EMPLOYMENT TRIBUNALS

Claimant: Mr L O'Dowd

Respondent: Kempton Carr (Maidenhead) Ltd

HELD AT: Reading via CVP **ON:** 5th August 2021

BEFORE: Employment Judge Eeley

REPRESENTATION:

Claimant: In person
Respondent: Ms T Burton, counsel

RESERVED JUDGMENT

1. The claimant's claims of breach of contract and for unauthorised deductions from wages or holiday pay fail and are dismissed.

REASONS

Background

1. By a claim form presented on 2nd Jun 2020 the claimant brings claims for breach of contract and/or unauthorised deductions from wages arising out of his time working for the respondent.

2. In order to determine the claim I had the benefit of witness statements from the claimant and Mr Robert Kerrigan (Managing Director of the respondent). Both witnesses were cross examined. I was also referred to a number of documents in the agreed trial bundle which ran to 138 pages. In addition, I heard oral submissions on behalf of both parties and received some written submissions on behalf of the respondent.

Findings of fact

3. I heard oral evidence from both witnesses and both were subject to cross examination. On the whole, where there was a conflict in the evidence presented, I preferred the evidence of Mr Kerrigan which I found to be more consistent with the available contemporaneous documentation. In addition, Mr Kerrigan had a clear recollection of the events in question whereas, on a number of occasions, the claimant stated that he could not recall what had been said. He indicated that, without a written document to follow up an oral conversation, he could not be sure one way or the other what had been said. In general I found him to be a less coherent and reliable witness.

4. The claimant is a qualified chartered surveyor. The respondent is an independent property consultancy with eight offices in the South East of England. The respondent employs approximately 35 people. The claimant previously worked for the respondent during the period 2013 to 2016. During that time, he worked alongside the respondent's witness Mr Kerrigan. Mr Kerrigan mentored the claimant through his training to the point that he gained his professional qualification. The claimant subsequently moved on to different work. Prior to the events which form the basis for this claim the claimant was working in the healthcare sector.

5. In February 2020 the claimant contacted Mr Kerrigan looking for a new role. At that point he was still a chartered surveyor and registered valuer. He told Mr Kerrigan that he considered that a role with the respondent facilitating loan security valuations would work for him.

6. The claimant and Mr Kerrigan entered into correspondence regarding him potentially taking up a new role with the respondent. A proposal was put forward to the claimant on 13th February. It was explained to the claimant that he would be shadowing Simon Mills in running the loan security team, although the aim would be for him to take on the management of the team over time. His role in the loan security valuation team would involve undertaking valuation work for loan security purposes for commercial, residential and development property.

7. There were some further negotiations between the parties culminating in Mr Kerrigan sending the claimant a conditional offer of employment on 21st February for the position of chartered surveyor in the loan security valuation team. The offer was accompanied by a contract of employment. The relevant documents were at pages 48-51 and 52-62 of the bundle.

8. The offer letter gave the claimant's job title as "chartered surveyor". It confirmed that his line manager would be Simon Mills, Head of Loan Valuations. The typed version of the contract indicated that the commencement date was "to be decided". It was later hand annotated "30th March 2020 (proposed)". The offer letter set out details of the claimant's proposed basic salary and referred to his entitlement to

participate in a non-contractual bonus scheme. The offer letter went on to state an entitlement to earn commission on 10% of fees invoiced/earned by the claimant. The claimant was further entitled to a company car or car allowance. He was entitled to 6.6 weeks holiday per annum. The notice period on both sides was said to be three months. One of the conditions of the offer was that the claimant should satisfactorily complete a probation period of three months. If this condition could not be met then the claimant's employment was terminable without notice.

9. The claimant signed his copy of the offer letter on the 27th February 2020.

10. The further detailed terms and conditions were set out in the document at page 52 of the bundle. Relevant provisions included Clause 16.1 which stated: *"If there is a reduction in work, the Company may temporarily lay you off without pay or reduce your working hours and your pay proportionately. Depending on the circumstances you may have a statutory right to a guarantee payment."*. As is often standard in a contract of employment it was noted that basic pay would be subject to tax and National Insurance deductions which would be taken at source. The detailed provisions in relation to termination of the contract included clause 24.3: *"Notwithstanding the notice periods contained in the Offer Letter the Company shall be entitled to dismiss you at any time without notice or payment in lieu of notice if you … commit a serious breach of your obligations as an employee…."* The claimant also signed his copy of the detailed terms and conditions on 27th February 2020.

