

Neutral Citation Number: [2025] EAT 71

Case No.: EA-2023-001336-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 May 2025

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

Between :

MR ALASTAIR DOBBIE

Appellant

- and -

PAULA FELTON T/A FELTONS SOLICITORS

Respondent

The **Appellant** appeared in person
Ms Susan Chan (instructed by **Feltons Solicitors**) for the **Respondent**

Hearing date 25 March 2025

JUDGMENT

SUMMARY

DEDUCTION FROM WAGES

The claimant was engaged by the respondent, a firm of solicitors, under a consultancy agreement pursuant to which he carried out duties as a consultant and was entitled to 40% of the fees billed, paid and received by the respondent firm. The agreement included an “entire agreement” clause and said that it could only be varied by an agreement in writing signed by the parties. The claimant claimed fees in respect of work billed in relation to one client, referred to as “client A”, as unlawful deductions from wages. The employment tribunal held that (i) there was a separate oral agreement governing the work done for client A; (ii) alternatively, under the written consultancy agreement, the claimant was only entitled to fees calculated on the basis of fees billed and paid for work he had done personally for client A and not for work done by other fee earners. The claimant appealed on three grounds.

The appeal was dismissed. The employment tribunal was correct to decide that under the written consultancy agreement, properly interpreted, the claimant was only entitled to 40% of the fees billed, paid and received in respect of the work he personally did for client A (and not for fees paid in respect of work done by others). Although the employment judge was wrong to find that there could be a separate oral agreement governing the work for client A in light of the “entire agreement” and “no oral variations” clause following *MWB Business Exchange Centres Ltd v Rock Advertising* [2019] AC 119, this error was academic and immaterial because of her correct conclusion about the interpretation of the written consultancy agreement. That conclusion also meant that the respondent did not make a deduction from wages.

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This appeal is brought by Mr Dobbie, who was the claimant before the employment tribunal (“ET”), against a judgment of Employment Judge Elliott (the “EJ”) sent to the parties on 4 October 2023.
2. I shall refer to parties as the Claimant and the Respondent, as they were before the ET.
3. The Claimant appeared in person and the Respondent was represented by Ms Chan. I am grateful to both for their submissions.

Background

4. The Claimant is a solicitor and non-practising barrister. The Respondent is a firm of solicitors who at the material times was operating as a sole trader.
5. The background to this matter is set out in judgment of EJ Spencer sent to parties on 1 November 2017. The Claimant began working for Respondent from 2010, having been called to the bar but not having undertaken pupillage. After he was admitted to the roll as a solicitor on 6 March 2014, he worked for the Respondent as a consultant under the terms of a written agreement dated 6 March 2014 (the “Consultancy Agreement”). The parties used the Law Society’s standard consultancy agreement, adapted for their use.
6. **The Consultancy Agreement.** The meaning and effect of the Consultancy Agreement is central to this appeal. The Respondent was referred to as the “Practice” and the Claimant was defined

as the “Consultant”. By clause 2 he was to carry out “the Consultant’s duties from the date of this Agreement”. The Agreement was for an initial period of six months but could be renewed.

7. Under the heading “Remuneration”, clause 3 stated:

“The Consultant shall be paid a consultancy fee of 40% of the fees billed which have been paid and received by the Practice net of VAT and disbursements on receipt of an appropriate invoice which shall be rendered at the end of each month by the Consultant. Where the Consultant has introduced the client to Feltons the consultancy fee shall be 50%. The Practice will pay the Consultant within 30 days of receipt payment [*sic*] from the Client. For the sake of clarity the Consultant is self-employed and is not an employee of the Practice and it is the responsibility of the Consultant and the Practice to obtain money on account from Client’s [*sic*].”

8. The Consultancy Agreement went on to state that the Respondent would repay to the Consultant out of pocket expenses (clause 4). Clause 5.1 stated that the “Consultant shall perform the Consultant’s duties in a good, efficient and proper manner consistent with the standards expected of a professional person”. He was expected to work for such period as was reasonably necessary to perform his duties (clause 5.2). By clause 5.3.1 the Consultant was required to work “as and when there is work available to do and he accepts the instruction for that work”, but under clause 5.3.2 he could not be required to work.

