EMPLOYMENT TRIBUNALS

Claimant: Mr James Conroy

Respondent: NowCE Limited

Heard at: Watford ET (by CVP in the virtual region) **On:** 7 & 8 May 2024

Before: Employment Judge Poynton (sitting alone)

Representation

Claimant: In person

Respondent: Mr Jonathan Heard (Counsel)

JUDGMENT having been given to the parties at the hearing on 8 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent as Chief Technical Officer until his employment was terminated by a letter dated 31 July 2023.

2. The claimant's position is that he has been employed since 2012 with no breaks in his continuous service, originally by Roundpoint Ltd and then by NowCE Limited, which he describes as a spin-off of Roundpoint Ltd.

3. The respondent's position, as clarified at the hearing, is that the claimant's employment started on 1 September 2021. The respondent's position is that Roundpoint Ltd and NowCE Limited are two different corporate entities and that under no operation of law did the claimant's employment transfer from Roundpoint Ltd to NowCE Limited.

4. Early conciliation commenced on 23 May 2023 and ended on 4 July 2023. The claimant submitted his ET1 claim form on 24 July 2023. The claimant ticked the box stating that he was claiming arrears of pay. He did not tick any other box to present any other type of claim on the claim form.

5. The claimant made an application to amend his claim to include a complaint of unfair dismissal. This application was considered at a preliminary hearing on 27 February 2024 and allowed. The respondent was given permission to amend their response to the claimant's claims.

6. The claimant brings complaints of unfair dismissal, unpaid wages and that the respondent has failed to provide him with a written statement of employment particulars. The respondent's defence is that the claimant does not have two years' service and is not entitled to pursue a complaint of unfair dismissal, that the claimant did not perform the work that he was contracted to perform and was not entitled to be paid. The claimant's position is that he was told not to do any work.

7. The respondent has also brought a counterclaim. The respondent's case is that as a result of the claimant failing to carry out the work he was contracted to perform the respondent has had to engage two independent contractors to perform the claimant's tasks. The respondent counterclaims against the claimant for the sum of £25,000.

The hearing

8. This was a remote hearing by video conference call in which the parties participated. There were no significant issues relating to connectivity and both parties agreed to the hearing being conducted by video.

9. None of the participants required any reasonable adjustments to be made during the hearing.

10. The claimant is a litigant in person and represented himself. The respondent was represented by Mr Heard of counsel. Mr Trevor Shonfeld, Director, appeared as a witness on behalf of the respondent.

11. At the start of the hearing, I had to deal with some preliminary matters.

Respondent's application for late evidence to be admitted

12. The respondent submitted pension documents from NEST and asked that these be added to the bundle. Mr Heard submitted that Mr Shonfeld had only recently realised that his recollection of the date that the claimant's employment started was incorrect. Mr Heard submitted that these pension documents were relevant to the respondent's case that the claimant's employment started on 1 September 2021. The claimant confirmed that he had no objection to the document being admitted. I considered that it was in the interests of justice for the respondent to have opportunity to fully present their case and therefore allowed the submission of these late documents.

Respondent's application to amend their grounds of resistance

13. The respondent requested permission to amend their grounds of response to reflect the alteration to the date on which the respondent states that the claimant's employment started and to contest the claimant's complaint of unfair dismissal on the basis that he does not have sufficient qualifying service to bring an unfair dismissal claim pursuant to section 108 of the Employment Rights Act 1996.

14. The respondent's initial response to the claim stated that the claimant's employment started on 1 August 2021. Mr Shonfeld's first witness statement states that the claimant's employment with NowCE Limited started on or around 1 August 2021. Mr Shonfeld's second witness statement refers to the claimant's employment starting on 1 September 2022, although Mr Shonfeld confirmed at the start of the hearing that this is an error and should read 1 September 2021.

15. I considered **Selkent Bus Co Limited v Moore 1996 ICR 836 EAT** and **Abercrombie v Aga Rangemaster Limited [2014] ICR 209**. The Tribunal must consider all the circumstances in light of the overriding objective, including the balance of hardship and injustice between the parties, the nature of the amendment, and the timing and manner of the application to amend. I noted that the respondent had emailed details of their request to amend the grounds of resistance to the claimant on 24 April 2024. I considered all the circumstances of the case and the balance of hardship and concluded that the balance of hardship in not allowing the amendments would fall on the respondent. The claimant had been notified that the respondent disputed the date on which his employment started since the initial response to the claim was submitted by the respondent. I therefore concluded that the amendments should be allowed.

Wrongful dismissal / notice pay

16. The case management order of 27 February 2024 included wrongful dismissal / notice pay within the list of issues which the Tribunal would be considering at the final hearing.

17. Mr Heard submitted that the respondent's position is that there is an issue as to whether this was a claim that had been pleaded by the claimant. Mr Heard submitted that this was not included in the ET1 claim form and that the claimant's application to amend his claim to include a complaint of unfair dismissal did not inherently include a complaint of wrongful dismissal. Mr Heard submitted that the record of the claimant's application to amend his claim as set out in the case management order dated 27 February 2024 does not refer to a wrongful dismissal or notice pay claim save for in the list of issues. Mr Heard submitted that this prejudiced the respondent as the respondent should only have to respond to the pleaded claim.