11. Shortly after the claimant and the respondent had signed the employment contract the coronavirus pandemic really began to take hold. The government placed the country into lockdown on 23rd March, with all non-essential businesses being required to close and people being asked to stay at home.

12. The lockdown had an immediate impact upon the respondent business. There was insufficient loan security work available which could be undertaken by the loan security team. Consequently, the team were placed on furlough with effect from 1st April 2020 once the furlough scheme came into operation.

13. On 24th March 2020 (i.e. the day after lockdown was announced) the claimant contacted Mr Kerrigan on the telephone. He asked whether his employment would still go ahead in light of the pandemic. I accept that during this conversation Mr Kerrigan explained to Mr O'Dowd that his employment could not go ahead as planned because there was no loan security work at that stage and the team he was due to join was to be furloughed. The business was not in a position to keep paying staff as normal. The claimant did not qualify for furlough under the terms of the scheme. As a result, Mr Kerrigan explained that the options for the claimant were to either take unpaid leave or be laid off pursuant to clause 16 of the employment contract. Unsurprisingly the claimant asked for

time to think about the situation and there was an agreement that he would call back the next day to discuss matters further. I find that Mr Kerrigan's account of this conversation is entirely consistent with the prevailing employment conditions at the time and his commercial need to protect his existing workforce in circumstances where there was no work to be completed in the normal way. The options offered by Mr Kerrigan were consistent with the terms of the employment contract previously agreed between the parties.

14. Later that same day the claimant sent Mr Kerrigan a text message (page 63 at 9:45 pm). In that text message the claimant explained that he had cut short his notice period from his previous employment. He explained that he understood the respondent's position, that "it was not foreseen", and that the respondent is operating a business. However, he went on to point out that he could not lose three weeks' worth of pay. He expressed some disappointment that he had had to initiate the conversation they had had earlier that day. He continued on to say that he would need a definitive answer from Mr Kerrigan with regard to his position and the claimant's potential employment at the respondent. He expressed the view that he and the respondent could be a formidable team. He said that he had opportunities to bring to the table during these uncertain times. He said that he was happy to have a call the next day.

15. I find that the contents of this text message are entirely consistent with the respondent's account of the earlier telephone conversation. The text message is referring to the fact that the respondent has a business to run and may not, in those circumstances, be able to accommodate the claimant in the way that had initially been agreed. The claimant is also conceding that the pandemic constitutes unforeseen circumstances which could not have been planned for. He is effectively "selling" the benefits to the respondent of having him "on the books" and makes oblique reference to the contacts and opportunities he can bring into the respondent's business. He also refers to his "potential employment" with the respondent which appears to be a concession that the parties' previous plans had been somewhat overtaken by events.

16. In subsequent text messages Mr Kerrigan organised a telephone conversation for the next day (i.e. 25th March). That telephone conversation took place as arranged. Mr Kerrigan explained that if the claimant were to join the respondent on 30th March, the only options would be for him to take unpaid leave or be laid off. To that extent he re-stated his earlier position. The claimant's response was to tell Mr Kerrigan that he had other opportunities to look at including staying with his current employer, working with his father, becoming self-employed or exploring other jobs within the healthcare sector. Mr Kerrigan explained to the claimant that he needed to make the right decision for himself. He suggested that the claimant may want to consider a conversation with his then current employer in order to be placed on furlough, with a view to recommencing conversations with the respondent after lockdown. If he took that option the claimant would receive an income which would put him in a better position than joining the respondent only to be placed on unpaid leave or laid off. The

claimant said he would explore the options and come back to the respondent.

17. I accept that Mr Kerrigan's account of this conversation is accurate. Whilst he did have some background knowledge of the claimant's circumstances, he makes specific reference to the option of the claimant working with his father, becoming self-employed or exploring other jobs within the healthcare sector. It is more likely than not that he obtained this information during the course of the telephone conversation on 25th March 2020. Furthermore, the options set out were entirely practical given the circumstances and it was evidently in the best interests of the claimant to explore alternatives to taking up employment with the respondent only to be left without any income. This was a realistic and reasonable approach to take in the circumstances.

