



EMPLOYMENT TRIBUNALS

Claimant: Mr J Townsend

Respondent: Howard Kennedy LLP

Heard at: London South **On:** 18/9/2024 - 20/9/2024
(Croydon via CVP)

Before: Employment Judge Wright

Representation:

Claimant: Mr T Cordrey – counsel

Respondent: Mr G Mansfield – King’s counsel

RESERVED JUDGMENT

It is the Judgment of the Tribunal that the claimant’s claim of unauthorised deductions from wages under Part II of the Employment Rights Act 1996 (ERA) is not well founded, it therefore fails and is dismissed. The claimant’s claims for holiday pay and consequential loss are also not well founded and are dismissed.

REASONS

1. The claimant presented a claim form on 3/3/2023 following a period of early conciliation which started on 26/12/2022 and ended on 6/2/2023. The

claimant is an employment law solicitor and at the relevant time was a Partner in the Employment and Immigration Team within the Corporate Department of the respondent from 20/1/2020; until he resigned/retired on the 20/1/2022. His engagement ended on the 30/9/2022.

2. A case management preliminary hearing took place on 21/11/2023 and that resulted in an agreed list of issues to be determined by the Tribunal.
3. The issues were recorded as (page 59):

1. Do the profit share payments received by the Claimant as an equity partner of the Respondent fall within the definition of “wages” under s.27(1) ERA 1996?

2. If so, were the amounts claimed by the Claimant “properly payable” to him for the purposes of s.13(3), ERA 1996? When deciding what was “properly payable” to the Claimant the Tribunal will have to determine the terms of his contract with the Respondent.

The following issues arise:

The Equity Points Claim (PoC paras. 44.1-44.3)

3. In relation to the year 2020/2021:

3.1 Was the Claimant’s unlawful deductions claim presented outside the statutory time limit under s.23 ERA 1996? The Respondent contends that this claim was presented out of time: GoR para. 42(b).

3.2 The Claimant was paid a fixed profit share for the year of £225,000. Did the Claimant agree to receive that fixed profit share, such that he received what was “properly payable” to him?

3.3 If not, should the Claimant’s profit share have been calculated and paid on the basis that he was entitled to an award of 56 equity points (as the Claimant contends at PoC para. 44.1) or a maximum award of 42 equity points (as the Respondent contends at GoR para. 42(c))?

3.4 If the Claimant did suffer any unlawful deduction, what amount is owing?

4. In relation to the year 2021/ 2022:

4.1 Was the Claimant’s claim presented prematurely (see GoR para 42(b) and (e))?

4.2 *The Claimant's profit share was calculated and paid based on an award of 45 equity points.*

4.3 *Was the Claimant entitled to a profit share based on an award of 56 equity points (as the Claimant contends at PoC 44.2) or was the Respondent entitled to award him 45 equity points (as the Respondent contends at GoR para 42(e))?*

4.4 *If the Claimant did suffer any unlawful deduction, what amount is owing?*

5. *In relation to the year 2022/ 2023:*

5.1 *Was the Claimant's claim presented prematurely (see GoR para 42(b))?*

5.2 *The Claimant's profit share was calculated and paid based on a fixed profit share of £226,576, pro-rated to his departure date.*

5.3 *Did the Claimant agree to receive that fixed profit share (as the Respondent contends at GoR para. 42(f)), such that he received what was "properly payable" to him?*

5.4 *If not, was the Claimant entitled to a profit share based on an award of 56 equity points (as the Claimant contends, by implication, at PoC 44.3)?*

5.5 *If the Claimant did suffer any unlawful deduction, what amount is owing?*

6. *Should the Tribunal find that the Claimant was awarded fewer equity points than his contractual entitlement, is the Claimant estopped from relying on such entitlement by his representations on 10 June 2020 and/or by his express or implied representations/ conduct/ acquiescence thereafter (as the Respondent contends at GoR para. 43)?*

The unquantified deductions claim (PoC para 44.4)

7. *Was the Claimant's claim presented prematurely (see GoR para 46)?*

8. *Were discretionary bonus awards made by the Respondent in June 2022 in relation to the year 2021/ 2022 made unlawfully because:*

8.1 *Mr Emden, the Respondent's Managing Partner, was acting ultra vires when approving them?*

8.2 *They were not made by special resolution?*

The Respondent contends that the relevant performance awards were lawfully made by the Management Committee under Clause 14.2 of the

Members' Agreement, meaning that questions of ultra vires and/or the alleged need for a special resolution do not arise: GoR para. 48.

9. If the aforementioned discretionary bonus awards were made unlawfully, what impact (if any) did that have on profit share? What awards would have been made if the Respondent had acted lawfully?

10. Does the effect of any unlawful discretionary bonus amount to a deduction from wages? The Respondent contends that the Claimant's cause of action (if any) could only be for breach of contract and not a claim under Part II ERA 1996: GoR 47.

11. Was the amount paid to the Claimant in respect of 2021/2022 less than the amount that was "properly payable" to him?

12. If the Claimant did suffer any unlawful deduction, what amount is owing?

Holiday pay claim (PoC para 44.5)

13. Was the Claimant entitled to a further £1,958.48 in respect of untaken holiday on termination? The Respondent says that the Claimant was overpaid in respect of holiday on termination: GoR para. 37

Consequential loss

14. Is the Claimant entitled to claim the alleged consequential losses set out at PoC para 44.6?

15. If so, to what amount is the Claimant entitled?

4. The Tribunal heard evidence from the claimant and for the respondent from: Mr Craig Emden (managing partner) and Mr Ashley Reeback (head of corporate department).
5. There was a 465-page electronic bundle. There was also a bundle of authorities. Submissions were heard and considered. Both representatives provided skeleton arguments and Mr Cordrey provided a short written closing argument.
6. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing. It includes the documents referred to by the witnesses and took into account the Tribunal's assessment of the evidence.
7. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not

been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence.

Findings of fact

8. The claimant joined the respondent on the 20/1/2020 as a fixed-share partner. This followed a recruitment process, with an offer letter and Accession Agreement dated 21/8/2019 (page 142), which was signed by the claimant on the 9/9/2019 (page 144 and 150).
9. Although the claimant wished to join as an equity partner, the respondent's explanation for him joining as a fixed-share partner was that for a partner joining part-way through the financial year (FY) (1/5 to 30/4) they were fixed-share until the 30/4 and then became an equity partner from the 1/5 for the forthcoming financial year.
10. The claimant contended for income of £225,000 and the offer letter stated
'Our financial offer is as follows:
 - *from the date of your joining the firm until 30 April 2020, you will be a Fixed Share Partner on a fixed share in the gross sum of £225,000 for the full financial year, which would then be pro-rated for the relevant period; and*
 - *from 1 May 2020, you would become an Equity Partner, with such number of equity points as reflect a budgeted share of profits on entry for the financial year 2020/21 of £225,000, which at the current time would be 40 points. The Equity Partners all have an element of their projected profit share withheld, and the current level of such withholding for someone on 40 points is 10%. Therefore your net monthly draw in 2020/21 would be reduced by such withholding. The withheld sum (subject to any retention, which applies to all Equity Partners) is then usually paid to Equity Partners in September/October 2021 (after completion of the audit).'*
11. The claimant's fixed-share from the date of joining to 30/4/2020 equated to £65,202.
12. The claimant does not bring any claim in respect of this period.
13. Of course, the global situation in the spring of 2020 was completely unpredicted in August/September 2019 when the offer of partnership was made to the claimant.
14. It is extremely difficult now, more than four-plus years later to recreate the environment which existed in 2020. For example: on 5/3/2020 the first death from coronavirus in the UK was confirmed; on the 17/3/2020 NHS England

