THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Tallentire	**AND**	Northern Print Solutions Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: North Shields ON: 14,15,16 &17 November 2016 and 12 & 13 January 2017
AND AT Newcastle upon Tyne 18, 19 & 20 January 2017

EMPLOYMENT JUDGE HUNTER

Appearances
For the Claimant: Mr A Maitra of Counsel
For the Respondent: Mr A Crammond of Counsel

RESERVED JUDGMENT

1 The claim of constructive unfair dismissal is not well-founded and is dismissed.

2 The alternative claim of unfair dismissal by reason of redundancy is not well founded and is dismissed.

3 The claim of wrongful dismissal is not well-founded and is dismissed.

4 The claim of unlawful deductions from wages in respect of pay and holiday pay is not well-founded and is dismissed.

5 The respondent's counter-claim in respect of breach of contract by the claimant is well-founded and the claimant is ordered to pay to the respondent £2,748.27.

REASONS

1 Issues

1.1 On the second day of the hearing (15 November 2016) the parties agreed that the following were the issues for the tribunal to decide

Unfair dismissal

- Has the Claimant proven that he was constructively dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (ERA)?

- Was there a fundamental actual or anticipatory repudiatory breach of contract by the Respondent entitling the Claimant to resign? In particular, did the Respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between itself and the Claimant?

- If so, did the Claimant affirm or waive any such alleged breaches such as to treat the contract as continuing?

- If not, did the Claimant resign in response to that breach?

- In the alternative and in the event that there is no constructive dismissal, notwithstanding the fact that the Claimant resigned his employment with the Respondent with effect from 7 January 2016 (EDT), on the basis that his contract was previously terminated by the Respondent with notice (served on 9 December 2015) to expire on 9 January 2016, is the Claimant "taken to be dismissed by" the Respondent (on the EDT), pursuant to S.95(2) ERA?

- If a dismissal is found, whether a constructive dismissal or under section 95(2) of the 1996 Act, has the Respondent proven that there was there a potentially fair reason for the dismissal?

- Did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee in all of the circumstances having regard to equity and merits of the case and the size and administrative resources of the respondent?

- If the Claimant was unfairly dismissed, should the Claimant receive a basic award and, if so, in what amount?

- If the Claimant was unfairly dismissed, should the Claimant receive a compensatory award, and if so, in what amount? What amount, if any, in all of the circumstances of the case, is it just and equitable to award the Claimant as to his losses in consequence of the dismissal?

- Did the Claimant cause or contribute to his own dismissal and, if so, to what extent is it just and equitable to reduce any claimed compensatory award?

- Would the Claimant have been dismissed (whether as a result of redundancy, conduct, or otherwise), in any event, and, if so, what percentage reduction ought to be made (Polkey)?

- Has the Claimant proven that he has actually suffered any losses as a result of the unfair dismissal?

- If so, has the Claimant failed to take reasonable steps to mitigate his loss and, if so, over what period of time and in what amount ought the Claimant be awarded losses, if any?

- Did the Claimant unreasonably fail to follow the ACAS Code of Practice by failing to raise a grievance and, if so, in what amount is it just and equitable to reduce any award made to the Claimant up to 25%?

- If applicable, does the statutory cap of the Claimant's annual gross salary apply to cap the Claimant's compensation?

- Ought any sums awarded on the counterclaim of the Respondent be set off against any award made to the Claimant?

Wrongful Dismissal

- Was the Claimant dismissed in breach of contract?

Unlawful deduction from wages (section 13(3) if the ERA)

- Did the Respondent pay the Claimant his wages from 1 January to 7 January 2016?

- Is the Claimant owed holiday pay to cover the accrual period from 1 January to 7 January 2016?

- In respect of both, is the Claimant entitled to the same and are the wages and/or holiday pay properly payable and outstanding to the Claimant?

Respondent's counterclaim

- Has the Respondent proven that the Claimant acted in breach of the express and/or implied terms of his contract of employment?

- If so, has the Respondent proven that it suffered damage that flows from said breach(es) of contract and, if so, in what amount?

2 <u>The Facts</u>

2.1 The respondent is a print business owned by Neil O'Boyle and Craig Daly. It was established in 2011. It is a small business with limited financial resources. Mr Daly was a graphics designer. Mr O'Boyle previously had a mobile phone franchise which he sold. He has another business – an estate agency.