9. Clause 6 repeated that the Claimant was not to be deemed an employee of the Practice but was engaged as a self-employed contractor. After various clauses dealing with his authority to bind the practice, confidentiality and outside interests, the Agreement set out the events, such as serious misconduct, entitling the Respondent to terminate the agreement forthwith (clause 10). By clause 11 either party could terminate the agreement on one month’s notice for any other reason.

10. Clause 14 contained an “entire agreement” and “no oral variation” clause. It stated:

“The provisions of the First and Second Schedules hereto form part of this Agreement which contains the whole of the terms agreed to in respect of the Consultant’s appointment as from the Commencement date and is in substitution for any previous agreement or arrangement between the Consultant and the Practice and shall only be capable of being varied by a supplemental agreement in writing signed by or on behalf of the parties hereto”

11. Under the heading “The Consultant’s Duties”, the First Schedule stated:

“1. To conduct the affairs of those clients of the Practice as shall be referred to his [sic] by the Practice PROVIDED ALWAYS that such matters shall be within the reasonable sphere of competence and experience of the Consultant.

2. Such other duties as the Consultant may reasonably be expected to carry out taking into account his particular skills and areas of expertise”

(The Second Schedule contained post-termination covenants)

12. Factual details of the Claimant’s work with the Respondent are set out in the reasons of EJ Spencer. The Claimant’s employment with the Respondent ended on 15 March 2016 for reasons which are not material to this appeal.

13. **The work for client A: pleadings and early tribunal judgments.** The appeal is focused on the work done for one particular client, referred to as “client A”, and the amount payable to the Claimant in respect of that work. To understand the appeal it is necessary to trace the procedural history and findings of different tribunals.

14. In his claim form received on 21 July 2016 the Claimant raised various complaints, including automatically unfair dismissal for whistleblowing under section 103A of the Employment Rights Act 1996 (“ERA”). He also claimed for breach of contract and unlawful deduction from wages. In the “grounds of claim” annexed to his claim form, the Claimant contended that he was employed on the terms of the Consultancy Agreement (§2). He also alleged that he entered into an oral agreement with the Respondent for his engagement on work for the client now referred to as client A, contending it was agreed in January 2016 he would receive a fixed fee of £10,000 a month (§7). In the subsequent

section dealing with the deduction from wages claim, he claimed for both 40% of *all* fees received by the Practice - and not just those attributable to his personal work - and, in the alternative, £10,000 a month as a fixed retainer.

15. In her grounds of resistance, the Respondent denied the claims.

16. The facts relevant to the dispute about the fees payable to the Claimant in respect of client A emerge from four different judgments of the tribunals, all produced before the judgment which is the subject of this appeal.

17. The first chapter was the preliminary hearing before EJ Spencer, who decided that the Claimant was not an employee of the Respondent but was a worker. She therefore dismissed the claims of unfair dismissal and breach of contract. She found that, at the time the parties entered into the Consultancy Agreement, the Claimant was aware of the “standard arrangement” that the Respondent had with other consultants, by which they were paid 40% of the fees billed (§7). In practice, she found that the Claimant was paid a percentage of the fees billed against invoices he submitted (reasons §22). While she noted that the Consultancy Agreement was “not wholly clear” on the point, she said that the “accepted practice” was that he was paid a percentage of the fees which related only to the work he personally had undertaken (§22). She also made some findings about the work the Claimant did for client A from 2014: see §§25-26.

18. A subsequent hearing took place before EJ Gordon and members to decide the “live” claims of detriments for making protected disclosures and unlawful deduction from wages. In the event the tribunal only dealt with the protected disclosure complaints, as explained in its reasons of 6 December 2019 at §11, which it dismissed. The judgment was later overturned on appeal. However, the EJ

Gordon tribunal made some findings about client A, noting it was an important client of the Respondent firm, the Claimant had been working on litigation for it and, at the relevant time, the Claimant was being paid on the basis of 50 hours per month, receiving 40% of the fees: see §§20-22.