announced from 15/4/2020 all non-urgent operations would be postponed, to free up beds to help tackle the virus; on 20/3/2020 the Prime Minister ordered all cafes, pubs and restaurants to close that evening; on 23/3/2020 the first 'stay at home' lockdown was announced; on 11/5/2020 the Government advised people to wear a face covering in enclosed spaces where social distancing was not possible; on 18/5/2020 jury trials resumed in a handful of courts; and from 1/6/2020 groups of up to six people were able to meet outside in gardens and private spaces and there was a phased re-opening of schools. A second lockdown was announced on the 31/10/2020 in England to prevent a 'medical and moral disaster' for the NHS. The third lockdown in England started on the 5/1/2021. As late as 14/9/2021 the Prime Minister unveiled England's winter plan for Covid – 'Plan B' to be used if the NHS came under 'sustainable pressure', which included measures such as wearing face masks. In general, there was fear, panic and uncertainty.

15. This was the background against which the claimant, as per the agreement, transferred from being a fixed-share partner, to an equity partner.
16. Mr Emden explained the 'equity points' system (his witness statement paragraph 11):

'... the Respondent operates an equity points system for all equity partners under which an equity partner will be assigned a specific number of equity points, which in turn determines their profit share. Depending on the firm's performance in a given year, the Respondent will determine an audited "profit per point" figure. The final annual remuneration an equity partner receives is largely based on the partner's number of equity points multiplied by the audited profit per point figure, in addition to which they may be awarded a discretionary bonus.'

17. Although the respondent had indicated that as of August 2019, to achieve a profit share of £225,000 the claimant would be allocated 40 equity points, this was not revisited by the respondent prior to the claimant becoming an equity partner, as per the Accession Agreement, on 1/5/2020 (page 147):

'EQUITY POINTS AND CAPITAL OF NEW PARTNER

5. As a Fixed Share Partner the New Partner shall be required to contribute £100,000 by way of Capital. Such contribution shall be made no later than 2 months of becoming a Partner.

6. As an Equity Partner, the Partner shall be allotted Equity Points to the value of £225,000 or more. The Capital contribution shall remain at £100,000.'

18. The Accession Agreement therefore did not specify a number of equity points. It referred to being 'allotted Equity Points to the value of £225,000 or more'.

19. The indication of 40 Equity Points arises from $\text{£}225,000 / \text{£}5,730 = 39.27$, rounded up to 40 Equity Points. The sum of $\text{£}5,730$ being the profit per point (PPP) budgeted figure for the FY 2019/2020 as at August 2019 when the offer to the claimant of his remuneration package was made (page 159).
20. The parties proceeded from the 1/5/2020 with the assumption that the claimant had been allocated 40 Equity Points. The claimant did not query or question this. This is reflected in the Partner Financial KIP statement – April 2020 (page 156). It was agreed this was incorrect as the claimant did not have any Equity Points for FY 2019/2020. The claimant is also shown on the undated 2020/2021 Points Ladder as having 40 Equity Points (the points ranging from 26 to 115) (page 351).
21. The respondent accepted that based upon a PPP figure in fact the claimant should not have been on 40 for the FY 2019/2022. It conceded that he should have been awarded 42 points based upon the April 2020 budget PPP figure of $\text{£}5,291$ (in its ET3 page 51 and 159):

$$\text{£}225,000 / \text{£}5,291 = 42.525$$

22. During the hearing, Mr Emden accepted the number of equity points for FY 2020/2021, using that methodology, should have been 42 or 43 (depending upon whether or not the figure was rounded up or down).
23. The claimant challenges that this document, entitled 'Budget Profit and Loss Account 20/21' was a projected budget (page 159). It was attached to an email sent to the Management Committee and Finance Team on 21/4/2020 (page 157). The subject matter of the email is 'Revised 20/21 Budget' and the attachment is named '2021 Revised P&L.pdf'.
24. The claimant disputes that this is the budget; he says it is a profit and loss account. He referred to the underlined heading in the left hand corner 'BUDGET PROFIT AND LOSS ACCOUNT 20/21'. He does not accept that the respondent produced a FY 2019/2020 budget prior to the 13/5/2020 when the Chief Operating Officer sent an email referring to a Partners' Meeting on the 14/5/2020 (page 164). The claimant relies upon the fact that there were two attachments, described in the body of the email as:

'1. Profit and Loss account summary – this provides analysis of the FY 20/21 Budget, FY 19/20 Actual and also FY 19/20 budget as a comparison for FY 19/20 Actual

2. A breakdown of fees by department and total firm expenses for the FY 20/21 Budget showing how we overlaid the impact of COVID-19 on the initial normalised budget'

25. The claimant also relies upon the phrase ‘after a number of iterations and reviews’ by the Management Committee and the Board, the various stakeholders were ‘comfortable’ signing off the ‘attached budget’.
26. The Tribunal finds the respondent had prepared a budget for FY 2020/2021 ahead of the end of the FY 2019/2020 (page 159).
27. It is accepted that this document was the respondent’s budget for FY 2020/2021. It is nonsensical to suggest that the respondent had not set its financial targets for the forthcoming FY, prior to that FY starting. It may be that the use of the terminology indicated that the profit and loss showed what had happened in FY 2019/2020 (subject to the accounts being audited) and the projections for FY 2020/2021; confused the claimant. Indeed, the document included both the projections for FY 2019/2020 and the actual figures. That would help assist forecasting for FY 2020/2021 prior to that FY starting.
28. In any event, notwithstanding any budget forecasting, the impact of the Covid-19 pandemic continued to be felt into May 2020. It was becoming clear that far from being ‘past the peak of the pandemic’ on the 30/4/2020¹, the pandemic’s impact on the UK, was the most serious national event in almost a century.
29. It is not surprising therefore, that the respondent reviewed its budget and revised it. It is also understandable, at this time, that certain less pressing matters (that is not to say there were unimportant) were not addressed. Such as the actual allocation of the claimant’s Equity Points. The fact 40 Equity Points were allocated to the claimant on the 1/5/2020 was not revisited by him at any point until the 20/1/2023, nor by anyone on behalf of the respondent.
30. The respondent revised its budget and that led to the partners’ meeting on 14/5/2020 (page 162). It reduced its projected fees billed by 8% and its total income by 12%. This impacted upon the projected PPP for FY 2020/2021, which was reduced from £5,291 to £4,017. The claimant’s Equity Points however were fixed at the 1/5/2020; not on the 14/5/2020 when the budget was revised.
31. At the time both the respondent and the claimant were under the impression and accepted, that the claimant had been allocated 40 Equity Points as at the 1/5/2020, by reason of that figure being referenced in the offer letter and subsequent documents.
32. The number of Equity Points was the mechanism of the claimant achieving remuneration of £225,000 in FY 2020/2021. The Tribunal finds that the claimant being paid that sum of profit share was the intention and focus of

¹ Per the Prime Minister.

both parties. The rationale behind the allocation of points was to ensure the claimant had the chance of being paid a profit share of £225,000, if the PPP figure was achieved or bettered in FY 2020/2021. The claimant however, as did the other partners, took the risk that the PPP figure would be lower than £5,291 when the accounts were audited and that his overall profit share would be lower. At the time of the negotiation over the offer of partnership, both parties thought that risk was quite low, based upon the performance of the respondent over the preceding years.

