



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr R Davies

Londorf Capital Limited

Heard at: London Central (by video) **On:** 2 October and 6 November 2023

Before: Employment Judge Stout (sitting alone)

Representations

For the claimant: In person

For the respondent: Mr M Bignell (counsel)

JUDGMENT

The Claimant's claim for unlawful deduction of wages is not well-founded and is dismissed.

REASONS

Introduction

1. Mr Davies (the Claimant) by a claim form filed on 14 March 2023 brings a claim against Londorf Capital Limited (the Respondent) for unlawful deduction from wages under s 27 of the Employment Rights Act 1996 (ERA 1996). The Respondent denies the claim. The parties are in dispute as to whether there was a contract between them at all and, if so, whether the Claimant was a 'worker' for the purposes of s 230 of the ERA 1996 so as to give him an entitlement to claim under s 23 ERA 1996 and, if so, whether the nature of the claim is one to which s 13(3) ERA 1996 applies, i.e. whether the

claim is one for an ascertainable amount of wages payable to the Claimant on a particular occasion.

The type of hearing

2. This has been a remote electronic hearing by video under Rule 46. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The Evidence and Hearing

3. The hearing was originally listed for 1 day, but in the event we were unable to complete the case within 1 day, so (with the parties' consent) the case was adjourned for a further day, with the parties producing written submissions and making oral submissions on the second day. The Claimant's written submissions for the second day were prepared on his behalf by counsel, but the Claimant otherwise represented himself at both hearings. The Respondent was represented by counsel.
4. The Claimant had prepared a written witness statement and was also cross-examined by Mr Bignell. The Claimant also submitted a written witness statement for Mr Price who was in Australia and unable to attend. By agreement, I took his statement 'as read', noting that he was not available for cross-examination.
5. For the Respondent, I received written witness statements from Mr Bassett (Managing Director of Capiconic FZE) and Mr Barrett (Head of Recruitment and HR for the Respondent). They both gave oral evidence and were cross-examined by the Claimant.
6. I asked questions of all witnesses as necessary.
7. The parties also provided me with a bundle of 332 PDF pages.

Amendment applications

8. After I had read into the case, I dealt with applications made by both parties to amend their statements of case. I granted both applications for reasons I gave orally.
9. I granted the Claimant permission to amend his claim as per the calculations at the end of his witness statement dated 18 September 2023. His claim is that he was employed by the Respondent as an employee or worker from 2 January 2023 at a rate of £14,000 per calendar month gross. He claims 12 days salary for January, 20 days for February and 15 days for March

(including a 7 day notice period), based on a daily rate which he calculates as £646 per day (gross). These days reflect days that he says he worked during those months. He has also claimed a one-month sign on bonus of £14,000, pension contributions (£910) and accrued holiday pay of 4 days for that period which he calculates as £2,584.

10. I granted the Respondent permission to amend its Grounds of Resistance as per its application of 13 September 2023.

The facts

11. I have considered all the oral evidence and the documentary evidence in the bundle to which I was referred. The facts that I have found to be material to my conclusions are as follows. If I do not mention a particular fact in this judgment, it does not mean I have not taken it into account. All my findings of fact are made on the balance of probabilities.

The key players

12. The Claimant is a well-qualified and experienced engineer. He was, at the time that events relevant to this claim commence, working for Briggs of Burton, a company he had been working with since August 2022. He has a 'personal service company', System Solutions (Midlands) Ltd, which is a company through which the Claimant sometimes provides consultancy work to clients.
13. The Respondent Londorf Capital Limited is a company incorporated in the UK. The Respondent provides shared services including HR and payroll to different companies, including Capiconic FZE (Capiconic). Capiconic is incorporated in the United Arab Emirates.
14. Mr Rod Bassett is Managing Director of Capiconic. Mr Sam Barrett is Head of Recruitment and HR for the Respondent. Because the close similarity in their surnames has caused confusion at this hearing and because I am prone to mixing them up when typing, I am going to refer to them in this judgment respectively as Rod and Sam. I intend neither any disrespect in so doing.
15. Both the Respondent and Capiconic are part of the United Green group. I use the word 'part' here in a loose sense. I have not received evidence as to management structure, directorships or share ownership of any of these entities. Afshin Ashar is the CEO of the United Green Group. The United Green Group is a family-owned investment company. A 'family office' sits at the head of management of the organisation of which Afshin and another person referred to in the documents as Albrecht Frischenschlager are members.

16. Mr Phil Price has previously worked for United Green Nutrition Limited through its subsidiary Capiconic either in paid consultancy positions or unpaid work.