18. The claimant's schedule of loss did not include any claim for notice pay. I discussed with the claimant whether he wished to pursue a complaint of wrongful dismissal / notice pay. We took a short break to allow the claimant time to consider whether he wished to pursue a complaint of wrongful dismissal / notice pay. On returning

to the hearing, the claimant confirmed that he did not wish to proceed with a complaint of wrongful dismissal / notice pay.

The claims and issues

19. The issues in this case are set out below.

a) Unfair dismissal

i) Does the Tribunal have jurisdiction to consider the claimant's complaint of unfair dismissal? Does the claimant have two years' continuous employment? If the Tribunal does have jurisdiction to consider the claimant's complaint, it will then consider the following:

ii) Was the claimant dismissed?

iii) If the claimant was dismissed, what was the reason or principal reason for dismissal?

iv) Was it a potentially fair reason?

v) Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?

vi) The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

b) Remedy for unfair dismissal

i) Does the claimant wish to be reinstated to their previous employment?

ii) Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

iii) Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

iv) Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

v) What should the terms of the re-engagement order be?

vi) If there is a compensatory award, how much should it be? The Tribunal will decide:

(1) What financial losses has the dismissal caused the claimant?

(2) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
(3) If not, for what period of loss should the claimant be compensated?
(4) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
(5) If so, should the claimant's compensation be reduced? By how much?
(6) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
(7) Did the respondent or the claimant unreasonably fail to comply with it?
(8) If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
(9) If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
(10) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
(11) Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

vii) What basic award is payable to the claimant, if any?

viii) Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

c) Unauthorised deductions from wages

i) Whether the claimant's complaint as set out in his claim form is an unlawful deduction from wages complaint and/or a breach of contract complaint?

ii) Does the Tribunal have jurisdiction to deal with the respondent's counterclaim?

iii) If the Tribunal has jurisdiction to deal with the respondent's counterclaim, is the value of the counterclaim £25,000? Should any amount be offset?

iv) Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

d) Written statement of employment particulars

i) When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

ii) If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

iii) Would it be just and equitable to award four weeks' pay?

Evidence

20. I was provided with a hearing bundle of 142 pages, one witness statement from the claimant and two witness statements from Mr Trevor Shonfeld, Director of the respondent. I also had the claimant's schedule of loss. I heard oral evidence under affirmation from the claimant and Mr Shonfeld.

Representations by the parties

21. After the evidence had been concluded, both parties made oral submissions which addressed the issues in this case. I was also assisted by Mr Heard's written submissions prepared on behalf of the respondent. I have set out the key points in the parties' submissions below. It is not necessary for me to set out those submissions in detail here. I fully considered all the submissions made and the parties can be assured that they were all taken into account in coming to my decision.

The claimant

22. The claimant submitted that there was no correlation between the amount of hours worked and the hours recorded in Jira. The claimant submitted that there was no requirement for time to be recorded and that he carried out the same role for Roundpoint Ltd and for NowCE Limited. The claimant submitted that he made it clear to Mr Shonfeld that he was available for work and was told explicitly to not work.

The respondent

23. The respondent's submissions can be briefly summarised as follows:

Unfair dismissal

a) Roundpoint Ltd and NowCE Limited are two separate entities. The claimant does not have two years' continuous qualifying employment with NowCE Limited and is not able to bring a complaint of unfair dismissal;
b) The dismissal was for a potentially fair reason, namely conduct as the claimant was not working 35-40 hours per week and/or was not recording 130 hours per month;
c) The respondent genuinely believed that the claimant was guilty of misconduct and had reasonable grounds to conclude that;
d) The respondent's decision to dismiss the claimant was within the range of reasonable responses;

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e) If the claimant was unfairly dismissed, there was a 100% chance he would have been fairly dismissed in any event;

Contributory fault

f) If the claimant was unfairly dismissed; he contributed to his dismissal by 100%;

Unauthorised deductions from wages

g) It was an express or implied term that the claimant would work 35-40 hours per week;
h) It was an express or implied term that the claimant would time record 130 hours per month;
i) Mr Shonfeld made it clear to the claimant that his failure to time record was having a detrimental impact on the business;
j) The claimant agreed to a reduction in his salary from £6,100 to £4,500 per month;
k) The claimant was deliberately refusing to work and/or he was not ready, willing and able to work;
l) The claimant did not work 35-40 hours per week and/or record 130 hours per month for the period March 2023 to July 2023;
m) The claimant did not fulfil the terms of the contract and therefore his salary was not properly payable;
n) The claimant's complaint of unauthorised deductions from wages was presented before the claimant was dismissed and the respondent's counterclaim cannot proceed against that as a breach of contract claim;

Written statement of employment particulars

o) The claim relating to no written statement of particulars of employment is dependent upon the claimant succeeding in one or more of his complaints. If the claim succeeds, there are no exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002.