33. This is evidenced by not only the documents exchanged during the recruitment and leading up to the claimant signing the Accession Agreement on the 9/9/2019; but also the subsequent exchanges.
34. The lower figure of PPP put to the partners at the meeting of 14/5/2020 would result in a reduced income for all Equity Partners. Although that is the risk they take, if their remuneration is a share of the profits and the profits are reduced (for whatever reason), their income will accordingly reduce.
35. On the 28/5/2020 the claimant was sent a copy of the signed Accession Agreement by the respondent's recruitment manager (the email subject matter was 'James Townsend – Partner Accession Agreement – signed.PDF – Private & Confidential') (page 168). He replied to her on the same day saying 'signed copy attached'.
36. On the 4/6/2020 the claimant requested a letter for his mortgage underwriter confirming the Accession Agreement was genuine (it contained a footer with the date of 18/4/2016 on page 2 and 4). The claimant also asked (page 460):

'Could you also confirm that my agreement with HK is that my profit share for this financial year was agreed as being £225,000 as per the attached?'
37. Post the revised budget, Mr Emden was concerned that the claimant, on 40 Equity Points as they both understood it, would not achieve an income of £225,000. If the PPP of £4,017 was multiplied by 40 Equity Points, that would result in a profit share of £160,680.
38. This troubled Mr Emden, in relation to the claimant and three other senior associates who were being promoted to Equity Partner.
39. On the 5/6/2020 Mr Emden was sent a copy of the claimant's offer letter of 21/8/2019 as a result of a discussion he had had with Mr Reeback (page 175).
40. It is not disputed that Mr Emden had a Microsoft Teams meeting with the claimant at 10am on the 10/6/2020. Mr Emden agreed he had had limited contact with the claimant prior to this; he met him as part of the recruitment process and believed that he would have spoken to the claimant once his

engagement commenced. Mr Emden was however sure that this was the first Teams meeting he had had with the claimant. He said that as a result of the pandemic, along with many others, he had just started to use Teams to communicate.

41. The claimant takes issue that he was not put on notice of the content of the meeting. Mr Emden explained and it was accepted that the subject matter of the meeting was one which it was not helpful to give advance notice of. To do so would cause more concern and upset. Furthermore, the claimant did not raise this at the time or after the meeting.
42. Mr Emden made a proposal to the claimant on the basis that in light of the revised PPP and based upon the understanding he was on 40 Equity Points, the potential was that the claimant's income could significantly reduce. Mr Emden did not think this was fair and so he offered two options to the claimant. He could remain on 40 Equity Points and take the risk that the PPP would be significantly reduced; or indeed it could potentially exceed the reviewed figure, or even exceed the April 2020 projected figure (of £5,291, or it could exceed the actual audited PPP FY 2019/2020 figure of £5,730). Or, the claimant could accept a fixed share of profits of £225,000 for FY 2020/2021.
43. Although the claimant was no longer a fixed-share partner and was an equity partner (this was not in dispute), the second option would guarantee him an income and (unless the respondent became insolvent) remove practically all of the risk for him during the pandemic.
44. The other Equity Partners (apart from three senior associates) did not have the benefit of any guarantee and were exposed in respect of their financial risk. They are exposed in any event, however, the risk was more acute at this point in June 2020.
45. Mr Emden agreed that he did most of the talking during this meeting and that the claimant did not have much to say. The claimant did however, agree to the second option; the fixed share for FY 2020/2021 of £225,000, with the accompanying low level risk. The agreement between the parties, was therefore varied by them at this point.
46. It is the claimant's case that during the conversation Mr Emden did not want him to have 'fifty or so points' (his witness statement paragraph 60). Mr Mansfield pointed out that in his claim form, the claimant referred to him being entitled to 56 Equity Points from 1/5/2020 and that Mr Emden did not want him to have 56 Equity Points (page 25).

47. Mr Emden said that the concept of 55², 56 or 57 Points arose for the first time after the claimant left and when he sent his letter before action on the 20/1/2023 (page 311).
48. That is accepted. There is no contemporaneous evidence to suggest that it was the claimant's view that he was entitled to 56 (or so) points. The Tribunal finds that this assertion was manufactured by the claimant after he left the respondent. Furthermore, the lack of precision over the number of points demonstrates the uncertainty over what was proposed, based upon the claimant's case.
49. The claimant referred to his personal circumstances at the time. A building project at his home which was incurring significant debt (hence the re-mortgage); his wife being a key worker; his three young children; and the general impact of the pandemic and the resulting uncertainty. All of these matters point to the claimant seeking security and a fixed/guaranteed income.
50. The claimant had criticisms of Mr Emden's conduct of the meeting. The claimant said Mr Emden imposed the variation and that he was not in a position to challenge it. He referred to Mr Emden having absolute power to simply give him notice and referred to Mr Emden doing so to another Equity Partner. The claimant accepted the departure of the Equity partner he referred to was in August 2021 and so was not on his mind in June 2020.
51. Mr Emden does not have the power the claimant prescribes to him. The claimant referred to clause 25.4.1 of the Members' Agreement (page 100). That clause applied to the Management Committee and is subject to consultation with the Partnership Council. Mr Emden may have been Managing Partner and he may have been the individual who communicated decisions of the Managing Committee; he did not have absolute power.
52. Furthermore, the Tribunal finds Mr Emden was not an unreasonable person. He and the claimant understood that the claimant was on 40 Equity Points. Mr Emden realised the claimant (and three others) was in a vulnerable position, as a result of the pandemic. Based upon the revised PPP for FY 2020/2021 the claimant could expect a shortfall of over £64,000. This was against a backdrop of both sides being clear that the primary aim in terms of the claimant's remuneration, was for him to be paid profits of £225,000. Mr Emden therefore took steps to address this.

² In his witness statement, the claimant said that he accepted the respondent's calculation of 55 Equity Points and cross-referred to the respondent's ET3 and to the calculation £4,017 x 55 = £225,885. This is an incorrect calculation (£4,017 x 55 = £220,935 whereas the claimant has transposed the PPP figure with that of £4,107 x 55 = £225,885). This explains where the figure of 55 Equity Points originates.