October – December 2022

17. Rod contacted the Claimant via LinkedIn on 19 September 2022 regarding the role of Head of Engineering with Capiconic.
18. There were then further contacts between Rod, Sam and the Claimant. By email of 4 October 2022 (p 206) from Sam using his United Green email address, the Claimant was invited to an initial virtual meeting with Mr Afshar regarding *“a potential job opportunity with our Agri Development and Asset Management company, Capiconic”*.
19. An in-person meeting between Sam and Rod and the Claimant was then arranged for 13 October 2022 in person. The Claimant travelled to London for the meeting.
20. In advance of that meeting the Claimant by email of 11 October 2022 (p 4) to Rod at his United Green email address ‘crunched some numbers for you to consider’. He made an offer to split a salary of £136,000 between him personally ‘as a salary’ of £96,500 and a contract with his service company for the remainder, which the Claimant noted would be beneficial for tax purposes and *“above board”* because his company was already *“set up to provide project management and consultancy services”*.
21. The parties’ accounts of the meeting on 13 October 2022 differ. Having heard them and considered the evidence, I have concluded that both parties’ accounts of the meeting are broadly correct and that the difference between them turns on the legal effect of the facts rather than any significant dispute of fact. I explain this further in my conclusions, but in essence I accept that the Claimant was at that meeting offered and accepted a role as Director of Agri-Food Industrial Processing for Capiconic. However, there was no agreement at that stage as to any of the terms of the appointment, including when it would start, who the ‘employer’ would be, or what the pay would be.
22. The Claimant’s evidence was that at this meeting a job offer was “made and agreed” with Rod. He said that he was introduced to Antonia Montanez as Director of Agri Food Processing, offered a laptop by Simona Michalekova (although a suitable working model could not be found) and asked to make himself available for a trip to Kenya w/c 14 November 2022. I find as a fact that all this happened. It has actually not really been disputed by the Respondent and it is clear from what happened subsequently that Rod regarded him from that point as being the only person in line for that Director role (‘locked in’ was the term that Rod later used).
23. Rod’s evidence was that at the meeting on 13 October 2022 it was clearly conveyed that formal engagement was subject to internal approval and

capitalisation of the joint venture in Kenya (which was the project the Claimant was potentially needed for). He added in oral evidence that HR has rigid procedures that have to be followed. Sam's evidence supported Rod that he had made clear there would need to be funding in place before someone could be hired. Again, I find that these points were also made clear to the Claimant at this meeting as it is apparent from what follows that the Claimant understood that funding was required before his employment would start and that he understood formal agreement was required from the family office. The family processes for formal appointments were evidently well-established (Mr Price's evidence about the Respondent's general mode of operation being consistent with the Respondent's evidence on this issue) so that I accept Rod made these points at the meeting.

24. The Claimant emailed Rod the next day: "*great to meet yesterday at last. Can't wait to get on board ...*". He asked about vaccinations for Kenya (p 209). Rod replied with advice about vaccines (p 210).
25. On 14 October 2022 Rod also wrote to the Claimant by WhatsApp (p 60):

Great to see you yesterday.

In an attempt to get things moving on the project, I really wish to get a scoping team on the ground in Kenya for 2 weeks asap (w/c14th & 21st Nov). I think for ease of everything (devising your contract, which UK entity employs you, etc.) and until Capiconic contract signed by the Kenya JV and money in the bank, we secure your services asap via your own business initially.

Could you let me know what your daily rate would be for 2-3 weeks to get the ball rolling.

26. The Claimant in reply quoted £750/day + expenses "*for this type of short term consultancy work as we are looking to move forward together*". Rod in reply indicated that he was content with that as a daily rate. The Claimant proposed starting w/c 14 October 2022.
27. It is apparent from these early communications that neither of them considered they had reached any formal legally binding agreement for a longer-term commitment at this stage. There was a project on which they wanted, and expected, to work together, but the proposal at this point given the various uncertainties was for the Claimant to work on a daily rate on a consultant/self-employed basis through his existing service company and a rate of £750 per day was agreed between them. Rod's email also in substance reiterates the points that I find he made at the meeting, specifically the need for a formal contract and for funding to be in place before any long-term commitment can be made.
28. Around this time the Claimant was also introduced to Mr Price as "the Lead, Agro Industrial Engineering for Capiconic". Mr Price confirms this in his statement. Mr Price describes how he was involved with preparatory work on the Kenya project. He initially thought there would be at least a week's work in London before a trip to Kenya on 14 November 2022, but timescales started to slip and Mr Price continued doing other work and only limited work for United Green as he had previously worked on another project for the

group without financial reimbursement and was thus reluctant to commit his time without a contract.

29. By email of 16 October 2022, the Claimant resigned from Briggs stating that he had been *“offered and accepted a permanent position as Director of Agr-Food Industrial Processing ... The first projects will be in Kenya where the pre-feasibility studies are about to commence ... This was not even on my radar when I started with Briggs in August ... These guys approached me. An opportunity that I just can’t turn down, I’m sure you will agree. ...”*. On 17 October 2022 the Claimant told Rod by WhatsApp that he had resigned from Briggs (p 60). Rod responded that he would need to set the Claimant up with a Capiconic email address. He suggested that the Claimant should *“connect with Satake (rice milling), Lummus (cotton ginning), etc...”* and that he could share some slide decks with the Claimant when he was back from Tanzania.
30. The Claimant says now that he resigned from Briggs at Rod’s request (an assertion he first made in an email of 22 December 2022 – see below), but I observe that in his witness statement for this hearing he does not give evidence that Rod actually made that request. What he says after the meeting on 13 October is that *“In order for this to happen [i.e. in order for him to go to Kenya on 14 November as discussed] I needed to resign immediately from my then current position, due to the 4 wk notice period on my contract”*. Further, the Claimant in his WhatsApp message of 29 November 2022 (see below) stated that he ‘resigned from a decent contract on a handshake’ which is also more consistent with him having decided of his own motion to resign rather than at Rod’s specific request. Rod denies requesting the Claimant to resign, saying that he advised him to stay with Briggs. However, it is apparent from the WhatsApp messages that Rod did not advise the Claimant to stay with Briggs until a couple of weeks’ later in his WhatsApp of 25 October (see below). When Rod first learned that the Claimant had resigned on 17 October his response indicated no surprise and he just moved onto the practicalities of setting the Claimant up with a Capiconic email address.
31. In the circumstances, I find that the Claimant resigned from Briggs in order to put himself in a position to be able to travel to Kenya on 14 November 2022, that he did so of his own volition, because of his enthusiasm for the project and, no doubt, also because Rod had been very persuasive about the project as an exciting opportunity (I say that because it is apparent from later WhatsApps that Rod was still being very positive about the project and the opportunities it would provide to the Claimant some months later). Rod was aware that the Claimant intended to resign and did not discourage him from doing so, but I do not accept the Claimant’s case that Rod specifically asked him to resign from Briggs because the Claimant has not identified the occasion when Rod is alleged to have done this or the words he used, and I also find it unlikely, having heard the oral evidence and read the documents, that Rod would have said anything so specific. Rod was very conscious of the need for funding and a contract before long-term commitment as is reflected in his email of 14 October 2022.