Findings of fact

24. From the evidence and submissions, I made the following findings of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the witnesses (both in their respective written statements and oral evidence). Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities, taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence, including the documentary evidence. In this decision I do not address every episode covered by the evidence, or set out all of the evidence, even where it is disputed. Matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me, reflects, in accordance with the overriding objective, the extent to which I consider the particular matter assists me in determining the relevant issues. Instead, I have set up my principal findings of fact on the evidence before me that I consider are necessary to fairly determine the claim and issues.

Employment status

25. The respondent is a small company that digitalises exams on behalf of medical education institutions, with the aim of providing an easy to operate digital exam assessment platform specifically designed to comply with the conditions required to meet the rigorous standards set for medical exams and assessments.

26. Both parties accept that the claimant was an employee of the respondent and that he was employed as chief technical officer. As an employee, the claimant is entitled to pursue his complaints. He was also a director of the respondent.

Dates of employment

27. The parties do not agree on the date that the claimant's employment commenced with the respondent.

28. It is the claimant's case that his employment commenced with Roundpoint Ltd in 2012 and that he has continuing employment since that time as Roundpoint Ltd and NowCE Limited were effectively the same company.

29. The respondent does not dispute that the claimant commenced employment with Roundpoint Ltd in 2012. However, it is the respondent's case that Roundpoint Ltd and NowCE Limited were two separate companies and that the claimant's employment with NowCE Limited, the respondent, commenced on 1 September 2021.

30. I was taken to a wage slip which showed that the claimant was employed by Roundpoint Ltd and paid on 31 August 2021. I was also taken to the pension documents which were admitted as late evidence. This shows that the employer's duty start date for NowCE Limited is 1 September 2021. It also records that the first payment for NowCE Limited was for the earning period 1 to 30 September 2021 and the claimant is listed as one of two members for whom contributions were made. These documents corroborated Mr Shonfeld's oral testimony. I accept Mr Shonfeld's oral evidence and found him to be credible in this regard.

31. I find that the claimant commenced employment with the respondent on 1 September 2021.

32. There is no dispute between the parties that the claimant was dismissed on 31 July 2023.

33. I make no findings at this point in relation to the nature of the claimant's dismissal. However, I am mindful that the claimant was approximately one month short of two years' completed service at the time of his dismissal. I have therefore considered whether any notice period would affect the claimant's effective date of termination. There is no written contract of employment which specifies an agreed notice period. I find that if the claimant were entitled to a notice period beyond 31 July 2023, that would be a statutory minimum notice period of one week (the claimant having less than two years' completed service) in accordance with section 86 of the Employment Rights Act which would make the claimant's effective date of termination in those circumstances 7 August 2023.

Does the claimant have continuing qualifying employment with Roundpoint Ltd and NowCE Limited

34. The respondent's grounds of resistance state that the claimant's role at NowCE Limited was to develop a technical resource for university medical schools, writing code and managing computer programme subcontractors. The claimant did not dispute or challenge this description of his role when cross-examining Mr Shonfeld. The claimant spoke in his own evidence about employing and managing a subcontractor, Alex Rose.

35. The claimant's position is that his roles and responsibilities were the same with Roundpoint Ltd and NowCE Limited. Mr Shonfeld disputed this. I considered the offer of employment with Roundpoint Ltd which refers to the claimant's position being that of a consumer enterprise developer and that he would report to Barrie Hughes on all day to day work projects and technical matters, Darryl West would be the claimant's senior technical manager and Mr Shonfeld would be the senior manager on all other matters and any aspect relating to the claimant's terms of employment. I find that the claimant's role at NowCE Limited was materially different from his role at Roundpoint Ltd. I find this due to the differing responsibilities. In his role at Roundpoint Ltd, there is evidence that the claimant reported into Mr Hughes and Mr West in relation to technical and project matters. In his role at NowCE Limited, he was responsible for supervising subcontractors.

36. Mr Shonfeld gave oral evidence that the only client of NowCE Limited was Cambridge University. He confirmed that Cambridge University was not a client of Roundpoint Ltd. The claimant did not challenge Mr Shonfeld's evidence in this regard. I accept Mr Shonfeld's evidence and find that there was no transfer of clients from Roundpoint Ltd to NowCE Limited.

37. I find that Roundpoint Ltd and the respondent are not associated employers. I accept that both the claimant and Mr Shonfeld worked for both companies. However, there was no evidence before me from which I can conclude that it was agreed that the claimant's employment with Roundpoint Ltd would continue with NowCE Limited.

38. In relation to the payment to the claimant in August 2021 which Mr Shonfeld confirmed was made by NowCE Limited but related to Roundpoint Ltd, I accept Mr Shonfeld's explanation that this was an error made by him. I am not persuaded that this is evidence from which I can conclude that there was a transfer of business from Roundpoint Ltd. I also considered the claimant's evidence that he undertook work relating to Roundpoint Ltd's clients when employed by NowCE Limited. Mr Shonfeld's evidence was that this was minimal and that Roundpoint Ltd was then invoiced for that work. I accept Mr Shonfeld's explanation and I am not satisfied that this is evidence from which I can conclude on the balance of probabilities, there was a transfer of clients, work, rights or obligations from Roundpoint Ltd to NowCE Limited.

39. There was no express term agreed that the claimant's employment with Roundpoint Ltd would qualify as continued service.

40. I therefore find that the claimant's employment with Roundpoint Ltd does not constitute part of his qualifying employment with the respondent.

Terms and conditions of employment

41. It is common ground that the claimant was employed by the respondent as chief technical officer and that the claimant was also a director of the respondent business.

42. The claimant had no written contract with the respondent or written statement of employment particulars.

43. The case of **Agarwal v Cardiff University [2018] EWCA Civ 2084** confirms that the Tribunal has the jurisdiction to determine the terms of the contract when considering a claim for unlawful deductions, in order to ascertain what is properly payable under that contract.

44. In the absence of a written agreement, I must look at the presumed intention of the parties at the time that the contract was made.

Hours of work

45. The parties were in broad agreement that the expectation when terms were orally agreed was that the claimant's hours of work would be between 35-40 hours per week. This is consistent with the evidence from both the claimant and Mr Shonfeld. I find that the claimant was employed on the basis that he would work for 35-40 hours per week.

46. The claimant also accepted in cross-examination that aside from periods of holiday and illness, if he did not work, he did not expect to be paid. The claimant clarified in cross-examination that he considered this to be the arrangement until he says he was told by Mr Shonfeld to not work on 15 May 2023. I find that there was an agreed term that if the claimant did not work, he would not get paid.

Salary

47. Mr Shonfeld accepted in his oral evidence that it was agreed that the claimant would be paid £6,100 gross per month. This accords with the claimant's ET1 claim form and oral evidence and is corroborated by the record of payments included within the bundle.

48. I find that from December 2022, Mr Shonfeld was trying to find a solution to the respondent being in a financial predicament of expenditure exceeding income. As part of trying to find that solution, I find that there were discussions between the claimant and Mr Shonfeld with the intention of renegotiating terms, at least from Mr Shonfeld's perspective. Mr Shonfeld accepted that no agreement was reached in relation to those discussions.

49. I find that the parties agreed a term at the outset that the claimant would be paid £6,100 gross per month and that this was not varied by agreement.

Recording hours on Jira

50. On 31 January 2022, Mr Shonfeld messaged the claimant on Skype. This said "Just to be clear - you said (last month) you would add hours to Jira each morning. Leaving it to the weekend at the end of the month is not what you suggested. And clearly does not work".

51. On 12 December 2022, Mr Shonfeld emailed the claimant with a financial forecast for 2023 and about prospects for the next few months. This email had attached a document called "Issues for directors". This stated that the company was facing a black hole as income falls below costs. Mr Shonfeld identifies that the black hole is avoidable depending on a maintenance fee being paid, being paid outstanding development costs and being paid a regular service maintenance and other work agreement fee. He also clarified that the service fee side is dependent on a few factors which include being able to justify the hours spent that the respondent wants to charge to the client. He further clarified that the respondent could only do that with up-to-date time sheets. Mr Shonfeld further clarified that practically, he required hours to be logged by 30 December to enable the respondent to bill the client on 3 January 2023.

52. On 1 March 2023, Mr Shonfeld emailed the claimant and stated that "You will not enter billable tasks to Jira and where you have made entries they seem to be copied and pasted and often with little detail - so not billable. Not all hours are billable and that's fine but even those that were billable have floated away without a penny being invoiced for them. I repeatedly ask you to do this and as you have not responded our reserves have just gotten smaller and smaller."

53. In his email of 2 April 2023, Mr Shonfeld set out that "There is only one issue here. No logged hours= no billed hours= no income = cutbacks - until we finally run out of cash. If you do not enter your hours usefully into Jira we cannot bill for them. You have entered some copy tasks which were low in detail for some January days and which have not been confirmed, none in February and two 16 hours in March. So, we (me) are not able to bill or even argue the case with Cambridge for further payments for the work we have done. If we do not bill the client, we run out of cash (you know this well). I made this very clear in my email to you of Sep 20 last and many times before and after. In January we discussed one to one how this was deteriorating our prospects. You were reminded again about entering hours on Jan 2….. So once more, please complete your hours for Jira so next month looks better. Note that March processing was held back as a courtesy to give you the most time to log your missing hours". The claimant logged 16 hours in March 2023. He did not reply to this email.

54. On 11 April 2023, Mr Shonfeld emailed the claimant and stated that "If we can separate our issue of difference from the current workflow then I can assign you some tasks to move along with today.". The claimant recorded 6 hours in April 2023. He did not reply to this email.

55. On 12 May 2023, Mr Shonfeld emailed the claimant and stated that "I have asked so many times and finally instructed you to complete hours records to Jira. But

despite my instruction and continued requests, you have steadfastly refused to do so. You have said this is a 'ludicrous' request.". The claimant recorded 0 hours in May 2023. He did not reply to this email.

56. On 15 May 2023, the claimant and Mr Shonfeld had a discussion. The claimant recorded this discussion without Mr Shonfeld's knowledge or permission. I attach limited weight to the transcript given the circumstances of the recording and attach greater weight to the oral evidence given by the claimant and Mr Shonfeld at the hearing. The claimant's case is that he was told to not carry out any further work from this point. The respondent's case is that Mr Shonfeld was specifically talking about not working specifically on anything in preparation for an upcoming demo meeting with the client on 20 June 2023. I accept Mr Shonfeld's evidence that for the claimant to get involved at this point would have only been more disruptive than helpful. I also accept Mr Shonfeld's evidence that the claimant's frequent absence meant that it was harder for him to be involved for a short burst. I therefore accept Mr Shonfeld's evidence that his instruction was specific to the work for the client meeting on 20 June 2023.

57. There was an exchange of emails between the claimant and Mr Shonfeld on 26 May 2023. I find that this exchange of emails show that Mr Shonfeld was trying to get the claimant to engage and carry out work.

58. On 30 May 2023, the claimant and Mr Shonfeld met. Mr Shonfeld describes that meeting in his first witness statement. Mr Shonfeld states that he advised the claimant that carrying out work was a priority but that recording the hours was also a priority. Mr Shonfeld followed up that meeting with an email to the claimant which stated that "your refusal to enter your hours into our Tempo system is my own blocker to arguing for payment from the client."

59. The claimant responded the same day and said that "nobody has refused to enter any hours". On balance, I do not find this to be plausible and find that if this were true, the record of hours logged would show significantly more hours than the claimant has recorded. I prefer Mr Shonfeld's evidence in light of this being supported by the contemporaneous documentary evidence.

60. The claimant's case is that there was no expectation that hours would be recorded and that this was not a prerequisite to payment. The respondent's case is that it was necessary to record hours in order to be able to support the invoices to the client. The documentary evidence I have highlighted supports Mr Shonfeld's testimony and the respondent's position. I found the claimant's evidence to be inconsistent. In his oral evidence, he spoke about the recording of hours as being "beneficial to the business" as it made administration easier. He further expanded on this to say that it made administration easier for the purpose of generating invoices and monitoring performance. I found this to be inconsistent with his evidence that time recording was not expected. I also find this to be inconsistent with his suggestion that time recording was not necessary to be able to generate invoices for the client. I find that Mr Shonfeld was clear throughout his communications with the claimant that time recording was required and that it was necessary to be able to support invoices to the client. The claimant did not respond to many of Mr Shonfeld's emails and messages. He did not dispute the content of

Mr Shonfeld's emails but described these as being "arbitrary demands", "cracking the whip" and "control mechanism".

61. Under cross-examination, the claimant referred to there being many examples of where timesheets were not necessary but he did not provide any further detail or direct me to any documentary evidence in support of this. The claimant stated that it was never part of the agreement that recording time would be a prerequisite to payment of his salary. He also gave evidence that timesheets could be completed retrospectively. However, when cross-examined on this point, he could not explain why he had not done this.

62. The claimant stated in his evidence that the financial records from the respondent would show that the time recorded was not necessary for the creation of any invoices and that invoices were still created. When questioned by me on this point, The claimant could not direct me to any documentary evidence in support of this. Given the contradictions in the claimant's evidence, where it was necessary to do so, I preferred the evidence of the respondent's witness, particularly as this was corroborated by the contemporaneous documents.

63. The record of payments made to the claimant also shows the hours logged. This showed that time was recorded at 97.5 hours in September 2021, 146.5 hours in October 2021, 22 hours in November 2021, 154.73 hours in December 2021, 132.18 hours in January 2022, 97.25 hours in February 2022, 66.58 hours in March 2022, 66.1 hours in April 2022, 33.73 hours in May 2022, 12 hours in June 2022. Zero hours were recorded in July – September 2022. The picture from that point forward fluctuates with monthly records of 8 hours in October 2022, 88 hours in November 2022, 88 hours in December 2022, 82 hours in January 2023, 0 hours in February 2023, 16 hours in March 2023, 6 hours in April 2023 and 0 hours in May, June and July 2023.

64. I find that the hours recorded at the beginning of the claimant's employment with the respondent shows that on the balance of probabilities, it was expected and agreed by the claimant and respondent when entering into the contract that time would be recorded. This is consistent with Mr Shonfeld's evidence that he expected hours to be recorded and that the claimant was expected to record 130 hours per month. It is also consistent with the documentary evidence which includes a number of emails where Mr Shonfeld sets out to the claimant the expectation that time will be recorded on Jira to support invoicing the client.

65. I also find that on the balance of probabilities, it is reasonable to expect that the respondent would require time to be recorded to support the invoices that could be rendered to the client. I find the claimant's own evidence to be inconsistent in this regard.

66. I also find that if time recording was not necessary or required at all, as is suggested by the claimant, then the claimant would not have been doing this at any point.

67. The claimant's objection to recording time appeared to be based on his opinion that this was as he described "nagging" and "an arbitrary demand" from Mr Shonfeld. When asked by Mr Heard why he did not complete his time records for

March 2023 when he had been advised by Mr Shonfeld by email on 1 March 2023 and during a telephone call on 4 March 2023 that it was necessary, the claimant's response was that other things took precedence and that it was not a requirement, it was just Mr Shonfeld nagging and imposing arbitrary rules. The documentary evidence supports Mr Shonfeld's evidence that he informed the claimant on a number of occasions that it was necessary for time to be recorded and that this was to support invoicing the client. I find that on the balance of probabilities, the claimant can have been in no doubt during the period December 2022 to July 2023 that recording of time was expected by the respondent.

68. There is a general presumption that the parties to a contract intended to create a workable agreement. If, therefore, it is necessary to imply a term in order to give business efficacy to the contract and make it workable, the courts will be prepared to do so. I have considered whether a term to record hours was necessary. The test is not one of 'absolute necessity', and it might be more helpful to say that a term can only be implied if, without the term, the contract would lack 'commercial or practical coherence'. I find that in this case, the contract would lack practical coherence without a requirement to record time to support invoicing the client.

69. A term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying. I find that in this case, a term that time would be recorded to support invoicing the client would have been obvious at the time the contract was made. I am fortified in this by the record of hours logged which clearly shows that time was recorded by the claimant for a number of months and I find that this goes to the intention of the parties at the time.

70. I therefore find on the balance of probabilities that it was likely that there was an agreement that the claimant would record his time and that he was expected to record 130 hours per month, or alternatively, that this is a term that can be implied.

Did the claimant present himself for work during the period March 2023 to July 2023?

71. It is the claimant's case that he presented himself for work and was working full time during this period. The claimant accepted when questioned that his time recording had become erratic from the end of 2021 onwards. I found the claimant's evidence to be inconsistent. He suggested that on some occasions the lack of time recording was due to him being absent due to ill health although he stated that he could not recall whether March 2023 to July 2023 was one of those times. The claimant has not produced any medical records or fit notes to support an assertion that he was absent due to ill health during this period.

72. He also suggested that an explanation for the lack of time recording was that he didn't have time to do this and that his time was "better spent" working on developing the product for the client. This is inconsistent with his own evidence that timesheets could be backfilled and that there were a number of places where information about what work had been completed was available. I find that the

claimant did not inform Mr Shonfeld that he could not record his time as he was too busy and that the development work was taking precedence.

73. The claimant stated when questioned that March 2023 was one of those busier times where other things took precedence. I find the claimant's oral evidence to be inconsistent with the documentary evidence. The transcript of text messages between the claimant and Mr Shonfeld on 4 March 2023 shows that the claimant stated that there were no chargeable hours in March. This does not support a conclusion that the claimant worked full time in March. I also find that this is inconsistent with the claimant's suggestion that he was too busy to record hours. I find that on the balance of probabilities, if the claimant was too busy, there would have been significantly more hours recorded during March and as accepted by the claimant in his own evidence, there would be some other record of the work that the claimant had undertaken. The claimant did not direct me to any documentary evidence which shows that he worked full time hours during the period March 2023 to July 2023, nor did he direct me to any evidence which supports his assertion that there are other records of the work that could be used to provide detail on invoices.

74. I accept Mr Shonfeld's evidence that he and Mr Rose were having difficulties getting hold of the claimant and that the claimant's personal difficulties were impacting on the business. This is corroborated by the contemporaneous documentary evidence, for example, the emails of 18 January 2023, 1 March 2023, 12 May 2023. I also find that the claimant's delay in responding to Mr Shonfeld's email of 1 June 2023 is supportive of a conclusion that he was not working at that time. I have noted that the claimant's case is that he was told to not work. I refer to my earlier finding in relation to this and that I accept Mr Shonfeld's evidence as to his instruction only relating to the upcoming meeting on 20 June 2023.

The Law

Unfair dismissal

75. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed:

> ***94.— The right.***
>
> *(1) An employee has the right not to be unfairly dismissed by his employer…*

76. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95. In this case there is no dispute that the claimant was dismissed.

77. Section 108 of the Employment Rights Act 1996 requires a claimant to have not less than two years' service to make an unfair dismissal complaint.

> ***108.— Qualifying period of employment.***

> *(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.*

78. If the claimant has sufficient qualifying service to be able to make an unfair dismissal complaint, section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer (the respondent) must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason. The respondent's case is that the claimant was dismissed on the grounds of conduct, in that the claimant was not working or recording his hours and/or he was failing to follow the respondent's reasonable instructions to record any worked hours.

79. Section 98(4) provides that the determination of the question of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

80. In assessing fairness in cases of misconduct dismissal, the Tribunal must apply the 'Burchell test', originating in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal, subsequently approved in a number of decisions of the Court of Appeal. The test involves consideration of three aspects of the employer's conduct:

    a. Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?
    b. Did the employer genuinely believe that the employee was guilty of the misconduct complained of?
    c. Did the employer have reasonable grounds for that belief?

81. In determining whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances or whether that band falls short of encompassing termination of employment. The assessment should consider the fairness of all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed and not on whether the employee has suffered an injustice. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**, and **London Ambulance Service NHS Trust v Small [2009] IRLR 563**).

82. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors (**Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854**).

Polkey

83. I agreed with the parties that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair procedure had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey v A E Dayton Services Limited [1988] ICR 142** and the subsequent guidance from the Employment Appeal Tribunal in **Software 2000 v Andrews & others [2007] ICR 825**.

84. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand (**Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24**).

Contributory fault

85. If an unfair dismissal complaint is well founded, remedy is determined by section 112 of the Employment Rights Act 1996 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

86. The basic award is a mathematical formula determined by section 119. Under section 122(2) the basic award can be reduced because of the employee's conduct:

> ***122.— Basic award: reductions.***
>
> *…*
>
> *(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly…*

87. The compensatory award is primarily governed by section 123 as follows:

> ***123.— Compensatory award.***

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

…

88. The Tribunal must be satisfied that the action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award. Culpable behaviour need not amount to a breach of contract or a tort but is 'unreasonable in all the circumstances', though not all unreasonable conduct is necessarily culpable or blameworthy. (**Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111)**.

ACAS Uplift

89. Where there has been an unreasonable failure to follow ACAS codes of practice on the part of the employer, the Tribunal is able to uplift an award by up to 25% if it considers it just and equitable to do so (section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992). The Tribunal is also able to reduce an award by up to 25% if it is considered just and equitable to do so in circumstances where an employee has unreasonably failed to comply with ACAS codes of practice (section 207A(3) Trade Union and Labour Relations (Consolidation) Act 1992).

Unauthorised deductions from wages

90. The right not to suffer unauthorised deductions is set out in section 13 of the Employment Rights Act 1996:

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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

No work, no pay

91. In order to determine what is properly payable the terms of the contract and the necessity for the claimant to be ready and willing to work must be considered.

92. In the case of **Miles v Wakefield Metropolitan District Council [1987] ICR 368, HL**, Lord Templeman stated that:

93. *"In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work."*

94. In **North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387**, the co-dependency principle was considered in the context of modern employment cases. Lord Justice Coulson made the point as follows:

> *"… In my view developments in both employment and regulatory law mean that, in the present day, the co-dependency argument needs to be treated with considerable caution… the contractual analysis is fundamental: if the employer cannot show that, pursuant to the express or implied terms of the contract, or by reference to custom and practice, he is entitled to deduct pay [in circumstances where the employee has not been at work] then it seems to me that a general co-dependency argument cannot give him the remedy that the contractual terms themselves do not."*

95. He also stated that:

> *"I consider that the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself . . . Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract? If the contract did not permit deduction then . . . the related question is whether the decision to deduct pay for the period . . . was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the "ready, willing and able" analysis . . . falls to be considered."*

96. In view of the above cases, if the contract does not give the employer the power to withhold pay, the consideration is whether the employee who was not able to work was ready and willing to work. Employees who deliberately or unreasonably refuse to do any work – and so are clearly not willing to work are not entitled to be paid. In that situation the application of the co-dependency principle (i.e. no work, no pay) is much more straightforward.

Written statement of employment particulars

97. Section 1 of the Employment Rights Act 1996 provides:

> ***1.— Statement of initial employment particulars.***
>
> *(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.*
>
> *(2) Subject to sections 2(2) to (4)—*

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

98. Section 38 of the Employment Act 2002 provides:

38 Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by [a worker]1 under any of the jurisdictions listed in Schedule 5.

…

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the [worker]6 in respect of the claim to which the proceedings relate, and

(c) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996… the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of a worker shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

…

Analysis and conclusions

Unfair dismissal – qualifying period of employment

99. In order to claim unfair dismissal, an employee must have worked for the employer for two years, unless the dismissal was for certain reasons specified in section 108 of the Employment Rights Act 1996. I have found that the claimant's employment with the respondent started on 1 September 2021 and ended on 31 July 2023. Even taking into account a further period of notice, the claimant's effective date of termination would be 7 August 2023.

100. I have found that Roundpoint Ltd and NowCE Limited were two separate businesses and that there was no transfer of clients, they operated different types of businesses and that it was not the case that the claimant's employment had transferred from Roundpoint Ltd to NowCE Limited with a transfer of the rights and obligations. It was a new contract that was formed with the claimant, albeit that no written contract was agreed.

101. The claimant did not have the qualifying two years' service under section 108 of the Employment Rights Act 1996 or any exceptional circumstances that provide for an exemption to the qualifying service period and accordingly, the claim for unfair dismissal is struck out as the Tribunal does not have jurisdiction to consider the claim.

Terms of the contract

102. Deciding whether wages are 'properly payable' requires employment tribunals to resolve any disputes as to the meaning of a contract, including questions of interpretation and implication. This was made clear by Lord Justice Underhill in **Agarwal v Cardiff University and anor 2019 ICR 433, CA**. **Delaney v Staples (t/a De Montfort Recruitment) 1991 ICR 331, CA**, states that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under section 13 of the Employment Rights Act 1996 is properly payable, including an issue as to the meaning of the contract of employment.

103. I have concluded that it was agreed that the claimant would be paid £6,100 gross per month.

104. I have also concluded that it was an agreed term that the claimant was expected to work 35-40 hours per week and that it was an agreed or implied term that he was expected to record between 130 hours per month to support invoicing the client.

Unauthorised deductions from wages

105. I have found that the claimant was entitled to be paid £6,100 per month, for a 35-40 hour week and that it was either agreed or implied that time would be recorded to support invoices to the client.