2.2 The business started up in Mr O'Boyle's house. It moved to a converted village church hall in 2012. The business acquired expensive printing presses,

including a lithographic press. Andrew McGuire, a long term acquaintance of Mr O'Boyle and Mr Daly, was recruited and trained to operate it.

2.3 The claimant was also recruited in 2012. He was already working in the trade and had previously worked with Mr Daly. He was trained in operating digital printing software on a Mac computer. He was also an experienced print finisher. The claimant was originally recruited as a graphic design and printing specialist and was promoted in August 2013 to the role of Production Manager. He had a written contract on appointment in 2012, but there was no was no written statement of variation of the terms of that contract on promotion to Production Manager.

2.4 Mr Daly had created a Production manager role because he wanted to be able to concentrate his efforts on drumming up business and to spend more time with his family. The claimant managed a team of five or 6 employees working in production. He was not good at delegating the work and he struggled to persuade his colleagues to perform. The respondent never had any complaints about the claimant's technical abilities.

2.5 In 2015 production slowed to the point that Mr Daly had to intervene and work until 3 a.m. or 4 a.m. When the claimant was on holiday, Mr Daly managed the production team and was able to run the production more efficiently and more smoothly. Mr Daly noticed a change in the claimant's attitude. He was unhappy about his pay. He wanted more. Mr Daly told him in October 2015 that the business was struggling. Neither director had taken any wages for several months.

2.6 In November 2015 the respondent's accountant, Alan Watson, told Mr Daly and Mr O'Boyle that the percentage profit margin had fallen and that there was a significant reduction in profitability. He told them that direct wage costs were a high proportion of turnover and that they needed to consider the value of all staff and whether they were all productive and value for money. He suggested there may be a need for redundancies.

2.7 By the end of November 2015 matters came to a head. By then Mr Daly had not taken a wage for six months. He took the view that the Production Manager's role was superfluous because he was having to perform much of the work himself. Mr Daly and Mr O'Boyle did not want to lose the claimant because he was a good print finisher. They decided they would offer him a position as a print finisher at a reduced salary of £18,000.00 p.a. (a cut of £4,000.00 p.a.). Mr Daly and Mr O'Boyle felt that the principal benefit to them would be that Mr Daly could control production and significantly improve results for the business.

2.8 There was a meeting with the claimant on 2 December 2015. What happened at this meeting is disputed. No one took notes. Mr O'Boyle two or three weeks later put together an account of this meeting and two subsequent meetings which took place on 7 & 8 December 2015. The claimant covertly recorded the meetings of 7 & 8 December 2015. It is clear that Mr O'Boyle's notes are not accurate: they are his recollection made after the events. They reflect the gist of the conversations, but they cannot be relied upon as an accurate record of the details. The claimant's covert recordings throw some light on what was said. Mr O'Boyle, who could not be accused of playing to the microphone, on several occasions refers to what the

claimant had said on 2 December 2015 and the extent to which the claimant was then contradicting himself.

2.9 I am satisfied that at the meeting on 2 December 2015, Mr O'Boyle and Mr Daly expressed dissatisfaction with the claimant's attitude and performance in his role as Production Manager. They told him that there was a duplication in the role and that Mr Daly could do a better job of running production. The claimant told them he could no longer do the job. He said that if they offered him a role as a print finisher at the same wage he would bite their hands off. Mr O'Boyle told the claimant this was not an option. Although I am satisfied that the respondent would have offered the claimant a position of print finisher at a reduced salary, they did not do so in the light of the claimant's insistence that he be paid the same wage. Whether or not the words "redundant" or "redundancy" were used, I am satisfied that the claimant realised that the respondent was proposing that the post of Production Manager was superfluous; that Mr Daly would take on the management of production and that if the claimant were to stay on it would be as a print finisher at a reduced salary.

2.10 The transcript of the meetings on 7 & 8 December 2015 and the recordings are conclusive as to what was said. At the meeting on 7 December 2015, Mr O'Boyle focussed on the claimant's attitude which he said was not right for the role of Production manager. Mr O'Boyle had not had the benefit of any Human Resources advice on the appropriate way to conduct a redundancy consultation exercise. He was no doubt approaching the matter in the way he believed was appropriate, but the meeting fell short of what is required in terms of redundancy consultation.

2.11 At the meeting on 8 December 2015 Mr O'Boyle informed the claimant that the respondent was going to remove the role of Production Manger from the business. He dismissed the claimant with 4 weeks' notice and told him that he did not need to work his notice.