18. Following the telephone conversation the claimant sent a text message on 26th March at 16:09 (page 65). The message stated: *"It's unlikely that AY will be able to change/extend the notice period at this point. The head of healthcare will make enquiries but he didn't sound too confident. I get to keep the equipment until the lockdown is over which will be useful. I might be stacking shelves at Tesco yet."* The reference to working to Tesco, although apparently light-hearted, belied an acknowledgement on the claimant's part at the time he sent the message that his position was far from certain. It did not reflect a settled intention to commence his employment with the respondent on 30th April under the terms and conditions in the signed contract of employment. Rather, it indicated that at this stage his options were still open and he had a choice to make as regards his immediate future. It is a tacit acknowledgement of the respondent's stated position that he would not be able to work under the original terms: he would not be provided with work from 30th April and would not be paid the salary which formed part and parcel of the contract of employment.

19. There was a further telephone conversation between the claimant and Mr Kerrigan on 27th March 2020 where Mr Kerrigan asked the claimant what he wished to do. The claimant told him that, further to his text message on the 26th, he didn't think his employer would agree to put him on furlough. Mr Kerrigan expressed some surprise at this and acknowledged that it did not sound like they were being sympathetic to the claimant's situation. The claimant then asked about the possibility of joining the respondent on an alternative basis, explaining that he had his own clients from whom he could generate an income. I accept that Mr Kerrigan indicated that he could not take on an additional overhead given the immediate reduction in workload/income. That is entirely consistent with the circumstances as they were at that time at the beginning of the first lockdown. Taking on a new employee with an obligation to pay salary in those circumstances would not be at all attractive to the respondent. Mr Kerrigan suggested that he could facilitate a working arrangement where the claimant would be paid against any invoicing he raised under a consultancy arrangement. This was a logical "middle way" in the circumstances which would provide the claimant with the opportunity to earn an income without putting

unacceptable burdens on the respondent's business during the pandemic.

20. I accept that during the telephone conversation the claimant said that a consultancy/contractor arrangement would work for him and that he went on to say he would generate in the region of £10,000 in fees for the month of April. I find that this figure came from the claimant as he was the one who had an incentive to generate income to this sort of level. Mr Kerrigan explained that an acceptable way forward would be for the claimant to earn a third of the fees billed. (Mr Kerrigan had engaged consultants to work for the business in the past and so it was not an entirely unknown situation). I find that the parties agreed during the course of this conversation that the claimant would work for the respondent as a consultant and that he would receive equipment and be set up on the respondent's system on 30th March 2020. This is entirely consistent with being the only practical way to ensure that the claimant received an income via working for the respondent. It was already clear to both parties that the original employment contract could not go ahead as planned in the pandemic circumstances. In that situation I find it entirely likely that the claimant commented that he might as well take the risk of working as a consultant as he was 100% committed to making things work and was confident that he could generate work to be paid against.

21. It was in the context of that verbal agreement that Mr Kerrigan asked Jane Holmes, Finance Director and Company Secretary, to draw up a consultancy agreement for Mr O'Dowd. The work that he was going to be undertaking as a consultant would involve valuation, agency, rating, and professional work which was different in nature to the purely loan security work which had been the subject of the original employment contract.

22. Consistent with putting this plan into action the claimant obtained his equipment from the respondent on 30th March and spent the day getting it set up (texts at page 66).

23. On 2nd April Jane Holmes emailed the claimant (page 137-138) stating: *"I hope you are keeping well? It is such a shame that your start has been messed up by coronavirus. Rob said that he has given you all your equipment and induction booklet etc. He has also asked me to draw up a temporary contract to cover the period when we have very little work. I also wanted to check when your RICS valuer re-registration date was?*" The claimant responded to this email at page 136 and dealt with the query about equipment and RICS registration. He did not express any surprise about the draft "temporary contract". Nothing in his email suggested that he was not expecting a new contractual agreement. This rather suggests that the respondent's account of the previous telephone conversation and verbal agreement is correct. Otherwise, one would expect the claimant to have queried why he was being sent a new agreement if he was to continue as an employee under the original terms and conditions. This is particularly so given that he had, by this time,

already started work. If he thought he had started work under the old contract which the parties had already signed then surely he would've said so in response to Jane's message?

24. The claimant next sent a text message to Mr Kerrigan on 3rd April (page 66) stating: *"How's your week been? 3 instructions for me and lots of legwork. Enjoy the sunshine and let's catch up next week."* The natural and objective interpretation of the claimant's reference to "legwork" is that he was referring to his attempts to generate work which he could invoice against. There would be no need to do such "legwork" in an employment situation where his work would be given to him 'on a plate', so to speak. The respondent is on numerous lending panels and the claimant's role as an employee would have been servicing those instructions. As the property market was closed at that point there was no work to be done on the panel instructions. Hence, the loan security team had been furloughed.

