Case No: 1800911/2022
1800915/2022
1800916/2022
1800917/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms S Cross
Ms S Taylor
Mr J Allard
Mr B Walker

Respondent: Birchwood Strategies LLP

Heard at: Hull **On:** 17, 18 and 19 April 2023

Before: Employment Judge Miller

Representation
Claimants: Ms Cross assisted by Mr Birchall – Mackenzie Friend
Respondent: Mr Morgan – HR Consultant

JUDGMENT having been sent to the parties on ***24 April 2023*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. This is a claim that was originally brought by eight people followed by a further single claim by Ms Bexley. The majority of the claims have been dismissed upon withdrawal so that the remaining claimants are Ms Sharon Cross, Mr Joshua Allard and Mr Ben Walker.

2. The respondent is Birchwood Strategies LLP which is a limited liability partnership. The claims of Mr Allard and Mr Walker are claims for breach of contract for failure to give them the correct notice on the dismissal and for non-payment of pay in lieu of untaken annual leave. Ms Cross's claims are similarly for breach of contract and failure to pay holiday pay and she also makes a claim for a redundancy payment.

3. The claims were submitted in one claim form on 24 February 2022 following a period of early conciliation from 28 January 2022 to 23 February 2022.

4. Mr Allard and Mr Walker were dismissed without notice on 26 November 2021 and they were each paid one week's pay in lieu of notice. Ms Cross was dismissed without notice on 6 December 2021. The respondent agreed that Ms Cross was entitled to pay in lieu of notice in accordance with her contract of employment, payments for untaken holiday pay and a redundancy payment but they have refused to pay them.

5. The respondent submitted their response to the claimant's claims on 4 April 2022 and in that claim they also made a counterclaim for breach of contract by Ms Cross.

6. The respondent says it was an express term of the claimant's contract of employment that she was required to work a minimum of 30 hours a week in exchange for wages and that these hours must be conducted between the hours of 9 AM to 5:30 PM Monday to Friday. They said that after the claimant's dismissal by reason of redundancy it had been identified that the claimant had other employment which was undertaken at the same time the claimant was purported to be carrying out her role for the respondent.

7. The respondent's claim for breach of contract was therefore for all of the wages during her employment on the basis that the claimant was said to be undertaking work for other organisations.

8. There was a case management hearing before employment Judge Drake on 28 July 2022 at which he made case management orders and identified the issues. At that hearing Ms Cross made an application to amend the claim to include a claim for unfair dismissal and that application was refused for reasons given at the time. The issues recorded at the hearing to be determined were,

    a. in respect of wrongful dismissal, what was each of the claimant's contractual notice period? This depends on the validity of the purported contracts of employment. Were the claimant's then given appropriate notice under the contract of employment or paid in lieu of that notice. If not, were the claimant's guilty of gross misconduct so that the respondent was entitled to dismiss them without notice.

    b. in respect of the claim for holiday pay, this is recorded under the working Time regulations 1998, although it is not explicit in the claim itself, and the questions are what was the claimant's leave year, how much of that leave year had passed by the end of their employment, how much leave it accrued during that period, how

much of it had been taken, and had a payment to represent the residue been paid?

9. Ms Cross also brings a claim for redundancy payment. Although that is not recorded in the list of issues it is clearly expressed in the claim form and it is not disputed that she was entitled to a redundancy payment. The respondent seeks to offset any damages for breach of contract by Ms Cross against the redundancy payment that is owed.

The hearing

10. The hearing was held in person in Hull over three days. I had witness statements from Ms Cross, Mr Allard and Dr Oates for the claimants who all attended and gave evidence. I also had a witness statement from Mr Walker who did not attend, a witness statement from Mrs Sarah Grant who is referred to below who also did not attend. I gave those witness statements such weight as was appropriate in the circumstances. I also had additional witness statements from third parties which were not referred to and which I do not, therefore, consider.

