Case No: 2408838/2022

EMPLOYMENT TRIBUNALS

Claimant: Mark Craven

Respondent: Forrest Fresh Foods Limited

Heard at: Manchester (by CVP) **On:** 6th, 7th March; 10th, 11th May 2023

Before: Employment Judge Cline (sitting alone)

Representation
Claimant: Mr Lee Bronze, counsel
Respondent: Mr Scott Redpath, counsel

JUDGMENT

1) By consent, the Claimant's claim for unauthorised deduction of wages by way of pension payments is withdrawn but not dismissed.

2) The Claimant's claim for unauthorised deduction of wages by way of PAYE earnings is not well-founded and is dismissed.

3) The Claimant's claim for unauthorised deduction of wages by way of sick pay is not well-founded and is dismissed.

4) The Claimant's claim for unauthorised deduction of wages by way of payments to HMRC is not well-founded and is dismissed.

5) The Claimant's claim for unauthorised deduction of wages by way of a bonus payment is not well-founded and is dismissed.

6) The Claimant's claim that the Respondent did not provide him with written particulars of employment is not well-founded and is dismissed.

REASONS

The Parties and their Representation

1) The Claimant in this matter is Mr Mark Craven. The Respondent is Forrest Fresh Foods Limited, the managing director and majority shareholder of that company being Mr Christopher Craven, who is a second cousin of Mr Mark Craven. For the sake of clarity and brevity, I shall refer herein to the Claimant and Mr Craven, such that any reference to "Mr Craven" is to Christopher Craven. No disrespect is intended to the Claimant by not using his name but there is an obvious need to differentiate between the two individuals without any confusion.

2) Both parties were represented by counsel: Mr Bronze for the Claimant and Mr Redpath for the Respondent. I am grateful to both of them for their assistance in dealing with the matter and, especially, for focussing on the relevant evidence and documentation from two bundles with a combined length of some 1,500 pages.

The Hearing and the Documentation

3) The final hearing of this matter was listed to commence on 6th March 2023 and had a time estimate of 2 days. Although both counsel, when asked at the outset, agreed that this was sufficient, it proved not to be and had to be re-listed, part-heard, for another 2 days approximately 3 months later. Although this was rather unsatisfactory (and it has to be questioned whether 2 days was ever going to be sufficient), this gap has not, in my view, had any impact on dealing with and resolving the claim.

4) Reference to documents in the main bundle herein will be in square brackets by page number, for example [45], with those from the supplementary bundle having an S pre-fix, for example [S45].

5) In addition to the two bundles, I was provided with the following witness statements (from whose authors I also heard oral evidence during the course of the hearing), all of which I have read in full:

    a. The Claimant (13th March 2023);
    b. Danny-Lee Finch (22nd February 2023);

c. Maggie Craven (21st February 2023);
d. Christopher Craven (1st March 2023); and
e. Jamie Kennedy (1st March 2023).

Background and the Claimant's Claims

6) The Respondent company specialises in the wholesale distribution of food and drink products. They are based in Rochdale but have premises in London and Bedlington and employ approximately 70 people on a full-time basis. It was not in dispute that, as managing director, Mr Craven had oversight of the whole business and its finances. It was also not in dispute that the Claimant started working for the Respondent in 2008 or 2009 as a driver, left in 2011 or 2012 and then returned, subsequently becoming the business development manager (although it is unclear when this happened, the Claimant saying that it was in 2013, Mr Craven saying that it was August 2015 and the grounds of response saying 2013, a disparity that I do not consider to be material).

7) It was also not in dispute that the Claimant became a shareholder of the Respondent company (holding one ordinary D share with dividend rights only) and was appointed as a director in June 2016. The Claimant moved to Romford to assist in building a new arm of the business and remained there for 3 years, returning to Manchester in 2019 with the business being run centrally from there. It appears that the Claimant and Mr Craven were very close (on a personal and business level) but that, over time, there has been a deterioration in their relationship which has led to what seems to be a significant falling-out, with the Claimant taking time off work with stress and eventually ceasing to be a director of the company or to be working there. This has resulted in not only the claim before this Tribunal but also in at least one other claim in the civil courts; several references were made by both parties to other claims being pursued but I had no information about that and attach no relevance to it save as an illustration of the extent of the parties' disagreements.

8) By way of his ET1 claim form and grounds of complaint received by the Tribunal on 11th November 2022, the Claimant brings claims for various unpaid sums to which he says he was entitled as an employee but (recognises that he was also a director and shareholder). These were set out as follows:

a. PAYE / sick pay of £4,701.95 for the 5-month period from 1st July to the end

of November 2022;

b. Pension contributions of £2,400;
c. Bonus of £35,000; and
d. Unpaid instalments to HMRC on behalf of the Claimant of £13,270.36 (i.e. the total outstanding sum plus any charges) at a monthly rate of £2,363 over the previous 6 months.

The Claimant also claims an uplift of 25% for the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") and compensation of 4 weeks' pay due to the Respondent's failure to provide a written statement of his particulars of employment.