32. It is apparent from the following WhatsApps on p 60 that after 17 October Rod then travelled to Kenya and that while he was there he realised that the Kenyan organisation for whom Capiconic was expecting to be working was not going to be ready to start in November 2022 as originally envisaged. He did not let the Claimant know this until 25 October however.
33. In the meantime, on 18 October 2022 (p 5) the Claimant emailed Sam (copying in Rod and a Ms Bloomfield (all at United Green)) about work he had started doing to assemble a team for the Kenyan project. The email included the following from which it is again clear that the Claimant knew he did not have contract other than a proposed day rate contract at this point:

Not sure if Rod had a change [sic] to speak to you regarding contracts. We though a temporary contract (day rate) until maybe end of January which will give you guys time to put all the company structures in place. We agreed a rate. I can sent a proposal though to you. If I address it to United Green and/or any subsidiary group companies this will give you flexibility to place any POs against one of the group businesses. If that works I will construct something tomorrow so we have at least a temporary contract in place for me start with you w/c 14th November.

As soon as we have a tentative plan for our first scoping visit can someone share it. Not sure what dates we are looking at but w/c 21st November was suggested? Need to get a load of homework done prior to make any visit effective, so we need to set up some sort of Sharepoint system ASAP. Have spoken to colleagues and the feelings I am getting back is MS SharePoint appears to be the best way to collaborate in teams. Don't know what experience you have with this software but it's certainly worth looking at.

As you can see I am starting to line things up and put some feelers out so we can hit the ground running to achieve the milestone dates we are currently looking at.

34. On 19 October 2022 the Claimant submitted a quotation proposal at the £750 per day rate for “*pre-contract work*” (p 15). The proposal was put forward to “*United Green and/or Group Companies*”. Although the Claimant submitted this and other invoices based on this £750 per day rate, the Respondent did not pay any of these invoices.
35. On 25 October Rod messaged the Claimant on WhatsApp (p 61) as follows. This is the WhatsApp he had in mind when he said he had encouraged the Claimant to stay at Briggs, albeit this came two weeks after the Claimant had told him he had resigned, by which time Rod had realised that the start date would have to be pushed back:

I think in reality having back in Kenya for the past 2 days...the more likely days to get you guys on the ground is w/c 5th & 12th December.

I need to get formal clarity from the JV partners when cash will be transferred into a JV bank account and when all the collaboration agreements will be finalised with IFC....this is where the due diligence is drowning us -> supporting the local partner side...UG has well and truly passed.

My preference is to have you guys on full time contract from a contract management perspective and will allow us more time to get these contracts sorted. You can have your hols in Jan and we can sort something out, that it is not included in your annual leave.

Hence, stay committed to Briggs and do what you need to get down there. In parallel we can start drafting contracts, review insurance policies, look at vaccination programmes (get these done in London and UG can organise for you).

In reality we are probably looking at a w/c 28th Nov start for the team. I will however need to be in Tanzania that week....which complicates matters a little as well.

Let's just stay in touch regularly and please ask any question you may have. I will apologise up front, that generally over the next few weeks it will be difficult to respond immediately.

36. The Claimant replied (p 61) noting that his contract with Briggs expires on 11 November 2022 and that ideally he would start with the Kenya project the week after as he was planning two weeks off in January *"without income"*. (I take this to be a reference to his planned holiday and note that his expectation was therefore that in January he would not be entitled to paid holidays.)

37. In further WhatsApps, the Claimant and Rod discussed preliminary work on the project and arrangements to meet and discuss further with Mr Price. By WhatsApp of 28 October 2022 at 17:28 the Claimant wrote:

Spoke with Sam and he says the same regarding contacting you so couldn't shed any more light on where we are regarding contracts, start dates, visit dates, itinerary for any visits etc....

38. The Claimant asked to meet, to which Rod replied *"YES"*.

39. On 29 October at 23:11 the Claimant indicated that he would take time off *"before starting with you either w/c 21 Nov if you want to get together in London prior, or straight out to Tanzania w/c 28 Nov, followed by Kenya return 16 Dec ish ..."*.

40. By email of 3 Nov 2022 (p 217) the Claimant emailed Sam and Rod:

Sam I have arranged to come down to the office next Thursday/Friday 10th/11th to get the ball rolling when Rod is in UK. Assume you will pick up my expenses, but we still do not have any contracts or even commitments from your end which leaves me a little uneasy. Planned start date with you guys would be either w/c 21st Nov or w/c 28th Nov. Either/or I'm OK with. However I would like to see some sort of formal commitment to me from you end, even if we haven't finalised the details. Not sure if the current thinking is day rate/staff from the get go??