25. On 6th April Mr Kerrigan emailed the claimant a copy of the consultancy contractor agreement (page 67). The email stated: *"Jane has sent me the attached to cover this period of lockdown for you. As discussed the intention here is for you to earn on invoicing during this uncertain period rather than a period of unpaid leave. Check through and come back to me with any queries and then we can get this signed off."* The content of the email suggests that there was an overall agreement that a consultancy contract arrangement was in place and it was anticipated that the claimant would be happy to sign the contract subject to any "queries". The tenor of the email does not suggest that an agreement is yet to be reached, just that the written formalities have yet to be completed. The claimant does not respond immediately to the email to suggest that the consultancy agreement has come "out of the blue" or was otherwise not expected. If the document had not been sent pursuant to an oral agreement which had already been reached the claimant could have been expected to point this out by reply.

26. The draft contractor agreement made qualified provision for the claimant to send an approved substitute to perform the services on his behalf. The claimant would retain liability to pay any such substitute. The contract made provision for the claimant to charge commission on fees invoiced as part of his work. The claimant was to raise invoices on the last working day of each month. The agreement confirmed that the consultancy arrangement did not prevent the claimant from being engaged in any other business so long as the respondent's confidentiality was maintained and the respondent's consent was obtained in case of work which could be said to be for one of the respondent's business competitors. The claimant's status was dealt with at section 11 which confirmed that the relationship between the claimant and the respondent would be that of independent contractor and that he would not be an employee, a worker, agent or partner of the company and would not hold himself out as such. The agreement also made provision for the claimant to provide various indemnities to the respondent. The agreement contained no provision for paid annual leave or sick pay or any other form of leave.

27. On 8th April 2020 the claimant sent Simon Mills a list of his current work in progress (page 99). The email in question is more consistent with the claimant working as a consultant because an employee would be given the work that he was expected to do and would not have to generate it for himself. The very fact that the claimant felt the need to update Simon with details of the work in progress suggests that he too realised that he was working as a consultant/contractor and therefore needed to give information about the work he was doing so that he could invoice for it. In an employment situation the employer would already know what work was being undertaken by the employee as part of normal line management processes.

28. On 13th April the claimant sent an email to Mr Kerrigan (page 95). He states: *"Thank you for this and I trust you have had a good Easter break. I have now had chance to review, initially I would say, is there anything we need to do to postpone the existing contract or make this document an amendment to it? Just to ensure we do not have overlapping contracts, which may present an issue. Furthermore, being employed as a Consultant, does this essentially make me self-employed? This may present added tax liability/cost to me. Also it makes it a pain for me having to submit the Company an invoice at the end of each month. I get the theory behind this and not sure if it can be simplified for both parties. Would it just be easier to amend the current contract (during this COVID-19 period) with a base salary of say £1000 per calendar month and commission of 30% (as an example)? I am just slightly concerned that being a consultant is not a role that I was looking for and if it essentially means being self-employed wouldn't be ideal for myself."* This email represents a change of position by the claimant as compared to his stance up to this point. He seems to suggest in this email that the original contract of employment is still in place. He obviously points out the disadvantages to him of working on a consultancy basis.

29. Having considered the evidence in the round I conclude that this email does not reflect the claimant's actual understanding of the position at the time insofar as he suggests that the contract of employment was still in existence and he was working to that pending agreement of a new consultancy role. The better explanation for this email is that the work in progress that he had been able to generate up to this point did not approach the £10,000 he had expected. He had realised that there would be a shortfall and that the consultancy arrangement would not be as financially beneficial to him as he had expected. Consequently, it was in his interests to try and reopen negotiations to agree something which was more financially advantageous to him. That is what this email is designed to do. He seeks to revert to an employment model but amend the salary entitlements to try and make it more attractive to the respondent. Essentially, this email is the product of the claimant having second thoughts about the agreement he has entered into with the respondent to work as a consultant.

30. On 15th April Mr Kerrigan spoke with the claimant on the telephone to express his surprise about the contents of the claimant's 13th April email. Mr Kerrigan reiterated the basis of the agreement they had previously reached on 27th March.

31. The claimant then said that this agreement did not work for him anymore. Mr Kerrigan explained again that it was not possible for the claimant to work as an employee. The claimant said he understood and would think about it and return to Mr Kerrigan.