2.12 The respondent wrote a dismissal letter dated 9 December 2015 confirming that his last date of employment with the respondent was 9 January 2016. He was given a right of appeal.

2.13 The claimant took advice from the law firm which represented him at the hearing. He appealed by letter dated 15 December 2015. His grounds of appeal were that the redundancy was a sham and had been concocted as a reason for dismissal when he refused to stand down as Production manager during meetings on 2nd and 7th December 2015 and that no process had been carried out in in relation to either performance management or redundancy. He requested that an independent HR professional should chair the appeal.

2.14 The respondent attempted to find a suitable HR professional to conduct the appeal. The first person they identified was not acceptable to the claimant who believed that she may be not be independent. Mr O'Boyle then approached Joanne O'Leary a former HR Business Partner at a Consett based factory which has recently closed. She was considering establishing her own HR practice and agreed to act for the respondent pro bono in order to gain experience.

2.15 Although Ms O'Leary believed there was a genuine redundancy, she accurately identified shortcomings in the process. She advised that there should be a further consultation to resolve any miscommunication issues and to enable the claimant to remain in the employment of the respondent. She wrote to the claimant on 21 December 2015 inviting him to a meeting. It was made clear that the purpose was to begin the process again. The claimant wrote back that he would attend neither the appeal nor the further consultation meeting. He accused the respondent of dishonest behaviour.

2.16 Ms O'Leary conducted the appeal on 22 December 2015 in the claimant's absence. She upheld his appeal, but did not re-instate him. She informed him that the role had been identified for redundancy on the grounds of financial pressure and role duplication. She instructed him to attend work on 4 January 2016 to participate fully in a process that she envisaged could be completed before his notice expired on 9 January 2017. The claimant refused to engage and Ms O'Leary's involvement ceased.

2.17 Mr O'Boyle and Mr Daly set up a company known as Tradeprint Solutions Ltd which has until recently been shown at Companies House as a dormant company. It was set up to trade on-line. There were problems with the website and not many orders resulted. On their accountant's advice all orders were processed through the respondent because it was not commercially viable to operate Tradeprint as an active company until the on-line business took off. In August 2015, Mr O'Boyle and Mr Daly negotiated with a man named Mr S Imray. He owned a printing business known as Magnetic. Mr Imray transferred the goodwill of Magnetic to the respondent, increasing the turnover by £10,000.00 per month. Mr Imray's function was to make Tradeprint's on-line business work. He has never been an employee of the respondent and has never been paid by them. He is an employee of Tradeprint Limited.

2.18 David Leonard was a delivery driver. On 22 December 2015 he saw Mr Daly looking stressed and asked him if there was a problem. Mr Daly told Mr Leonard that the claimant was threatening to bring a tribunal claim. Mr Leonard was appalled on learning this. The next day he told Mr Daly that the claimant had been using the respondent's fuel card without permission and that the claimant and Mr McGuire were doing personal jobs, printing and finishing them early in the morning and putting them in the claimant's car or hiding them in the stock room. He said that this had been going on for some time; that they had an on-line shop and a ghost account. Mr Leonard admitted that he had delivered for them and had received cash from them for doing so. He had also picked up cash from customers. Mr Leonard said that all of the work he had seen had been done on digital printing machines. The respondents took a statement from Mr Leonard which he signed on 23 December 2015. Mr Leonard was then suspended.

2.19 Over the Christmas break, Mr Daly interrogated the Mac computer on which digital graphic design work was done. He found files which were not the respondent's work, mainly relating to labels used by anglers. He believed that only three people could use the Mac computer to design and produce art work to send to the printing press, namely himself, the claimant and Paul Fenwick. Mr Daly asked

Paul Fenwick whether he had designed anything for Andy McGuire. He said that he had not and Mr Daly believed him.

2.20 Mr O'Boyle and the office manager, Kay Pattison, interviewed Andrew McGuire on 4 January 2016. He signed a witness statement. It was put to him by Mr O'Boyle that he and the claimant had been stealing company materials and using the company's equipment for their own financial gain. Mr McGuire denied that he had been involved. He implicated the claimant. Mr McGuire was suspended. Kay Pattison was asked to interview witnesses and prepare a report.