106. Taking the claimant's case at its highest, he should have been paid £6,100 for March 2023, April 2023, May 2023, June 2023 and July 2023, which totals £30,500. The record of payments shows that the claimant was actually paid £11,471.89 for those months. The claimant accepted the accuracy of these figures. In total, for the months March to July 2023, on the claimant's case there was a shortfall of £19,028.11 and that this was an unauthorised deduction from his wages.

No work, no pay

107. The respondent's position is that the claimant did not work during that period and that as a result, he was not entitled to be paid.

108. Mr Heard directed me to the comments in **North West Anglia NHS Foundation Trust v Gregg** and **Miles v Wakefield Metropolitan District Council** as set out earlier in these reasons. He also directed me to the relevant principles identified by Lord Justice Coulson at paragraph 52 of the decision in **North West Anglia NHS Foundation Trust v Gregg**.

109. The claimant accepted that he understood the contractual position to be that if he did not work, he would not get paid. I conclude that the respondent was therefore entitled, in principle, to deduct pay in circumstances where the claimant has not been at work.

110. There is also the common law doctrine of "ready, willing and able to work" i.e. that an employee's right to remuneration depends on his doing or being able to do the work that he was employed to do and that if he declined to do that work, the employer need not pay him.

111. I considered **Miles v Wakefield Metropolitan District Council**. In my view, the correct analysis of what is properly payable therefore requires the Tribunal to consider whether the claimant was performing his contract of employment at the material time, and if not, whether this was a result of the claimant "simply withholding" his services, or something else.

112. I have accepted Mr Shonfeld's evidence that he and Mr Rose were having difficulties getting hold of the claimant and that the claimant's personal difficulties were impacting on the business. This is corroborated by the contemporaneous documentary evidence. I also find that the claimant's delay in responding to Mr Shonfeld's email of 1 June 2023 is supportive of a conclusion that he was not working at that time. I have noted that the claimant's case is that he was told to not work. I refer to my earlier finding in relation to this and that I accept Mr Shonfeld's evidence as to his instruction only relating to the upcoming meeting on 20 June 2023.

113. Having considered all the evidence, I have concluded that the difficulties in getting hold of the claimant, and the lack of time being recorded support a conclusion that in those circumstances, the claimant was not performing the requirements of his contract of employment, namely working 35-40 hours per week and recording 130 hours per month.

114. I am satisfied that considered against the test in **Miles v Wakefield Metropolitan District Council**, the claimant was withholding his services. I have found that there was an agreement that the claimant would work 35-40 hours per week and the parties do not dispute this. I have also found that there was an express agreement or an implied term that time would be recorded on Jira to support invoicing the client. I have concluded, on the balance of probabilities, that the limited time recorded in March and April 2023 (a total of 22 hours) and the absence of any time recorded for May, June and July 2023 shows that the claimant was not working 35-40 hours per week and that he was not recording time.

115. I have therefore also concluded that the claimant was not ready, willing and able to work.

116. Against that backdrop, I have concluded that it cannot be said that the claimant was making himself available for work. At most, his willingness to attend work was conditional on his demands being met. He was not attending all meetings to which he was invited. Mr Shonfeld was attempting to renegotiate terms with the claimant although no resolution had been reached so the original terms prevailed. The relationship between the claimant and Mr Shonfeld had deteriorated and I find that this is, in no small part, connected to Mr Shonfeld's attempts to reduce the respondent's outgoings. I find that the claimant took exception to complying with Mr Shonfeld's requests and this is supported by the language that the claimant used to describe Mr Shonfeld's requests.

117. As I have concluded that it cannot be said that the claimant was making himself available for work, therefore it cannot be said that his salary during the period March 2023 to July 2023 was "properly payable" within the meaning of Section 13(3) of the Employment Rights Act 1996. Accordingly, the claimant's claim of unlawful deduction from wages is not well founded and is dismissed.

Respondent's counterclaim

118. The claimant's claim for unauthorised deduction from wages was presented before his dismissal. In closing submissions, Mr Heard submitted that the respondent accepts that the claimant's claim was presented prior to his employment being terminated. I have concluded that the claimant's claim cannot have been presented as a breach of contract claim under the Employment Tribunals Act 1996 and it must therefore have been presented as a claim under Part II of the Employment Rights Act. The Tribunal does not have jurisdiction to hear the counterclaim as the claimant did not bring a breach of contract claim (Employment Tribunals Extension of Jurisdiction)(England and Wales) Order 1994. The respondent's counterclaim is accordingly struck out.

Written statement of employment particulars

119. The respondent accepts that there was no written statement of employment particulars. An award of additional pay under section 38 of the Employment Act 2002 for failure to provide a written statement of employment particulars is therefore possible.

120. However, the award of additional payment is only possible where another claim under the Act has succeeded. The claimant has not succeeded on any of his claims and therefore no compensation will be awarded in respect of the respondent's failure.

Employment Judge Poynton

Date 5 June 2024

REASONS SENT TO THE PARTIES ON

13 June 2024

FOR THE TRIBUNAL OFFICE