11. I also had a witness statement from Mr Burton on behalf of the respondent who attended and gave evidence.

12. I was provided with a very substantial bundle of 569 pages and Ms Cross provided additional documents on the day which were admitted as they were relevant and the respondent was able to address them.

Facts

13. I make the following findings of fact. Where facts are disputed I have made my decision on the balance of probabilities. I heard a substantial amount of evidence. I do not propose to address all of that evidence and I only make such findings of fact as are necessary to determine the issues before me.

14. It is necessary to identify as far as I can the individuals and corporate entities involved in this claim.

15. Mr Warrick Burton was at the relevant time a partner in the respondent. There were three other partners, Mrs Harrison, Mr Wilkinson and Dr Oates. Mr Burton attended to give evidence on behalf the respondent and Dr Oates attended to give evidence on behalf of the claimants.

16. There is a company called Renaissance Group Limited which owns a building in Huddersfield that comprises some flats, a spa and some other space about which I did not hear any evidence. The spa is run by a company called Property Renaissance Ltd which is a wholly owned

subsidiary of Titanic Spa Ltd. There is another company called Titanic Mill Energy Services Ltd which supplied services to the building.

17. These companies were connected in the sense that there was some commonality of directors and shareholders although they are not, as far as I know, a formal group.

18. There is a further company called Village Estates (Titanic) Ltd which is owned by Ms Cross and which provides management services to leasehold flats in the Huddersfield building. It is unclear when Ms Cross took over ownership of that company but Mr Burton found out about it and, it seems likely, this happened in around summer 2021.

19. There is yet a further company called Birchwood Strategies and Associates Ltd. The status of this company is unclear and I do not need to make any findings about it except to say that Dr Oates was a director and possibly an owner of this company along with Ms Cross, and, surprisingly, Mr Birchall, the claimant's representative or McKenzie friend at this hearing.

20. The final company to mention is Hexham Training Ltd. This is a further company connected in some way with the respondent, Dr Oates being one of the owners of Hexham Training. Ms Cross was a formal director in that company from 10 February 2020, and she was also the HR director. Hexham training provides services relating to the provision of training and apprenticeships, at that time specifically in the health and care sector.

21. The final thing I say at this stage about this confusing set of circumstances is that there are ongoing legal disputes in the civil courts between Titanic Spa Ltd, Property Renaissance Ltd and Dr Oates. This relates to an alleged breach of fiduciary duties and I will therefore avoid making any findings except as far as is absolutely necessary in relation to any of these matters so as not to impact on any other proceedings.

22. Against this background, therefore, I make the following findings of fact about the claims that are before me.

23. Ms Cross was appointed to work for the respondent from 21 July 2019. Mr Burton asserted that previously Ms Cross had been employed by Birchwood Strategies and Associates Ltd and her employment had transferred to the respondent in July or August 2019. This, Mr Burton said, was facilitated by Dr Oates without his knowledge at the time.

24. Dr Oates appointed the claimant to the respondent at that time. Her job was said to be senior project manager. The purpose of the respondent was to promote the franchising of the brand of Titanic Spa. This means that it was the role of the respondent to identify and progress opportunities to franchise or license or otherwise profit from the Titanic spa brand.

25. There is an agreement referred to as a franchise agreement which is in fact an agreement for services between Property Renaissance Ltd and the respondent to the effect that the respondent will "give assistance in franchising the operations of the company".

26. In practical terms this seemed to mean identifying investors and developers to operate a Spa using the Titanic Spa brand. It is not disputed that during her employment the claimant did not finalise any franchise agreements resulting in the use of the Titanic spa brand. It is also obvious that any opportunities identified would be required to be for the benefit of Property Renaissance ltd.

27. Ms Cross was not a party to the franchise agreement. Ms Cross was aware, however, that the purpose of the respondent was to promote the Titanic Spa brand and develop franchise or other opportunities.

28. Ms Cross was managed by Dr Oates. Ms Cross also had a close personal relationship with Dr Oates and they have operated together in different projects and, as far as I can tell they worked together in the Hull office.