2.21 On 5 January 2016, the respondent's solicitors wrote to the claimant's solicitors setting out what they had learned and enclosing copies of the statements from Mr Leonard and Mr McGuire. They informed them that the claimant was suspended and asked for an explanation by midday on 7 January 2016.

2.22 Mr McGuire had spoken to the claimant following the making of his statement, despite being instructed not to do so by the respondent. He wrote to the claimant's solicitor saying that the statement which he had signed was 90% false and not a true account of what he had said. He said that he had been pressured by Mr Daly and Mr O'Boyle into signing it. He wrote to Mr Daly saying that there were answers he had given that were not in the statement. He wished to retract the statement and make a new one. Mr O'Boyle told Mr McGuire that if he wished to retract the statement he should provide an explanation in writing. This was not forthcoming.

2.23 On 7 January 2016 the claimant's solicitors wrote to the respondent's solicitors. They said that the allegations of theft had been fabricated. Mr McGuire had confirmed that Mr O'Boyle had said he wanted to destroy the claimant. The allegations were no more than a sham. The claimant would not be commenting further on the allegations.

2.24 On 7 January 2016 the claimant wrote a letter of resignation. In summary he said that the sham redundancy and the sham gross misconduct case were malicious and unreasonable. The respondent's actions were calculated and completely destroyed any trust and confidence he had in the respondent as his employer. He said that he was resigning in response to the treatment he had received and that he would bring a claim for constructive dismissal. He would be seeking an order for legal costs.

2.25 Ms Pattison continued with her investigation. She interviewed all of the staff. She spoke to the Xerox engineer. Files with art work are sent from the Mac computer to the digital Printing Machine with a job title and job number. These are recorded on the Printing machine log. The printing machine also has a meter, recording the number of sheets of paper going through the machine. The machine is leased from a Xerox company called Concept and the respondent is invoiced by reference to the usage as recorded on the meter. Ms Pattison asked the Concept engineer to assist. He compared the meter with the log and found discrepancies. He believed that there could only be a discrepancy if a job had been deleted from the log. The claimant cast doubt on this. He had spoken to a Xerox engineer who reported that there is no way of editing the job log unless it is exported to a spreadsheet. The fact remains, however, that between 17 March 2015 and 8 December 2015 the meter on the main

digital printer (Versant 2100 serial number 315302120) recorded that 1,111,346 colour sheets had been printed, whereas the log recorded only 1,096,318 colour sheets, a discrepancy of 15,028. The meter also recorded that 43,507 monochrome sheets had been printed, whereas the log recorded only 42,217, a discrepancy of 1,290. No discrepancies were found on a new machine installed in late November 2015. There were no discrepancies in respect of digital printer J75, although there were a large number of jobs presented on the log with no company job number, including some with an angling related theme.

2.26 The respondent has computer software called Accura. This calculates the cost to the business of a job based on quantity of products used and factors in the cost of overheads.

2.27 In 2015 2,050 sheets of vinyl Jac paper was ordered without a purchase order (including 1,400 sheets in November 2015). The respondent regards the claimant as Production manager responsible for this, since he was the only person who could order paper without a purchase order. The respondent assumes that the claimant has stolen this amount of paper, although I heard evidence that Jac paper is sometimes left over from an order and is stored at the print works. No credit has been given for this. The respondent estimated that the amount of paper ordered would have been sufficient for 205 jobs and that each job would have a cost sales value of £50. The loss to the respondent was calculated at £10,250.

2.28 Deducting the Jac paper from the colour discrepancies, the respondent's cost estimate for the remaining 12,978 sheets not accounted for on the log is £1,951.87

2.29 The respondent included in its counter claim an element to reflect the cost of the claimant's and Mr McGuire's salary, amounting to £3,439.00 based on the two of them spending five hours per week on jobs for themselves over the 38 week period (17 March 2015 to 8 December 2015).

2.30 Unfortunately, the Xerox engineer, when calculating the discrepancy between the meter and the log made an arithmetical error which was only picked up by Mr Crammond when preparing for this case. The engineer calculated the discrepancy as 216,028 whereas the actual discrepancy was as identified by Mr Crammond was 15,028. The respondent has not made allowance for this when calculating the salary cost.

2.31 Mrs Kay also included a cost of £4,037 in respect of her own time, accountant's fees and legal costs. (£637, £1,700 and £1,700 respectively).