41. Sam replied that he hoped to get formal agreement and timeline in place next week in discussion with Rod, Afshin and Albrecht.

42. On 10 Nov 2022 the Claimant went to the United Green offices in London and was given a draft employment contract (pp 144-154) with the Respondent and asked to populate the roles and responsibilities. The Claimant populated the draft contract and sent it back to Rod (p 105). The role was identified as being with Capiconic, reporting to the Managing Director of Capiconic. There was no start date in the draft, and no salary, and neither party signed the document.

43. On 11 November 2022 the Claimant attended a meeting with Lt Gen Sir Barney White-Spunner and Sir Peter Kendall where he was introduced as the Director of Agri Food Processing. The meeting was about setting up a board of directors for the project wealth fund and a draft investment proposal was created. The Claimant's name appeared on this as Chief Engineering Officer (p 238). The Claimant signed an EOI for projects in Ethiopia. A United Green E-mail address was created (Russell-davies@capiconic.com) and he was given access to confidential company files on Sharepoint.
44. Rod suggested that he looked at the viability of using a number of companies as strategic partners and made arrangements for business cards for the Claimant, but also messaged that his (i.e. Rod's) priority was to arrange capital and he asked the Claimant to bear with him (p 65).
45. The Claimant in his witness statement stated that he commenced employment with the Respondent on 14 November 2022, but I find that there was no significant change in the relationship at this point. This is just the date that it had originally been hoped work on the project would start in Kenya.
46. By WhatsApp of 18 November the Claimant asked whether Rod had secured any funds yet, to which Rod replied in the negative. The Claimant was anxious to make plans. On 19 November (p 65) Rod messaged at 00:37 "*The minute I can lock anything in you'll be the first to know*". There were further messages about potential travel plans. On 21 November at 21:36 Rod messaged: "*All I know is ... even if nothing starts in next few weeks ... 2023 is going to be your busiest and most daunting year ever.*" (This is what I was referring to earlier when noting how persuasive Rod probably was in the initial meeting on 13 October 2022.)
47. On 23 November 2022 representatives from Capiconic met with the Governor on the Kenya project (p 66). The Claimant chased for news. On 25 November 2022 Rod messaged "*The reality I think, it is too compressed to mobilise resources, particularly Phil to be on the ground in Kenya in 2022. This will become an immediate 2023 start.*"
48. With effect from 23 November 2022 the Claimant issued himself a P45 from his service company so that he could start work for United Green. He subsequently re-employed himself in December 2022 in order to draw some money from the service company but resigned again in January 2023 in anticipation of starting employment with the Respondent/Capiconic.
49. The Claimant made clear in WhatsApps on 27/28 November 2022 (pp 67-68) that he needed an income for December, although he said he could take it out of annual holiday allowance for 2023 if need be. He chased the payment of expenses. The Claimant and Rod discussed how to get the Claimant an income in light of the delay:

[27/11/2022, 21:48:22] Russell Davies: Let's look at January then, but we do need to sort some income for December. Don't mind taking out of annual holiday allowance for 2023 and if I need holiday in 2023 then will just take as unpaid as

there should be surplus in the bank by then to absorb it. How does that sound? Ideally start on 1st December but take until January as vacation.

[27/11/2022, 21:51:32] Russell Davies: In parallel with an employment contract we also need to put a "services" contract in place with my Ltd company. I'll draft a proposal that you could place a PO against and send over to you and Sam tomorrow.

[27/11/2022, 22:03:18] Rod Bassett: Will push....however, this is a family office and not a typical corporate. The main thing is I will create justification to get at least you and Antonia on asap to get up to speed.

[27/11/2022, 22:14:40] Russell Davies: As I said just need some income until January.

[27/11/2022, 22:31:22] Russell Davies: Family office should have more flexibility on how they operate as a whole I hope. Never worked for a corporate but I'm sure they wouldn't be able to manipulate things to suit as easily.

...

[28/11/2022, 14:04:41] Russell Davies: Any more thoughts regarding onboarding myself and Antonia? I know it's all going to happen but I just can't sit around without any income - even if it is simply to pay the bills until it kicks off.

50. The Claimant was also doing some work in putting together a project team. Rod also asked him about staff plan for his team and the Claimant provided an organogram. Further messages relevant to the claim are as follows. It is apparent from these that Rod is still making clear the decision regarding employing the Claimant lies with the family office:-

[29/11/2022, 12:34:51] Rod Bassett: Pushing. I can't get hold of CEO who is at the World Cup...whom will make final decisions at this early stage -> before we get immersed in projects and more independence

[29/11/2022, 12:43:04] Russell Davies: Does that mean you can't even make a commitment in principle? Is he there until the end - 18 December? If that's the case I reluctantly need to put feelers back out which is highly frustrating as I resigned from a decent contract on a handshake. Don't want to as I know this is going to happen, but I may be skint by then.

[29/11/2022, 12:44:08] Rod Bassett: He will respond before then... We will construct an equitable scenario. It is my priority

[29/11/2022, 12:44:37] Rod Bassett: We can easily make a commitment in principle...the key is to enable some cash flow for you

[29/11/2022, 12:47:57] Russell Davies: Please because I really want this to happen. Make the commitment (contract) and as payday is probably end of December we can sort by the. The two scenarios I suggested (13 month dilution or holiday on account) seem reasonable compromises?