19. The third chapter in the story are the reasons of EJ Elliott, listed to deal with the outstanding claim for unauthorised deductions from wages, reasons for which were sent to the parties on 7 December 2020. By this stage, the Claimant's claim relating to the work done for client A was for two months' work in January and February 2016, with the Claimant alleging he was entitled to £10,000 instead of £5,000 each month pursuant to an oral agreement with the Respondent reached on 19 January 2019: see issues at §10. There was a separate issue whether the Claimant was entitled under Consultancy Agreement to the interim bills paid by client A in 2016 and, if so, whether the Respondent was entitled to reduce the amount paid on the basis that his work in January and February 2016 was, the Respondent argued, of no or little value.

20. After adopting the earlier findings of the EJ Gordon tribunal about client A, EJ Elliott stated (§30):

“There was a separate arrangement for the Claimant in relation to his work for this client. It was not in dispute that it was initially agreed that the Claimant would be paid for £5,000 a month for working for this client, on the basis that he was doing at least 50 hours a month for that client.”

She found there was no agreement that the sum due to the Claimant would be reduced if costs draftsman did not think work justified the hours billed or otherwise subject to “clawback”: §§31-32. She also found on the balance of probabilities that it was not agreed in January 2016, as the Claimant had contended, that he would be paid £10,000 a month because, among other matters, there was no written record of any such agreement: see §§37-40.

21. These findings fed into EJ Elliott's conclusions at §§68-69, in which she decided that

Claimant was entitled to £5,000 a month, not £10,000, in respect of client A but the Respondent could not reduce his pay for substandard work. The EJ considered, however, that she could not finally determine all the sums due to the Claimant by way of the wages claim because, for example, of a claim for additional compensation under section 24(2) of ERA, so that unless the matter could be agreed beforehand, the final determination was to be done at a remedies hearing.

22. The fourth chapter in the history was a reserved judgment and reasons sent to the parties on 14 June 2023 (EJ Goodman and members). It followed the Claimant's successful appeal to the EAT against the judgment of the EJ Gordon tribunal, the protected disclosure claims being remitted to a new tribunal, and a later tribunal decision holding that the Claimant had made two protected disclosures. Although the issue for the EJ Goodman tribunal was whether the Claimant had been subject to a detriment because of those disclosures, the tribunal made some further findings of fact about the billing of client A: see reasons at §§40-52. Some of these findings were referred to in the judgment subject to this appeal.

23. Following some problems with a legal claim issued on behalf of client A, the Goodman tribunal found that a meeting took place with the client in Stuttgart in October 2015, attended by the Respondent and Claimant. During a part of the meeting at which the Claimant was not present, the Respondent explained that other fee earners beside the Claimant would work on the file and it was agreed that there would be a monthly retainer for the next four months and itemised bills thereafter (§46). This agreement led to a client care letter being sent to client A, showing a retainer of 50 hours each month for the Claimant and 50 hours each month for other members of the team, amounting in total to £25,000 per month from 1 November 2015 (on the basis of a rate of £250 per hour for all fee earners).

24. The EJ Goodman tribunal also found that, in the course of discussions between the Claimant and Respondent in December 2015 and January 2016, the Claimant told the Respondent that his work for client A had increased and he wanted to be paid £10,000 a month for January and February 2016. The EJ Goodman tribunal noted that on 25 February 2016 the Claimant had sent an invoice for his work in January for client A based on a fee of £10,000 instead of £5,000 (§52).