9) In their ET3 and grounds of response, the Respondent agrees that the Claimant's current employment (in relation to which, see paragraphs 10 to 14 below) began in 2013, there having been a break in service, and was suspended on 17th May 2022 when they had cause to suspect that, amongst other matters, the Claimant was working for another business and concealing this whilst at the same time claiming to be unfit for work through stress. The response to the specific sums claimed can be summarised as follows, with all liability to the Claimant being denied:

a. PAYE / sick pay: the Respondent pays company sick pay at its absolute discretion and was reasonable in refusing to pay the Claimant when they did not accept his illness to be genuine and there were other serious allegations against him as noted above;
b. Pension contributions: this is misconstrued as such payments are not wages;
c. Bonus: this claim is out of time as it would have been due by 30th April 2022 but, in any event, it does not amount to wages and was intended to reflect the Claimant's performance in his role as a director; furthermore, the agreed trigger for payment of the bonus of net profit of £700,000 for the year ending 30th April 2022 was not achieved in any event;
d. Unpaid instalments to HMRC: this does not amount to wages; and
e. The claims for an uplift for failure to comply with the ACAS code and compensation for failing to provide written particulars of employment are

simply denied.

The Issues to be Determined

10) At the commencement of the first day of the hearing, I was told by Mr Bronze that the Claimant intended to withdraw the claim relating to pension contributions (because it is being pursued via another jurisdiction) but asked that the claim not be dismissed. Mr Redpath had no objection to this course of action on behalf of the Respondent. Noting Rules 51 and 52 of the Employment Tribunals Rules of Procedure in this regard, I found that there was, in the circumstances, a legitimate reason not to dismiss the claim upon withdrawal as set out at paragraph 1 of the judgment above.

11) Mr Redpath had provided a draft list of issues but it had not been sent to me prior to the start of the hearing. Having taken time to consider it, I was then told that it was not agreed between the parties, the sole disagreement being that the Respondent appeared to include the question of whether or not the Claimant was an employee as an issue requiring determination when, Mr Bronze pointed out, his employment status had not been raised until now. This was clearly an important issue as one of the main planks of the Respondent's case as set out by Mr Redpath thus far appeared to be that the Claimant was not an employee and was only a director such that he was unlikely to be able to establish any entitlement to wages within the jurisdiction of the Tribunal. As such, I invited submissions so that this issue could be resolved and not become more problematic as the hearing progressed.

12) Mr Bronze, on behalf of the Claimant, argued that his employment status had not been put in issue before now and should not suddenly become an issue in dispute. He pointed out that paragraph 1 of the Respondent's grounds of response admitted paragraph 1 of the grounds of complaint save that the Claimant's current employment began in 2013, having had a break in service. Paragraph 1 of the grounds of complaint says that "[t]he Claimant is employed by the Respondent as a Commercial Director" and has been "employed by the Respondent" since 2008. In a similar way, paragraph 2 of the grounds of complaint asserts that the Claimant "in addition to being an employee" is a director; and paragraph 3 of the grounds of response says that paragraph 2 of the grounds of complaint "is admitted", before going on to enlarge on the

Claimant's status as a director. In light of this, argued Mr Bronze, the Claimant has not provided any evidence in relation to his employment status as this point had clearly been conceded; if he now needed to deal with this issue, there may be a need for further evidence.

13) In response, Mr Redpath submitted that the issues are very clearly articulated in Mr Craven's witness statement and that the grounds of response make it clear that the main issue between the parties is whether or not the Claimant was an employee / worker or a self-employed director such that the Tribunal does not have jurisdiction where the Claimant's remuneration does not constitute wages within the statutory definition. When I queried with Mr Redpath how this can sit with the apparently clear concessions at paragraphs 2 and 3 of the grounds of response, he said that the terms "employed" and "employment" were being used in the "loose sense", rather than admitting status as asserted by the Claimant, and argued that the use of the word "employment" in the grounds of response was "a matter of semantics". He also noted that the issue of the Claimant's employment status was raised clearly in Mr Craven's witness statement such that it should not be a surprise to the Claimant that he will be required to prove his position by way of evidence.

14) Having allowed time for both counsel to take instructions on this matter so that it did not return as a contentious issue at a later stage in the hearing, Mr Bronze told me that he would object to status being put in issue as it would be, in effect, an amendment to their response which has never been raised before now. If this amendment were allowed, he said, there would need to be additional evidence collated in terms of documentation and a supplementary witness statement. One possible option offered by Mr Bronze was to deal with everything other than status at this hearing and then, if required, the matter could be re-listed on a part-heard basis so that any further evidence can be provided. It seemed to me that the issues in the case are so intertwined that this would be a recipe for chaos (effectively trying to resolve substantive issues of fact before considering the Tribunal's jurisdiction) and I therefore put to Mr Redpath that, in my judgment, the Respondent needed to accept that they have admitted that the Claimant is an employee or they must apply to amend their response.

15) After a rather lengthy and, it has to be said, convoluted exchange, Mr Redpath

conceded that the Respondent is bound by the concession that the Claimant is an employee within the definition of Section 230 of the Employment Rights Act 1996 ("the ERA 1996") throughout the relevant period and that this is therefore not an issue which requires determination by the Tribunal. It seemed to me that this issue had simply not been considered properly by the Respondent and their representatives and it was regrettable that Mr Redpath was, in effect, put in a position where he was required to argue against what his own pleadings had said. That being the case, much of the first morning of the hearing was taken up with an argument that simply would not have been needed if the parties had sought to agree a list of issues (although I accept that there had not been a specific direction to do so) and if the Respondent had turned their mind to exactly how their case was being put. In reality, we all agreed that there was nothing in principle preventing the Respondent from arguing that the Claimant was both an employee and a director and that some or all of the claims were denied on the basis that he could not establish an entitlement to payment as an employee such that the Tribunal does not have jurisdiction to make any award pursuant to the provisions of the ERA 1996. With this in mind, an agreed list of issues was finally produced at the start of the first afternoon of the hearing as I put an end to the argument by observing that the Respondent is able to argue in relation to each individual element of the claim that the Claimant was not entitled to that sum as an employee even if he was indeed an employee as well as a director and shareholder.