53. Later on the 10/6/2020 the respondent's recruitment manager emailed the Financial Accountant with the letter for the claimant's mortgage broker, which confirmed his profit share of £225,000 (page 456). There was then reference to the conversation between the claimant and Mr Emden and to 'finding out what happened' (page 456).
54. The letter for the mortgage broker was finalised and dated 18/6/2020 (page 185). It referred to the errors in the date and that the claimant's profit share for FY 2020/2021 had been set at £225,000.
55. The claimant said that the meeting on the 10/6/2020 led him to reflect and to conclude that his future lay elsewhere (his witness statement 67).
56. Mr Emden sent an email to the claimant on the 14/6/2020 which read (page 179):

'Morning James and I trust you have been enjoying the fine weather this weekend.

Further to our recent conversation, thank you for your understanding and co-operation and I think that we have arrived at a sensible place.

Just to confirm that the arrangement for the financial year 2020/21 will be as follows:-

- 1. You will be on 40 points;*
- 2. We will make a one off exception and fix your profit share for this year at £225,000. So whether your 40 points would entitle you to less or more than that same, your profit share will be fixed at £225,000;*
- 3. You will be subject to the same deductions as other Equity Partners in terms of monthly drawings, but ultimately, as stated above, your profit share will still be £225,000. Payment of any undrawn profit will be paid out to you in the same way as for other Equity Partners.*

Please do let me know if you have any queries regarding the above and in the meantime, enjoy your Sunday!

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57. According to Mr Emden, this is an email between colleagues, in non-legal language which confirmed an agreed variation to the contract.
58. Not only is it the claimant's case that there was no 'agreement' and that the variation was unilaterally imposed upon him by Mr Emden; he takes issue with the use of the word 'understanding'. The claimant claims this shows that there was no 'agreement' and that the variation was unilaterally imposed.

59. The claimant also takes issue that Mr Emden spoke to him on this subject at all, as he had only had a handful of interactions with Mr Emden. He had had more contact with Mr Reeback as his Head of Department. On the 21/5/2021 the claimant said, when highlighting three partners who had worked with him to make a significant difference that he wished to nominate Mr Reeback for 'being continuously supportive...' (page 236). He also said in his exit interview on 29/9/2022 that when he resigned, Mr Reeback had 'really tried' to resolve the issues' (page 294).
60. The claimant was by the 10/6/2020 an Equity Partner who was 29th out of 46 Equity Partners on a Points Ladder published shortly after Mr Emden's email to him of 14/6/2020 (page 25 and claimant's witness statement paragraph 77). He qualified as a solicitor in 2002 and was previously a partner/member of a (in terms of revenue) a top 100 UK law firm where he had been Head of Employment since 2015. He had experience of High Court and Employment Tribunal litigation.
61. If the claimant believed at the relevant time, he was being disadvantaged by Mr Emden, it was open to him to raise this and/or to approach Mr Reeback for assistance.
62. The claimant did not do so. He did not make any assertions in respect of his contractual 'rights' as he now says he understood them at the time. He did not then raise, on his case ongoing deductions from his drawings, from May 2020.
63. It is implausible that if the claimant understood or believed he was entitled to anything other than 40 Equity Points at the time, that he would not have done something about it.
64. After further emails were exchanged, the respondent's Financial Accountant wrote to the claimant on the 16/6/2020 regarding his FY 2020/2021 financial package (page 182). That email set out that although the claimant had transitioned from a fixed-share partner to a full Equity Partner and had been 'allocated 40 points', his profit share had been fixed at and will not exceed £225,000. The email then went onto deal with accounting, practical and tax matters. This was the second time, post the 10/6/2020, the respondent had confirmed to the claimant in writing that his Equity Points allocation was 40. The claimant did not challenge this statement.
65. The letter to the claimant's mortgage broker from the respondent's Chief Operating Officer was sent on the 18/6/2020 (page 185). That letter confirmed his partnership profits for 20/1/2020 to 30/4/2020 were £65,202. It also confirmed that his profit share for the financial year ending 30/4/2021 had 'also been set at £225,000'.

66. The claimant had seen the email of the 14/6/2020, the email of 16/6/2020 and the letter to his mortgage broker of the 18/6/2020. Both emails confirmed his Equity Points at 40 and all three documents referred to the fixed share for FY 2020/2021 of £225,000.
67. On the 13/7/2020 the respondent's Partnership Co-ordinator sent the claimant his 'profit share statement for 2019/2020, in advance' ... of the meeting with Mr Reeback later that day (page 190). The appended document is entitled '20/21 Drawings Statement' (page 191). It must be a FY 2020/2021 document due to its contents (not FY 2019/2020). It refers to 2020/2021 points of 40 and 2020/2021 profit share of £225,000:

20/21 Drawings Statement

Partner name		James Townsend
19/20 Net monthly draw		£10,948
May 20 COVID monthly draw		£8,758
20/21 Points		40
20/21 Profit share		£225,000
20/21 Monthly gross profit share		£18,750
20/21 Monthly net of tax profit share		£10,130
20/21 Withholding	5%	£504
20/21 COVID withholding		£0
Net monthly draw from July 20		£9,626
20/21 Effective tax rate		44%
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19/20 Capital		100,000
20/21 Rung		5
20/21 Capital		100,000
20/21 Voting		1
20/21 Withholding rate		5%
20/21 Current account buffer		10,000
Movement in capital		No Change

68. On the 22/10/2021 the respondent's Chief Operating Officer confirmed the financial statements for the FY ending 30/4/2021. This email confirmed the PPP for FY 2020/2021 had been finalised at £5,612. It went onto caution that (page 192):

'individual profit shares may not be a straight forward calculation of points x profit per point. This is because the first draw on profits is to allocate interest on capital accounts as per the Members Agreement.'

69. On the 15/1/2021 the respondent's Financial Accountant sent the claimant a statement of his current account and tax reserves as at 30/4/2020 (page 193).

70. There is a 'Partner Financial KPI Statement – April 2021' for the claimant. That shows his 2020/2021 points as 40 and his place on the 2020/2021 rung as 5 (page 196).

71. As per the previous year, the respondent's Senior Financial Accountant sent the claimant his 'statement of your current account and tax reserve' as at 30/4/2021 (page 247).

72. The claimant's 'Partner Self Evaluation Form 2021' was dated 21/5/2021 (page 231).

73. Under the heading 'What are your expectations of the profit share review? [See profit share movement criteria]' the claimant set out (page 236):

'The market value associated with my contribution / practice should allow for annual drawings in excess of £300,000. I consider that an appropriate adjustment (allowance is made under the guidance for a significant 10+ points adjustment where warranted) needs to reasonably be made to my points allocation to take into account the value of my contribution via originations and to ensure fairness in point distribution under the ladder within the meaning of the guidance.'

74. The claimant refers to his 'drawings' in this document when discussing his income.

75. The claimant had a meeting with Mr Reeback on the 25/5/2021 (page 237-238). Mr Reeback said that he was aware from the claimant's Self-Evaluation Form that he would like his remuneration to be in excess of £300,000.

