrs. Cahill's employment commenced or finished part way through the holiday year, her holiday entitlement was to prorated accordingly. One months' notice was required to terminate her contract after 6 months employment (see clause 19.4). Mrs. Cahill claimed she was not paid £2,000 notice pay. This was not challenged in cross examination.

35. On 19 December 2019 Mr. Evans emailed Mr. Barber on the basis that Mrs. Cahill had not received the salary increase of £24,000 and she was owed £333.34 gross pay difference (p.293).

36. Mrs. Cahill also complains that a purported deduction from her wages for pension was not paid to a pension fund for her benefit. of a shortfall in her pension payments. On a payslip dated 10 January 2020 a deduction of £120.59 was made for "pension". However, Mrs. Cahill's unchallenged evidence was that she checked this with the pension provider and the respondent did not pay this sum into the claimant's pension fund for her or a further sum of £121.87 (total £242.46).

37. Pursuant to Mrs. Cahill's contract of employment (page 265), her holiday year ran from 1 April to 31 March (at clause 8.2). She claims 7.1 days of holiday leave outstanding at the end of her employment. This was not challenged in cross examination.

38. Mrs. Cahill continued to work alongside of Mr. Evans until 10 January 2020 when her mobile telephone and internet connection was blocked by SFBM Head Office and she was unable to carry out her work for the respondent. There was no mention in any subsequent email correspondence that Mrs. Cahill was dismissed by the respondent. Mrs. Cahill claims additionally one month's notice. She was entitled to consider by removal of her essential tools to do her job (telephone and internet connection) she had been constructively summarily dismissed by the respondent on 10 January 2020. She was entitled to one months notice.

THE LAW

39. The usual requirements of contract apply to employment contracts namely offer, acceptance, consideration, intention to create legal relations and certainty. In the case of **Wells v Devani (2019) UKSC 4** the Supreme Court held that the courts will determine whether objectively assessed the parties intended to create a legally binding relationship. If they did and if they have acted on their agreement the courts will be reluctant to find that any agreement is too vague or uncertain to be enforced. There is no general rule to prevent the courts from rendering a contract sufficiently complete to be binding by implying a missing term into the agreement. A contract of employment may also be implied from the parties conduct; **Franks v Reuters Limited (2003) EWCA Civ 417.** In determining the terms of a contract a tribunal will have to consider the provisions of a written contract (if any). Where there is a written contract it will not be correct to consider only its terms unless it is established that the parties intended that the document should contain all the terms of the contract. It is open to the parties to agree some terms in writing and others orally (**Carmichael v National Power plc (1999) 1 All ER 897**). The Supreme Court stated in **Autoclenz Limited v Belcher (2011) UKSC 41** the fundamental question is "what was the agreement between the parties'. Parties subsequent conduct is not admissible in construing their original written agreement (**Hooper v British Railways Board 1988 1 All ER 98**). The nature of the relationship and the power imbalance is a matter of context that the court can consider **Daniels v Lloyds Bank Plc (2018) EWHC 660.**

40. The employment contract contains an implied term of mutual trust and confidence namely parties to a contract will not without reasonable and proper

cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee (**Malik v BCCI 1998 AC 20** and **Baldwin v Brighton and Hove City Council 2007 ICR 680**). This term is fundamental to the employment relationship and any breach is likely to be repudiatory (**Morrow v Safeway Stores plc 2002 IRLR 9**).

41. Pursuant to section 13 of the Employment Rights Act 1996 ("ERA") no deduction from a worker's wages may be made unless either (a) it is required or permitted by a statutory or contractual provision or (b)the worker has given his prior written consent to the deduction. If the deduction is made pursuant to a contractual provision the terms of the contract must have been shown to the worker or if not in writing, its effect notified in writing to the worker before the deduction is made (see section 13 (2) of the ERA 1996). In determining whether there had been an unlawful deduction from wages the employment tribunal is required by section 13 (3) of the ERA to determine the "total amount of wages properly payable" (**Mears v Salt UKEAT/0522/11**).

42. Pursuant to section 27 (2) of the Employment Rights Act 1996 wages are defined as excluding payments by way of pension. However, a failure to pay pension payments into a pension fund where there is a contractual term that the employer will do so, amounts to a breach of the employment contract.

43. Statutory holiday entitlement pursuant to the Working Time Regulations 1998 is 5.6 weeks per year. Where a worker's employment is terminated and he has accrued but untaken leave to which he is entitled under the Regulations the employer must pay him in lieu of that untaken leave (see Regulation 14).

44. Minimum periods of notice to terminate an employment contract are contained in section 86 of the Employment Rights Act 1996. It provides that where service is less than one year an employee is entitled to a minimum of one weeks' notice. Contractual notice periods may be more generous than the statutory minimum.

CONCLUSIONS

45. The starting point is what was the agreement between the parties? The Tribunal takes into account the nature of the relationship and the power imbalance between the claimant and the respondent.

46. There is no single written document setting out the full terms of Mr. Evans employment contract. A draft director's service agreement was provided to Mr. Evans but he never signed it and in fact he sought prior to the commencement of his employment a revised final service agreement but did not receive one from the respondent. The Tribunal is not satisfied that Mr. Shute failed to send one to the claimant because he believed there was an agreement in place; by the request of the claimant for a revised final service agreement Mr. Shute was well aware that the draft service agreement did not incorporate the full terms and conditions of the claimant's employment and there was no concluded agreement on the basis of the draft.

47. On the facts found by the Tribunal the agreement between the parties was that the first claimant, Mr. Evans was to be paid £3,500 net per month. The claimant was in fact paid "wages" into his bank account via payroll each month. When the first claimant indicated to Mr. Barber his monthly wage (with Mr. Shute copied in) Mr. Shute did not challenge this. There was no agreement to reductions or overpayments via a director loan; the fact is no concluded agreement to this effect existed. A draft director's loan was drafted and preliminary discussions took place between the claimant and Mr. Shute. However, at no time was there a concluded agreement such that the respondent can rely upon it to make deductions from the claimant's wages of payment in excess of national minimum wage. Due to the significance of the implications of a director's loan namely the deductions to an employee's salary and implications of tax and the context of an imbalance of power between the claimant and the respondent, the Tribunal finds that in the absence of a concluded agreement to this effect, the Tribunal cannot simply imply this into the agreement. The parties did not expressly agree the claimant would be paid by way of director's loan.

48. The draft agreement does describe annual leave entitlement for this claimant and a proposed holiday year. There was no concluded agreement as to the precise holiday entitlement of the claimant. In the circumstances the claimant was entitled to rely upon the statutory entitlement for holiday pay. There was no concluded agreement about the entitlement for notice. In the circumstances the claimant relies upon statutory notice and the proposed holiday year in the draft agreement. He was not challenged about this in cross examination. The claimant's unchallenged evidence was that he was entitled to statutory holiday pay and 6.9 days was outstanding. The Tribunal finds that he was entitled to this and awards £1,531.18 gross.

49. Despite remaining as an employee and working in the business from 1 December 2019 to 10 January 2020, the first claimant was not paid any wages. He is entitled to be paid for this period of working for the usual amounts he was paid as wages each month and the failure to do so is an unlawful deduction of wages. The Tribunal calculates this at £6,361.37.

50. The respondent provided the first claimant with a number of ultimatums at a meeting on 17 December 2019. However, Mr. Shute did not follow these up with the claimant and the first claimant stayed in the business and continued his work. The first claimant remained in the respondent's employment until his resignation on 13 January 2020. The first claimant was still regarded to be a director and employee of the respondent as indicated by Mr. Barbers' request on 6 January 2020 that the claimant authorise a number of the respondent's transactions. No process was adopted to terminate the first claimant's employment. However, by the actions of failing to pay him wages, termination of access to emails and telephone lines required to do his job, Mr. Evans was entitled to consider there was a repudiatory breach of the implied term of trust and confidence and he had been effectively dismissed (page 357). The claimant was summarily dismissed. He is entitled to one weeks statutory notice pay calculated at £1,109.54 gross.

51. The respondent failed to follow any process to terminate the employment contract of the first claimant. No explanation has been provided by the respondent as to why this was the case. The respondent sought to suggest it dismissed the claimant on 17 December 2010. The Tribunal rejected this. To simply have cut off the claimant's ability to carry out his role in the absence of any process, prima facie there are breaches of the ACAS code of practice pursuant to paragraph 10,11,13, 18 and 26. In the absence of any explanation as to why these fundamental steps were not taken, the tribunal finds it is appropriate to order an uplift of 25% on the first claimant's award.

52. In all the circumstances the Tribunal finds that there was no right of the respondent to deduct overpayments or that the claimant should repay payments, the respondent's counterclaim fails and is dismissed.

53. The Tribunal finds that Mrs. Cahill remained working in the business and resigned when her mobile telephone and internet connection was blocked by SFBM Head Office. At this point she was unable to carry out her work for the respondent. Her salary had been increased to £24,000 per annum (see page 262). However, Mrs. Cahill did not receive the salary increase of £24,000 and she was owed £333.34 gross pay difference (p.293).

54. Mrs. Cahill was also entitled to be enrolled in the company's pension scheme (clause 11 of her contract). A purported deduction was made from her wages for pension which was not in fact paid to a pension fund for her benefit. On a payslip dated 10 January 2020 a deduction of £120.59 was made for "pension". However, Ms. Cahill has checked this with the pension provider and the respondent did not pay this sum into the claimant's pension fund for the benefit of Mrs. Cahill or a further sum of £121.87. This evidence was unchallenged in cross examination. The claimant sought compensation under the heading unlawful deductions of wages. Pension payments are not wages under section 27 (2) of the Employment Rights Act 1996. Her claim is a breach of contract and she is awarded this sum.

55. Her holiday entitlement was for 28 days (including 8 bank holidays) and her holiday year commenced on 1 April to 31 March. Pursuant to Mrs. Cahill's contract of employment (page 265), her holiday year ran from 1 April to 31 March (at clause 8.2). She claims 7.1 days of holiday leave outstanding at the end of her employment. This was not challenged in cross examination.

56. One months' notice was required to terminate her contract after 6 months employment (see clause 19.4). The respondent cut off her access to the telephone and internet on 10 January 2020. In the circumstances that in these absence of these "tools" of her work she could not continue in her role, she was entitled to consider herself constructively dismissed. Mrs. Cahill claimed she was not paid £2,000 in notice pay. This was not challenged in cross examination. She is awarded this sum.

57. No process was adopted by the respondent to terminate Mrs. Cahill's contract of employment. Mrs. Cahill is awarded an uplift of 25 % on her award.

58. For the reasons set out above, the respondent's counterclaim is ill founded and is dismissed.

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Employment Judge Wedderspoon

23 February 2021