[29/11/2022, 12:48:40] Rod Bassett: Yes

[29/11/2022, 12:48:54] Russell Davies: Leave it with you

[30/11/2022, 03:06:32] Russell Davies: FYI holiday on account would be my preference. What are your movements for December? Ideally we need to get together for a few days this side of Xmas.

...

[01/12/2022, 13:16:32] Rod Bassett: Mate...it is 100% hectic here. Sorry for not

replying earlier. Am now asked to head across to Uganda tomorrow and then across to Kenya on Tuesday. I have raised having you start asap. Let me sort travel, meetings etc and get focused on your situation.

51. WhatsApp messages continued from 2 December, at which point Rod was anticipating signing Memoranda of Understanding (MoU) with Kenyan organisations shortly:

[03/12/2022, 21:01:24] Rod Bassett: Sorry...just finished 10 hours of meetings here in Uganda. I also had another long chat with IFC today re. Kenya capital deployment.

Your contract is pretty much there and you are locked in for the role - the broader group most definitely see what you will bring to the role. All good on that front. To be honest it is something that I am working through and I'm the slow one. But, I think you know why. Trying to get the cash coming in a way we will feel overwhelmed.

[03/12/2022, 21:07:25] Russell Davies: I understand, as when your on the ground that takes priority, but I am sure you can understand my uncertainty. ... Keep me informed but I won't explore alternatives just yet. Have good evening.

[03/12/2022, 21:17:57] Rod Bassett: You're locked in...I just need to formalise this for you

[04/12/2022, 02:14:53] Russell Davies: If I'm locked in when's the Xmas party 🕒



[04/12/2022, 09:09:38] Rod Bassett: That's a good idea....I think the main UG one was last Friday. But we can do something

[04/12/2022, 11:21:03] Russell Davies: Was only jesting

...

[05/12/2022, 22:15:58] Russell Davies: When you're with Albrecht this week can you see if you can sort out my contract please.

[06/12/2022, 04:48:10] Rod Bassett: YES

52. A significant MoU was signed on 7 December 2022 on the Kenyan project as a result of which Rod hoped that they would see some funds next week. There was discussion about the possibility of backdating a contract.
53. The Claimant worked on a budget document that he was requested to amend in Telecons. There was discussion of logistics of office location, travel and expenses. By 14 December 2022, however, there was still no certainty and the Claimant raised concerns about potential team members not being likely to wait (p 72).
54. The Claimant by email of 22 December (p 17) set out his contract requests including for a 'sign on bonus' or *"some method of remunerating me for the past few weeks. Since resigning from Briggs I have spent 5 days in London and also about another 2 days total doing ... background work/discussions with potential team members etc ... This could legitimately be invoiced at a rate of £750/day = £5,250. What level of 'sign on bonus' did you have in mind,*

considering I resigned at your request mid-November? By a January start I am about £15k out of pocket and have had no income for 6 weeks. Am quite happy to forfeit 2023 holiday ... Not really expecting any 'bonuses' for not doing much to date but just receiving some payment 'on account'...

55. As of 22 December 2022 (p 73) Rod indicated that he was looking to put a sign-on bonus in place for both the Claimant and Mr Price in their contracts and there was a discussion about whether the Claimant was joining as an employee or not and the Claimant confirmed he was happy to be a contractor, although he did see it as a long term venture.
56. As of 23 December (p 74), Rod indicated that Albrecht's preference was for everyone in the UK to be contractors rather than employees.
57. By email of 23 December 2022 (p 19-23) the Claimant sent Rod a draft consultancy agreement (p 155) 'in case they were to go down that route'. The proposed parties were United Green Group and the Claimant's service company. Rod sent an alternative draft (p 180, 22). The Claimant indicated that he did not want salary in USD.
58. By 30 December 2022, the Claimant was writing to Rod that he assumed they would be all good to go after the holidays and Rod said everything was submitted and formal approval/requests had been made and it was "Over to the family to make a decision" (75).
59. The Claimant in closing submissions suggested that a WhatsApp from Rod of 3 March 2023 (p 130) shows that a December 2022 start date had been promised to a Kenyan governor. However, that WhatsApp does not say that (and even if it did, that would be irrelevant to the Claimant's claim). What is clear from that and other WhatsApps is that the timescales for the Kenyan project slipped and slipped, apparently owing to problems on the Kenyan side (eg that page mentions the Kenyan County Finance Minister derailing things).

January to March 2023

60. By WhatsApp of 3 January 2023 (pp 75-76) Rod indicated there were still some problems with the budget and that the family wanted most staff to be based in East Africa but "*This won't impact yourself (you're locked in)...*". He was clear that all contracts including the Claimant's still needed to be formalised, but assured the Claimant that for his contract it was "*a matter of red stamping*" (p 76).
61. On 4 January 2023 the Claimant requested his employment contract to countersign and Rod stated that final approval and sign-off was still required from the Exec Committee meeting the next day (p 77). By WhatsApp of 5 January 2023 at 19:02 the Claimant asked whether his contract had been agreed (p 78). Rod did not give him a direct answer. The Claimant followed up at 20:18 with "*Understand Afshin is a little reluctant to commit until he sees money, so as far as receiving salary for January this can just wait until the*

funds are there and be added to February salary. I agreed to submit an invoice for 'pre-contract work/sign on bonus' from my services company and if this is paid then it will tide me over...". He asked again to be sent the contract for signing.

62. On 6 January 2023 the Claimant sent his P45 to Sam Barrett from his service company (p 30). It was not queried. He was researching potential equipment suppliers for the project. The Claimant submitted an invoice for 18 days at £750 dated 23 December 2022 on 6 January 2023. He asked Rod to forward him the employment contract backdated to 3 January 2023, which he would then countersign and return.
63. There were some minor variations to the Employment Contract (p 260) requested. The Claimant started investigating suitable training courses for the Capiconic team (p 80) and suggested a course to Antonia Montanez. He started looking for team members and putting together project work and documents.
64. There are two different drafts of the contract in existence at this point one with Capiconic as the employer and one with the Respondent as the employer. Both have a start date of 3 January 2023 (pp 188 and 195). The draft contracts included terms that the employment was subject to a probationary period of three months during which time it could be terminated at any time on one week's notice.
65. As at 11/12 January 2023 (pp 36-37) the parties were still negotiating the terms of the written contract on WhatsApp and the Claimant was chasing for payment on the invoice he has submitted from his service company.
66. The Claimant was on vacation from 16-30 January 2023. While he was away there were communications about how they were still looking for funding and Rod was unsure why there was a delay (pp 81-82). The Claimant said he was running out funds and Rod on 30 January 2023 suggested that the Claimant look for alternative short-term employment in the industry for about 2 months because the Kenyans were being 'so slow'. The Claimant responded that this was ridiculous, but he would try. He asked if he was going to be reimbursed for his time since November "*when you wanted me to start initially*". The Claimant then asked (p 82) if there were other things he could do with the group in the meantime for the group. Rod replied on 30 January 2023 that he was "*locked in for sure... however, Afshin is unwilling to pull the trigger on full time appointments until Kenya JV is incorporated and the Capiconic contract signed*". The JV was then incorporated on 1 February 2023 (p 83).
67. On 2 February 2023 Mr Price was asked by Rod to prepare a task list for Antonia, Tom and the Claimant, which he did, although he was not on contract at that point either.
68. As of 6 February 2023 the Claimant had an opportunity for a three-month contract elsewhere but was unsure whether to take it in case the Kenyan project started immediately (p 84). Rod said he should take that contract as

the Respondent was not going to look anywhere else for Engineering lead. The Claimant then responded regarding the other role, but it turned out not to be an opportunity.

69. On 6 February 2023 the Claimant emailed Rod indicating the income package on the table for him was 'too much', that £14,000 pcm gross on PAYE was 'too much' for the Respondent once on costs are taken into account (p 39).
70. During February the Claimant worked on various contractual documents for the venture as agreed at the team meeting. An equipment purchase agreement was drawn up. Business card details were confirmed on 21 February 2023 under the Capiconic name (p 311).
71. On 27 February 2023 the Claimant sent a number of WhatsApps to Rod including the following:

27/02/2023, 10:18 - Russell Davies: How are things developing. Seems to be lots going on in Ethiopia but we still have not secured Kenya. This is now my major issue. I have been doing work on this since November with no remuneration what so ever. I just can't carry on Rod. I don't really have any commitment from UG at present either, apart from a verbal agreement from yourself. I have seen a contract but nothing has been put on the table to be signed (even if it states delayed remuneration - like you did in Ethiopia). At the minute I have no firm commitment. I need some money this week. If not, I will need to explore other opportunities (which I don't want to do but.....) because I need to pay the bills and eat. Can you speak to the powers that be ASAP and explain the situation. I have tried to be flexible but it's now just not fair on me. I am expecting to be paid for the work I have done to date at your request, irrespective. I need at least £5k to keep the dogs at bay irrespective of whether the Kenyan Investment is signed off this week or not. I am currently around £40k out of pocket having resigned at you request. Just something.

[27/02/2023, 19:37:38] Russell Davies: I need to start looking then because I am skint (and annoyed and frustrated that I have been put in this position). Don't want to, because I am cracking on well if we are at the final hurdle. Is he likely to pay me for what I have done to date on a whim and a promise? 14 weeks of lost income otherwise!!! £40k

[27/02/2023, 19:48:05] Russell Davies: Much as Afshin may think it easy to get the right people you and me know it ain't. I will be really frustrated if I have lost that amount of potential income by doing things in good faith. Fool on me perhaps. The whole concept sounds fantastic which is why I don't want to dip out but.....

[28/02/2023, 12:42:58] Russell Davies: I've put out feelers everywhere. To date I have incurred expenses for trips to London, vaccinations etc... that I haven't claimed. How should I go about doing that. As I am not technically 'employed' suggest I simply submit an invoice to cover, as before, through my service company. Should I send it to you for approval which hopefully can be paid on receipt?

72. Rod agreed to approve the Claimant's invoice from his service company for expenses if he submitted it in the system (p 128). The expenses were later paid. The Claimant submitted a 'sign on bonus' invoice and chased for payment on 9 March 2023 (p 96).

73. In further communications the Claimant repeated that he was expecting to be paid for the work done to date, but Rod and Sam stated that only interim contracts would be put in place at £5,000 per month with no payment for the work done up to that point (p 314).
74. On 14 March 2023 the Claimant emailed: “*further to Sam’s confirmation last week that UG have no intention of paying for my time over the last few months it leaves me with no other option but to resign*” (47).
75. Sam replied (51) saying there was no need to resign as he was not employed. Sam quoted from Rod’s email of 25 October in which he had suggested the Claimant ‘stay committed to Briggs’ while negotiations were ongoing.
76. The same day (14 March 2023) the Claimant commenced this Employment Tribunal claim.