76. There was a further meeting on the 7/7/2021 between the claimant, Mr Reeback and Mr Emden (page 245). What was proposed for the claimant was a performance award of £35,000 and an increase in his Equity Points of 5, to a total of 45 (page 239). Mr Emden recorded (page 240):

'Strong financial year, main reason as he is underpointed. Award reflects strong year and underpointing. . . . Getting 300k as he asks is a bit toppy, more than a third. A third is c£266k. About progression, if does the same this year will progress again.'

77. The key message for 2021 read (page 242):

'An excellent first year where originations were good at £792,000 and in addition onboarded many of his clients from Mitchelmores and recruited Domonique. The award is in recognition of a good financial performance and the recruitment of Domonique. As only based on one year's performance 5 points is a decent level increase in a short period and if performance continues at this (or indeed a higher) level then the upward trajectory will continue, with additional points. 5 points is amongst the highest'

78. The claimant's FY 2021/2022 Drawings Statement showed (dated as 6/7/2021 according to the index) (page 246):

21/22 Drawings Statement

Partner name	James Townsend
20/21 Performance award	£35,000
20/21 Net performance award	£19,602
20/21 Points	40
20/21 Profit share @ £5,602 per point*	£224,080
20/21 Net monthly draw @ £5,000 per point	£9,626
20/21 Effective tax rate	44%
May 21 monthly draw @ £5,711 per point	£9,630
21/22 Points	45
21/22 Budgeted profit share @ £5,711 per point	£256,995
21/22 Monthly gross profit share	£21,416
21/22 Monthly net of tax profit share	£11,873
21/22 Withholding	15% <u>£1,775</u>
Net monthly draw from July 21	£10,099
21/22 Effective tax rate	45%
20/21 Rung	5
20/21 Capital	100,000
20/21 Voting	1
20/21 Withholding rate	5%
21/22 Rung	6
21/22 Capital	150,000
21/22 Voting	2
21/22 Withholding rate	15%
21/22 Current account buffer	25,000
Movement in capital	50,000
Catch up required in July for under draw in May and June	£937
*20/21 draft statutory profit subject to BDO review	

79. This statement reflects the increase to 45 Equity Points, at a budgeted PPP of £5,711 x 45 = a projected profit share of £256,995.

80. On the 27/1/2022 the claimant gave notice of his 'retirement' under clause 24 of the respondent's LLP Deed (page 252). The claimant said he understood his retirement would take effect on the 30/9/2022 unless an earlier date was agreed.

81. Two other partners had given notice of retirement and the three of them sought to collectively agree their departure terms. The claimant's colleague sent an email to Mr Emden and the Chief Operating Officer on the 24/6/2022

setting out their understanding of the respondent's proposal (page 253). The email set out their interpretation that they 'would move from equity to fixed share'. It set out the reason for this was to avoid the need to provide specialist management accounts for each of their respective termination dates. The email also understood they would 'take the estimate profit per point and effectively fix this as our remuneration as fixed share partners'. There was then a discussion about withholding part of the profit share above and beyond that needed for their individual tax liability.

82. On the 12/7/2022 the claimant emailed Mr Emden and again referred to being (page 257):

'given the option to move to fixed share status during the present accounting year (FY 22/23), something each of us agreed made sense and avoided the need for each of us to instruct an accountant at the firm's cost to forensically examine the firm's accounts, make reasonable projections as to Profits and produce management accounts.'

83. Mr Emden responded on the 25/7/2022 (page 260). He explained (page 262):

'Our proposal to vary the partner's status was intended to address the potential disadvantage of relying on termination date management accounts (with an inherent built in seasonal disadvantage). There is no compulsion to move to [fixed-share partner] status but if not then the literal language relating to management accounts should apply.

...

As stated , you all voluntarily entered into the deed and all voluntarily decided to leave the partnership in accordance with the terms of the deed. Insofar as relying on mid-year management accounts is regarded as unfair, we have sought to address this by proposing an alternative arrangement, with you becoming Fixed Share Partners.

We have tried to be fair to you, but if you do not wish to accept the proposal that we have made, then that is entirely your prerogative and we will draw up Management Accounts in accordance with the deed, up to your respective Termination Dates.'

84. During August 2022 further emails were exchanged and further financial information was requested.

85. In respect of the percentage 'withholding' for each of the three departing partners, on the 22/9/2022 the claimant's colleague (he was copied in to the email) proposed 5% for herself and 15% for the claimant and the other colleague (page 286).

86. Mr Emden wrote to all three departing partners on the 25/9/2022 and then to the claimant individually approximately 15 minutes later (page 287). He

proposed that after taking into account 'the favourable tax and disallowables treatment for fixed share partners and reducing your withholding to 10%, your monthly net draw will be £10,232, which I trust will be acceptable to you.'

87. On the 26/9/2022 the claimant emailed Mr Emden to say that he would be £6,000 gross/£4,000 net worse off than he had anticipated. He made a counter offer of agreeing to 'moving us to fixed share and reducing our withholding from 15% to 7%' (page 291).
88. Mr Emden replied on the 27/9/2022 at 17:20 and said '... your compromise suggestion is accepted. ... I am pleased that we got there in the end!'. The claimant responded at 17:28 and acknowledged Mr Emden's email (page 290).
89. If it is the claimant's case that he was not a fixed term partner for the FY 2022/2023, that is not accepted. An offer of reverting to a fixed-share partnership was made. The claimant made a counter-offer, which incorporated reducing the percentage withholding to 7%, which Mr Emden accepted.
90. The claimant underwent an exit interview on 29/9/2022 (page 294). The claimant said that his reason for leaving was his relationship with his Head of Department. In response to a question regarding improvement/change he referred to the 'remuneration structure is an issue'. He did not however expand upon that or refer to his own remuneration. He made no mention of any underpayment. When asked whether he felt he was paid fairly compared to his market peers, he said that as per his discussions with Mr Emden he wanted profits equivalent to one-third of what he 'brought in'. He referred to being on 45 Equity Points and his Head of Department being on 55. He said the remuneration structure was not transparent enough (page 295). He was asked what one thing the respondent could do to make him stay would be; and he replied that the issue was he could not work with his Head of Department (page 295).
91. On the 30/9/2022 the Head of HR wrote to the claimant to confirm that would be his last date of service (page 296). She confirmed his status had changed to that of a Fixed Share Partner on 1/5/2022 and that his fixed annual share was £226,576 pro-rated. The covering email asked the claimant how many days holiday he had taken since 1/5/2022. The claimant replied that he had not taken leave since May and had worked every day. He said that 12.5 days showed as accrued holiday (page 300). The schedule to the Accession Agreement provided for 30 days holiday per annum (page 148). $30 \text{ days} / 12 \text{ months} = 2.5 \text{ days per month} \times 5 \text{ months (May to September 2022)} = 12.5 \text{ days}$. The Head of HR responded on the 4/10/2022 that the claimant had accrued '8.5 days of statutory leave' (page 229).