2.32 The case was due to be heard in September 2015. The respondent's solicitors informed the tribunal that there was to be a police investigation and proceedings were, therefore, stayed. The stay was lifted on 10 October 2016 on being notified by the police that no further action was to be taken against the claimant or Mr McGuire.

2.33 After leaving the respondent the claimant set up a new business known as Consett Print Services.

2.34 There was a provision in the claimant's contract whereby the respondent reserved the right to deduct any outstanding money owed by the claimant to the respondent from his final pay. This included the cost of damages or losses attributable to the claimant's negligence or dishonesty.

3 The Law

Termination of the Contract

3.1 Section 95 ERA provides:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)—
>
> > (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> >
> > (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
> >
> > (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
>
> (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
>
> > (a) the employer gives notice to the employee to terminate his contract of employment, and
> >
> > (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
> > and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Constructive unfair dismissal

3.2 The claimant says that he was constructively dismissed. It is for the claimant to satisfy the Tribunal that there was a fundamental breach of contract on the part of the respondent going to the root of the contract of employment; that the respondent's breach caused the claimant to resign and that the claimant did not affirm the contract by delaying for too long before resigning. A breach of contract by the respondent will be regarded as fundamental if it is so bad and so significant that no reasonable employee could be expected to put up with it. Western Excavating (ECC) Ltd v Sharpe [1978] ICR 221.

3.3 There is an implied condition of mutual trust and confidence in a contract of employment. It would be a fundamental breach of contract for an employer, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84.

3.4 It was held in Malik v BCCI [1997] IRLR 462 that an employer must not engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue. The conduct must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in the employer.

3.5 If a resignation is to be treated as a dismissal, the reason for the dismissal is the reason for the respondent's breach of contract. Berriman v Delabole Slate Ltd [1985] ICR 546.

3.6 Section 98 ERA provides

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

3.7 If an employer does not attempt to show a potentially fair reason in a constructive dismissal case relying on an argument that there was no dismissal, a tribunal is under no obligation to investigate the reason for the dismissal itself. The dismissal will be unfair because the employer has failed to show a potentially fair reason for it. Derby City Council v Marshall [1979] ICR 731

The meaning of redundancy

3.8 Section 139 ERA provides:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.
>
> (6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

3.9 The law relating to the meaning of redundancy was restated in the leading case of Murray v Foyle Meats Ltd [1999] 3 All ER 769. Lord Irvine LC (with whom Lords Jauncey, Slynn and Hoffmann agreed) said this:

> "My Lords, the language of paragraph (*b*) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."

Deduction from wages

3.10 Section 13 ERA, which gives a worker the right not to suffer unauthorised deductions, provides:

> (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.

Breach of Contract and Employer's Counter Claim

3.11 Articles 3 & 4 of the Employment Tribunals Extension of Jurisdiction (England And Wales) Order 1994 provide:

> 3 Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
>
> > (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
> >
> > (b) the claim is not one to which article 5 applies; and
> >
> > (c) the claim arises or is outstanding on the termination of the employee's employment.
>
> 4 Proceedings may be brought before an [employment tribunal] in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
>
> > (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
> >
> > (b) the claim is not one to which article 5 applies;

> (c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and
>
> (d) proceedings in respect of a claim of that employee have been brought before an [employment tribunal] by virtue of this Order.

3.12 The references to Section 131(2) of the 1978 Act are now references to section 3(2) of the Employment Tribunals Act 1996 which provides:

> (2) Subject to subsection (3), this section applies to—
>
> (a) a claim for damages for breach of a contract of employment or other contract connected with employment,
>
> (b) a claim for a sum due under such a contract, and
>
> (c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,
>
> if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.
>
> (3) This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.

3.13 Article 10 limits the amount of the tribunal's order for a contract claim by an employee or an employer to £25,000.00.

4 Analysis

The witnesses

4.1 I approach the evidence of the claimant with caution. The claimant had set up a Facebook page called Personal Moments. The respondent believed that it was through this means that the claimant attracted personal business while working for the respondent. The claimant said that he had set up the Facebook page with Craig Daly's knowledge in order to attract business for the respondent. He said that he had had a dispute with Mr Daly about payments and did not take the matter further. Mr Daly contradicts this. I can see no good reason why the respondent would ask an employee to set up a Facebook page to attract business for it. I do not believe it was set up for that purpose. This fundamentally undermines the claimant's credibility. There were other aspects of his evidence that I found implausible. For example, I do not believe that he thought Mr Daly had given him carte blanche to use the fuel card whenever he wanted to.