25. **The judgment subject to appeal.** This brings me to the reasons of EJ Elliott sent to the parties on 4 October 2023 which are the subject of this appeal. The background to this decision was that the Claimant had applied to EJ Elliott for her to reconsider her earlier judgment sent to the parties on 7 December 2020. The parties' arguments about the fees due to the Claimant in respect of client A are summarised at §§32-43 of the EJ's reasons. Just as he argued on this appeal, the Claimant submitted to the EJ she was wrong to find that he was only entitled to £5,000 in respect of the work for client A in January and February 2016 because under clause 3 of the Consultancy Agreement he was entitled to 40% of *all* the fees billed and paid in respect of work for that client - that is, 40% of the £25,000 paid by client A, or £10,000, each month.

26. The EJ dealt with that §§60-70. She accepted that this alternative argument, based on the meaning and effect of the Consultancy Agreement, was in the list of issues for the hearing in December and so should have been addressed (§61). The structure of her reasons in relation to this issue was as follows.

27. First, the EJ again addressed the argument for the Claimant that had been raised at the previous hearing before her, that there had been an agreement reached in January 2016 under which the Claimant would be paid £10,000 each month in respect of client A. She rejected that argument, essentially for the same reasons as she had given in her previous judgment, including the absence of

written confirmation of such an agreement: see §§62-5.

28. Second, the EJ repeated her previous finding that there was a “separate agreement” in place for the work for client A, that Claimant would be paid £5,000 for 50 hours work each month, referring to §30 of her earlier judgment: see §66. Though it was not in dispute that the relevant agreement was oral, the EJ did not address whether this “separate agreement” was permissible because of the entire agreement provision and “no oral modifications” provisions in clause 14 of the Consultancy Agreement.

29. Third, the EJ then turned to consider the Claimant’s argument that he was entitled to all the sums billed in respect of client A under the Consultancy Agreement. She did so on the assumption that she was wrong that there was a separate oral agreement. It was not in dispute that Respondent had invoiced client A for £25,000 in respect of a 100 hours of work for the relevant period, so that if the Claimant were entitled to 40% of all the fees billed, his share was £10,000 - the same as he was claiming pursuant to the alleged agreement in January 2016 (§67). She stated:

“68. Employment Judge Goodman’s tribunal found that the client care letter to client A following the meeting in Stuttgart, “showed a retainer of 50 hours per month for the claimant and another 50 hours for other members of the team, equating to £25,000 per month from the 1st of November”. My finding on reconsideration is that by seeking 40% of the fee billed at £25,000, the claimant is seeking to benefit from the work done by fee earners other than himself. He is not entitled to be paid at 40% of fees billed and paid in relation to work done by other fee earners.

69. As found by Judge Goodman’s tribunal at paragraph 70, there was no time recording for the Client A file. For this reason I find that even if I am wrong on my primary finding, the claimant has not discharged the burden of proof as to his entitlement to be paid an additional £10,000 for work he did on client A. Other fee earners were involved.

70. The claimant is not left without any payment for his work for client A. His entitlement is at £5,000 per month and not £10,000 per month. The original decision in relation to client A is confirmed.”

30. Though not fully spelt out by the EJ, the effect of her judgment was that both routes led to the same destination: the Claimant's entitlement under the separate, oral agreement was to £5,000 each month; and under the EJ's interpretation of the Consultancy Agreement he was entitled to 40% of half of the fees for which client A was invoiced in each of January and February 2016 - that is, 40% of £12,500 (representing his 50 hours' work) or £5,000.

31. In light of that decision and EJ Elliott's rulings on other sums due to the Claimant, the parties agreed the sum due to the Claimant and the EJ awarded that sum plus a sum for interest under s.24(2) of ERA.

32. Following an application by the Claimant, in a letter of 23 October 2023, EJ Elliott refused to reconsider her decision.

The Grounds of appeal

33. Three grounds of appeal were permitted to proceed to a full hearing. They are set out in a notice of appeal dated 12 November 2023.

34. However, it is convenient to begin with ground 3, based on the proper interpretation of the Consultancy Agreement. The other grounds depend, for different reasons, on the Claimant establishing he is right on ground 3.

35. **Ground 3.** Ground 3 is that, properly interpreted and on its natural and ordinary meaning, clause 3 of the Consultancy Agreement entitled the Claimant to payment of 40% of all the fees billed and paid in respect of client A in January and February 2016 and not only 40% of the fees billed and paid for work the Claimant personally did for that client. It is said that the ET failed to apply the

leading authority on interpretation of terms, *Arnold v Britton* [2015] AC 1619 and in effect “invented” an implied term that the Claimant was only entitled to be paid for he personally worked and evidenced.

36. There was no dispute between the parties about the principles to be applied on contractual interpretation. The familiar principles are set out in Lord Neuberger’s judgment in *Arnold* and were endorsed and elucidated in the judgment of Lord Hodge *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at §§8-15, who emphasised that the recent history of contractual interpretation is “one of continuity rather than change” (§15). Lord Neuberger’s summary in *Arnold* is at §15:

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions...”

Lord Neuberger went on to emphasise seven factors relevant to the application of those principles at §§16-23. Those factors emphasise the importance of the language used and cautions against the use of invoking “commercial common sense” in order retrospectively to correct a bad bargain.

37. In his judgment in *Wood*, Lord Hodge gave this further guidance at §13:

“Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis,

for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.”

38. The Claimant gave particular emphasis to “textualism” when it came to interpreting clause 3 of the Consultancy Agreement. He argued that the natural interpretation of clause 3, and the phrase “40% of the fees billed which have been paid” was that the Consultant was entitled to 40% of all the fees paid and received by the Practice. If the clause permitted the Practice to deduct the fees payable in respect of work done by other fees earners, it would say so. So long as the Consultant had accepted the instructions to work for a particular client under clause 5.3.1, the Claimant submitted, he or she was entitled to 40% of the fees billed by the firm for that client. There was no basis, for example, for the firm to reduce the sum payable to the Consultant because it had supervised his work: that was the reason why the Consultant only got 40% of the total, not the remaining 60% which went to the Respondent. That this interpretation might produce consequences that were detrimental or even disastrous for the Respondent was not a sufficient reason to depart from the plain and natural meaning of clause 3: see Lord Neuberger in *Arnold* at §19. If the Respondent wanted to change the plain meaning, it should have sought a written variation under clause 14, which it never did.

39. Moreover, the Claimant argued, the EJ here had not engaged in the exercise of contractual interpretation at all. Rather, at §§68-69 of her reasons she had implied a term into the contract, that the Claimant was not entitled to a fee based on the fees billed and paid in relation to client A by other fee earners. However, the implication of such a term did not meet the strict test of necessity for implying terms: see *Marks and Spencer plc v BNP Paribas Securities Services Trust* [2016] AC 742. The implied term was also barred, he submitted, by the “entire agreement” clause in the Consultancy Agreement.

40. I do not accept these submissions. First, I consider that EJ Elliott was engaged in the exercise of contractual interpretation at §68 and not the exercise of implying a term. She had early summarised the Claimant’s submission about the interpretation of the Consultancy Agreement, in which he relied on *Arnold* at §36. In my judgement, it was that argument, based on contractual interpretation, that she was addressing at §§67-69, as is made clear by §67. Nowhere did she refer to the legal test for implying a term, and nor did she say she was implying a term at §§68-69. Interpreting the reasons fairly and against the background of the arguments advanced by the Claimant, her statement in §68 that the Claimant “was not entitled to be paid 40% of the fees billed and paid in relation to work done by other fee earners” was a succinct answer to the question of contractual interpretation.

41. Second, I consider that EJ Elliott was entitled - and right - to conclude that, properly interpreted in light of the common law principles set out in cases such as *Arnold* and *Wood*, clause 3 of the Consultancy Agreement did not entitle the Claimant to 40% of all the fees billed and paid in respect of the work performed by other fee earners. Rather, as the EJ held, he was only entitled to 40% of the fees billed and paid in respect of his work for client A in the relevant months. My reasons are as follows:

- (1) The statement in clause 3 that the “Consultant shall be paid a consultancy fee of 40% of the fees billed and which have been received by the Practice” is far from being as clear on its natural meaning as the Claimant contended. The “fees billed” could mean the Claimant’s own work or it could mean the fees billed by the whole firm in respect of that client. While the clause does not refer to the fees billed “in respect of the Consultant’s own work” nor does it state that the Consultant is entitled to “40% of all the fees billed by the firm in respect of that client”. The clause is somewhat ambiguous as to what are the “fees billed” and “paid” on the basis of which the 40% is calculated.

(2) The phrase is located in a sentence in which the sum is paid “on receipt of an appropriate invoice which shall be rendered at the end of each month by the Consultant”. That is an important contextual indication that the clause is aimed at work done by the Consultant personally. For, as Ms Chan pointed out, a consultant would not necessarily know, and probably would not know, how much work had been done by other consultants for a particular client. It is hard to see how an invoice simply stating, for example, that “I claim 40% of all the fees billed and paid in respect of client X” would be an “appropriate invoice” within the intended meaning of the clause. It suggests reasonable persons in the position of the contracting parties would have contemplated invoices only in respect of the Consultant’s personal work for a particular client.

(3) The Respondent’s construction, that the clause is restricted to work done personally by the consultant (and which is billed and paid by the client), fits much better with commercial common sense. By contrast, some of the consequences of the Claimant’s interpretation border on the ludicrous. At one stage the Claimant was inclined to suggest that clause 3 meant that he was entitled to 40% of all the fees billed by the firm, even if he had *never* done any work for the particular client(s) - with the outlandish consequence that if the firm billed and was paid £100,000 for the work of 20 other consultants for a client, he was entitled to £40,000 for doing nothing (as would all the other consultants if they were engaged on the same terms): nice work if you can get it. Later, however, the Claimant seemed to accept that he had to have accepted *some* work for the particular client under clause 5.3.2 in order to be entitled to 40% of the total fees paid by that client (and at one stage he accepted he had to have done some work in the relevant one-month billing cycle). I consider he was right to make that concession: if clause 3 entitled him to all the work billed and paid to the firm from whatever source, in my view the Consultancy Agreement would have said so expressly and the need for an invoice

from the consultant would appear to be otiose.

(4) That acceptance by the Claimant is telling, however, because it suggests the need for *some* sort of link between the consultant's personal work and the fees he is paid under clause 3. But this revised interpretation still produces such extravagant results that I do not consider a reasonable person in the position of the contracting parties could have understood clause 3 to bear that meaning. For example, the Claimant contended that even if he only did 10 minutes work for a particular client, he would be entitled to all the fees billed and paid by that client; if the firm billed £500,000, he would be entitled to £200,000 for those ten minutes of his time.

(5) Other provisions in the contract as a whole suggest that the Consultancy Agreement is an agreement of remuneration in return for personal services by the Consultant: a type of wage-work bargain, albeit expressed as fees for consultancy services rather than as wages for personal work. For instance, by clause 2, the Consultant is required to carry out "the Consultant's duties", defined in the first schedule to mean the "conduct of affairs of those clients of the Practice as shall be referred to his [presumably this should say "him"] by the Practice", and §2 of that schedule is similarly focused on personal work by the Consultant. It is those personal duties which the Consultant must perform in a good, efficient and proper manner once he accepts an instruction for particular work under clause 5; and it is for carrying out those personal duties that the Consultant is paid under clause 3. The broader context, in my view, supports a reading that clause 3 is aimed at fees billed in respect of the performance of the Consultant's personal duties.

(6) The background reinforces that interpretation. As EJ Spencer found, at the time of entering the Consultancy Agreement the Claimant was aware of the standard arrangement that

the Respondent had with consultants that they were paid 40% of the fees billed. Reasonable persons in the position of the parties would know that more than one consultant might work for any particular client, and the amount of work done by a consultant might bear very little relationship to the total fees received by the firm. But suppose ten consultants all did some work, however minimal, for a client and the total bill paid was £100,000: each would be entitled to £40,000 under the Respondent's standard arrangement on the Claimant's interpretation, so that the fees to be paid would exceed the amount received. Reasonable persons in the position of the contracting parties when the Consultancy Agreement was made would not, in my view, understand the language of clause 3 as producing such an extraordinary result.