The legal principles

77. The claim is brought as a claim for unlawful deduction from wages under Part II of the Employment Rights Act 1996 (ERA 1996). In view of the £25,000 limit on the Employment Tribunal’s jurisdiction in relation to contract claims, the Claimant chose not to bring the claim as a contract claim and I confirmed this with him at the start of the hearing.
78. As such, the Claimant needs to show that he was a worker of the Respondent as defined in s 230 of the ERA 1996 which provides, so far as relevant, as follows:-

“(3) In this Act ‘worker’ (except in the phrases ‘shop worker’ and ‘betting worker’) means an individual who has entered into or works under (or, where the employment has ceased, worked under)–
(a) a contract of employment, or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual and any reference to a worker’s contract shall be construed accordingly.”

79. There are thus three elements to the definition: (i) a contract between the individual (A) and another party (B); (ii) an undertaking that A will do the work or perform the services personally; and (iii) a requirement that the B is not a client or customer of any profession or business undertaking carried on by A.
80. The starting point, however, described by Eady P in *Catt v English Table Tennis Association Ltd and ors* [2022] EAT 125 as the ‘necessary first step’, is whether there is a contract between the parties at all containing the necessary bilateral enforceable legal obligations to constitute the consideration from each party necessary to create the contract: see the discussion of *Catt* in *Plastic Omnium Automotive Ltd v Horton* [2023] EAT 85

at [38]-[42] *per* HHJ Katharine Tucker. The contract must also be between the Claimant personally (and not his service company) and the named Respondent to this claim: see *Plastic Omnium* at [59].

81. In *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229, [2022] IRLR 447 at [41] to [47] the Court of Appeal held that an irreducible minimum of obligation, in the sense of an obligation on the individual to accept and perform some minimum amount of work and for the other party to offer and/or pay for the work, is not a prerequisite to “worker” contract. It is sufficient for there to be an obligation on the individual to perform work or services personally, provided the other party is not a client or customer.
82. Where there is no written agreement in place between the parties, it is necessary to consider whether a contract falls to be implied, taking account of all the circumstances including the conduct of the parties and taking account of any written terms that they did have, applying the principles set out by the Supreme Court in *Autoclenz Ltd v Belcher* [2011] IRLR 820 and further discussed in *Uber BV v Aslam* [2021] IRLR 407 at [83]-[89].
83. In *Smith v Carillion* [2015] EWCA Civ 209, [2015] IRLR 467 at [21] *per* Elias LJ the Court of Appeal confirmed that a contract can only be implied where it is necessary to do so in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist. In this case, the Respondent has relied on Elias LJ’s observation in that paragraph that it will be ‘fatal’ to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract. As the Claimant has not been legally represented at the hearing, I have not heard detailed argument as to whether Elias LJ’s observation has been upheld in other cases. I therefore proceed on the basis that the test is one of necessity (without further gloss). I am mindful however of the caution urged by Carr LJ in *Yoo Design Services Limited v Iliv Realty PTE Limited* [2021] EWCA Civ 560 at [51]: the concept of necessity must not be watered down – it is a “stringent” test of “necessity, not reasonableness”.
84. The legal minimum requirements for a contract are: offer, acceptance, supported by sufficient consideration, and a mutual intention to create legal relations. The burden of proving there was no intention to create legal relations lies on the party seeking to establish that: *Edwards v Skyways Ltd* [1964] 1 All ER 494 at 500 *per* Megaw J. Whether or not there was the necessary intention is to be determined objectively by Tribunal: *Blakely v On-Site Recruitment Solutions Ltd and anor* (UKEAT/0134/17) at [37]-[41] *per* Choudhury J. Further, when an offer is made subject to a condition, the contract will not take effect until the condition is fulfilled: *Wishart v National Association of Citizens Advice Bureaux Ltd* [1990] IRLR 393, CA at [15].
85. The Claimant also needs to establish the necessary elements for a claim of unlawful deduction from wages contrary to ss 13 and 27 of the ERA 1996, which provide (so far as relevant):

13 Right not to suffer unauthorised deductions.

- (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.
- (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
- (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

27 Meaning of "wages" etc.

- (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, ... but excluding any payments within subsection (2).
- (2) Those payments are—
- (a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),
 - (b) any payment in respect of expenses incurred by the worker in carrying out his employment, ... and
 - (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.
- (4) In this Part "gross amount", in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.

86. In particular, the Claimant needs to establish for the purposes of ss 13(3) that there was 'an occasion' on which the wages paid to him were less than the total amount of wages 'properly payable' to him on that occasion. In order for wages to be 'properly payable' for the purposes of s 13(3) they need to be

payable under the worker's contract 'or otherwise' as required by s 27(1). The wages must also by s 27(2) be wages payable to him in his capacity as a worker.

87. It is well established that a claim for unlawful deduction from wages must be a claim for a quantifiable sum of money to which the worker has a legal entitlement (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27, CA and *Coors Brewers Ltd v Adcock and ors* [2007] ICR 983, CA) rather than a claim for failure to exercise a contractual discretion or damages for misrepresentation or another claim of that type.

Discussion and conclusions

88. In this case, the Claimant accepts that no 'formal' written employment contract was ever agreed. He contends in his witness statement that the draft contract produced with a starting date of 3 January 2023 reflected a "formalisation of the verbal offer put forward by Rod Bassett at our initial meeting on 13-10-22". He emphasises that he resigned from his then employer, Briggs, on the strength of that offer, provided work in response to requests from Rod over the next few months and went for a very considerable number of months without pay as a result of his belief that he had been offered and would shortly be starting lucrative permanent employment with the Respondent.
89. The Claimant claims that he was therefore employed by the Respondent as an employee or worker from 2 January 2023 at a rate of £14,000 per calendar month gross. He claims 12 days salary for January, 20 days for February and 15 days for March (including a 7 day notice period), based on a daily rate which he calculates as £646 per day (gross). These days reflect days that he says he worked during those months. He has also claimed a one-month sign on bonus of £14,000, pension contributions (£910) and accrued holiday pay of 4 days for that period which he calculates as £2,584. At the hearing, he clarified that the specific day on which he says these various alleged deductions were made was 'pay day' in each month, which he assumes to be the end of each month.
90. Having considered carefully all the evidence I have heard, I have concluded that this claim must fail, and it fails for several reasons.
91. First, it fails because, although the parties were in agreement that the Claimant would be the Director of Agri-Food Industrial Processing for Capiconic in respect of the Kenyan project, they had at no point reached agreement as to when that job would start, who the parties to the contract would be (whether it would be the claimant or his service company or the Respondent or Capiconic) or how much the Claimant would be paid (even as at 6 February 2023 the Claimant was suggesting that the income package 'on the table' for him was too great).

92. Secondly, viewing the position objectively, the parties at no point had the necessary intention to create legal relations between them in relation to the alleged contract on which the Claimant relies. They were, throughout the period, negotiating with each other as to the terms on which they wished to contract. Further Rod had, I find, made it clear from the outset that any binding agreement had to be made with the approval of the family office, so that, objectively, in the absence of agreement from the family office (which was never forthcoming) the Claimant knew that the Respondent had no intention of creating legal relations. I find that the Claimant's understanding in that respect is apparent from his references to having resigned from Briggs 'in good faith' and 'on a handshake' and to there not being 'formal' agreements and commitments in place, etc. However, even if the Claimant did not in fact understand this, it is an objective test and I find that he ought in the circumstances to have known that there was no mutual intention to create legal relations in the absence of approval from the family office. There was no point, on the facts as I find them to be, at which Rod gave the impression that he could act without approval from the family office. This was something that I find had been made clear from the outset, and certainly well before 3 January 2023, which is the date from which the Claimant's claim commences.
93. Thirdly, Rod's offer of employment to the Claimant in the Director role was, from the outset, stated to be subject to securing funding as well as approval from family office. Those were conditions that were never fulfilled. For that reason too the contract on which the Claimant relies was never concluded.
94. Fourthly, there is no need to imply a contract in the terms contended for by the Claimant in the light of the parties' conduct between October 2022 and March 2023 because:
- a. the parties did in fact have a workable agreement to cover what happened during that period, in that by email exchange on 14 October 2023 they had agreed that work done by the Claimant prior to the start of the anticipated longer-term contract would be done by the Claimant through his service company at a rate of £750 per day. I see no reason why the necessary elements of offer, acceptance, consideration and intention to create legal relations are not present in relation to that agreement. As part of this claim the Claimant has chosen not to rely on this agreement, and the Respondent does not appear to have paid the invoices the Claimant submitted on the basis of that agreement, and I infer from their evidence in these proceedings that there would be disputes between the parties as to what work the Claimant did on the Respondent's instruction during this period rather than on his own initiative. However, these points do not stop it being an agreement that makes it unnecessary to imply an alternative contract in the terms relied on by the Claimant in these proceedings; and
 - b. both the conduct of the Claimant and the Respondent during this period is wholly explained by the fact that there was a mutual

intention and desire for the Claimant to undertake the Director role for the Kenyan project if, as and when that project actually started. It is apparent that the parties would have conducted themselves as they did regardless of whether there was a contract because the Claimant did continue offering his services to the Respondent and doing preliminary work on the project even after it was clear that the role was not going to start on 14 November 2022 as anticipated, and even after Rod had started suggesting that the Claimant 'stay committed to Briggs' or find alternative employment, by which points it was (or ought to have been) clear to the Claimant that there was no contract in place, or none that the Respondent regarded as binding.

95. It follows from the above that the necessary elements for a claim for unlawful deduction from wages were not fulfilled in this case:
- a. There was no contract between the parties of any sort (other than the agreement, not relied on by the Claimant in these proceedings, that consultancy work prior to contract start, if done, would be paid at £750 per day to the Claimant's service company);
 - b. The Claimant was not therefore a worker of the Respondent as regards the sums he claims in these proceedings; and,
 - c. The Claimant has no enforceable legal entitlement to the sums he has claimed in these proceedings which were not 'properly payable' to him at any point.
96. I would add this further observation: even if the 3 January 2023 draft contract on which the Claimant relies had been signed, the Respondent was entitled to terminate it at any time within the first three months on 1 week's notice. Damages for failure to commence that contract would therefore have been limited to 1 week's wages.

Overall conclusion

97. The Claimant's claim for unlawful deduction of wages is therefore dismissed.

Employment Judge Stout

10 November 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

13/11/2023

FOR THE TRIBUNAL OFFICE