4.2 I approach the evidence of Andrew McGuire with even greater caution. Kay Pattison had found evidence of stickers being printed for a business called Pete's Bait. She discovered that Tina Fairclough was the Facebook site administrator. Mr O'Boyle phoned Ms Fairclough posing as Andy McGuire and querying whether an account had been paid. As a result, Ms Fairclough sent copies of Facebook entries

which showed that Mr McGuire had indeed been printing stickers at work and had received payment for them from Ms Fairclough via his wife's PayPal account. On checking the records, Mr O'Boyle discovered that the respondent had paid for the delivery of the stickers. Mr McGuire's explanation for this was that Ms Fairclough had been introduced to him by a friend. He had asked Mr Daly whether he could print the labels for her. Mr Daly had given him a figure as a cash job. He knew that Ms Fairclough would pay into his wife's PayPal account. He says he went to a cashpoint, drew out £50 and handed it to Mr Daly. Mr Daly denies this. I find Mr McGuire's explanation incredible.

4.3 I do not accept Mr McGuire's version of events in relation to the statement he gave to the respondent on 4 January 2016. The statement is there for all to see, signed by the claimant at the end and initialled on each page. I realise that Mr McGuire may have been in shock when presented with Mr Leonard's evidence, but I do not accept that he was bullied into signing it. In the statement he seeks to exculpate himself by blaming the claimant. I do not accept that Mr McGuire was innocent of the charges and that the claimant had been acting on his own.

4.4 The respondent suggested that Mr McGuire did not have the skills to design the art work or use the digital printer and that the claimant must have assisted him on all occasions. I am not sure that is necessarily the case. It is possible that clients may have sent artwork to him. However, I am satisfied that Mr McGuire could not have done this without the claimant's knowledge and co-operation and there is evidence from Mr Leonard that there was a joint enterprise.

4.5 I consider the evidence of the respondent's witnesses to be entirely truthful. The evidence they gave remained consistent under extensive and thorough cross examination. Mr O'Boyle's evidence, while truthful, was not in every respect reliable. Some of his evidence was based on documents he had constructed after the event which were clearly inaccurate.

<u>The termination of the contract</u>

4.6 The claimant resigned before the respondent's notice took effect. The reason for the resignation was the respondent's alleged repudiatory conduct. The claimant's notice brought the contract to an end for a reason which was not the same as the respondent's reason for serving notice to terminate the contract. Although there is a dearth of authority, it seems clear to me that section 95(2) ERA operates in a situation where an employee under notice of termination of the contract acknowledges the employer's reason for bringing the contract to an end, but for whatever reason wishes to shorten the period of notice. Section 95(2) makes it clear that the reason for the ending of the contract is the employer's reason for serving the notice of termination and by implication not any subsequent agreement to bring the contract to a premature end by mutual consent. I cannot interpret section 95 to apply where an employee chooses to bring the contract to a premature end alleging repudiatory conduct. Acceptance of an alleged repudiatory breach of contract by an employee, is not a "notice to the employer to terminate the contract on a date earlier than the date on which the employer's notice is due to expire."

4.7 If I am wrong about that, as a matter of interpretation, there is nothing to suggest that Parliament intended that a court should take the employer's reason for giving the notice as the reason for dismissal when the evidence shows the employee alleges there was another reason for the contract coming to an end. The law is clear. In the case of an alleged constructive dismissal the reason for the dismissal is the employer's reason for the alleged repudiatory conduct. Berriman v Delabole Slate Ltd. To make sense of section 95(2) it must be read to include at the end of the sub-section the words "unless the employee alleges some other reason for the termination of the contract."

4.8 I find that this contract came to an end by the claimant's resignation dated 7 January 2016 and not by the respondent's notice dated 9 December 2015.

4.9 For the sake of completeness I should add that if my interpretation is wrong and that this contract came to an end by reason of the respondent's redundancy notice, I would have found that the dismissal was initially unfair procedurally; that the appeal attempted to rectify the defect but failed only because of the claimant's refusal to co-operate. I would have found that the claimant would have been dismissed in any event and that there was time for the consultation to have taken place before the notice expired. The Polkey reduction would have meant that the claimant would not have received a compensatory award.

Has the claimant shown that he was constructively dismissed?