42. For all these reasons I consider that the EJ reached the correct conclusion about the meaning and effect of clause 3 in accordance with the principles in *Arnold* and *Wood*. Just as she decided at §68, clause 3 of the Consultancy Agreement only entitled the Claimant to payment in respect of fees billed and paid in respect of his personal consultancy work for client A and did not entitle him to 40% of the fees billed and paid in respect of work done by others. That was the correct conclusion on the interpretation of the Consultancy Agreement and did not turn on the EJ's inventing an implied term.

43. For completeness, I should note that the Claimant submitted at times that the EJ's treatment of client A was inconsistent with how she approached another client, referred to as "client M", in her earlier reasons of 7 December 2020. The background is set out at §§47-49 of that judgment. It seems a reduction was made to the sum due to the Claimant in respect of his work for client M because the Respondent had to deal with a client complaint. EJ Elliott decided that poor work did not justify reducing the sum payable to the Claimant: see §71. I do not consider the parties' treatment of client M assists in resolving the proper interpretation of the Consultancy Agreement, an exercise which is

based on what facts and circumstances known to the parties at the time that contract was agreed. In any case, the issue on appeal about client A is not about the quality of the work Claimant did but whether he was entitled to be paid a fee based on work done by others.

44. The consequence is that ground 3 of the appeal is dismissed. This means that the Claimant was only entitled to 40% of the amount of fees billed and paid by client A in respect of his work for January and February 2016. At the time the work for client A was billed and paid on the basis of 100 hours work at £250 an hour, half of which was attributable to the work of the Claimant (50 hours) and half to other fee earners: I was shown, for example, the invoice from the Respondent to client A for January 2016. The consequence was that the Claimant was entitled to 40% of £12,500 (50 hours x £250) amounting to £5,000 a month in respect of January and February 2016. That was the basis of the EJ's decision that he was entitled to £5,000 per month, both under the "separate agreement" and under the Consultancy Agreement: see §70. Because I have dismissed ground 3, that conclusion stands so far as it is based upon the construction of the Consultancy Agreement.

45. This has implications for the other grounds of appeal, so I deal with them rather more briefly.

46. **Ground 1.** Under this ground, it is contended there was no proper basis for EJ Elliott's finding at §66 that there was separate agreement which governed the Claimant's work for client A, and under the terms of that agreement the Claimant was entitled to be paid £5,000 per month for 50 hours' work. It is said that the ET failed to apply the findings of the judgments of EJ Spencer, the EJ Gordon tribunal and the EJ Goodman tribunal, and her own findings, that the terms of the Claimant's remuneration were set out in the Consultancy Agreement, and the "separate agreement" was neither evidenced nor notified in writing. The Claimant placed reliance on the "no oral variations" clause in the Consultancy Agreement.

47. The separate agreement found by EJ Elliott was, as was common ground, an oral agreement. She did not refer to clause 14 of the Consultancy Agreement, providing that the Agreement set out the “whole” of the terms agreed in respect of the Consultant’s appointment and that it “shall only be capable of being varied by a supplemental agreement in writing signed by or on behalf of the parties hereto”.

48. Prior to the hearing, I drew the parties’ attention to the judgment in *MWB Business Exchange Centres Ltd v Rock Advertising* [2019] AC 119, in which the Supreme Court held that “no oral modification” clauses were permissible under the law of contract and did not conflict with public policy and unjust reliance on them could be prevented by estoppel. Just as in *Rock* itself, to the extent any oral agreement varied what was agreed in the Consultancy Agreement, that agreement would be invalid for want of writing or signature. I did not understand Ms Chan to dispute this.