32. Emails in the bundle indicate that the claimant continued to work for the respondent during this period.

33. On 21st April the claimant went into the office and had a further conversation with Mr Kerrigan. He said that his concern was whether his employment would be subject to a three-month probationary period if he entered into a contract of employment with the respondent in the future. Mr Kerrigan reassured the claimant that if he worked successfully as a consultant for the company during the hard times by proving he had the capacity to deliver the fee invoicing this would go favourably for him when agreeing any future employment contract. This implied that the claimant would not be required to undertake a probationary period if all went well and he was offered employment by the respondent in the future. The claimant indicated that he was pleased that they had had this conversation and he would return the contract agreement.

34. The claimant did not return the signed agreement and his next contact with Mr Kerrigan was when he attended the office on the 30th April. The claimant indicated that he still felt that the contractor agreement did not work for him and that he may as well work on his own. Mr Kerrigan indicated that it was up to the claimant how he wished to proceed and if he didn't wish to continue as a consultant then he would be required to return the equipment provided by the respondent. The claimant responded that it was his decision and he would leave the equipment he had at the time in the office, and would return the remainder of the equipment the following day. Mr Kerrigan asked the claimant whether he wanted to make the decision on the spot but he stormed off.

35. On 30th April Mr Kerrigan received an email from the claimant attaching a letter of complaint (pages 122-124). The claimant alleged that the respondent had failed to pay him in accordance with the employment contract. He said that following the conversation that morning he was compelled to assume that the respondent wished to terminate his employment with effect from 30th April. It appears, from the contents of the claimant's letter, that he was labouring under the misapprehension that only written contracts of employment 'count' for legal purposes i.e. that if an agreement is not reduced to writing it does not have legal effect.

36. On 1st May the claimant arrived at the office to return the rest of his equipment. He asked Mr Kerrigan how he was and Mr Kerrigan said he was very disappointed. The claimant stated *"if you throw a punch, expect a fight".* I accept that the claimant said this in the manner Mr Kerrigan

alleges. It is a very specific form of words which has the ring of truth about it. Indeed, Mr Kerrigan asked the claimant to repeat what he had said which the claimant did and then stormed out of the office. This was inappropriate, threatening, unprofessional behaviour on the claimant's part.

37. On 1st May Mr Kerrigan responded to the claimant's formal complaint and set out the sequence of events from his perspective (page 119). This account is virtually contemporaneous to the events it describes and wholly consistent with the evidence given by Mr Kerrigan to the Tribunal. In that response Mr Kerrigan stated that he expected to receive an invoice from the claimant for the work he had completed and invoiced in April 2020 together with reasonable expenses incurred for approval. At no stage after this message was sent has the claimant ever submitted invoices for the work carried out by him during his time working for the respondent. Instead, the claimant sent a further letter on the 4th May (pages 125-126) stating that he had not received written notice of the termination of the employment contract. Mr Kerrigan responded to the claimant on 11th May to reiterate that the employment contract had been mutually terminated between them upon agreeing an arrangement whereby he would be paid via invoice. He went on to say that the claimant's actions on 30th April together with his non-observance of services under clause 9 of the agreement represented a breach of contract. On that basis it was said that the claimant had terminated the contract agreement through his actions (page 119). The claimant sent another letter on the 12th May repeating what he said in previous correspondence and Mr Kerrigan responded on the 29th May to set out the respondent's position.

The Law

Frustration

38. A contract of employment may come to an end when an unforeseen event makes performance of the contract impossible or radically different from what the parties originally intended: *Davies Contractors v Fareham UDC* [1956] AC 696 HL. When a contract is frustrated, the contract ends automatically by operation of law. There does not need to be a dismissal or resignation. When the contract ends by means of frustration, both parties to the contract are discharged from any further obligations. An employee cannot claim for notice or payments in lieu of a frustrated contract: *GF Sharp and Co Ltd v McMillan* [1998] IRLR 632 EAT. The burden of proof to establish frustration is on the party who is asserting that the contract has been frustrated (in this case the respondent). The question of frustration is an objective one. Once a contract has been frustrated it is rendered a nullity in law and the parties to it cannot elect to 'keep it alive': *GF Sharp and Co Ltd v McMillan* [1998] IRLR 632 EAT. The doctrine of frustration is less frequently applied to employment contracts than commercial contracts. This is reflected in the relative antiquity of many of the reported cases of frustration in an employment contract.

Variation

39. A contract of employment may be varied if the parties agree to change its terms. A change to contractual terms normally requires agreement unless there is clear language that gives one party the right to vary a contract unilaterally. Express variation of terms may be done either orally or in writing. As set out in IDS at paragraph 9.12:

> '*Where a variation of contract is shown to have been expressly agreed by employer and employee, it will clearly be enforceable. Just like the contract itself, an express variation may be made either orally or in writing. The question most likely to arise where an express agreement is contested is whether there is sufficient evidence of the agreement. Therefore, it is always preferable that the agreement should be committed to writing, as oral agreements are more likely to be contested at a later date. However, this does not mean that what is written down takes precedence over what has been said and done'*.

40. The variation needn't be effected in writing see *Simmonds v Dowty Seals Ltd* [1978] IRLR 211 EAT. The EAT stated that regardless of whether an employee's statutory statement of terms and conditions is altered to reflect the change, whether there has been a consensual variation of the terms of the employment depends on the evidence in the particular case. An agreement to vary the terms of a contract is not required to be in writing to have legal effect. The claimant had proved that there had been a consensual variation of his contract, albeit an informal one, so that he was only required to work on the night shift.

41. The employee must be aware what he is agreeing to and that agreement cannot have been obtained through duress.

42. Contractual terms can also be varied by implied agreement. Where an employer changes a contractual term without an employee's agreement and the employee does not resign but continues to work, the Tribunal may conclude that the employee has accepted the employer's breach by way of his or her conduct. However, a Tribunal should be cautious in finding that an employee has consented to contractual changes in absence of an express agreement in circumstances where the change of terms does not have immediate effect: *Jones v Associated Tunnelling Co Ltd* [1981] IRLR EAT. The EAT in that case stated:

> '*if the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where… the variation has no immediate practical effect the position is not the same*.'

43. See also *Solectron Scotland Ltd v Roper and ors* [2004] IRLR 4 where Mr Justice Elias stated:

'*The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change, they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract containing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct*.'

44. The question of whether an inference of agreeing to variation by continuing to work may be drawn depends on the particular circumstances of the case: *Abrahall and ors v Nottingham City Council and anor* [2918] ICR 1425 CA. In that case Underhill LJ set out a number of principles, as summarised in IDS at §9.22:

'*First, the inference must arise unequivocally — if the employee's conduct in continuing to work is reasonably capable of a different explanation, it cannot be treated as constituting acceptance of the new terms. Secondly, protest or objection at the collective level may be sufficient to negate any inference of acceptance. And thirdly, the suggestion in Solectron that, after a 'period of time', the employee may be taken to have accepted raises the difficulty of identifying precisely when that point has been reached on anything other than a fairly arbitrary basis. However, this difficulty does not mean that the question has to be answered once and for all at the point of implementation*.'

45. In addition to agreeing to vary the existing contract it is of course open to the parties to terminate the existing contract by agreement and enter into a fresh contract on terms which they have agreed between them. As with other contracts, the new contract need not be in written form to be legally binding on the parties to the contract.

Resignation

46. Resignation means that the employee has terminated the contract. Usually an employee must communicate his or her resignation. The communication can be by words or conduct: *Edwards v Surrey Police* [1999] IRL 456 EAT. Resignation can be inferred from conduct and the overall context. The general rule is that if one party to a contract purports to terminate it without giving proper notice, that amounts to a repudiation of the contract which must be accepted by the other party in order to

bring the contract to an end: *Geys v Société Générale London Branch* [2013] ICR 117 SC.

Nature of the contract and jurisdiction

47. Only an employee is entitled to bring a claim for breach of contract in the Employment Tribunal. If the claimant is not an employee then the Tribunal has no jurisdiction to entertain the complaint.

48. A claim for unauthorised deductions from wages can be brought to the Tribunal by either an employee or a 'worker' as defined by section 230(3)(b) Employment Rights Act 1996. The section refers to an individual who has entered into or works under *"any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."* The three key elements are therefore: the existence of a contractual relationship; the requirement to provide personal service; and the absence of a business client or customer relationship.

49. In analysing the relationship between the parties, the Tribunal must focus on the reality of the relationship and not the form of any written document. The Tribunal must be astute to determine whether any written documentation accurately reflects the reality of the relationship between the parties. If it does not, then the documentation is put to one side and the Tribunal bases its determinations upon the substance and reality of the relationship in practice rather than on paper. However, it is to be noted that in the current case only the first contract of employment was encapsulated in a written document (signed 27th February). The alleged agreement that the claimant should work as a contractor/consultant was reached orally. The respondent sought to reduce it to writing but the claimant would not sign the written terms. In those circumstances the question as to whether the written terms in the draft consultant/contractor agreement accurately reflect the terms of the contract between the parties does not arise. This is not a case about sham written agreements. Rather, I have to determine whether a binding contract was reached between the parties on an oral basis and, if so, what the nature of that contract was.