4.10 The claimant alleges that the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. In essence they say that the redundancy was a sham and the allegation of theft was a sham.

4.11 The claimant's case in respect of the redundancy was that at the so called consultation meetings the focus was on the claimant's performance and that the role of Production Manager still had to be done. The claimant argues that the real reason for dismissing him was that he refused to accept a demotion. The claimant argues that Mr Imray was acting as the print manager.

4.12 The test is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. I am satisfied that the respondent was advised by its accountant that its wage costs were high, that it needed to consider the value of all staff and whether they were value for money. I am satisfied that the respondent came to the conclusion that they did not need the claimant to act as Production Manager because he was not successful in that role and because Mr Daly believed that he could absorb the role into his. It is true that the respondent had told the claimant that he could remain as a print finisher on a reduced salary, but he was not given notice of dismissal because he refused to be demoted. The argument about Mr Imray is a red herring. Mr Imray did not work for the respondent. He worked for an associated company. He was recruited to develop a new line of business. He added value by bringing with him the goodwill from his previous business. I am satisfied that the respondent's notice to the claimant was attributable to the above state of affairs and for no other reason. My conclusion,

therefore, is that the redundancy dismissal notice was not a sham and did not constitute a fundamental breach of contract.

4.13 The investigation of the claimant in respect of dishonesty was not a sham either. The respondent had evidence from Mr Leonard and Mr McGuire implicating the claimant. They were entitled to investigate it. They did not concoct the allegations.

4.14 My conclusion is that the respondents were not in fundamental breach of contract and the claimant is not entitled to treat his resignation as a dismissal.

Wrongful Dismissal

Was the Claimant dismissed in breach of contract?

4.15 Since there was no dismissal, the wrongful dismissal claim fails.

Unlawful deduction from wages (section 13(3) of the ERA)

Did the Respondent pay the Claimant his wages from 1 January to 7 January 2016?

4.16 The respondent did not pay the claimant's net wage of £348.60 for this period. They withheld it under the power in the contract. The non-payment did not amount to an unlawful deduction from wages because section 13 (1) (a) ERA applies.

Is the Claimant owed holiday pay to cover the accrual period from 1 January to 7 January 2016?

4.17 No evidence was given to me as to the total holiday entitlement in the relevant holiday year or the total holiday taken. I am unable to assess the amount of holiday pay if any that has been deducted by the respondent.

Respondent's counterclaim

Has the Respondent proven that the Claimant acted in breach of the express and/or implied terms of his contract of employment?
If so, has the Respondent proven that it suffered damage that flows from said breach(es) of contract and, if so, in what amount?

4.18 I am satisfied that the claimant and Mr McGuire were involved in a joint enterprise doing printing work for their own benefit using the respondent's paper, the respondent's printing machines at a time when they were employed by the respondent. This was done without the respondent's knowledge. That was a clear breach of contract. The respondent has, however, overestimated the extent of this unlawful activity. The printing machine showed a discrepancy between the meter and the job log. The claimant was the production manager and I am satisfied that he found a way of tampering with the records to disguise his activities. The counter claim was formulated on the discrepancy as reported by the Xerox engineer, but he made an arithmetical mistake. Not only has the cost of the jobs based on the paper used to be recalculated, but so also has the wage loss. I am not satisfied that all of

the Jac paper ordered by the claimant without an order number was used for his own purposes and the respondent has not given credit for any Jac paper that was not used and stored on the premises. I can see no reason why the claimant's legal costs should be factored into the loss. Nor am I satisfied that the accountant's fee relates wholly to his checking Ms Pattison's method of calculation. The respondent must also give credit for the wages they deducted. The following, is a breakdown of my award. I suspect that it falls well short of the losses the respondent suffered as a result of the claimant's illegal activities, but it is all that I can award based on the evidence before me:

Loss of sales based on the discrepancy of paper used	£1,951.87
An assessment of the wages paid that relates to the illegal activity (scaled down pro rata)	£ 208.00
An assessment of the accountant's fee attributable to the calculation of loss	£ 300.00
Ms Pattison's time on the investigation	£ 637.00
	£3,096.87
Less wages deducted	£ 348.60
Award	£2,748.27

EMPLOYMENT JUDGE HUNTER

RESERVED JUDGMENT SIGNED BY THE EMPLOYMENT JUDGE ON

7 February 2017

JUDGMENT SENT TO THE PARTIES ON

15 February 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL