EMPLOYMENT TRIBUNALS

Claimant: **Mr A McIvor**

Respondent: **Kepi International Solutions Limited**

Heard at: **Leeds by CVP** **On:** **30 March 2021**

Before: **Employment Judge Tegerdine**

Representation
Claimant: In person
Respondent: Mr Morton (solicitor)

WRITTEN REASONS

1. After hearing evidence and receiving submissions from the claimant and the respondent's representative, the Tribunal delivered its oral judgment. On 31 March 2021 the respondent's representative contacted the Tribunal by email to request written reasons. The Tribunal now gives its reasons for the judgment that was reached.

Introduction

2. In a claim form presented to the Tribunal on 31 July 2020, the claimant brought complaints of unauthorised deductions from wages and breach of contract.

3. The claimant brought claims for the following sums:
   - 24 days' accrued but untaken holiday pay;
   - unpaid wages in respect of the period between 1 February 2020 and 13 July 2020;
   - compensation of £400 per month in respect of the respondent's failure to provide him with a "quality" car between August 2019 and 13 July 2021;
   - 8 days' pay for website development; and
   - mileage expenses of £440.

4. The Tribunal heard evidence from the claimant. The respondent called evidence from Mr Craig Carmichael, the respondent's Chief Executive Officer.

5. The Tribunal shall firstly set out its findings of fact. A summary of the relevant law will be then set out. The factual findings will then be applied to the relevant law, and the Tribunal's conclusions set out.

Findings of fact

6. The claimant started working for the respondent on 18 February 2019. He was employed as the respondent's Managing Director.

7. A copy of the claimant's employment contract was at page 39 of the Bundle. The claimant's contract had been signed by both parties, and its authenticity was not disputed. On this basis the Tribunal found that this was the claimant's employment contract.

8. The respondent dismissed the claimant on one month's notice on 15 June 2020. The claimant was not required to do any work during his notice period. The last day of the claimant's employment was 13 July 2020.

9. The claimant secured alternative work immediately after his employment with the respondent terminated.

Working days/salary

10. At paragraph 6, 9 and 10 of the claimant's witness statement the claimant said that his working days increased from 4 days a week to 5 days a week with effect from 1 February 2020. The claimant said that he was underpaid between 1 February and 13 July 2020, because he was only paid for working 4 days a week instead of 5 days a week during this period.

11. At paragraph 2 of his witness statement, the claimant said that before he started working for the respondent he and Mr Carmichael agreed that he would initially be employed on a 4 day week basis on a salary of £48,000, but when his workload picked up, his hours would increase to 5 days a week, and his salary would increase to £60,000. This was not disputed by the respondent. On this basis the Tribunal found that it was agreed that the claimant would work 4 days a week to start with, and that his hours would increase to 5 days a week at some point when his workload picked up. However there was no agreement as to exactly when the increase in the claimant's hours would come into effect.

12. The claimant said at paragraph 6 of his witness statement that on the last Friday in January 2020 he had a meeting with Mr Carmichael during which the claimant suggested that he increase his working days to 5 days a week. The claimant said that Mr Carmichael agreed to this.

13. The claimant's claim that his hours had increased to 5 days a week with effect from 1 February 2020 was disputed by the respondent. At paragraph 4 of Mr Carmichael's witness statement Mr Carmichael said that the claimant worked 4 days a week in accordance with the terms of his written contract.

14. In Mr Carmichael's oral evidence, he accepted that the claimant had suggested that he increase his hours to 5 days a week, however Mr Carmichael denied that he agreed to this. Mr Carmichael said that he wasn't willing to increase the claimant's hours and salary, as the claimant was

already getting paid more than other employees, and wasn't performing to the level which was expected of him.

15. It was not disputed that on 24 February 2020, the claimant sent an email to Mr Carmichael's wife, Sherrie Carmichael, who managed the respondent's payroll. The claimant's email was at page 73 of the Bundle. The email stated: "Just to let you know that from 1st February, with Craig's agreement, I moved from 4 days per week to 5 days per week, as per the original agreement. This moves my salary from £48k to £60k".

16. At paragraph 6 of his witness statement the claimant said that the respondent responded to his email in a text message which said: "We will talk about this tomorrow". However, the text message was not included in the bundle. The claimant said that the following morning Mr Carmichael invited the claimant into his office and said that the respondent would pay him for a 5 day week, but not for that month. The claimant said that he chose not to make an issue out of it, as he believed it was going to be resolved going forwards.

17. It was not disputed that the claimant sent a further email to Mr and Mr Carmichael on 31 March 2020 in which he said that his salary hadn't been revised "as agreed". The claimant's email was at page 74 of the Bundle.

18. At paragraph 6 of his witness statement the claimant said that he received a response from Mr Carmichael the next day which was similar to the response he'd received the previous month. According to the claimant, Mr Carmichael responded by saying that increasing the claimant's pay "gave him a problem" and he would need to work something out. The respondent's response was not included in the Bundle.

19. The respondent did not dispute the fact that the claimant sent emails to Mr and Mrs Carmichael on 24 February and 31 March 2020 about the salary increase the claimant said had been agreed. On this basis the Tribunal found that the claimant did send two emails to Mr and Mrs Carmichael which stated that his salary hadn't been increased "as agreed", however he did not receive any reply by email. It was not clear whether the respondent responded to the claimant's emails in some other way, and if so, how it responded, and there was insufficient evidence for the Tribunal to make any findings about this.

20. Clause 4 of the claimant's employment contract states that the claimant's normal working days were Monday, Tuesday, Thursday and Friday, which is 4 days a week.

21. Clause 6 of the claimant's employment contract states that the claimant's salary was £48,000 per annum.

22. The Tribunal found Mr Carmichael to be a reliable and credible witness. Mr Carmichael's evidence was consistent. Mr Carmichael gave clear and direct answers to the questions he was asked, and the evidence he gave was consistent with the contemporaneous documents which were included in the Bundle, including the claimant's employment contract.

23. However, the Tribunal found the claimant's evidence to be unsatisfactory. The claimant's answers to the questions which were put to him were frequently vague, evasive, and inconsistent.

24. An example of the claimant's inconsistent evidence was when the claimant was asked what had been agreed between himself and Mr Carmichael about how much he would be paid for developing the respondent's website. The claimant made all of the following statements in response to questions he was asked about this: "We agreed on a day rate."; "Mr Carmichael was aware of my day rates to other people."; " I didn't say we agreed on a day rate; he knew what my day rate was. I used to work on a day rate for other people."; and "I had an agreement that I could do their website for under £2,000".

25. A further example of the claimant's inconsistent evidence was the answers the claimant gave in response to questions he was asked about the lack of written evidence to support his claims. In response to questions about this, the claimant gave the following answers: "Verbal requests don't get you anywhere, which is why on bigger issues such as salary discrepancies I resorted to sending emails"; "It was always verbal, how would you document that?"; and (with reference to the alleged agreement to increase his working days), "When you make an agreement like that with the owner of the company you have an expectation that the agreement will be honoured."

26. In addition to the claimant's evidence being unsatisfactory for the reasons set out at paragraphs 23 – 25, the claimant's claims were, for the most part, wholly unsupported by evidence. Given the length of time some of alleged issues had been outstanding by the time the claimant's employment terminated (in particular the failure to pay the claimant for the website development and provide him with a satisfactory company car), the Tribunal would have expected the claimant to have been able to produce documentary evidence to corroborate at least some of his claims.

27. For the reasons set out at paragraphs 22 – 26 the Tribunal preferred Mr Carmichael's evidence to the claimant's evidence, and found that in 2020 the claimant's working hours and rate of pay remained as set out in his employment contract: his working days were 4 days a week and his salary was £48,000.

<u>Company car</u>

28. Clause 9 of the claimant's written employment contract states that the claimant was entitled to "a car". The claimant claimed that he was entitled to a "quality" car which the respondent did not provide.

29. It was not disputed that the claimant had a meeting with Mr Carmichael at the Bell Hotel in Driffield before he commenced employment with the respondent. At paragraph 3 of his witness statement the claimant said that during this meeting he was told that he would be provided with a "quality" car. As this was not challenged by the respondent, the Tribunal found that this was said.

30. The claimant said that when the lease on the company's Mercedes he'd been using expired in July 2019, his company car was never replaced, however he was offered the use of a spare old builders' van for a week or so. Although

the claimant continued to have the use of the company van until he was dismissed, he was not offered a car. The claimant said that from the point at which the lease on which the Mercedes expired, Mr Carmichael refused to even discuss getting a new company car for the claimant.

31. The claimant did not produce any documentary evidence to substantiate his claim that he had complained about the company van which had been provided.

32. At paragraph 7 of his witness statement the claimant said that he had to "spend money on a car for use outside of work". However, when the claimant was asked during cross-examination for details of when he had hired a car, and how much it had cost him to replace the car which had not been provided by the respondent, he was unable to provide any details at all.

33. At paragraph 27 of his witness statement Mr Carmichael said that the claimant never raised an issue about the company vehicle he had been using until after his employment had come to an end.