50. Some rights of substitution are compatible with an obligation of personal performance. The common thread running through the worker status cases is that the right to substitute is fettered. In other words, that it was limited in some way.

51. If a person performs work on the basis that the person for whom he does so is a customer or client of his or her business or profession, he or she is not a 'worker'. Factors which may be relevant in determining whether the case falls into the client/customer category include the degree of control exercised by the employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the

worker supplied and the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to HMRC, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working may all support the view that the individual is running a business and that the person for whom the work is performed is a customer of that business.

52. Reference to *Hospital Medical Group Ltd v Westwood 2013 ICR 415, CA*, may be useful in determining whether the respondent is a customer or client of a claimant's business. In *Westwood*, the Court of Appeal rejected the idea that there is a single touchstone to unlock the words of the statute in every case but accepted that the 'integration test' set down by Mr Justice Langstaff in *Cotswold Developments Construction Ltd v Williams 2006 IRLR 181, EAT*, will often be relevant in determining whether a person is a worker or in business dealing with a customer or client. According to this test, it is possible (in most cases) to determine whether a person is providing services to a customer or client by focusing on whether that individual actively markets his or her services as an independent person to the world in general (and thus has clients or customers) or whether he or she is recruited to work for the principal as an integral part of its organisation. It may be relevant to look at the presence or lack of exclusivity in the relationship. Can the claimant provide such services to anyone else?

Conclusions

Frustration

53. Taking all the evidence in the round I conclude that the original contract of employment was not legally frustrated by the pandemic lockdown. No doubt the lockdown caused significant difficulties for the respondent's business and made it impossible for the parties to the contract to perform it in the way which was initially intended. However, that is not to say that the contract as a whole was frustrated. In the event that there was no work or reduced work available the contract made express provision for a lay off or reduction in the working hours. In those circumstances the contract could continue in existence even if there was no work for the claimant to do. It cannot be said that performance of the contract was impossible or radically different from what the parties originally intended. Yes, the primary way in which the contract could be performed was by payment of wages for work performed but clause 16.1 did anticipate a different mode of performance when the amount of work available reduced. This may not have been the 'first choice' option for either the claimant or the respondent but it was an option that they had contracted for and which remained open to them even if they did not, in the end, choose to take it. The presence of this second, contracted for mode of performance meant that the contract was not legally frustrated even if that clause was not in fact activated.

54. The absence of work and the lockdown situation did not, of itself frustrate the contract. Rather, it left the parties to the contract with options as to how best to proceed. This is consistent with the respondent's approach at the time. Mr Kerrigan did not initially say that the contract was

frustrated. Rather, he said that if the claimant wanted to start the contract he would have to be under a period of unpaid leave or lay off. He left that choice to the claimant. That was an alternative way for the parties to continue to perform the contract which was contemplated by the terms of the contract itself.

What actually happened to the contract?

55. If the contract was not frustrated what did happen to it? Taking the evidence as a whole I conclude that, faced with the challenge of the pandemic, the parties made an agreement to change the nature of the contract. Whether that could be said to be termination of one contract and the start of another or the agreed variation of a contract of employment into a consultancy/contractor arrangement is of less importance than the fact that the parties agreed that the claimant would not start work pursuant to the written employment terms and conditions which he had signed. The written and oral communications leading up to the claimant's start date on 30th April made it clear that he would not be performing the same type of work as anticipated under the written contract of employment. He would be doing a wider range of work and would be generating his own work rather than waiting for his employer to allocate it to him. There was an agreement in principle on 27th March that the claimant would work as a consultant and would be paid via invoice based on 33% of the fees generated. This was an express decision by both parties to move away from an employment contract because of the change in circumstances which had been posed by Covid-19 before the claimant had actually started work under the original, written contract of employment. It was a solution to allow the claimant to generate income during lockdown without imposing financial burdens on the respondent at a time when it was unable to shoulder additional overheads. The new contract came into existence on 27th March as a result of the discussions between the parties.