16) As such, the list of issues to be determined by the Tribunal was agreed as follows:

1) Was the Claimant entitled to be paid:
   a. the PAYE earnings between 10th June 2022 and 17th January 2023;
   b. sick pay between 10th June 2022 and 17th January 2023; and
   c. a bonus in relation to the Respondent's year ending 30th April 2022?

2) If so, has the Respondent made an unauthorised deduction of any of these amounts for the purposes of Section 13 of the ERA 1996?

3) Was the Claimant provided with a written statement of employment particulars?

4) With respect to the Claimant's claims, was the Respondent in breach of the ACAS code? If so, is the Claimant entitled to an uplift? If so how much, up to 25%? The Claimant asserts the following were breaches of the Code:

a. Employers and employees should raise and deal with issues promptly and should not unreasonably delay;
b. Employers should carry out any necessary investigations;
c. Employers should allow an employee to appeal against any formal decision following the meeting decide on what action, if any, to take;
d. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken;
e. Appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance; and
f. The outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

Findings on Disputed Facts

i) The Claimant's Employment Status

17) Having heard the oral evidence as a whole, it was clear that much of it had focussed on the relationship between the Claimant and the Respondent in order to argue for or against the assertion that the Claimant was entitled to the sums claimed as an employee as opposed to as a director and shareholder. As noted above, I formed the view (and both counsel agreed as a matter of principle) that the Claimant could be both an employee, a shareholder and a director simultaneously but that, for the purposes of this claim, what is important is to consider that question in relation to each specific sum being claimed rather than as a general concept, which would not provide a satisfactory solution. As such, I considered that the appropriate starting point is to make findings of fact which then allow each specific head of claim to be considered. This is best achieved by considering the way in which the Claimant's relationship with the Respondent changed over time and how that then impacts on each element of the claim.

ii) The Claimant's Contract of Employment

18) The Claimant's employment commenced in approximately 2009 as a driver; he then left and returned in 2013, again as an employee. When attempting to establish what happened next, I turn to the "statement of main terms of employment" relied upon by the Respondent [173]. This document is, in effect, a contract of employment between the Claimant and the Respondent; it gives the Claimant's job title as business development manager and notes that his employment began on 26th May 2009. It is signed on behalf of the Respondent with a signature that is difficult to decipher and is dated 24th August 2015. The section for the Claimant to sign and date it is blank. Throughout his claim and his oral evidence, the Claimant has maintained that he never received a written contract of employment; in his oral evidence, when this contract was put to him, he denied having ever seen it, denied ever signing it and denied having any detailed knowledge of the terms and conditions of his employment. One issue that was not explored by either counsel in evidence or in submissions, but which I have discovered myself within the voluminous papers not referred to during the hearing, is a copy of the Claimant's email dated 18th July 2022 to Mr Craven and Jamie Kennedy (another director), in which he submitted a grievance against the Respondent [584]. Crucially, the very last sentence of the email says: "*Finally, I request a copy of my employment contract which I signed some years ago and returned to Shona Craven & Chris Craven*".

19) When the issue of the employment contract was raised with Mr Craven in cross-examination, he agreed with the suggestion that, if such a contract had been presented to the Claimant, there would be no reason for it not to be signed; indeed, Mr Craven went on to tell me, there were two copies, both of which had been signed by Shona Craven (his wife) so that the Claimant could then sign and return one of them. In his witness statement at paragraph 9, Mr Craven says that the Respondent "does not have a copy of the Claimant's contract"; this was prompted by the Claimant's assertion at paragraph 1 of his grounds of complaint that "he has an employment contract but that it is in the possession of the Respondent who deny they have it". Mr Craven repeated this position in his oral evidence and said that "all I can provide is what we've got", whilst conceding that he had no other evidence such as email chains or other contemporaneous documentation.

20) This is an important issue in the case and I pause to set out why. As will already

be clear, the relationship between the Claimant and the Respondent will be the key to most of the issues. I remind myself throughout that, although both parties have of course provided evidence, it is ultimately the Claimant who bears the burden of proof on the balance of probabilities in establishing that he has an entitlement within the ERA 1996 to the various sums claimed. In this case, whilst one would expect an employer to provide evidence in relation to such matters, they do not have any burden to disprove the Claimant's claims unless and until he has established an apparent entitlement on the evidence provided. I keep in mind that these events took place approximately 7 or 8 years ago and I recognise the difficulty in recalling specific details so long afterwards. In such circumstances, I must also look to any contemporaneous documentation that is available to me. I am struck, however, by the fact that the Claimant's grievance email is from July 2022 and makes a very clear assertion that he signed an employment contract "some years ago and returned [it] to Shona Craven & Chris Craven". This sits very uncomfortably with the Claimant's assertion at paragraph 6 of his witness statement where he says: "*I don't recall being provided with the contract provided in the bundle at pages 173-174*". I do not make a finding that the Claimant has sought intentionally to mislead me on this point but I must find that his recollection of these issues, and the care with which he has considered them during the course of these proceedings, needs to be approached with some caution given that he has, in effect, put forward two seemingly contradictory accounts within a matter of 9 months. I have considered the possibility that there is more than one contract at play such that the Claimant is referring in his grievance email to a contract other than the one in the bundle but I have no evidential basis whatsoever to make such a finding as the Claimant has not dealt with it at all as part of his case.