34. The Tribunal preferred Mr Carmichael's evidence for the reasons set out at paragraphs 22 – 26 above, and made the findings at paragraphs 35 – 38 on that basis.

35. The Tribunal found that the claimant was entitled to a company car rather than a company van, as this was set out in his employment contract. However, there was no evidence that the claimant had a contractual entitlement to a "quality" company car, and even if this had been agreed, the phrase "quality car" would have been too uncertain to enforce.

36. The Tribunal found that the claimant was given the use of a company van instead of a company car between August 2019 and June 2020, but did not make a complaint about it until after his dismissal.

37. The Tribunal found that even though the provision of a company van was not in accordance with the terms of the claimant's employment contract, the claimant accepted the fact that he was given the use of company van instead of a car.

38. As the claimant did not produce any evidence of any costs he incurred because he had to hire a car for personal use, or of any other costs he incurred as a result of being given a van to drive rather than the car, the Tribunal found that the claimant did not suffer any financial loss as a result of being given the use of a van rather than a car.

39. It was not disputed that the claimant returned the company van at the beginning of his one month notice period. However, the claimant did not produce any evidence of any financial loss he incurred during the notice period as a result of not having the use of a company vehicle. On this basis the Tribunal found that the claimant did not suffer any financial loss as a result of not having the use of the company van during his notice period.

Expenses

40. The claimant claimed that he was entitled to a payment of £440 in respect of outstanding but unpaid mileage expenses.

41. Clause 10 of the claimant's employment contract states: "The Employer will reimburse out-of-pocket expenses incurred by the Employee during the operation of his/her day to day duties, subject to production, within one month, of written evidence of expenditure, where procurable".

42. At paragraph 8 of his witness statement the claimant explained that the Mercedes company car he drove for a while had a tracker on it. The claimant said that the tracker was linked to software which was supposed to be used for claiming mileage expenses. However, the software was faulty and information regularly got lost. The claimant said that eventually the company that provided the software went into administration and all data was lost. The claimant claimed that because information was lost, many of his mileage claims were lost.

43. The respondent did not dispute the fact that the tracker software was faulty and that the company which owned the software went into administration. However, in his oral evidence Mr Carmichael explained that the software was not installed for the purposes of submitting mileage expense claims, but for other reasons. Mr Carmichael said that employees were expected to keep a record of mileage and submit separate mileage expense claims. At paragraph 21 of his witness statement Mr Carmichael said that the claimant was paid all mileage which was owed to him.

44. The claimant did not produce any evidence to show that he submitted a mileage expense claim for £440 which had not been paid. When the claimant was cross-examined about what his claim for unpaid expenses, he was unable to provide any details about which journeys the mileage related to, or how the figure of £440 had been arrived at.

45. The Tribunal preferred Mr Carmichael's evidence to the claimant's evidence for the reasons set out at paragraphs 22 – 26 above. On this basis the Tribunal found that that the claimant was required to keep his own records of his mileage, and submit mileage claims for any mileage he wanted to be reimbursed for. The Tribunal also found that the claimant had not submitted a mileage claim for the £440 claimed, or produced any evidence to support his claim that he had incurred mileage expenses of £440 which had not been reimbursed.

<u>Website development</u>

46. In his witness statement at paragraph 4 the claimant stated that before he started working for the respondent, Mr Carmichael asked him to review the respondent's IT CRM system and website. The claimant said that he told Mr Carmichael that he could re-develop the system from scratch, and that Mr Carmichael agreed to pay for the re-development. The claimant said that he did the website development work, but was never paid for it.

47. In his oral evidence the claimant said it was agreed with Mr Carmichael that he would do the website development work for "less than £2,000". However, the claimant also said in his oral evidence that: "We agreed on a day rate.";

and " I didn't say we agreed on a day rate; he knew what my day rate was. I used to work on a day rate for other people".

48. The respondent did not dispute the fact that the claimant did some work on its website. However, at paragraph 18 of Mr Carmichael's written statement, Mr Carmichael said that the claimant agreed to do the work voluntarily because he enjoyed doing that kind of work, and there had been no discussion or agreement about the claimant being paid for it.

49. The Tribunal preferred Mr Carmichael's evidence to the claimant's evidence for the reasons set out at paragraphs 22 – 26 above. For these reasons the Tribunal found that there was no agreement that the claimant would be paid for the work he did on the respondent's website, and that in the absence of any agreement he was not entitled to be paid for it.

Holiday pay

50. The claimant claimed that he was entitled to a payment in lieu of 24 days' accrued but untaken holiday.

51. In his oral evidence the claimant explained that his claim for accrued but untaken holiday pay was based on:
    - 3 days' accrued but untaken holiday in respect of the period between 18 February and April 2019;
    - 11 days' accrued but untaken holiday in respect of the period between April 2019 and 1 January 2020; and
    - 10 days' accrued but untaken holiday during the period between 1 January and 13 July 2020.

52. The claimant's contractual holiday entitlement is set out at clause 11 of his employment contract. Clause 11 states that:
    - Holiday entitlement for a full-time employee is 28 days including bank holidays. Holiday entitlement for part-time employees is pro rata;
    - The claimant's holiday entitlement for the 2018/2019 holiday year is 3 days;
    - Holidays must be taken in the holiday year of entitlement and may not be carried forward to the following holiday year;
    - The respondent's holiday year runs from April to April.
    - Upon termination of employment, the claimant is entitled to be paid in lieu of any unused holiday entitlement.

53. At paragraph 5 of the claimant's witness statement the claimant said that although his employment contract stated that untaken holiday couldn't be carried over to subsequent holiday years, he discussed this with Mr Carmichael, and as the claimant was the Managing Director, they agreed that he could set the holiday policy and carry over his holidays until the respondent could manage without him.

54. In his oral evidence the claimant said that in 2019 he and Mr Carmichael agreed that the claimant's holiday year would change from April to April to January to January.

55. However, at paragraphs 6 and 11 of Mr Carmichael's witness statement, Mr Carmichael said there was no discussion or agreement with the claimant about the claimant being able to carry over untaken holidays, or any agreement to change the claimant's holiday year.

56. At paragraph 8 of Mr Carmichael's witness statement he said that the respondent's 2020 leave year began on 1 April 2020. He also said that between 1 April and 13 July 2020 the claimant was paid for 4 bank holidays and took 5 days' annual leave, which meant he took a total of 9 days' holiday during the 2020 holiday year. This was supported by the claimant's holiday records were in the Bundle at pages 83 and 84.

57. In his oral evidence the claimant accepted that he took 5 days holiday in June 2020. However, according to the respondent, the claimant also took 4 days holiday on bank holidays during the 2020 holiday year. In his oral evidence the claimant did not deny that he was paid on bank holidays and was not required to work on those days, however he said that the reason he did not work on bank holidays was because the respondent was closed, rather than because he was on holiday. The claimant pointed out that he had never submitted holiday request forms in respect of bank holidays, and couldn't physically attend work on bank holidays because the building was locked.

58. It was not disputed that the claimant was paid for 1 day's accrued but untaken holiday when his employment came to an end. In his oral evidence Mr Carmichael explained that a member of staff had mistakenly calculated the claimant's holiday entitlement on the basis of a full-time employee's holiday entitlement, which was the reason a payment in lieu of holiday was made.

59. The Tribunal found the claimant's evidence to be unreliable for the reasons set out at paragraphs 22 – 26, and preferred Mr Carmichael's evidence about the claimant's holiday year arrangements and the holidays the claimant had taken, which was supported by the claimant's contract of employment.

60. For the reasons set out at paragraph 59 the Tribunal found that the claimant's holiday year ran from 1 April to 31 March, and that he was not entitled to carry over untaken holiday from one holiday year to the next. The Tribunal did not accept the claimant's proposition that he did not take holiday on bank holidays because he did not have to submit holiday request forms. The Tribunal found that the claimant was on holiday on bank holidays, as he was not required to work on those days but was still paid for them.

61. As the Tribunal found that the claimant's holiday year ran between 1 April to 31 March and the claimant was not entitled to carry over untaken holidays from one year to the next, the Tribunal found that any untaken holiday for the holiday years 2018-2019 and 2019-2020 was lost when the 2020-2021 holiday year started on 1 April 2020.

62. The claimant claimed that he was entitled to 28 days holiday per year, however the Tribunal found that he was employed to work 4 days a week for the duration of his employment, and his employment contract states that holiday entitlement for part-time employees is pro-rated. The claimant's annual holiday entitlement was therefore 80% of 28 days including bank holidays, which amounts to 22.5 days holiday a year. The Tribunal found that

the claimant's pro rata holiday entitlement for the period between 1 April – 13 July 2020 was 6.6 days.

63. The Tribunal found that the claimant took 9 days' holiday between 1 April and 13 July 2020, and was paid for 1 additional day's holiday on termination of employment. The claimant therefore either took or was paid for a total of 10 days' holiday in respect of the holiday year which started on 1 April 2020, a period during which when he was only entitled to 6.6 days' holiday. On this basis the Tribunal found that the claimant had no accrued but untaken holiday entitlement when his employment terminated on 13 July 2020.

Law

Unlawful deductions

64. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision, or a relevant provision of a worker's contract or the worker has previously signified in writing his agreement to the making of the deduction.

65. An employee has the right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 of the Employment Rights Act 1996. The definition of "wages" in section 27 of the Employment Rights Act includes holiday pay.

66. Where a Tribunal makes a declaration that there has been an unauthorised deduction from wages, it may order the employer to pay the worker, in addition to the amount deducted, such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the unlawful deduction (section 24(2) if the Employment Right Act 1996).

Breach of contract

67. In English law, the purpose of an award for damages for breach of contract is to compensate the injured party for loss, rather than to punish the wrongdoer. The general rule is that damages should (so far as a monetary award can do it) place the claimant in the same position as if the contract had been performed (**Robinsons v Harman (1848) 1 Ex 850**). The purpose of damages for breach of contract is to compensate the injured party for the financial loss they have suffered, and to put them in the position that they would have been in had the contract been performed.

Holiday pay

68. The Working Time Regulations 1998 provide for minimum periods of annual leave, and for payment to be made in lieu of any leave accrued but not taken in the leave in which employment ends.

69. The Working Time Regulations give workers the right to 5.6 weeks paid leave per year. There will be an unauthorised deduction from wages if an employer

fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

70. The general rule under the Working Time Regulations is that workers must take annual leave in the leave year in which it is due (regulation 13(9)), however an employee may have a contractual right to carry over accrued but untaken holiday.

Conclusions

71. The Tribunal reached the following conclusions based on the findings of fact which are set out above.

72. The Tribunal found that there was a discussion and a tentative agreement between the claimant and respondent that the claimant would initially be employed to work 4 days a week, and his hours would increase to 5 days a week when his workload picked up. However, the respondent did not agree that the claimant could increase his hours to 5 days a week with effect from 1 February 2020, and the increase in the claimant's hours never came into effect. The claimant was therefore not underpaid between 1 February and 13 July 2020, and was not entitled to any unpaid wages in respect of this period.

73. The Tribunal found that the claimant was entitled to a company car under the terms of his employment contract, but was provided with a company van instead. On this basis the Tribunal found that the respondent did breach the claimant's employment contract, however as the claimant used the vehicle which was provided, and did not submit a complaint for a period of over 10 months, he waived the respondent's breach of contract. In addition, the claimant did not produce any evidence that he had suffered any financial loss as a result of being provided with a van instead of a car, so would not have been entitled to any damages in any event.

74. The Tribunal found that the claimant did not have the use of any company vehicle during his one month's notice period. However, the Tribunal found that the claimant was not entitled to any damages, as he had not produced evidence of any financial loss.

75. The Tribunal found that there were no outstanding mileage claims, and the claimant was unable to specify how the sum of £440 which he was claiming had been calculated, or which journeys that sum related to. On this basis the Tribunal found that the claimant was not entitled to any payment in respect of any mileage expenses, and the respondent was accordingly not in breach of contract.

76. The Tribunal found that the claimant volunteered to develop the respondent's website, and that had been no agreement that the claimant would be paid for doing this. The Tribunal therefore found that there were no sums owed to the claimant in relation to the development of the respondent's website.

77. The claimant claimed that he was entitled to a payment in lieu of holiday in respect of untaken holiday in the holiday year 2018-2019, holiday which he accrued but did not take during the 2019 – 2020 holiday year, and 10 days

accrued but untaken holiday in respect of the period between 1 January and 13 July 2020.

78. The Tribunal found that the respondent's holiday year ran from 1 April to 31 March, and the claimant had no right to carry forward any untaken holiday. As a result, any untaken holiday which the claimant had accrued was extinguished at the end of each holiday year.

79. As any accrued but untaken holiday was lost at the end of each holiday year, the Tribunal found that the claimant was not entitled to any payment in lieu of accrued but untaken holiday in respect of the 2018-2019 and 2019-2020 holiday years.

80. The claimant's employment terminated during the holiday year which began on 1 April 2020. As the claimant had a pro rata entitlement to 6.6 days for the period between 1 April and 13 July 2020, and took a total of 9 days holiday during this period, he was not entitled to any payment in lieu of accrued holiday. However, the claimant was erroneously paid for 1 day's accrued but untaken holiday which he was not in fact entitled to.

81. The judgment of the Tribunal was that the claimant's claims for unauthorised deduction from wages and breach of contract were not well founded. Accordingly, the complaints of unauthorised deduction from wages and breach of contract failed.

Employment Judge Tegerdine

Date 21 May 2021