56. Under the new arrangement the claimant did not wait to be assigned work by his employer. He generated his own work. He accounted for his work in progress in a way which an employee would not be required to do. The parties' actions are entirely consistent with an orally agreed variation or termination and re-engagement on consultancy terms. The fact that there was no signed consultancy contract in place when the claimant started work does not mean that the old signed employment contract was still in operation. An oral contract need not be reduced to writing in order to be legally binding even though it is often preferable for all concerned to reduce an oral agreement to writing so that its existence and terms can be easily proved. In any event, the respondent in this case actually produced a written contract to reflect the oral agreement and tried to get the claimant to formalise the arrangement by signing it. It was at this point that the claimant had second thoughts and sought to renegotiate the position back to a contract of employment (albeit with different payment terms to the original, signed contract). The problem for the claimant is that he failed to get the respondent to agree to this second variation of the contract. There was no agreement to vary the contract a second time. Unless and until the claimant got the respondent's agreement to vary the contract again then the consultancy contract was

what he was working under. Therefore, when he finally walked away on 1st May he could not claim any payments under a contract of employment (whether the original one he had signed or his later, proposed, modified contract of employment). He started to actually perform work for the respondent after the change to the consultancy contract had taken place and ceased working for the respondent before he was able to change the contract back to a contract of employment. His only entitlement to any payments would therefore have been under the terms of the consultancy contract.

57. On balance, given that the change from a contract of employment to a different type of contract is significant, I have concluded that what happened here was the termination of the original employment contract by consent between the parties followed by the commencement of a second consultancy contract which had been orally agreed between the parties. That is to say, the termination of one contract and the commencement of a second contract, all by agreement. If I were wrong in that characterisation of events, I would find that the original contract of employment was varied by consent between the parties. Either way, I am satisfied that the claimant agreed that he could not start work under a contract of employment as originally intended. This is the only reasonable interpretation of the parties' communications and actions during the relevant period. I do not consider that the claimant's actions were reasonably consistent with an intention to start work under the original contract of employment.

58. The claimant terminated the contract on 1st May by deciding to leave the respondent. He effectively walked away from the contract. The contract did not terminate because of any breach of contract by the respondent. In those circumstances the consultancy contract would govern what, if any, sums might be owed to the claimant.

59. The claimant never submitted any invoices to the respondent for the work he did during the term of the contract. He has not provided any documents of that nature to the Tribunal- there are no invoices in the trial bundle. In those circumstances it is impossible to quantify what sums the claimant might be entitled to under the consultancy agreement in any event. Nor did the claimant invoice for any expenses he incurred whilst working for the respondent. No sum for expenses could be awarded by the Tribunal.

60. No notice pay can be claimed as the respondent did not terminate the contract in breach of any notice requirements. The claimant terminated the contract with immediate effect. There was no provision for a car allowance under the consultancy contract and so the sum of £508.33 claimed by the claimant is not owed either.

61. The claimant has claimed holiday pay in the sum of £576. I find that there was no provision for holiday pay in the orally agreed contract. The claimant's only route to obtain holiday pay would be to claim a statutory entitlement under the provisions of the Working Time Regulations 1998. He would have to be a 'limb b' worker for those regulations to apply (regulation 2 Working Time Regulations). I have concluded that the

orally agreed contract between the parties was neither an employment contract nor a worker's contract for the purposes of the Working Time Regulations. It was a much more flexible arrangement which was designed to allow the claimant to trade on his own account during the pandemic. It was not an exclusive arrangement. The claimant could explore other sources of income and work. It was not intended to be a particularly long-term arrangement. The claimant was generating his own work and finding clients to introduce to the respondent. He was not integrated into the business, especially as he would not be working with an established team or department at the respondent. He was due to invoice the respondent and account for his own tax and NI. The claimant took all the risk in the arrangement and would garner the rewards of his work. If he did not generate the work he would earn no money. There was no risk to the respondent from this arrangement. Indeed, the arrangement would not have been agreed by the respondent if it had posed any financial risk to the business given that it was lockdown which precipitated the consultancy arrangement in the first place. As the claimant was paid on commission only (rather than according to the day or hours worked) it would be difficult to apply a statutory annual leave entitlement to such a situation. Furthermore, I find that his work could have been done by a substitute had he so wished. There was not such a fetter on this as to mean that there was an obligation to provide services personally as required by the legislation.

62. I find that there was insufficient obligation on the claimant to provide personal service and that, essentially, he was in business on his own account. The respondent was a customer or client of the claimant's business.

63. Even if the claimant's claim had succeeded there would have been significant questions as to whether he had mitigated his losses as he managed to get backdated furlough pay for April, May and June to cover the period in question and any notice period. He also mitigated his loss by obtaining alternative employment albeit the new work may not have been as highly paid as the work for the respondent under the original signed contract of employment.

Employment Judge Eeley

Date: 19th August 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

16 November 2021

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