29. Dr Oates was a partner in the respondent and the contract of employment on which Ms Cross relies says "you are employed as senior project manager and your duties will be as advised by your manager on a day-to-day basis. Your duties may be modified from time to time to suit the needs of the business".

30. I conclude, on the balance of probabilities, that Ms Cross and Dr Oates had a close working relationship but that Dr Oates was Ms Cross' line manager and she was subject to his instructions in relation to any work done, or purported to be done, under her employment contract with the respondent.

31. Other relevant clauses in the claimant's employment contract related to hours of work, leave and notice period.

32. The clause headed 'hours of work' says

    "A normal day of work will be 9 am to 5.30 pm Monday to Friday. However, your normal hours of work may be changed by the Partnership to accommodate the operational needs of the business. You will be expected to attend for or complete a working schedule equivalent to a minimum of 30 hours per week. Your schedule will be dictated by the business as it develops".

33. In relation to annual leave I find that the contract provides for 30 days holiday per year inclusive of bank holidays. It further says "in the event of termination of employment your entitlement to annual leave will be calculated at 1/12 of the annual entitlement for each completed month of

service during that holiday year any annual leave accrued but not taken will be paid for".

34. In relation to notice I find that the contract provides for one month's notice to terminate Ms Cross' employment if she has been employed for between one month and five years.

35. Mr Burton said that he did not become aware that Ms Cross had been employed by the respondent until late summer 2021. He was unable to say what work Ms Cross had or had not been doing during the period of her employment because he was unaware of her employment by the respondent. The respondent relies on the fact that during her period of employment with it, Ms Cross was the director of nine companies, she received payment from two of the companies, she undertook the management of the building in Huddersfield through her company, Village Estates (Titanic) Ltd, that she was working as the HR director for Hexham Training Ltd and that as a matter of fact no franchise or other agreements had been concluded for the benefit of Property Renaissance Ltd throughout her employment.

36. In her witness statement, Ms Cross did not explain in detail what work she had been doing for the respondent. Although she said that evidence of that work was available for inspection, I was not taken to any in the hearing. In oral evidence Ms Cross did not give a very detailed explanation of the work she did, although she said that she worked various hours in a week at various locations. Dr Oates, Ms Cross' line manager, also did not explain what work Ms Cross did beyond saying that the people he had appointed were for the purposes of assisting him in pursuit of the policies of the respondent.

37. In oral evidence there was discussion about a proposal to build a spa somewhere in the vicinity of the Humber Bridge. This seemed to necessitate planning applications, meetings with various public bodies and other such work associated with implementing a major project. This evidence arose out of the disclosure during the course of the hearing, although it is apparent that Ms Cross, Dr Oates and Mr Burton were all aware of it before that disclosure.

38. I will return briefly to this project shortly.

39. I found the evidence of Ms Cross and Dr Oates to be unhelpful. They certainly gave the appearance of being evasive. Conversely, while I found Mr Burton to be *more* plausible, he was unable to provide any evidence about Ms Cross' actual activities.

40. The respondent has accepted that the claimant was employed by them from around July 2019 to the termination of her employment.

41. I find, on the balance of probabilities, that during her employment the claimant was working substantively on matters given to her by Dr Oates.

42. The explanations given by Ms Cross about the two other substantive or relatively substantive roles that she fulfilled for Hexham Training and Village Estates are plausible. The amount of money that the claimant took from Village Estates was minimal and reflective of the amount of work that she described. This would not have *necessarily* interfered with her ability to undertake a role for the respondent.

43. The claimant did take a salary from Hexham Training, although it is not clear how much. She described the work as overlapping and connected with the role of the respondent, although Mr Burton disputed that. She also described circumstances when she would be undertaking work for Hexham Training alongside work for the respondent.

44. I prefer Mr Burton's evidence that there was no real connection between the work Hexham Training did and the requirements of the respondent.