21) In light of the above discussion, I therefore find on the balance of probabilities that the Claimant was provided with an employment contract (as per the document in the bundle [173]), already signed by Shona Craven on behalf of the Respondent, and that he then signed at least one copy which he returned to the Respondent. I am fortified in this finding by the assertion by Jamie Kennedy in his witness statement (at paragraph 5) that he and the Claimant were both given "new contracts of employment" in August 2015, something which he maintained in cross-examination; and there was no evidence brought to my attention to contradict this. It is quite unsatisfactory that the Respondent

does not have a copy of the mutually-signed contract and it is also regrettable that the Claimant says, in his witness statement and to me in oral evidence, that he cannot recall ever signing one when asserting in an email in July 2022 that he actually did. However, I can only make findings on the basis of the evidence available.

22) The position in relation to the contract of employment is an unfortunate precursor to a number of issues below in relation to which both parties have provided rather incomplete evidence. In several instances, I have had to piece together something of a jigsaw in order to make the required findings of fact.

iii) The Claimant Becomes a Shareholder and Director

23) As noted above, it is agreed that the Claimant became a shareholder of the Respondent in April 2016 with one ordinary D share (with dividend rights only) and this is recorded by Companies House in the usual way [211, 216 and 220]. The Claimant was also appointed as a director in June 2016 and this too is recorded by Companies House [206]. Jamie Kennedy was made a director at the same time alongside Mr Craven and the Claimant and also Matt Mitchell, who subsequently left the company.

24) It is the Respondent's position, as expressed clearly by Mr Redpath in his closing submissions, that the Claimant's appointment as a director heralded a fundamental change in his relationship with the Respondent and that, in effect, he was no longer an employee. Mr Redpath argued that, once the Claimant became a director, his relationship with the Respondent was governed solely by the company's articles of association, a copy of which was provided during the course of the hearing (and the relevant parts of which I have read), having not been included within the bundle for reasons that were never made clear to me. When I asked Mr Redpath how this argument can be sustained in the absence of any explicit agreement by the Claimant that this change would take place, he argued that it could be implied by the Claimant's conduct in agreeing to become a director, which brought with it more freedom and more flexibility in his tax affairs, and that, if the articles of association did not replace the contract entirely, they should be taken as being imported wholesale into whatever contractual relationship existed at that time (which the Respondent maintains is as set out in the contract of employment [173]).

25) It was put to the Claimant in cross-examination that, prior to his appointment as a director, he received his regular payment via his contract of employment. The Claimant replied that he is unable to remember this but that it was all done by PAYE. He then went on to repeat that he "was never given a contract"; for the reasons discussed above, I am unable to accept this assertion. Paragraph 12 of Mr Craven's witness statement, in which he says that the Claimant was paid by way of a salary only prior to his appointment as a director, was put to the Claimant and he said that he could not remember but that it was PAYE only so it must have been a salary. It was then suggested to the Claimant that the way in which he was paid changed when he became a director and he agreed with this. He also agreed with the suggestion that his role in the business changed significantly. During the course of the cross-examination that followed, the Claimant effectively said that he did not really understand the new payment structure or his role as a director but that he did understand that he would be paid by way of dividends and directors' loans, which he left to Mr Craven to arrange. In relation to the directors' loans, the Claimant again said that he left all of this to Mr Craven, who "dealt with that side of things" and that he never signed any document regarding anything to do with shares, dividends or loan accounts.

26) The Claimant was then taken to a number of documents in the bundle (all of which I noted and considered but will not be set out here individually) relating to his tax returns dating back to 2016-17. In summary, the Claimant accepted that he was paid some of his income by way of dividends and agreed that his accounts and tax returns had been signed by him. He also accepted that, as could be seen from a letter from HMRC to him in February 2018 [237], he had appointed AMS Accountants to act as his agent and that this was a firm of accountants who also acted for Mr Craven and for the Respondent company. Further, the Claimant agreed that he had reached an arrangement with HMRC in August 2021 that he would pay off his unpaid tax totalling £18,626.27 by way of 6 monthly instalments (5 of £2,286.45 and then one of £2,620.46).

27) Throughout this section of his evidence, the Claimant said that he had trusted Mr Craven, had left everything to him in relation to his tax returns and the way in which he was paid by the Respondent and had no real understanding of what

was being done. He agreed that, even though a lot of the documentation received by him from HMRC was addressed to him, he simply passed it to Mr Craven to deal with it. I asked the Claimant directly if he was aware that all this was being done in his name and was happy with this and he said that he was as he trusted Mr Craven. He also agreed that he would simply let Mr Craven deal with any tax that he had to pay, which included the payments as part of the arrangement referred to above.