92. After the respondent's FY 2021/2022 had been audited, the claimant raised some questions via email in respect of monies which had been withheld. On the 5/1/2023 the respondent's Senior Financial Accountant sent the claimant the statement of his current account and tax reserve (page 304).
93. The statement (page 301) referred to a profit share from 1/5/2022 to 30/9/2022 of £110,169.
94. On the 20/1/2023 the claimant wrote to the respondent and referred to his offer letter (page 311). He also referred to the reduced PPP of £4,017 'subsequently budgeted for'. He indicated his offer letter stated that he would be awarded 'such number of equity points as reflect a budget share for the financial year 2020/21 of £225,000 which at the current time would be 40 points'.
95. He went onto refer to the reduced PPP of £4,017. He calculated that $\frac{£225,000}{£4,017} = 56.011$. He therefore contended that he was 'entitled' to 56 Equity Points for the FY 2020/2021. He stated that the Management Committee had in fact awarded him 40 Equity Points for the FY 2020/2021. He claimed he was contractually entitled to 56 Equity Points. He referred to the audited PPP for FY 2020/2021 of £5,612 and he therefore claimed an under payment of £89,272 [$56 \times £5,612 = £314,272 - £225,000 = £89,272$].
96. The claimant stated (page 311):
- 'I therefore calculate that during the period 1 May 2019 - 30 September 2022, £176,725.67 has been unlawfully deducted from my wages and this further sum with interest is now properly payable to me and should be paid promptly to me on top of the amounts reflected in my current and tax statement.'*
97. Mr Emden rebutted the claimant's claim and referred to his email of 14/6/2020.
98. Further emails were exchanged and that resulted in a 'letter before claim' from the claimant to Mr Emden on the 10/2/2023 (page 320). The claimant maintained he was contractually entitled to 56 points, not 40 as at 1/5/2020. He suggested that for the FY 2021/2022 his Equity Points should have been 61 (56 plus the 5 Points awarded on 1/5/2021) (page 322). He referred to Mr Emden's variation in June 2020 being *ultra vires* (page 321). The claimant did not develop this particular argument until in his claim form he suggested that Mr Emden's variation was *ultra vires* as it was not authorised in the LLP Deed or by the members (page 25).
99. The claimant went onto claim that Mr Emden was in his third term as Managing Partner, in breach of the LLP Deed and therefore, any actions taken by Mr Emden after the end of his second term as Managing Partner (which ended on the 30/4/2021) were *ultra vires* (page 26).

100. Although amicable resolution and mediation was discussed, the claimant presented his claim on the 3/3/2023.

The Law

101. Both parties referred the Tribunal to sections 13 and 27 of the ERA:

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.

(8) In relation to deductions from amounts of qualifying tips, gratuities and service charges allocated to workers under Part 2B, subsection (1) applies as if—

(a) in paragraph (a), the words “or a relevant provision of the worker’s contract” were omitted, and

(b) paragraph (b) were omitted.

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,

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

(c) statutory maternity pay under Part XII of that Act,

(ca) statutory paternity pay under Part 12ZA of that Act,

(cb) statutory adoption pay under Part 12ZB of that Act,

(cc) statutory shared parental pay under Part 12ZC of that Act,

(cd) statutory parental bereavement pay under Part 12ZD of that Act,

(ce) any amount of qualifying tips, gratuities and service charges allocated to the worker under Part 2B of this Act,

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),

(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,

(fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act.

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(j) remuneration under a protective award under section 189 of that Act, 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,

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

(d) any payment referable to the worker's redundancy, 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.

(5) For the purposes of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is—

(a) of a fixed value expressed in monetary terms, and

(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a

time) for money, goods or services (or for any combination of two or more of those things).

Conclusions

102. The parties did not particularly focus on the Tribunal's jurisdiction under the ERA. Mr Mansfield submitted that a partnership profit share is not 'Wages' as per s.27(1) ERA. He said that the profit share payments distributed by the respondent to Equity Partners are not sums payable in connection with their employment. Rather, they represent an allocation and distribution of the firm's profits, including profits generated by other partners. A payment of a profit share is also in connection with an individual being a member of a partnership who has invested in the firm's working capital. Finally, he suggested the distribution of profits is akin to dividends being paid to owners of shares in a limited company; he pointed out that like dividends, there is a risk that a share of partnerships profits may go up or down, depending upon performance.
103. Mr Cordrey said the respondent was not able to cite an authority in respect of its position; however, equally, he was not able to cite any authority that a partnership profit share comes within the definition of Wages as per s.27(1) ERA. He contended that monthly amounts paid consistently to the claimant over 32 months were clearly sums 'payable to the worker in connection with his employment' and an 'emolument referable to his employment'.
104. Both parties accepted that as per Bates van Winkelhof v Clyde and Co LLP 2014 ICR 730, SC, the claimant was a worker. Although Mr Mansfield noted that that decision was in relation to status to bring a whistleblowing claim.
105. In the absence of any quoted authority, the claimant was not 'in employment' with the respondent. There was no evidence that he was or was regarded as in employment by the partnership. The common law distinction between pure partners and a member of an LLP, contrasted with an employee, applies. The payments made to the claimant were not an emolument referable to his employment as he was not *in employment*. The payments made were an advance of an anticipated profit share.
106. The remuneration the claimant received was not therefore Wages under the ERA and the Tribunal has no jurisdiction to hear the claim under the ERA.
107. If that interpretation of the law is incorrect and as it appears the claimant is able to make a claim as a Worker under the Working Time

Regulations 1998 in respect of holiday pay, the Tribunal has proceeded to determine the remaining claims.

108. As already observed, there is no claim from the claimant in respect of the period 14/1/2020 to 30/4/2020 when he was a fixed-share partner on a share of £225,000. That is notwithstanding the period he set out in his email of the 20/1/2023 (page 311).

109. In respect of the FY 2020/2021, the Tribunal concludes that the claimant was never contractually entitled to a specific number of Equity Points. He was only ever contractually entitled under the Accession Agreement to (page 147):

‘As an Equity Partner, the Partner shall be allotted Equity Points to the value of £225,000 or more. The Capital contribution shall remain at £100,000.’

110. That Agreement also provided for the claimant to cease being a Fixed Share Partner and to become an Equity Partner on 1/5/2022.

111. What then happened was based upon the indication given to the claimant in his offer letter on 21/8/2019. He was allocated 40 Equity Points. That was based upon the budgeted PPP (of £5,730) for FY 2019/2020: $£225,000 / £5,730 = 39.27$, rounded up to 40 Equity Points.

112. The Accession Agreement did not specify which PPP would be used as at 1/5/2020. It could potentially have been the budgeted figure for FY 2019/2020 of £5,730, in which case the allocation was correct. Or, it could have been and in fact it was conceded by Mr Emden that it should have been the budgeted PPP figure for FY 2020/2021 of £5,291. Besides that concession, applying *Contra Proferentem*; the most favourable interpretation for the claimant is to use the PPP figure of £5,291.

113. That then provides for a calculation of $£225,000 / £5,291 = 42.53$. Based upon the wording of ‘points to the value of’ and as there are only whole points, that should have resulted in an allocation of Equity Points of 43 as at 1/5/2020, not 40.

114. The 40 Equity Points were however allocated and there was no attempt by the respondent to mislead or to misrepresent matters to the claimant. The offer letter had indicated 40 Equity Points would be allocated. The KPI statement of April 2020 indicated 40 Equity Points, albeit that referred to the FY 2019/2020. It also indicated a position on the Rung of 5, which was correct based upon 40 Equity Points (page 156).

115. The Tribunal finds that had the claimant taken up this issue with the allocation of his Equity Points, the respondent would have agreed and have amended the number of Points. Mr Emden had no issue with conceding that

during his evidence, subject to checking the arithmetic (whether it was 42 or 43). He also said that as far as the respondent was concerned, the claimant had joined on 40 Equity Points on the 1/5/2020 as he did not give it a moment's thought, but with the benefit of hindsight, he should have been on 43 Equity Points.

116. In any event, the Accession Agreement provided for the claimant to become an Equity Partner, which took effect on 1/5/2020. Then for the claimant to be allotted Equity Points to the value of £225,000 or more (page 147). At the point that allocation crystallised, on the 1/5/2020, the allocation was 40 Points; accepting it should have been 43 Points. The budget was set for the FY 2020/2021 and it took effect on the 1/5/2020.

117. There was specifically no entitlement to 56 Equity Points at the 1/5/2020 on any interpretation of the claimant's claim.

118. The budget was then revised on 6/5/2020 to reflect the impact of Covid-19 (pages 160 and 162). That revised budget was shared with all Partners on 13/5/2020 (page 164). That revised budget reduced the budgeted PPP for FY 2020/2021 from £5,291 to £4,017 (page 166). The forecasted income and net profit were reduced to reflect the circumstances at the time.

119. Mr Emden became aware that the revised FY 2020/2021 budget could potentially have an unfair impact upon the claimant and other newly appointed Partners. As the respondent's remuneration structure is set around the value of the PPP, if there was a great variance in that figure and a reduction, it could potentially reduce Partners' income. By way of illustration, the figures were (page 276):

	Budgeted figure	Actual figure
FY 2019/2020	£5,730	£5,504
FY 2020/2021	£5,291*	£5,612
FY 2021/2022	£5,711	

* save that the figure was amended to £4,017 on 14/5/2020

120. The FY 2020/2021 PPP revised figure represented a potential reduction in income of almost 23%; in rough terms, nearly a quarter.

121. For the claimant therefore, the projection of his profit share was 40 PPP x £4,017 = £160,680. Had the claimant been allocated 43 PPP, the calculation would have been 43 x £4,017 = £172,731. That is, give or take, an additional £12,000 pa.

122. There was no contractual right for the Equity Points allocated on the 1/5/2020 to be reconsidered. The Equity Points were fixed as at 1/5.

Whether or not the claimant was allocated 40 or 43 points on 1/5/2020, there was no mechanism for that to be revisited; other than by the parties by agreement. That is what subsequently happened on the 10/6/2020. The Tribunal concludes that all the contemporaneous documentation from the time the offer was made, when the Accession Agreement was accepted and to the revisions made in June 2020, that what both parties intended to achieve was a profit share of £225,000.

123. Mr Emden sought to achieve this objective for the claimant. He could have said to the claimant, 'you were allocated 40 Equity Points, based upon the revised budget will equate to a profit share of £160,000, I know that's £65,000 less than you expected (with a reasonable level of risk) and than we intended, but that's the bargain which was struck'. That was based upon the Equity Points allocated to the claimant, which were as per the indication in the offer letter and taking into account there was never a contractual agreement to a specific number of points.
124. Mr Emden proposed a variation to the contract and put forward two alternatives to the claimant. Based upon the 40 Equity Points he had been allocated, the claimant could proceed with that allocation and take his chances that the respondent would perform better than the revised budget. Or, he would remain on the 40 Equity Points and revert to a fixed profit share of £225,000.
125. By way of illustration, although it would not be known until October 2021, the actual PPP figure for the FY 2020/2021 was £5,612. That exceeded the budgeted £5,291, which had been reduced to £4,017 as a result of Covid-19. Had the claimant taken the option offered by Mr Emden to remain on 40 Equity Points, for the FY 2020/2021 he would have received profits of $40 \times £5,612 = £224,480$.
126. At the time however, in view of the claimant's domestic circumstances (building works), his personal circumstances in that he had moved to the respondent at the beginning of the year, his clients had transferred and his assistant had also either joined or was in the process of joining him and set against the backdrop of the pandemic, with all the attendant uncertainty; he accepted the variation of his contract proposed by Mr Emden.
127. Whilst it is accepted the claimant was not informed of the content of the meeting on 10/6/2020 before it took place, the Tribunal concludes that the meeting took place as described by Mr Emden; in that he set out the proposal and the claimant accepted the option of a fixed-equity-share of £225,000 for the FY 2020/2021. Not only was this what both parties had contracted for, it removed the vast majority of risk for the claimant at a time of great uncertainty. The claimant may have been confident that his area of work would not suffer in an economic downturn as his clients would still need

advice. The same could not necessarily be said of other areas of business of the respondent at that time. There was a significant risk in June 2020 that the respondent would not even achieve a PPP figure of £4,017 and that any share of any profit (if any) could be a much lower figure.

128. It is not accepted that the claimant was rushed into a decision or that Mr Emden intimidated him, as he now claims. It is accepted as per Mr Emden's evidence that if the claimant had requested time to reflect, he would have been granted it. It is more likely that the claimant recognised the variation Mr Emden proposed of a fixed-share, was a far better deal than the position he was currently in, having been allocated 40 Equity Points on 1/5/2020 and even if he should have been awarded 43 Points, the variation Mr Emden offered was more beneficial to him.
129. It is not accepted there was no consideration for the variation. The claimant accepted a reduced risk to his variable share of the respondent's profits, with a fixed-share of the profits.
130. There was no unauthorised deduction from the remuneration paid to the claimant in the FY 2020/2021. The offer was varied by Mr Emden and the claimant accepted the variation. This was reflected in Mr Emden's email of the 14/6/2020 (page 180).
131. The respondent recognised the claimant's contribution to it and his performance in the FY 2020/2021, in what were for all, difficult circumstances. It increased his Equity Points to 45 for FY 2021/2022 and he was paid a generous and discretionary award of £35,000, which represented an almost 16% uplift on his profit share. This does not indicate a management who were attempting to deprive the claimant of any contractual rights which he had.
132. Despite the claimant being on 40 Equity Points, rather than on 43 and besides the discretionary award, he was allocated an additional 5 Equity Points for the FY 2021/2022. Again, this indicates the respondent's fairness in its dealings.
133. Furthermore, it is clear that despite the claimant contending for a profit share of £300,000 and an additional 10 Equity Points (noting that at this stage the claimant accepted the 40 Points he was allocated and that he did not query this, even allowing for the fact it was acknowledged he should have been allocated 43 Points); this was not acceptable to the respondent for numerous reasons. Notwithstanding the claimant's performance, he had only been at the respondent for, around 16 months. This was against the backdrop of the pandemic and whilst the claimant had done well in terms of his billings; unlike the vast majority of the other Partners, he had financial security in respect of his fixed-share arrangement.

134. It was accepted that the respondent judged performance over at least a three year period, as that then accounted for any 'one-off' year, when performance was exceeded or where a partner underperformed.

135. Mr Emden made several comments in respect of the claimant's self-evaluation. He acknowledged the 'strong financial year' and that being the main reason he was 'underpointed' and that the award of £35,000 reflected that and the 'underpointing'. Mr Emden said that 'getting £300k as he asks is a bit toppy'. In respect of the claimant requesting a third of his billings, a third was more like a figure circa '£266k' was Mr Emden's view (page 240). The claimant's profit share including his fixed-share and award, equated to £260,000.

136. The comments continued (page 242):

'As only based on one year's performance 5 points is a decent level increase in a short period and if performance continues at this (or indeed a higher) level then the upward trajectory will continue, with additional points. 5 points is amongst the highest'

137. It is clear from this contemporaneous comment, that an additional five points was 'amongst the highest' and the respondent was never going to award the claimant anything like the ten points he contended for. The claimant would have known as a negotiator that the respondent would not have awarded ten points and that the five points he was awarded was the maximum he could expect.

138. Mr Emden also said, that even if the claimant had been on 43 Points, he would only then have been awarded an additional two points, to put him on 45 Points.

139. That is accepted, as Mr Emden gave measured and genuine evidence and it is substantiated by the fact that the claimant's Head of Department, was according to the 'ladder', on 55 Points (page 351). Mr Emden was on 110 Points and it is not accepted that a newly appointed Partner, who had worked at the respondent for one full FY, while having the benefit of a fixed-share during the pandemic, would not have been awarded any of:

$$40 \text{ Points} + 10 = 50$$

$$43 \text{ Points} + 10 = 53$$

On the claimant's own case, 55, 56 or 57 Points + 10 = 65/66/67

140. The claimant had accepted the confirmation of the allocation of 40 Points on the 14/6/2020. That then fed into the additional award of five Points

early in the FY 2021/2022. The net result of that was that the claimant was entitled to a profit share of 45 multiplied by the actual (after the accounts were audited) PPP for the FY 2021/2022. He was not entitled to more Equity Points.

141. It is not therefore accepted that there was any unauthorised deduction from the claimant's profit share; which it is not accepted amounts to Wages for the purpose of the ERA.

142. In view of the findings made, the Tribunal does not consider it proportionate to deal with the time limit issues raised by the respondent and in the limited amount of time of the hearing listed for what was a very basic claim (the original hearing was listed for two hours then extended to three hours) this was not purposefully advanced.

143. Turning to the list of issues as set out above, the conclusions are:

1 The profit share payments which the claimant received were not Wages for the purpose of the ERA. Furthermore, the respondent's submission that the payments made to the claimant were an 'advance' of his share of the respondent's profits is accepted. The profits crystallised at the end of each FY on the 30/4. The payments made to the partners each month were drawings, defined as (page 67):

*'sums drawn by any Partner on account of any **anticipated profits of the Firm** and any other sums paid or assets applied for his personal benefit by the Firm (other than for repayment of any such expenses as are provided for in this agreement) including in particular but without limitation any Tax paid on his behalf by the Firm;'*

[emphasis added]

3.2 The claimant agreed to the variation of his contract to a fixed-profit share of £225,000 in FY 2020/2021.

3.3 The claimant was not entitled to 56 Equity Points, he agreed/accepted the variation proposed by Mr Emden on 10/6/2020 as evidenced in his email of 14/6/2020 and he was allotted 40 Points.

4.2 The claimant's profit share was paid based upon the award of 45 Equity Points (40 Points from FY 2020/2021 plus 5 additional Points for FY 2021/2022).

4.3 The claimant was awarded 45 Equity Points on 1/5/2021 in accordance with the agreement as varied on 10/6/2020. He was not entitled to 56 Points.

5.2 By agreement, the claimant converted his equity share to a fixed-share partnership for the FY 2022/2023 which precipitated his exit from the respondent.

5.3 He received a fixed-share of the profits of £94,407.

6 The claimant agreed to the variation to his contract in his favour on 10/6/2020 and the result of that was that he agreed to an allocation of 40 Equity Points. The impact of that was that any offer of an increase to his Points, was based upon that starting point of 40 Points.

8 Mr Emden was not acting *ultra vires* at any point in his tenure as Managing Partner. This aspect of the claimant's claim should have been withdrawn once he had the respondent's full explanation for what appeared to be to him, Mr Emden's third term as Managing Partner. In fact it was his second term and was in accordance with the LLP Deed.

13 It is not clear what the claimant's position is on holiday pay. He claimed 12.5 days stating on the 30/9/2022 he did not take leave since May and 'worked every day'. He agreed in evidence that this was not correct when he was challenged upon this aspect. He was then told he had accrued 8.5 days of 'statutory leave'. It is not clear the basis upon which the respondent referred to 'statutory leave', whereupon the claimant was contractually entitled, as a partner, to 30 days' leave pa. As per this issue, the claimant claims a further £1,958.48. Based upon the list of issues, it is not clear if this is the difference between 8.5 days or 12.5 days. Or, whether or not this is based upon a claim in respect of the number of Equity Points awarded. The claimant's updated schedule of loss refers to the holiday pay calculation being 8.5 days, based however upon a claim of £1,975.23 calculated as $\text{£}60,420 / 260 = \text{£}232.38 \times 8.5$. This therefore appears to be based upon a calculation of the figure of £65,420 being a pro rata deduction in respect of the FY 2022/2023 of £60,420 for the entire FY.

Based upon this calculation, it is not accepted there was any underpayment of holiday pay under the ERA for the reasons already stated. Under the Working Time Regulations 1998, it is not accepted there was any underpayment. The claimant was paid for the 8.5 days he had accrued at the prevailing rate.

14 The claimant's claim for consequential loss is not understood. He refers to consequential loss arising out of the respondent's failure to pay him the sums due (page 28). He is not entitled to the 'sums due' and in any event, he has not pleaded or clarified how he claims interest on a bond on at a loss of 3%. The claimant referred in his ET1 to 3% loss (no basis for this figure was specified) of the unquantified

sum at paragraph 44.6 and cross-referred to paragraph 43.4. Notwithstanding there is no paragraph 43.4, the claim does not make sense. The list of issues cross-refers to paragraph 44.6. The claim is not sensibly pleaded and cannot be understood. The claimant has not referred to any legislation or any authority.

144. For those reasons, the claimant's claim is not well-founded and is dismissed.

Employment Judge Wright
Date: 9 October 2024

Sent to the parties on
Date: 10 October 2024