45. Notwithstanding this, I also accept Ms Cross's evidence that she worked irregular hours undertaking work related to the Titanic Spa brand. I therefore find, on the balance of probabilities, that Ms Cross worked a substantial number of hours each week undertaking tasks either at the direction of Dr Oates or in relation to the Titanic Spa brand generally.

46. I consider briefly the project related to the spa at the Humber Bridge.

47. I prefer Mr Burton's evidence that he and the respondent wanted no part of this project. This project appears to have been promoted by a yet further company called Titanic Projects Ltd which Mr Burton said he was made a director of without his knowledge or consent. I do not make any findings about Mr Burton's assertions about that.

48. However, it is clear from the email dated 26 May 2019, and I find, that Dr Oates was active in pursuing a project relating to the building of a spa somewhere near the Humber Bridge. I also find that Ms Cross undertook work on this proposal. This, I conclude, was work related to the Titanic Spa brand even if done without Mr Burton's approval as indicated in the various emails relating to this proposal and even if not done for the benefit of Property Renaissance Ltd. This is evidence that Ms Cross was spending at least some of her time on work that, on the face of it at least, appeared to fit in with the purposes of the respondent – namely profiting from the Titanic Spa brand.

49. Mr Burton said, as previously mentioned, that he discovered that Ms Cross was employed by and being paid by the respondent, rather than by Birchwood Strategies and Associates Ltd, in the summer of 2021. The respondent thereafter undertook an investigation. I have seen no evidence relating to that investigation.

50. On 18 November 2021 Mr Burton, Mr Wilkinson and Ms Harrison met as partners in the respondent and resolved to end their agreement with Property Renaissance Ltd. They said that no further assistance would be given to Property Renaissance Ltd in franchising the operations of the company.

51. I find, therefore, that from this date the respondent had no need for any employees to carry out any work for it as its sole purpose had ended.

52. Ms Cross was summarily dismissed with effect from 6 December 2021. The respondent does not dispute that it was by reason of redundancy. Ms Cross was not paid any notice pay, any pay in lieu of untaken holiday or a redundancy payment.

53. The amount of redundancy payment claimed is agreed as £1632. The amount of unpaid notice pay is agreed as £1926. The respondent says that the gross sum of holiday pay unpaid is £3000 representing 26 days. The claimant claims the sum of £2320.09 for holiday, but it appears that she has calculated this on the basis of the limits of a statutory weeks pay under the employment rights act 1996.

54. I now make the following findings of fact in relation to Mr Allard's claim.

55. Mr Allard says that he was referred by the DWP to go and work for Birchwood Strategies LLP and he was appointed from 4 October 2021, after a successful interview, as the production design assistant. Dr Oates says that he appointed Mr Allard to further the purposes of the respondent. The person responsible for administering the commencement of Mr Allard's employment was someone called Mrs Sarah Grant. Mrs Grant was employed by Village Estates, not the respondent, but she worked in the same office in Hull as the claimants in this case. She was described as the de facto office manager and she reported to Dr Oates and Ms Cross. Mr Allard says that he was sent a copy of his contract of employment along with other relevant employment documents by Mrs Grant on or around 4 October 2021.

56. There is a copy of the asserted contract in the bundle. The contract is unsigned by either Mr Allard or anybody else. Mr Allard said he did not remember whether he received it or not but it seems likely, he said, that he would have done.

57. The contract is between Birchwood Strategies LLP and Mr Allard. Mr Morgan placed great reliance on the fact that the contract refers to Birchwood Strategies LLP being part of the Birchwood Strategies Group and that there is no such thing as the Birchwood Strategies Group. In my view this is of no real consequence.

58. Unlike almost every other person involved in this case Mr Allard appears to have no prior relationship with any of the other people. He appears to have been caught in the crossfire of this unfortunate case. I find that Mr Allard believed that he had been employed by Birchwood Strategies LLP and that he had no reason to think that Mrs Grant was not acting with the authority of the respondent when providing him with his employment documents. He also seemed to be aware that there were a number of companies working out of the same office but that he assumed they were working together to reach a common goal.

59. I prefer Mr Allard's evidence and find that he was given a copy of the contract that is provided in the bundle on or around 4 October 2021 and that that says he was employed by Birchwood Strategies LLP.

60. I find that the contract provides that after one month's employment, Mr Allard was entitled to one month's notice to end his employment and I also find that he was employed on a salary of £14,000 per year. The contract provides that Mr Allard was entitled to 30 days holiday per year and payment on termination in lieu of untaken annual leave was the same clause as applied to Ms Cross.

61. Mr Allard was summarily dismissed by the respondent with one week's pay in lieu of notice on 29 November 2021. As at this date he had been working for the respondent for eight weeks.

62. It is agreed that the outstanding notice pay, if I find that the terms of the purported contract apply, amounts to £807.45 (gross). The respondent says that Mr Allard was owed 2 days holiday totalling £107.66. Mr Allard says in his schedule of loss, to which he referred in his witness statement, that he is owed 3 days holiday having accrued 5 days in total and having taken 2 days. This was not challenged by the respondent in evidence and I find that Mr Allard took 2 days holiday during his employment and that, under the contract of employment, he had by the time of his dismissal, accrued 5 days leave

63. Finally, I make findings of fact in respect of Mr Ben Walker's claim. Mr Walker did not attend to give evidence. His claim is for notice pay and pay in lieu of untaken holidays. There is a contract said to be between Birchwood Strategies LLP and Mr Walker. This is signed by Mr Walker and Sarah Grant purportedly on behalf of the respondent. That contract records

that Mr Walker's employment started on 20 September 2021. Mr Walker was summarily dismissed by the respondent on 29 November 2021 with one week's pay in lieu of notice and no holiday pay.

64. Although Mr Walker did not attend to give evidence, Mr Burton said that he could identify no reason why Mr Walker would have had any cause to question whether Mrs Grant had any authority to enter into a contract with him on behalf of the respondent.

65. I have considered Mr Walker's witness statement and I find that Mr Walker, like Mr Allard, signed a contract of employment believing that contract to be with Birchwood Strategies LLP.

66. That contract contains the same provisions as the contracts of Mr Allard and Ms Cross except that his salary was £19,000 per year.

67. Mr Walker says in his schedule of loss, to which he referred in his witness statement, that he is owed 4 days holiday having accrued 7.5 days in total and having taken 3.5 days. I find that Walker took 3.5 days holiday during his employment and that, under his contract of employment, he had by the time of his dismissal, accrued 7.5 days leave. Although Mr Walker did not attend to give evidence, the respondent has produced or referred to no evidence to contradict that and I therefore accept the evidence in Mr Walker's statement about this.

68. The respondent says that the pay for the outstanding notice period if I find that the terms of the purported contract apply to him amounts to £1101.45 gross.

Law and conclusions

69. Breach of contract

70. I consider first, the claimants' claims. An employee is entitled to the greater of the notice provided for in their contract of employment or the statutory notice under s 86 ERA 1996 to terminate their contract of employment. In this case, the respondent agrees that Ms Cross was entitled under her contract to one month's notice. She did not receive that notice and she is entitled to her losses arising from that. There is no argument that she unreasonably failed to mitigate her losses. The losses arising from the breach are the pay that Ms Cross would have received had she been given proper notice so that she is entitled to one month's pay being £1926 (gross pay).

71. For the same reasons as I will explain in relation to the respondent's counter claim, there is no evidence that Ms Cross was in breach of contract, so I find that the respondent has not shown that Ms Cross was in

repudiatory breach such as to allow it to summarily dismiss her without notice or notice pay.

72. In respect of Mr Walker and Mr Allard, the provisions of the Limited Liability Partnerships Act 2000 are relevant. Section 6 provides, as far as relevant, that

> (1) Every member of a limited liability partnership is the agent of the limited liability partnership.
>
> (2) But a limited liability partnership is not bound by anything done by a member in dealing with a person if—
>
> (a) the member in fact has no authority to act for the limited liability partnership by doing that thing, and
>
> (b) the person knows that he has no authority or does not know or believe him to be a member of the limited liability partnership.
>
> (3) …
>
> (4) Where a member of a limited liability partnership is liable to any person (other than another member of the limited liability partnership) as a result of a wrongful act or omission of his in the course of the business of the limited liability partnership or with its authority, the limited liability partnership is liable to the same extent as the member.

73. This means that Dr Oates was the agent of the respondent. It also means that the acts of Dr Oates when acting as a member of the respondent bind the respondent in any contracts he enters into. The only time when the respondent would not be bound by the acts of Dr Oates are if he was clearly doing something unconnected with the respondent or if the other party to the contract knew that Dr Oates did not have the authority to do what he did or did not believe him to be a member of the respondent.

74. In so far, therefore, that Mr Allard's and Mr Walker's contracts of employment were made between them and Dr Oates, the respondent is bound by them unless Mr Allard and Mr Walker either knew that Dr Oates did not have authority to enter into the contract, or they did not believe him to be a member of the respondent.

75. Dr Oates' evidence was that he appointed Mr Allard and Mr Walker and this was not disputed. It was agreed by the respondent that he appointed them, just that he appointed them to another one of his businesses – i.e. without authority from the respondent.

76. I find that Dr Oates did appoint Mr Walker and Mr Allard to their jobs and that in doing so he was representing to Mr Allard and Mr Walker that he was

doing so on behalf of the respondent. In my view, the fact that the mechanics of appointment were carried out by Mrs Grant are not relevant. She was implementing the instructions of Mr Oates who was in charge of things in the Hull office.

77. Further, I have found that Mr Walker and Mr Allard had no reason to think that Dr Oates was not acting with the proper authority of the respondent in appointing them.

78. I therefore find that in accordance with s 6 of the Limited Liability Partnerships Act 2000, Dr Oates was acting as the respondent in appointing Mr Allard and Mr Walker.

79. I also find that the terms of each of the contracts provided to the tribunal apply to Mr Allard and Mr Walker. If a contract of employment is signed, as Mr Walker's is, that is prima facie evidence that the parties are bound by its terms. For the reasons I have already explained, the signing of the contract by Mrs Grant on behalf of Mr Oates is binding on the respondent and Mr Walker has the benefit of that employment contract against the respondent.

80. It is not, however, necessary for a contract of employment to be signed for it to be binding. The terms of the contract, I have found, were sent to Mr Allard and he undertook work after receiving the contract. He did such work as he was given to do by his managers. I conclude, therefore, that he accepted those terms and they form part of his contract of employment. Again, the fact that the terms were sent by Mrs Grant is of no consequence for reasons I have already explained.

81. I find therefore that both Mr Allard and Mr Walker were entitled to one month's notice to terminate their employment as they had both worked for longer than one month. They were each paid one week's pay in lieu so I conclude that the respondent agrees they were not entitled to dismiss Mr Allard or Mr Walker without notice. I therefore award the following amounts for breach of contract:

    a. For Mr Allard: £807.45 (gross)

    b. For Mr Walker: £1101.45 (gross)

82. Turning now to holiday pay

83. An employee is entitled to the greater of 5.6 weeks holiday per year under the Working Time Regulations 1998 or any greater sum provided in their contract. I have made findings above about the contractual entitlements to leave for Mr Walker and Mr Allard.

84. Under the Working Time Regulations 1998, holiday accrues on a pro rata basis in the final year.

85. Mr Allard worked for 8 weeks, being 0.154 of a year. This means that under the Working Time Regulations the holiday he would have accrued was 4.3 days. This is less that that accruing under his contract. Under the contract, payment in lieu is payable for any untaken holiday at the termination of employment. I therefore find that Mr Allard is owed 3 days' pay in lieu of holiday, having been allocated 5 days and taken 2, in accordance with the provisions of his contract. His daily rate of pay is £53.84 (gross based on a salary of £14,000) and I make an award of £161.54.

86. Mr Walker worked for 10 weeks, being 0.192 of a year. This means that under the Working Time Regulations 1998, Mr Walker would have accrued a minimum of 5.38 days leave. This is less than that accruing under his contract. Under the contract, payment in lieu is payable for any untaken holiday at the termination of employment. I therefore find that Mr Walker is owed 4 days' pay in lieu of holidays having been allocated 7.5 days and having taken 3.5 days. His daily rate of pay is £73.08 (gross based on a salary of £19,000) and I make an award of £292.31 for payment in lieu of untaken holiday.

87. In respect of Ms Cross, the amount of untaken holiday is agreed to be 26 days. The leave year runs from 1 January to 31 December. Under the Working Time Regulations 1998 the claimant had worked for 48.5 weeks and thereby accrued a minimum of 26 days leave. The respondent puts the gross figure for this at £3,000 which is greater than the figure calculated by the claimant. However, the claimant appears to have assumed that a week's pay is capped for the purposes of determining entitlement to holiday pay, and it is not. The claimant was paid £30,000 per year under her contract of employment. This gives a gross daily sum of £115.38. It is agreed that the claimant did not take any holiday in her final leave year so the claimant is entitled to a payment for 26 days amounting to £3,000 (gross).

88. I noted, when preparing this judgment, that there is information in the bundle apparently about holidays both in the form of holiday records and payslips. However, these documents have not been referred to in evidence or submissions. I have not, therefore, considered them as neither party has commented on them and it would not be appropriate for me to rely on them without hearing any evidence about them.

89. Finally, in respect of redundancy, part XI Employment Rights Act 1996 provides that a redundancy payment is payable where a person is dismissed because the employer has ceased or intends to cease to carry

on the business for the purpose for which the employee was employed by them.

90. I have found that the respondent resolved on 18 November 2021 to end their contract with Property Renaissance Ltd and cease franchising activities. This had been the purpose for which Ms Cross had been employed and this purpose had ceased. Ms Cross' dismissal was, therefore, by reason of redundancy.

91. The amount of redundancy payment owed to Ms Cross is agreed as £1632.

92. I consider now the respondent's breach of contract claim against Ms Cross.

93. The respondent says that the claimant is in breach of the terms of her contract that says:

    "A normal day of work will be 9am to 5:30 pm Monday to Friday. You will be expected to attend for or complete a working schedule equivalent to a minimum of 30 hours per week. Your schedule will be dictated by the business as it develops".

94. Particularly, they say that Ms Cross started alternative work in February 2020 and that it was inconceivable that she could be the director of 9 companies, undertake work for 2 of them including between 9am and 5.30pm Monday to Friday, and do any work at all for the respondent.

95. The respondent says no franchise agreements came to fruition and that they have incurred losses as a result of this of the salary that they paid to Ms Cross.

96. A respondent can bring a counter claim for breach of an employment contract or contract connected with employment against an employee under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1993 where a claimant has brought a claim for breach of contract against the employer and providing the claim arises or is outstanding on the termination of the claimant's employment. There are other restrictions which are not relevant to this claim. Damages are capped at £25,000.

97. I do have jurisdiction to hear this claim.

98. I consider first the contract term said to be breached. In my judgment it is necessary to read the clause on which the respondent relies together with the preceding clauses which, together, say:

    Job Title

You are employed as Senior Project Manager and your duties will be as advised by your Manager on a day to day basis. Your duties may be modified from time to time to suit the needs of the business.

Place of Work

You will normally be required to work in Hull, Silsden and Linthwaite. You may be required to work outside of the United Kingdom and your duties will include a significant amount of travelling within the UK, including overnight stays.

Hours of Work

A normal day of work will be 9 am to 5.30 pm Monday to Friday. However, your normal hours of work may be changed by the Partnership to accommodate the operational needs of the business. You will be expected to attend for or complete a working schedule equivalent to a minimum of 30 hours per week. Your schedule will be dictated by the business as it develops.

99. Nothing about these clauses is unusual or opaque. The claimant is required to work at least 30 hours per week, normally including Monday to Friday 9 – 5.30. The work she is required to do is that given to her by her line manager and her normal hours of work may be changed to meet the needs of the business.

100. The final two sentences: “You will be expected to attend for or complete a working schedule equivalent to a minimum of 30 hours per week. Your schedule will be dictated by the business as it develops” clearly provide for flexibility in Ms Cross’ working arrangements. I find that this means that Ms Cross was required to do such work as was given to her by her line manager. She was required to actually work at least 30 hours per week. Those hours would normally be on Monday to Friday 9 – 5.30 but she might be required to work different hours.

101. It is not necessary, as Mr Morgan suggested, to have a formal variation of working hours to comply with these clauses – the purpose of this clause is to provide day to day flexibility for the respondent to allocate Ms Cross’ hours in accordance with the needs of the business.

102. In my judgment, from the perspective of Ms Cross, the needs of the business are communicated to her by instruction from her line manager, Dr Oates. Except in extremely obvious cases, it would not be necessary or appropriate for Ms Cross to satisfy herself that Dr Oates’ instructions were ratified by the other partners or were within his delegated authority from the respondent. I refer back to the provisions of s 6 of the Limited liability Partnerships Act as discussed above.

103. I consider now the application of the facts I have found to these contractual provisions.

104. I have found that Ms Cross was doing some work for other companies during the period of her employment with the respondent. However, the amount of work that she has been shown to have been doing was not, of itself, sufficient to preclude her also carrying out at least 30 hours per week work for the respondent.

105. I have found that, in respect of the Humber Bridge proposal, it appears that Ms Cross was working on the Titanic Spa brand. Dr Oates was intimately involved with that and I conclude that Ms Cross was undertaking this work because she was instructed or asked to do so by Dr Oates. Because this work was about the Titanic Spa brand (even if not for the benefit of the respondent or Property Renaissance Ltd) Ms Cross could have had no legitimate reason to question the directions of her line manager.

106. In respect of this project, therefore, I conclude that Ms Cross was complying with her contract of employment by doing work as advised by her line manager. This is the work that she was required to do for at least 30 hours per week.

107. Ms Cross was of the view, incorrectly I have found, that the work of Hexham Training Ltd was related to the Titanic Brand in so far as it related to the development of employees under the brand. However, she was of this view. I have found that she worked closely with Dr Oates. She must, therefore, have been asked by Dr Oates to do this work or he knew about it and did not stop her from doing it. There is no suggestion that Dr Oates was unaware of this work.

108. Again, therefore, I find that the claimant was doing work as advised by her line manager and in all the circumstances she had no legitimate reason to question that.

109. There is no other evidence from which I could conclude that the claimant undertook no work at all in accordance with her contract.

110. The burden of proving that the claimant is in breach of her contract falls to the respondent. The breach relied on is that the claimant failed to carry out meaningful work for the respondent while being paid. The respondent has failed to show that this is the case.

111. It is entirely possible that Ms Cross did not devote the entirety of every working day to working under her employment contract. However, this would give rise to a different claim. It would require the respondent to show how much time Ms Cross spent not working on her contract and what losses flowed from that. It is not sufficient to say that Ms Cross did not work

30 hours every week from 9 – 5.30 so that she should therefore repay two year's wages.

112. I do not say that the work Ms Cross was directed to do by Dr Oates was all for the benefit of the respondent. It may well be that Dr Oates misused some or all of the employees he engaged for his own purposes in breach of his obligations to the respondent as a partner. That is not something about which I can make a decision but may well be considered elsewhere.

113. For these reasons, therefore, the respondent's counter claim is unsuccessful and is dismissed.

114. I note, finally, for the purposes of clarity and completeness, that Ms Cross withdrew Ms Taylor's claim at the start of the hearing.

1800911/2022
1800915/2022
1800916/2022
1800917/2022

Employment Judge **Miller**

Date 25 April 2023