EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr M Widdows	**v**	Hollowdown Limited

Heard at: Reading **On:** 9 and 10 November 2017

Before: Employment Judge George

Appearances
For the Claimant: Mr R Johns (Counsel)
For the Respondent: Mr G Ridgeway (Consultant)

JUDGMENT

1. The respondent's name is changed to Hollowdown Limited.

2. The claimant was employed by the respondent as an Associate Director of Business Development from 4 July 2016 to 6 January 2017.

3. The claimant was constructively dismissed by the respondent on 6 January 2017.

4. The respondent shall pay to the claimant a net sum in respect of unauthorised deduction from wages which equates to £34,384.12 gross. To this shall be added a 25% uplift for unreasonable failure to comply with an applicable ACAS Code of Conduct making an award of £42,980.15 gross to be paid net of tax and employee's national insurance contributions.

5. The respondent shall pay to the claimant damages for breach of contract in the sum of £6,004.20. To this shall be added a 25% uplift for unreasonable failure to comply with an applicable ACAS Code of Conduct making an award of £7,505.25.

6. The total award is £50,485.40.

REASONS

Background and Evidence Presented to the Tribunal

1. Following early conciliation which took place between 6 January 2017 and 6 February 2017, the claimant presented his ET1 on 5 March 2017. By it, he complained of a breach of contract by the respondent in relation to an alleged contract of employment which, on the claimant's case, the parties entered into on 13 May 2016 and revised on 18 May 2016 in order to specify that the employment was due to start on 4 July 2016.

2. The specific complaints that he makes are:

   2.1. Wrongful dismissal, based upon his resignation without notice in response to an alleged repudiatory breach, namely failure to pay his wages and failure to investigate his grievance;

   2.2. Unauthorised deduction from wages namely an alleged failure to pay wages between 4 July 2016 and 6 January 2017;

   2.3. Breach of contract of employment by failing to provide benefits due under that contract, namely company car and a pension; and

   2.4. Failure to pay holiday pay accrued and unpaid on termination of employment, contrary to reg. 14 of the Working Time Regulations 1998 (hereafter the WTR).

3. The respondent defended the claim by their ET3 and in it they denied the existence of the contract of employment.

4. I have the benefit in hearing this two day case of a bundle of documents running to 1,372 pages of which I have been taken to a comparatively small proportion. Page numbers in these Reasons refer to that bundle. I have also been provided separately by the respondent with a template for a 44-point check list of steps which should be taken by someone recruiting to employment in their company. I have taken into account those documents to which I was taken.

5. I heard evidence from three witnesses. Mr Widdows gave evidence with reference to a witness statement that had been prepared on his behalf and which he confirmed to be true when starting his evidence. This was adopted in evidence and he was cross examined upon it. The respondent called Mr G Drewery, the director of the company, who likewise adopted his witness statement in evidence and was cross examined upon it. Mr Jarred Rose was called to give evidence having responded to a Witness Order made by the Employment Tribunal at the claimant's request. There was no statement prepared by or on behalf of Mr Rose.

6. The document relied on by the claimant as a contract of employment is at pages 41-47 of the bundle. On its face it bears the signature of Jarred Rose whose title was Clinical Director and who purported to sign on behalf of the respondent. The respondent's defence to the claim is that Mr Rose had no actual authority to contract with the claimant on behalf of the

respondent and the claimant argues that, if that is the case, then he would argue that Mr Rose had apparent or ostensible authority to do so.

7. Mr Drewery is a statutory director of the respondent – he is also now employed by the respondent but at the relevant time, he was contracted to work for them as an accountant and had other clients. He was not an employee at the material time and has no direct knowledge of the principal events. In addition to the people that I have already mentioned, the following key individuals are referred to in this Judgment: Gary Bowyer, the Director of Corporate Strategy; Michael (known as "Mick") Byrne, who was the Managing Director of the respondent in the relevant period from late 2015 to late 2016 and remains a statutory director to the present day; Colin Vanlint who was the Chief Executive Officer of the respondent in late 2015 through to 2016.

8. Pages 551 and 552 show the organisational chart. This indicates that Mr Rose reported directly to Mr Bowyer and above him was a flat structure in which the then Managing Director, Chief Executive Officer and Finance Director were on the same level with Mr Bowyer reporting to them.

The issues

9. The issues are therefore as follows:-

    9.1. Was the claimant an employee of the respondent? This raises the following sub-issues:-

        9.1.1. Did Jarred Rose appoint the claimant to the position of Associate Director of Business Development?

        9.1.2. Did Jarred Rose have actual authority to appoint the claimant to that position?

        9.1.3. Did Jarred Rose have ostensible or apparent authority to appoint the claimant to that position?

    9.2. Was the respondent in repudiatory breach of contract by failing to pay the claimant and by failing to investigate his grievance adequately or at all?

    9.3. Did the claimant resign in response to that breach? If so, then the claimant was dismissed.

    9.4. If the claimant was an employee of the respondent, what were the terms and conditions of his employment in relation to notice period, wages, holiday, entitlement to a company car and pension?

10. Depending upon my conclusions on those issues other issues of remedy will arise.

The law

11. At the start of the hearing neither party was aware what Mr Rose would say in evidence. The respondent denied that he had actual authority and the claimant was not in a position to put forward a positive case on something which would not have been within his knowledge. It became clear when Mr Rose gave evidence that he did not regard himself as having had actual authority to recruit the claimant and I make findings of fact on the evidence which are set out below. The law which is relevant to the central and determinative issue in the case is that on the concept of ostensible or apparent authority. This is where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorised them.

12. I have had regard to the explanation of apparent authority set out in paragraph 31-056 of Chitty on Contracts (32nd Ed. – incorporating 1st supplement) from which the following relevant quotations come (quoted without footnotes),

> "The rules as traditionally stated may however be divided as follows:
>
> (i)A representation must be made by words or conduct. But though such representation may be express, it may also be implied from acts of a quite general nature, e.g. putting the agent in a position carrying with it a usual authority. Such a representation may arise from a course of dealing (especially one involving regular ratification), though it has been said that authority will not readily be inferred from this.
>
> (ii)The representation must be made by the principal, or someone authorised in accordance with the law of agency to act for him. A representation by the agent as to his authority cannot of itself create apparent authority. …
>
> (iii)On general principles the representation must be of fact and not of law. …
>
> (iv)The third party must act on the representation. ….
>
> (vii)The authority will be that which the agent reasonably appeared to have to the third party, taking into account the manifestations of the principal, the implied authority normally applicable in the circumstances or to a person in the agent's position, or both. It has often been said that there is no constructive notice in commercial transactions and there is quite extensively argued recent authority that the third party can rely on an appearance of authority unless its belief that there was authority was "dishonest or irrational", which would include turning a blind eye. But though there is also authority that "nothing short of bad faith will do" such an approach may perhaps go too far in protecting third parties, and may not accord with all the existing authority cited here, always bearing in mind that the nature of reasonable inquiries may need to vary with the situation involved."

13. Based upon that explanation it appears to me that the questions that I need to ask myself when considering whether Mr Rose had apparent authority as alleged is whether the respondent explicitly or impliedly represented to the claimant that Mr Rose had authority to act on its behalf when entering into a contract of employment with him, whether the claimant acted upon that representation and whether Mr Rose reasonably appeared to the claimant to have the authority to enter into a contract of employment with him on behalf of the respondent. It is necessary that any representation, whether express or implied, was made by the respondent and not by the agent, the agent in this case being Mr Rose. Apparent authority also arises where the principal has placed the agent in the position from which it is reasonable for third parties to assume that he has the principal's authority to make a contract of the kind in question.

14. One argument raised by the respondent was in relation to the principle set out in Chitty 31-056 subparagraph (vii) (see paragraph 12 above). Mr Ridgeway rightly points out that there is authority that the extent of any obligation on the part of the claimant to make enquiries may negate the claimant's case on reliance on the representation. The respondent argues that the claimant could not reasonably rely upon any appearance of authority which Mr Rose had, taking into account the extent of an obligation to make enquiries and has referred to five authorities in this respect:

    Quinn v CC Automotive Group t/a Carcraft [2010] EWCA Civ 1412;
    Acute Property Developments Ltd v Apostolou & Others [2013] EWHC 200;
    Criterion Properties plc v Stratford UK Properties LLC [2004] UKHL 28;
    Mahoney v East Holyford Mining Co [1875] LR 7 HL 869;
    Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (in liquidation) [2010] HKCFA 64 (Mr Ridgway was unable to provide a copy of this report but the cases of Quinn and Apostolou cite and rely upon it and they are the binding authorities being decisions of the Court of Appeal and High Court respectively rather than of the Court of Final Appeal of the Hong Kong Special Administrative Region, persuasive though the dicta of Lord Neuberger undoubtedly is.)

15. Lord Justice Gross, giving the judgment of the Court of Appeal in Quinn decried an attempt to elevate this aspect of reliance to a test of reasonable enquiry (see paragraph 23 at (iii) in particular). The authorities of Quinn and Apostolu provide that if the third party turned a blind eye to matters about which they were suspicious or acted recklessly in contracting with the principal, then that may negate reliance on the representation. Authorities such as Quinn indicate that the test for that is comparatively high; it is not mere unreasonableness. The editors of Chitty suggest that the third party will succeed in showing that they have relied upon the representation if they prove that they believed it and acted upon it unless their belief was dishonest or irrational.

Findings of fact

16. Dealing first with the question of credibility of the witnesses, there is little actual disagreement between Mr Rose and the claimant about the events that are described in detail by the claimant in his witness statement. Mr Rose attended and gave evidence to the tribunal in response to a witness order. His employment by the respondent came to an end on 14 July 2017. He produced to the tribunal a letter from Dr Bell FRC Psych, a consultant psychiatrist employed by Cognacity Wellbeing LLP, by which Dr Bell indicated that Mr Rose was under his care for anxiety and depression. No dates for the period that Mr Rose has been being treated by Dr Bell are given in that letter. Mr Rose was candid in his responses. He did not attempt to supplement gaps in his memory with supposition. He was also candid about whether or not he could recall the detail of the events in question.

17. The claimant presented in impressive detail documents that showed logs of many phone calls that he had had with Mr Rose over the relevant period and printouts of WhatsApp messages that likewise covered many of the salient dates. He produced printouts of frequent emails, some of which were clearly also found in the respondent's archives. In general terms, I find the claimant to have been a credible witness who to a significant extent was able to rely upon contemporaneous documents to support his version of events.

18. The respondent put forward no positive case on the crucial meetings. By that I mean that they did not call Mr Byrne and Mr Drewery was not present during the meetings prior to the contract document being signed and was therefore unable to give direct evidence about what happened at them. I heard in submissions that Mr Byrne was unfit to travel to the full merits hearing during the days for which the hearing was listed because of a hospital procedure which was due to take place on 10 November 2017. No medical evidence of that was put forward and it was not suggested, either at or prior to the hearing that it should be postponed so that he could attend. Furthermore, no statement had been prepared on his behalf and there was no indication that the respondent ever intended to call him. Nor did the respondent call Mr Vanlint. Although his involvement was not said by the claimant to have been what caused him to believe that Mr Rose had the authority to contract, he could have confirmed or refuted the claimant's account of the meeting of 13 November 2015 which is referred to in paragraph 7 of the claim form.

19. I am invited to draw an adverse inference from Mr Byrne's absence but it does not seem to me to be appropriate to draw a general adverse inference against the respondent. On the other hand, the respondent has had the opportunity to adduce direct evidence of the meeting of 31 December 2015. It has chosen not to do so for whatever reason. I have to decide whether I believe the claimant's account of what Mr Byrne said in the light of all of the evidence including Mr Rose's account of the same

meeting. I then need to decide whether what I find was said amounted to implied authority given to Mr Rose.

20. In these reasons I only state those findings that I have made that are necessary to decide the issues that I have to decide but I have taken into account all of the evidence that I have been taken to in reaching these conclusions.

21. In late 2015, the claimant was the Emergency Operations Centre Manager for South Central Ambulance Service NHS Foundation Trust. He was on a salary which, together with benefits, amounted to something in the region of £42,000.00 a year. He had known Mr Rose in his position of the respondent's Clinical Director. At the time, the respondent was known by its former name which is UK Specialist Ambulance Services Ltd and therefore it has been referred to before me as UKSAS.

22. Mr Rose formed the view that the claimant would be an asset to UKSAS and suggested to Mr Byrne and Mr Vanlint (who were respectively the Managing Director and the Chief Executive Officer) that UKSAS should recruit the claimant. This is evidenced by the email at page 111, referred to by the claimant at paragraph 15 of his witness statement. Mr Rose was not taken to that specific email but his clear evidence was that he did make that suggestion to Mr Byrne and Mr Vanlint. I therefore conclude that the initial contact between representatives of the respondent, including but not limited to Mr Rose, arose out of a genuine interest on the part of the respondent in employing the claimant.

23. Mr Rose set up a first meeting between the claimant and Mr Byrne and Mr Vanlint on 13 November 2015. We only have the claimant's account of that meeting which is that he and Mr Rose and Mr Vanlint and Mr Byrne talked for over an hour about how he could slot into the business. Mr Rose recalled the initial meeting as being in mid-December.

24. Mr Rose was asked in detail about the second meeting, which is the one at which the representation relied upon by the claimant in these proceedings allegedly was made. He remembered clearly that there had been one. The purpose of it, according to Mr Rose, was "to try to get definitive answers for Mr Widdows about his potential employment". Mr Rose's recollection of 31 December 2015 meeting was vague. He accepted that it took place at the respondent's headquarters. He remembered that the claimant had a job description that he had drafted for the prospective job.

25. The claimant's account of this meeting is set out at paragraphs 31 and 32 of his witness statement. He says that at the meeting between himself, Mr Byrne and Mr Rose, amongst other things, he was told by Mr Byrne that: "He… wanted me to head up the research and set up the Clinical Hubs. However Mick did go on to say that I could not start until April as there were other things which would prevent me from starting before April." In paragraph 32, he states that Mr Byrne told him: "I will leave this with Jarred

and in terms of moving forward with this, Jarred will be your key point of contact." It is this statement which, together with the context of the discussion, the claimant argues gave rise to apparent authority on the part of Mr Rose.

26. Mr Rose could not recall whether or not Mr Byrne's exact words had been that the claimant was definitely to be employed but agreed that the impression was that the parties were moving towards "going forward" (as he put it) to Mr Widdows becoming an employee. As to paragraph 32, and the quote from Mr Byrne that the claimant specifically relies on, Mr Rose said that he could not remember those words exactly but he did not demur, he did not positively say that they had not been said.

27. The surrounding evidence to that meeting is that a job description had been sent to Mr Rose on 29 December (see page 124 and following) and Mr Widdows' DBS application had been submitted the same day, see page 129. According to the claimant, this was just before the meeting. The claimant was clearly not wanting there to be any impediment to employment from his side.

28. On the same day, following the meeting, the claimant emailed (see page 131-132). In that email, he said: "If possible I would like to have contract signed so I can hand my notice in on or around 1 March (or sooner) for a start around 1 April" and he goes on to say that he hopes that there is no issue in relation to the restructure.

29. This is a reference to what the claimant understood to be a takeover of the respondent's business. Looking at that as a statement of what was in the claimant's mind at the time, I find that he believed that a contract would be forthcoming and that is consistent with his account of the meeting of 31 December. His account of the meeting of 31 December has not been challenged. Mr Rose had no positive evidence that contradicted the claimant's evidence. The claimant's evidence is consistent with the stance he took in an email sent immediately after the meeting. I therefore accept his account of it. Mr Rose's response to that email that is on page 131 and seeks to reassure the claimant that there would be no issue with the restructure.

30. The claimant had been told by Mr Byrne that Mr Rose would be his point of contact going forward in connection with Mr Byrne's desire that he should be recruited by the respondent in order to set up Clinical Hubs. Details of the benefits which he would receive when employed were discussed between him and Mr Rose in February and that included a company car.

31. Mr Rose gave evidence before me that in fact he did not have authority to enter into a contract of employment on behalf of the respondent with the claimant. He said that he would have input into recruitment but not the final nod. He disputed that the title 'Clinical Director' would indicate that he had that authority because he was not in an operational position. The

respondent's evidence, which is not disputed by the claimant, is that they had at the time a formal recruitment process which was administratively handled by the Human Resources department. Although this was not disputed before me, the claimant says that he did not know about it at the time. This recruitment process included a 44 point recruitment check list which is given to a senior board member when it has been complied with. It is the senior board member who, according to Mr Drewery, has the power to authorise the appointment. It is then given back to the recruitment team and shown to the Managing Director for final approval. That was Mr Drewery's evidence about the procedure which should have been followed. It is therefore not said by the respondent that Mr Byrne had no authority to recruit. Indeed, it is consistent with Mr Drewery's evidence that the Managing Director had final approval of appointment that Mr Byrne did have authority to recruit. However, the respondent argues that the normal process had not been followed and Mr Rose had no authority to recruit.

32. Mr Drewery in his paragraph 12 reports his understanding of the state of knowledge of Mr Vanlint about the claimant's recruitment. However, I place no weight on that paragraph; I have not heard from Mr Vanlint himself when it is clear from the claim form that he was likely to have relevant evidence. Where this second-hand evidence conflicts with the claimant's direct evidence, for example in relation to the meeting of 13 November 2015, I reject it.

33. At no time did Mr Rose direct the claimant to the Human Resources department. Instead, he began to create an increasingly elaborate fiction. As well as asking the claimant to submit a DBS application and Mr Rose noting that he had received the results, draft contracts were exchanged. There are three drafts at page 146, 154 and 164 before that which was signed on 13 May 2016. Mr Rose represented that Mr Vanlint had approved it (see page 184).

34. Having been told by Mr Byrne that Mr Rose would be the point of contact, the claimant was told by Mr Rose that he should do everything through him. I accept that, at the initial stages running up to him signing the contract, there was nothing that would reasonably cause him to become suspicious about this. He had spent his working life in the public sector. He was told and accepted that process in a private company were different. He was excited about the prospects of joining the respondent company and he was given positive reasons to trust Mr Rose by Mr Byrne. The claimant filled in an application form and Mr Rose filed it although there is apparently no trace of it. In that, he included his bank details in order to facilitate payment of wages by the respondent to himself. This tragic situation I find to have been one where a very plausible man, namely Mr Rose, seems, to some extent at least, to have convinced himself that the deception he was practicing on the claimant would all come out right in the end. I accept the claimant's account that he was very convincing.

35. The claimant was invited by Mr Rose to headquarters with his wife to sign the contract. He saw the CEO briefly on that day, all of this was consistent with him being welcomed into his new job. On 13 May 2016, he resigned his position with SCAS, a full time position he had held for some 12 years (page 186). He subsequently arranged a start date with the respondent and a replacement contract was signed to reflect that.

36. If the steps taken by Mr Rose up to this point (in terms of accepting the DBS and exchanging draft contracts) seem elaborate, then what happened next causes me to say "Oh! What a tangled web we weave, when first we practise to deceive"[1]. Mr Rose made clear in his evidence that the claimant did not actually have a role in the company. However, he also accepted that, from the time that the claimant signed the contract, through the start date in July, all the way through to December 2016, the claimant would have believed that he was an employee of the respondent. That seems to me to be a very relevant piece of evidence from the person who was taking active steps at the time (which I detail below) to maintain the illusion that the claimant was employed by the respondent. It is particularly relevant to the arguments put forward by the respondent that the claimant's reaction to what happened after the start date can lead to the inference that he did not in fact rely on the representations of ostensible authority.

37. To maintain this illusion cost Mr Rose an extraordinary amount of time and inventiveness. He purported to create login details for the claimant, see page 324. He created work for the claimant: there are minutes of meetings which the claimant attended, apparently on behalf of the respondent, alongside another employee, Gerry Hill Jones. The claimant also gave advice about a CQC inspection. Mr Rose provided a pool car to allay the claimant's concerns that he was being asked to drive to lots of different places on behalf of the respondent and yet a company car had not yet been provided to him, but, of course, at the end of the first month, the claimant was not paid because, as we now know, he was not actually on the books.

38. The respondent argues strongly that the claimant's reaction to the failure to be paid suggests that in fact he never thought the job was real in the first place.

39. The claimant's explanation as to why he did not immediately resign is that he was told that he should go through Mr Rose and he therefore took the problem of his non-payment to him. Admittedly, he was told that by Mr Rose but I accept that he had no reason to be suspicious of him, given what he had been told by Mr Byrne. He was told by Mr Rose that the organisation was hierarchical and this is also consistent with what he had been told by Mr Byrne on 31 December. He was told that he was not the only one who was affected by non payment of wages. He was told that Mr Rose and Mr Vanlint were also unpaid and it was due to the takeover of

[1] From "Marmion" by Sir Walter Scott

the business or a restructure. It was even mentioned, falsely, that it was due to an act of apparent vengeance by the outgoing FD. The point is that the claimant was not in the position to be suspicious about this; it was all very plausible. I can see that he made daily phone calls about this, among other things. Mr Rose claimed to be setting up a series of meetings with the Managing Director and the CEO shortly after the first payment should have been made, for example, at page 326 on 2 August. It gives the impression that Mr Rose is assiduously trying to deal with the problem but this and subsequent meetings were cancelled at the last minute. Mr Rose accepts that they had never been going to take place; he had not in fact genuinely set up the meetings although the claimant was not to know that at the time.

40. The claimant's "job" was very much on the road and therefore the mere fact that Mr Rose was setting up meetings in service stations (rather than in the respondent's offices) would not be of itself enough to arouse suspicion. Time and again, we see the construction of what we now know to be an elaborate illusion that the claimant's concerns are being taken seriously, not only by Mr Rose but by senior management. It came to the end of the second month. The claimant was told by Mr Rose that UKSAS' accountant had been suspended for taking the money that should have been paid to them both. Again, this was completely false but the claimant was not to know that. The fact that Mr Rose claimed also to be unpaid reassured the claimant. On one occasion, Mr Rose acted out contacting the company by phone in front of the claimant and arranging further meetings. He went to the lengths of booking and paying for a hotel for the claimant to spend the night in before a meeting which was due to take place with the Spanish purchasers of the business. Like the others, that meeting was subsequently cancelled and again Mr Rose accepted that all of these meetings which he arranged were completely fictitious.

41. At the same time as all this was going on, the claimant's wife was expecting their second son. One can only imagine how a lack of salary and the stress of the uncertainty of this must have affected them at that time. The extent of the deception practised by Mr Rose is extraordinary but I unhesitatingly accept that it was done without any thought of personal gain on his part. It was done in the hope that somehow this would all turn out all right. Perhaps he too believed that Mr Byrne wanted to recruit the claimant. It was a convincing deception.

42. Mr Rose created the illusion that he had instructed a barrister on behalf of himself and the claimant to chase payment from the company. He created emails apparently from Mr Vanlint to the barrister and then from the barrister to himself which he forwarded to the claimant to sustain that illusion and to represent the company as having accepted that payment was owed. However, the email address from which "Mr Vanlint" appeared to have written had been created by Mr Rose. There were no emails from Mr Vanlint who, at the time, was ignorant about what was going on. The claimant put in a grievance and that appeared to be being dealt with. The claimant believed that action was being taken. Looking at what he was

told by Mr Rose and the extraordinary lengths Mr Rose went to encourage him to believe that, I conclude it was an entirely reasonable belief.

43. Eventually Mr Rose paid a cheque into the claimant's bank account in his attempt to clear arrears of pay. It bounced and when it was returned to the claimant, it became apparent that the cheque was drawn on Mr Rose's personal account. This led the claimant to make enquiries of the barrister's chambers and discover that there had never been any instructions on behalf of himself and Mr Rose to the barrister in question. He confronted Mr Rose on 5 December 2016 and that led to a meeting which actually took place with Mr Vanlint on 9 December. By then, Mr Rose was signed off sick with colitis for 28 days from 2 December. Mr Vanlint told the claimant that he would have a meeting with the senior management and that there would be a fact finding investigation. At his request, the claimant forwarded to him a statement of events. The claimant sent his statement on 13 December and it broadly tallies with his account to me. It is at pages 538-549 of the bundle. He also provided access to Mr Vanlint to the documentary evidence which he had of his dealings with Mr Rose. There was no written response to that statement and, to the best of Mr Drewery's information, there was no written document prepared as a result of any fact find that took place.

44. There has been no substantive reply from the respondent to the points raised by the claimant. He resigned after not being paid for December on 6 January 2017 (see page 526 citing non-payment of wages and failure to resolve a grievance in respect of the same).

45. It would be unfair to the respondent not to mention that, although they did not respond to the points raised by the claimant, their treatment of Mr Rose was very supportive. Mr Rose was very appreciative of the way that they approached the discovery of what he had done. He had certain powers removed from him, presumably in order to protect the company, but he wasn't disciplined. He regards his mental health and his desire to please people as being at the root of what he did and, although he no longer works for the respondent, I have no reason to think that the events which I have just recounted were in any way connected with that.

Conclusions

46. I now set out my conclusion on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment but I have them all in mind in reaching those conclusions.

47. The claimant's representative argues that Mr Rose had actual authority and that that was given to him by Mr Byrne on 31 December 2015. I reject that argument. There was a formal process; Mr Rose himself did not regard himself as having authority and in my view what Mr Byrne said does not go so far as to in fact give Mr Rose authority expressly and specifically to recruit the claimant.

48. I turn to the question of apparent authority.

49. It is argued by the respondent that the title 'Clinical Director' is not sufficient to give rise in the mind of a reasonable person to an implication of having authority to recruit. Mr Rose gave evidence that he did have input into recruitment although not the final nod. The title 'Director' when compared with 'Manager' does imply and would imply to a reasonable person from outside the business a level of executive authority. Mr Rose said he was a Clinical Director but, in evidence, he contrasted that title with being an Operational Director. That is a fair point, however, according to the response, Mr Bowyer (who is said to have had the power to recruit) was titled the Director of Corporate Strategy which may or may not impute an operational role to the outsider. In my view, it was reasonable for the claimant to assume that since Mr Rose had the title of director he could make decisions to recruit in his area.

50. However, that is a secondary consideration. In my view, what was said by Mr Byrne on 31 December was an implicit representation on behalf of the respondent from the Managing Director that Mr Rose had authority to recruit the claimant. The Managing Director, who gave the final nod on recruitment, had clearly indicated that he wanted the claimant to join the company and that Mr Rose should be his point of contact going forward. It was therefore entirely reasonable for the claimant to assume that Mr Rose had the respondent's authority to make a contract of employment with him.

51. In the light of the sophistication of Mr Rose's smokescreen, I have concluded that the claimant did not act recklessly in taking what Mr Rose said at face value. Many of the normal processes that one would expect in recruitment were carried out; if you do not have explicit knowledge of what the process actually was in this company. The fact that he was coming from the public sector is relevant because he accepted that the private company would be likely to be different to his previous experience. Nothing in what happened after the contract was signed causes me to think that the claimant actually ignored matters of which he should have been suspicious or that he either did or should have doubted the genuineness and the reliability of what he was told.

52. The claimant clearly relied on what he was told because he resigned from his job. I find that he did so because of what was Mr Byrne said on 31 December, the effect of which was reasonably taken to be that the claimant was going to be recruited and that Mr Rose was going to arrange it. Taking into account what he was told by Mr Byrne and the authority which one might reasonably expect a Clinical Director to have it was reasonable for the claimant to rely upon the respondent's representation. There was nothing reckless, dishonest or irrational about the claimant acting as he did.

53. I therefore conclude that there was an effective contract of employment that was entered into between the claimant and the respondent and that

the respondent is bound by it. They failed to pay the claimant, each failure amounts to a repudiatory breach of contract and they did fail to investigate his concerns adequately or at all. They were therefore in repudiatory breach of contract which the claimant accepted by resigning.

54. After giving oral judgment on liability, I invited further submissions on remedy and then made the following additional findings.

Remedies

55. I have received submissions in relation to remedies on four different matters: valuing the pension loss, valuation of the loss of the company care, the mechanism by which the unauthorised deduction of wages claim should be paid and the application of s. 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (hereafter TULR(C)A).

Unauthorised deduction from wages

56. The terms of the contract were set out on page 41 and following of the bundle. It was agreed that the claimant would be paid £5,000.00 gross per calendar month.

57. The unauthorised deduction from wages is brought under two heads: the payment in lieu of annual leave, calculated in accordance with reg.14 of the WTR, the gross figure for which is £3,230.27; and the failure to pay wages, the gross figure for which is £31,153.85 up to the end of a putative notice period. This makes a total payment to be made by the respondent to the claimant of £34,384.12 gross.

58. It is argued on behalf of the claimant that this should be paid gross and the claimant would account for tax and employee's national insurance contributions. The respondent argues that it should be paid net of tax and national insurance, as is usually the case, because otherwise the respondent risks having to pay tax and national insurance on top of the gross sum. The reason the claimant argues that it should be paid gross and he account for it is that he had other income during the course of that tax year and it is not clear what the tax should be. This is not a dispute about the amount of the deduction that had been made but about the way in which the judgment should be satisfied. I have decided that the balance of convenience is in favour of ordering the respondent to pay it net of tax and national insurance to the claimant. The claimant can notify the respondent of his tax code for that year. The only risk to the claimant is that in due course HMRC may need to adjust his tax if it turns out that the right amount has not been paid through the respondent's payroll and the respondent is going to have to put him on the payroll to be paid and pay employer's national insurance contributions in the usual way.

59. Therefore, the total sum of the unauthorised deduction from wages claim is £34,384.12 gross to be paid by the respondent to the claimant net of tax and employee's national insurance contributions. This is a minor revision

from the figure announced in tribunal of £34,382.00 which involved a calculation error.

Breach of contract

60. In relation to pension, the respondent says that the claimant would have been enrolled on an auto-enrolment pension to which the employer's contributions would only have been 1% per annum in the relevant period. There is no evidence before me either way and therefore I accept that submission. This head of claim is a claim for damages for breach of contract and therefore going the best that I can I value the loss to the claimant for the failure on the part of the respondent to set up a pension plan for him at half of 1% of £60,000.00 being £300.00.

61. The other breach of contract claim is the loss of the value of a company car. I accept that, taking into account the email correspondence between the claimant and Mr Rose, the company car that the claimant was to be provided with would have included an element of personal use as well as business use and that it was to be of a type of car of a bracket that included the Jaguar F-PACE. The amount claimed in respect of this is calculated by reference to the HMRC Company Car Fuel Benefit Calculator and in principle that sum is accepted by the respondent as a reasonable estimate of the loss of the value of that car. Credit is given by the claimant for 51 days' use that he had of the pool car.

62. The respondent argues that further credit needed to be given for the tax that the claimant would have paid on the benefit of having the car had he been in employment. It is argued by the claimant that it should be awarded in full because it will be taxable in his hands.

63. This is an award of damages for breach of contract, not unauthorised deduction from wages and I am seeking by this to put the claimant in the position that he would have been in but for the breach of contract. It therefore seems to me that I should accept the respondent's submission and give credit for the tax that would have been paid on the value of the car. Making a reasonable assumption about the incidence of tax upon this benefit, I therefore award 60% of the £9,507.00 claimed, making the award for damages for breach of contract for the loss of the company car to be worth £5,704.20.

64. The claimant can apply for reconsideration of the calculation of this head of loss if it turns out that I am wrong in my assumption that this is not taxable in the claimant's hands.

65. Therefore the total damages for breach of contract are £6,004.20.

Section 207A of TULR(C)A

66. There is then the question of whether there has been an unreasonable failure to comply with the Code of Conduct in Relation to the Grievance. I

find that there has been such an unreasonable failure to comply with the Code of Conduct. There was a grievance brought on 21 September 2016. It went to Mr Rose. There is no suggestion on the part of the claimant that anyone other than Mr Rose was aware of it although I accept that Mr Rose was in fact the correct person to whom it should be brought because he appeared to the claimant at least to be the claimant's line manager. However, more relevant for these purposes is the full statement that the claimant made on 13 December setting out in a great deal of detail exactly what he has told me but also providing by way of a Dropbox the evidence that demonstrates the length to which Mr Rose was going in order to convince the claimant that he was employed and that his concerns were being taken seriously.

67. Despite the meeting with Mr Vanlint on 9 December and despite Mr Vanlint's telling the claimant that there was to be a fact find, the claimant has had absolutely no response whatsoever to that statement. By reason of Schedule A2 of TULR(C)A, s.207A applies to both the unauthorised deduction from wages claim and the breach of contract claim. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) applied because the claimant raised a grievance, first with Mr Rose and then with Mr Vanlint. His statement to Mr Vanlint came after the 9 December meeting and therefore that meeting cannot be relied upon as having been a grievance meeting. There was no meeting with the claimant to discuss the grievance (contrary to paragraph 33 of the Code of Practice) and no decision on appropriate action (contrary to paragraph 40 of the Code of Practice). My conclusion is that there was a complete failure to comply with the Code of Conduct in relation to Grievance which applied and therefore I award a 25% uplift to both the sums that are awarded. Therefore the award for unauthorised deductions from wages is £42,980.15 and the award for damages for breach of contract is £7,505.25. Again the award for unauthorised deduction from wages is a slight revision from the figure announced in tribunal because the earlier arithmetical error was carried forward.

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Employment Judge George

Date: …4 December 2017…..

Judgment and Reasons

Sent to the parties on: 8 December 2017

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For the Tribunal Office