49. However, Ms Chan submitted that the so-called “separate agreement” that the Claimant would be paid £5,000 a month for 50 hours’ personal work was in fact no more than a clarification of what Claimant would be entitled to under the Consultancy Agreement - which was £5,000 a month in respect of client A, based on the 50 hours of his work billed and paid by that client in respect of the Claimant’s personal work. But the EJ did not analyse it in this way. She treated the oral agreement as a separate, “governing agreement”, not an explanation of how the Consultancy Agreement operated. I consider that was an error of law, though it is perhaps understandable if she were not shown the judgment in *Rock*.

50. But the effect of my upholding the EJ’s separate conclusion that the Claimant was only entitled under the Consultancy Agreement to 40% of the fees billed and paid by client A in respect of his personal work means that this ground is academic and immaterial to the result. On the correct

interpretation of the Consultancy Agreement, the Claimant's entitlement was the same as under the separate agreement.

51. **Ground 2.** The second ground falls away for similar reasons. This ground is that the EJ failed to apply section 13 of ERA, found in Part II under the title "Protection of Wages". In this ground, the Claimant contends that all deductions from wages must be authorised by a written term of the contract, by terms notified to the worker in writing or by the worker signifying in writing his agreement or consent to the deduction. The Claimant contends that the EJ could not authorise a deduction on the basis of the separate oral agreement to which she referred at §66.

52. However, as the Claimant acknowledged in his skeleton argument (§11) and as the Claimant argued before the EJ (see her reasons at §33), the premise of this argument is that he was entitled to 40% of the fees received by the practice in respect of client A for the relevant time (or £10,000 each month). On that premise, the Claimant contended that EJ's conclusion that his entitlement to £5,000 a month amounted, in effect, to a deduction from wages.

53. To determine whether there has been a deduction from wages requires deciding the logically prior question of what were the wages "properly payable" to the worker: see section 13(3) of ERA and, for example, *New Century Cleaning Co Ltd v Church* [2000] IRLR 27. The only entitlement suggested here was a contractual entitlement.

54. The fundamental problem with this ground of appeal is its premise. I have already upheld under ground 3 the EJ's conclusion at §68 that the Claimant was not entitled to 40% of the fees billed and paid by client A in respect of fee earners other than himself. The result is that the Claimant was only entitled in the first place under the Consultancy Agreement to £5,000 in each of January and

February 2016, as the EJ held at §70. Accordingly, that – and not £10,000 - was the amount “properly payable” to him as fees in respect of client A for those months.

55. The necessary consequence is that ground 2 fails. Because the Claimant was only entitled to £5,000 in respect of January and February 2016 under the Consultancy Agreement, the “separate agreement” did not operate as a deduction at all because there was none; it did no more than reflect the wages that were properly payable.

Disposal and end note

56. My conclusion is that the EJ was correct to conclude that under the Consultancy Agreement, properly interpreted, the Claimant was only entitled to be paid 40% of the fees billed and paid in respect of the work he personally did for client A in January and February 2016 and not for fees billed and paid in relation to other fee earners. The result is that ground 3 is dismissed, with the further consequence that the EJ was right to decide that the Claimant was entitled to be paid £5,000 for each of these months, as she found in her decision of 7 December 2020 (§§68-9), and as she confirmed in the judgment subject to this appeal (§70).

57. Although I consider the EJ erred in respect of ground 1, the effect of my conclusion on ground 3 renders this ground academic and immaterial. My conclusion on ground 3 also means that the wages “properly payable” to the Claimant were £5,000 in respect of the each of the relevant months, so that the premise of ground 2 falls away. The upshot is that I dismiss the appeal.

58. There are two further points. First, the parties agreed at the hearing that, from that time, the Claimant would serve any documents on the Respondent by post and the Respondent would serve documents on the Claimant by both email and post.

59. Second, the appeal hearing was listed for one and a half hours. In light of the grounds of appeal, the factual background and the authorities to which the parties referred, that was a gross underestimate of the time required and meant that this judgment was reserved. It is important that parties take a realistic approach to time estimates for hearings (including time for delivery of a judgment) and inform the EAT as soon as possible if the time estimate is too short.