28) One further example of the Claimant's approach was particularly telling. At paragraph 13 of Mr Craven's witness statement, he says that, when the Claimant and Jamie Kennedy were appointed as directors, they became self-employed; as a result, instead of being paid a salary, for tax reasons based on advice received from AMS Accountants, they received a "nominal but minimum" salary every month, a dividend in lieu of salary, a vehicle and a mobile phone. When this was put to the Claimant, he said that he "wouldn't agree with anything in that paragraph"; however, when pressed, he said that he had seen the payments go into his bank account but does not know whether they were salary or dividend. He also agreed that he received a minimal salary every month so that he could take advantage of the personal allowance tax structure but then said that he did not know the difference between a dividend and a director's loan and simply received the money into his account. In short, he said, "I have no clue".

29) I was struck whilst listening to the Claimant's evidence on these issues by the extent to which he effectively denied almost all knowledge and understanding of the way in which he was being remunerated; this is despite his gross income in 2016-17 being £32,878.74 and then increasing to £76,640 for 2017-18. At the same time, however, he accepted that he had signed off all the paperwork in relation to his accounts and tax returns, which had been prepared by the same firm of accountants as advised Mr Craven and the Respondent. His explanation for this was that he simply trusted Mr Craven and, in hindsight, now assumes that it was all being done simply to benefit Mr Craven, presumably to his (the Claimant's) detriment. I accept the Claimant's assertion that he is dyslexic as I have no reason to go behind it; I also accept that he may not have paid very much attention to the documentation which he signed on the assumption that it was being dealt with properly by others. However, I find it to

be an untenable assertion that the Claimant had such little understanding of what was being done that he can simply say that he is unable to explain it now, which I find is effectively what he is trying to do. Whilst I accept that there is no satisfactory documentation before me which sets out the basis upon which the Claimant was remunerated or what changed when he became a director in 2016, I find that the Claimant was content to take advantage of a payment structure which suited him at the time as it provided tax benefits when his declared income more than doubled from one year to the next.

30) I return to Mr Redpath's argument that, as the Claimant derived such significant benefits from becoming a director, it is reasonable to imply, in the absence of any agreement to the contrary, that he ceased to be an employee when he became a director and that his position was governed entirely by the articles of association. This would involve the Claimant surrendering all of his statutory employment rights accrued since at least 2015. It would also mean that, if he were solely a director and not an employee, the articles of association allowed the other directors to vote that he be removed as a director (as indeed did happen, as discussed below), which would leave him immediately unemployed with, in effect, no recourse. In the absence of any explicit agreement to this effect, I cannot accept that it is reasonable to imply such a wholesale agreement. I should also note that, at paragraph 10 of his witness statement, Mr Craven says that, by consequence of the Claimant's appointment as a director, "the Respondent considered the 2015 Contract to be void"; however, when this was queried in cross-examination, he agreed that there was no such agreement by the Claimant to be found in the bundle.

31) In light of the above discussion, I reject the Respondent's assertion that the Claimant ceased to be an employee entirely when he became a director, that the 2015 contract was therefore void and that his position was then governed solely by the terms of the articles of association. However, I also reject what I understand to be the basic tenor of the Claimant's position that his appointment as a director had no real impact on his employment status and that, in effect, all monies due to him were due to him as an employee pursuant to his employment contract. As such, when determining whether the Claimant was entitled to the sums he now claims, I have had to consider each claim as a discrete issue because it has not been possible to establish any overarching

agreement between the parties as to what sums the Claimant could expect to receive and in what capacity.

iv) The Claimant's Pay Structure

32) One of the main issues of contention between the parties is the basis upon which the Claimant was paid: in effect, was it as an employee or as a director and shareholder (or, indeed, both)? At paragraph 14 of Mr Craven's witness statement, he says that, once the Claimant had been appointed as a director in 2016, the arrangement relating to "take home pay" was that the Claimant would receive £2,500 per month in year one with part being paid by way of salary and the balance being made up by way of a drawdown from the directors' loan account. The amount of the drawdown increased on an annual basis based on the business' development. This can be seen from the list of payments made to the Claimant from the loan account between June 2017 and May 2022, with monthly payments increasing from £1,200 to £4,000 during that period [S42].

33) I note that, as I understand it (and as is set out below), the only "dismissal" of the Claimant prior to his resignation letters in January and February 2023 was his removal as a director in June 2022. The question therefore remains what the basis was of the payment that the Claimant received from the Respondent. As highlighted above, the Respondent's position appears to be that, in effect, all of the Claimant's income by the relevant period was by dint of his role as a director and shareholder. I have already rejected the Respondent's general assertion that, once he was made a director, the contract of August 2015 was void and the relationship between the Claimant and the Respondent was thereafter governed solely by way of the articles of association. However, I must consider the specific question of the nature of the monthly income received by the Claimant.

34) The Respondent's position is that, in effect, all pay to the Claimant by the relevant period was in his capacity as a director and shareholder. I am conscious that there was no specific agreement that the August 2015 contract had been amended but I also note that, in that contract [173], the Claimant's salary is put at £10,600.20 per annum. This is clearly a fraction of what he was receiving by the relevant period so it must be the case that the position changed by way of mutual conduct if not by specific agreement. I have already set out

above my view that the Clamant has, in effect, been content to take the benefits of being paid by way of a dividend whilst, at the same time, asserting that he did not understand the position and simply left it to Mr Craven to deal with on his behalf. In my judgment, the Claimant cannot have it both ways if he now says that he is entitled to payment as an employee pursuant to his contract. Despite the Claimant's assertions in this regard, I have not seen or heard anything to persuade me that the position set out by Mr Craven is wrong. The fact that the Claimant received payments from the Respondent into his bank account on a monthly basis does not indicate anything about the legal basis of that payment; indeed, the Claimant himself commented in cross-examination that he effectively just accepted the money and did not seek to question or understand the basis upon which it was being paid.

35) I am required to make findings of fact on the basis of the evidence before me and, as such, I find on the balance of probabilities that the Claimant either agreed or, at the very least, acquiesced over time, to a payment structure based not on the contract of August 2015 but on his position as a director. As such, once he had been removed as a director in accordance with the articles of association in June 2022, he was not entitled to any further payments from the Respondent on the evidence I have seen.

v) The Claimant's Entitlement to Sick Pay

36) Whilst I have found in relation to his monthly income that the Claimant cannot rely on the August 2015 contract for the purposes of his monthly income, the position can be, and in my view is, slightly different in relation to sick pay. The August 2015 contract states specifically that "[t]here is no contractual sickness/injury payments scheme in addition to SSP". Reference is made to the employee handbook [175], which says in section 3 [181] that statutory sick pay is to be paid "if you are eligible". Neither party addressed me on this point. As above, I have found that, for the purposes of his monthly income, the Claimant was not entitled to payment after his removal as a director in June 2022. The Claimant claims an entitlement to unpaid sick pay for the same period. However, given that the August 2015 contract does not provide for anything other than SSP and, by the relevant period, the Claimant had been removed as a director (and therefore, as I understand it, is not eligible for SSP), it must follow that he is not entitled to SSP during the relevant period.

vi) The Bonus Agreement

37) Perhaps one of the best illustrations of the evidential difficulties in both directions in this case is the Claimant's claim that he was entitled to a bonus payment of £35,000 from the Respondent which remains unpaid. It appears to be common ground between the parties that there was an agreement between them that, if the Respondent's profit reaches £700,000 in any given year, the Claimant will receive a sum equal to 5% of that profit. The consensus ends there. There is no written record of this agreement. The parties do not agree on when it was reached. Perhaps most importantly, they also disagree on what exactly was meant by "profit" for the purposes of deciding whether or not the bonus has been triggered. In her witness statement, at paragraph 63, Maggie Craven (the Claimant's wife) says that, because the Claimant looked up to Mr Craven as a brother and trusted him entirely, he "never forced the issue about making sure agreements were recorded in writing". This is of course an explanation of the evidential position about which I do not need to make any findings but I repeat it simply to emphasise the absence of cogent documentary evidence on key issues in this case which have resulted in both parties having to rely on a combination of witness recollection, inference and argument from principle in making (or meeting) the various allegations. The bonus issue is, as noted, a prime example of this.

38) At paragraphs 58 to 66 of his witness statement, the Claimant sets out his account of how the bonus agreement came into being and what was agreed. He says that, in 2014, Mr Craven told him and Jamie Kennedy that a bonus scheme was being put in place which would be triggered if the company hit £700,000 gross profit (but he does not say at this stage what the bonus actually was). That year, he says, a large deal with Coca Cola resulted in the target being reached but he does not say if a bonus was paid or, if it was, how much. He then says that, the next time the threshold was met (but does not specify when this was), Mr Craven said that the target isn't gross profit but net profit "as all bonuses are paid like this" and, therefore, the bonus would be 5% of net profit if the target of £700,000 is met.

39) The Claimant says that he did not understand what was meant by net profit and asked for an explanation, which Mr Craven said was "whatever the Company

makes before it pays taxes", which is the same as agreed with other colleagues. The Claimant says that nothing was recorded in writing about the bonus agreement but he "always remembered Chris' promises"; he says that he now "feels sick" that he put his faith in Mr Craven in this way. I note that the Claimant does not say anywhere in his statement whether he understood the bonus to arise from his position as an employee or as a director. At paragraph 63 of Maggie Craven's witness statement, she says that she can "say with confidence that there was definitely a bonus arrangement of 5% on £700,000 net profit" (and says the same at paragraphs 23 and 24) but does not say how or when she came to know about the details of the arrangement. Interestingly, Mrs Craven also says at paragraph 24 that the Claimant received a "£10,000 bonus in cash the year before" (which seems to mean in 2020-2021) which he used to build a gym in the garden; I do not recall this being mentioned by anyone else within the proceedings, including the Claimant.

40) In cross-examination, it was put to the Claimant that the agreement was that the bonus would be triggered by achieving a net profit of £700,000; the Claimant replied no, the arrangement "at the time" was that it was gross profit and, at that time, there was a "big year"; but then, the next time, Mr Craven said that it was net profit. The Claimant went on to say that, over the years, the bonuses were always agreed on a pre-tax net profit basis and there is no other way to do it as, any other way, "it's a minefield and nobody would be able to get their bonus". There was then a detailed exchange in relation to how the net profit figure is calculated and the Claimant appeared to accept that it can only be done once the accounts are completed (otherwise it would be a guess and is not guaranteed) and that, where the measure is pre-tax net profit, that has to factor in turnover, operating profits and costs. He also agreed that this can only be done by viewing all the financial information and finalising a figure, although he then added that this just was his understanding and stressed that he isn't an accountant.

41) Mr Craven says, at paragraph 41.4 of his witness statement, that there was a bonus agreement which "derived by consequence of [the Claimant] being a director, not an employee" and that the trigger was £700,000 net profit. It is not clear when he says this agreement came into being. In his oral evidence, Mr Craven initially agreed that the agreement was reached in 2014. At a later

stage, he said that, having thought about it further, he thought that the 5% figure came about in 2018 when the company hit £600,000 (which is the only year that had happened) and that this is where the £700,000 figure came from. Mr Craven was, unsurprisingly, challenged on this change in his evidence and his only explanation was that, when he said 2014, he was "just concentrating on the issue of a verbal agreement" and that 2018 was correct. He also suggested that, if it had been agreed in 2014, that would have been in the contract signed in 2015. I note that the Claimant's annual income in the August 2015 contract [173] is £10,600.20 so it seems rather unlikely that this was, or was intended to be, his sole income for the year; however, I heard no evidence or submissions on that point and make no findings accordingly.

42) I heard significant evidence in relation to the bonus structures and bonuses received by other employees in an attempt to draw parallels with the bonus expected by the Claimant. Mr Craven's response each time was that there was a different bonus structure in place for different people. I also heard lengthy exchanges in relation to the purported logic of one approach as opposed to the other in terms of whether or not it is likely that a bonus would be triggered. I did not find this evidence to be particularly helpful; it is within the gift of an employer to implement any bonus scheme(s) of their choosing and there is no reason for asserting that it should apply in the same way for each and every employee.

43) It can be seen from the summary above that the evidence surrounding the bonus agreement is somewhat confused on both sides. I remind myself that the Claimant has the burden of proof in establishing any entitlement to a bonus and the first step is, of course, to establish exactly what the circumstances were that he says would trigger such an entitlement. The best I can do with the evidence I have heard is to find that there was an agreement at some stage (be it in 2014 or 2018) that a bonus of 5% of the profits would be triggered if the company's net profit reached £700,000. Exactly what "net profit" means to each of the parties is difficult to discern and I can therefore only give it its normal meaning which, as I understand it, is the overall profit of the company at the end of the year, once all costs and expenses have been taken into account, and upon which figure tax would be payable.

44) The next question the Claimant must answer is whether he can prove on the

balance of probabilities that the £700,000 threshold was met in the relevant year. My finding is that he cannot. I read and heard evidence from the Claimant to the effect that he believed or expected, based on information he had seen or heard, that the company was likely to meet the target. He accepted in his oral evidence that the relevant net profit figure could only be calculated once the accounts had been completed otherwise, as he put it, it would be a guess. The company's audited accounts for the year ending 30th April 2022 are in the bundle [S49-80]. The Claimant was asked if these were signed off by him in good faith as a director and he said that he only saw them after they were filed as he had been off work due to his mental health. However, he made no suggestion that he had sought to challenge their veracity at the time. The company's net profit can be seen as being £563,184 [S59]; the Claimant agreed that this was shown in the accounts and agreed with the obvious point that it is less than £700,000. However, he denied that this was the relevant figure, saying that, as he understood it, "the operating profit is also the pre-tax profit" and that this is how it was explained to him by Mr Craven. Although the accounts show an operating profit of £750,754, this is then reduced by £187,570 for "interest payable and similar expenses" to reach the net profit figure of £563,184. I must confess that I did not understand the Claimant's evidence on this point; in any event, he was unable to point to any other figure in the accounts which should be considered instead. When pressed on the point, he said that he is unable to explain anything else about the accounts as he isn't an accountant but that he realises that he was accountable as a director at the time. Going through it now, he said, "nothing adds up" and he simply put faith in Mr Craven. The Claimant also made the point that other people were paid bonuses that year but he was unable to provide any evidence of that.

45) It will be clear that my finding on this issue is that the Claimant has failed by some significant margin to establish on the balance of probabilities that he was entitled to a bonus as claimed.

vii) The Deterioration of the Relationship

46) In his witness statement at paragraph 19, Mr Craven says that, towards the end of 2021, he "started to have some concerns about the Claimant's conduct" as he was taking time off work and taking longer to undertake routine tasks; he also says that the Claimant told a supplier that he was thinking of leaving the

business. It is common ground between the parties that, in February of 2022, there was a discussion between the Claimant and Mr Craven during which the Claimant told him that he had been working with another business and was now a director of another company called VIPHQ, which ran various gyms. Although I heard quite detailed evidence about this, I will not set it out here as I did not consider it to be particularly relevant, save that it serves as background information and something of an explanation as to why the relationship between the Claimant and Mr Craven appears to have deteriorated quite drastically at this juncture. Mr Craven said that he felt that the Claimant was, in effect, betraying him and not doing the work that he was supposed to do for the company. The Claimant said that, as far as he was concerned, there was nothing in place preventing him from doing additional work with other companies. It now appears that Mr Craven had been using a tracking device to monitor the Claimant's movements in his company car and this was another factor contributing to the falling-out.

47) As a result of the increased tension, the Claimant says, he was sleeping badly and feeling anxious and stressed. On 22nd April 2022, he went to see his GP and was certified as unfit for work as a result of stress. The Respondent's position is that they did not then, and do not now, accept that the Claimant was unfit for work as he was continuing to do work for VIPHQ; the Claimant's response is, in effect, that he was experiencing stress in his work for and with the Respondent and Mr Craven but that he was able to do other work. I have seen a number of fitness to work certificates and heard evidence about if and when they were sent to the Respondent. I have decided not to make any findings on these issues for reasons that will be set out below. It seems that the Claimant did not return to work for the Respondent after 22nd April 2022.

48) By way of an email dated 18th July 2022 [584], the Claimant submitted a grievance against the Respondent. He sets out his concerns, which include: there being a "vendetta" to remove him from the business "without justification"; "conducting surveillance of [his] activities"; not paying his salary for July 2022; not being paid a bonus after the company exceeded the £700,000 net profit threshold; and the Respondent not continuing to pay the direct debits to HMRC to clear his outstanding tax bill.

49) This grievance was eventually referred to a third-party assessor and, as I understand it, has still not been resolved. For the reasons set out below, I do not consider it necessary to make any findings as to the adequacy or otherwise of the grievance process.

50) According to Mr Craven's witness statement at paragraph 36, the Claimant's "employment" was suspended in May 2022; this is an unfortunate turn of phrase given the issues surrounding the Claimant's employment status but, nonetheless, the letter to the Claimant dated 17th May 2022 [58] makes it clear that "the majority shareholder has tabled a motion to remove [him] as a Director" and that there will be an EGM to vote on this on 3rd June 2022. As a consequence, it goes on, the Claimant is now "suspended from work". The letter then sets out the various allegations against the Claimant which underpin the decision to suspend him; it also says that the Claimant will be entitled to "the same salary" from the date of the letter until the EGM. It appears that the EGM was ultimately held on 10th June 2022 and that the vote was passed to remove the Claimant as a director; the Claimant did not attend through ill health but it was agreed between the parties at the hearing that this is indeed what happened, even though it is unclear when the Claimant says that he became aware of it. The Claimant's last payment date, according to his schedule of loss [37] was 10th June 2022. Having already been removed as a director, the Claimant wrote letters on both 17th January [1309] and 3rd February 2023 [1328] resigning his position as commercial director.

The Legal Framework

51) Having made the findings above, I turn to the applicable law. This was not contentious in the broad sense that both parties agreed that the relevant legislation in relation to wages is Sections 13 and 27 of the ERA 1996:

> *S.13 of the Employment Rights Act 1996 provides, as far as is relevant:*
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

S.27 of the Employment Rights Act 1996 provides, as far as is relevant:

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the M1Social Security Contributions and Benefits Act 1992,

…

but excluding any payments within subsection (2).

…

(2) Those payments are—

…

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

…

(e) any payment to the worker otherwise than in his capacity as a worker.

…

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

50) It is of course for the Claimant to establish on the balance of probabilities that he is entitled to each sum claimed before being able to claim that there has been any unauthorised deduction.

51) In respect of the requirement for a written statement of particulars of employment, Section 1(1) of the ERA 1996 says that: "*Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment*".

Consideration of the List of Issues

52) In light of the findings made above, the questions posed in the list of issues set out at paragraph 16 can be answered as follows.

53) *Was the Claimant entitled to PAYE earnings between 10th June 2022 and 17th January 2023?* For the reasons set out above at paragraphs 32 to 35, I find the answer to be no.

54) *Was the Claimant entitled to sick pay between 10th June 2022 and 17th January 2023?* For the reasons set out above at paragraph 36, I find the answer to be no.

55) *Was the Claimant entitled to a bonus in relation to the Respondent's year ending 30th April 2022?* For the reasons set out above at paragraphs 37 to 45, I find the answer to be no.

56) Although it was not in the list of issues, did not appear in the skeleton argument from Mr Bronze and was not addressed in closing submissions, the Claimant's grounds of complaint also include a claim for unpaid instalments to HMRC. For the avoidance of doubt, if this head of claim is indeed being pursued, I find for the reasons set out above at paragraphs 26 and 27 that this was simply a payment mechanism agreed between the Claimant and the Respondent to facilitate the Claimant's arrangement with HMRC to clear his outstanding balance of tax due, most likely as a drawdown from the directors' loan account. There was no evidence provided by the Claimant to suggest that the Respondent had agreed to pay this as part of the Claimant's wages and, as such, I find that there was no entitlement to such payment as it was the Claimant's personal responsibility to pay off his own tax debt.

57) *Have there been any unlawful deductions from the Claimant's wages?* In light of the above findings that the Claimant has not established an entitlement to

any of the sums claimed, I am not required to make any findings as to whether or not unauthorised deductions have been made.

58) *Was the Claimant provided with a written statement of employment particulars?* For the reasons set out above at paragraphs 18 to 21, I find the answer to be yes.

59) *Should there be an uplift following any breach by the Respondent of the ACAS Code?* As I have made no award of damages, there is no need to consider the allegations of breach of the ACAS Code as this relates solely to the question of remedy.

Disposal of the Claim

60) For the reasons set out above, each of the Claimant's claims is dismissed and no award is made.

Employment Judge Cline

Date: 30th July 2023

JUDGMENT SENT TO THE PARTIES ON

8 August 2023

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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