EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105618/2016

Held in Glasgow on 17 18 19 and 20th September 2018

Employment Judge: Laura Doherty

Mr E Cadden	**Claimant** **Represented by:** **Mr R Turnbull - Solicitor**
New Forest Communications	**Respondent** **Represented by:** **Mr. Walker** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is;

(1) The claimants claim of unfair dismissal succeeds, and the Respondents are ordered to pay the claimant a Monetary Award of **Fifteen Thousand Six Hundred and Eighty-Two Pounds and Fifty Pence (£15,682.50).**

(2) The claim of unauthorised deduction of wages contrary to Section **13** of the Employment Rights Act 1996 (the ERA) succeeds and the respondents are Ordered to pay the claimant the sum of **Seven Thousand Pounds** (**£7,000).**

(3) The claimants claim of Breach of Contract succeeds and the Respondents are ordered to pay the claimant the sum of **One**

Thousand, Five Hundred and Fourteen Pounds and Fourteen Pence (**£1,514.14).**

(4) The claim of under Regulation **14** of the Working Time Regulations 1998 (the Regulations) succeeds and the respondents are ordered to pay the claimant the sum of **One Thousand, Three Hundred and Seventy-Two Pounds, and Seventy-Five Pence (£1,372.75)** in respect of leave accrued but not taken at termination of employment.

REASONS

1 The claimant presented a claim on 25 November 2016 claiming unfair dismissal, breach of contract, failure to pay holiday pay, and unauthorised deduction of wages. All claims were resisted by the respondents. The final version of the amended response was lodged in December 2017.

2 The claimant was represented by his solicitor, Mr Turnbull, and the respondents were represented by their Managing Director, Mr Walker.

Preliminary issue

3 There is a preliminary issue as to the identity of the claimant's employer. The Respondents position is that the claimant was not employed by them, but by another company, Pointshift Ltd.

Unfair Dismissal

4 The issue in this claim is whether the claimant was constructively unfairly dismissed in terms of Section 95 (1) (c) of the Employment Rights Act 1996 (the ERA)

5 The term of the claimant's contract which is said to have been breached is the obligation to pay wages. It is accepted that the claimant tendered his resignation on 28th July 2016 giving 3 months' notice, and thereafter, during that notice period he resigned with immediate effect on 20 September, bringing the contract and end on that date.

6 The Respondents position is that there was no breach of the claimant's contract, in that all sums due to him had been paid. It is also said that the claimant resigned from his own the reasons and not in response to a breach of contract.

7 In the event that the Tribunal finds that the claimant was constructively unfairly dismissed it will have to consider the issue of remedy. This will include considering if compensation should be reduced on the grounds of failure to mitigate loss, contributory conduct, and whether the principles to be derived from the case of *Polkey v A E Dayton Services* should be applied.

Unauthorised deduction of wages

8 The issue is whether the claimant is due to be paid salary for the months of August and September 2016, and if so, in what amount.

Holiday pay in respect of leave accrued but not taken on the termination of employment.

9 The issue is whether the claimant is due to be paid for any leave accrued but not been taken on the termination of his employment.

Breach of Contract.

10 This claim relates to payment of expenses which the claimant says are due in respect of a period during which he worked away from home. The issue is whether the claimant is contractually entitled to recover expenses, and if so in what amount.

Preliminary Application

11 At the commencement of the hearing the Tribunal dealt with an application for strikeout of the response under Rule 37 (1) (a) and (c) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules). The Tribunal refused the application and give reasons for this orally.

The Hearing

12 The claimant give evidence on his own behalf, and evidence was given by Monica What, who had worked with the claimant and had also been a Director of Pointshift Ltd.

13 For the respondent's evidence was given by Mr Matt Walker, the respondents Managing Director and Mr Johnson Oliff -Cooper, a Director and shareholder of the respondents.

14 Both parties lodged bundles of documents, referred to by the prefix Cl and R.

Findings of fact

1. The respondents are a company engaged in the supply of IT services, including the supply of computer hardware. They supply a significant number of 'real time' systems, which are used in security systems and in transporting cash. They had around 5 or 6 employees at the relevant time.

2. The respondents acquired a company by the name of Pointshift Ltd (Pointshift) on 1 August 2013. Pointshift is a company engaged in the supply of software services.

3. The claimant whose date of birth is 28/06/1966 set up Pointshift in around February 2003 and had been was employed by that company from that date. He was a Director and Shareholder in that company. The respondents and Pointshift had worked together for a number of years in a main contractor/ subcontractor type of relationship.

4. The respondents acquired Pointshift by way of a share transfer in around July 2013. The respondents Directors entered into a Shareholder's Agreement with the Directors of Pointshift (CL 159), by virtue of which the claimant was allocated twenty shares in the respondent company. Ms Watt was allocated 10 shares. The other Shareholders were Mr and Mrs Walker, and latterly Mr Ollif-Cooper

5. There are consequences for a shareholder, in terms of the Shareholders Agreement, if they are found to be a 'Bad Leaver'. A Bad Leaver is defined as;

> *'A shareholder who is an individual and who is an employee of a member of the Group and who ceases to hold such employment as a result of fraud, dishonesty or gross negligence unless the Board notifies the Company that such person is not a bad leaver.'*

6. *The Group,* is defined as '*the Company, and Track 360*.' *The Company* is defined as '*New Forest Communications Limited'*.

7. On the acquisition of Pointshift by the respondents, it was intended that Claimant, and the other employee and Director of Pointshift, Monica Watt, would become employees of the respondents.

8. On 8 January 2014 Mr Walker forwarded the claimant a draft contract of employment. This reflected that standard terms and conditions on which the respondents engaged employees. The claimant and Ms Watt revised this document, and their proposed amendments were marked up on it (page Cl 463). This was not returned to the claimant with an indication that the proposed amendments were rejected. The document was headed 'Contract of Employment' and is stated to be between the respondents and the claimant.

9. In terms of clause 5.1 of the document it is said that the claimant's rate of pay is £3,500 per month payable on or about the 20th of each month.

10. Under the heading 'Holidays', the document states:

> *'6.1 Your holiday year runs from 1st December to 30th November and you are entitled to 20 per year, to be taken as such times as may be agreed with the Employer'*

6.2 In addition, you are entitled to the following public holidays: All Bank Holidays.'

11. On the claimant's revisions of the document there is a query as to whether the pay is net; whether it is a minimum salary plus dividend; and if the bank holidays are English or Scottish.

12. The draft document provided by the respondent's states that the claimant's employment with Pointshift counted as parts of his continuous employment with the respondents. In the revised version of the contract, the claimant inserted a date of commencement of employment of 25 February 2003.

13. No contract of employment was signed between the claimant and the respondent, however Cl 463, the final version of the draft, set out the terms on which the parties intended to contract with each other.

14. After the respondents had acquired Pointshift, the claimant continued with the duties which he had previously carried out as an employee of Pointshift. That was maintaining the existing infrastructure, looking after software services, dealing with support services, and looking for sales opportunities. He also had some contract with clients of the respondents. The claimant's job title was Head of Operations (Glasgow). He remained a Director of Pointshift.

15. Pointshift continued to invoice customers for work which was performed by Pointshift, however some work was invoiced to the respondents.

16. Mr Walker was not involved to any significant extent with day to day decisions which the claimant took in the performance of his work, but he was responsible for deciding the order in which the projects the claimant worked on were done, and ultimately, he considered that the claimant was answerable to him.

17. Pointshift continued to maintain its own bank account and the claimant was the only person who had access to this. The account was used to pay routine expenses associated with the running of the business. It was also the account

from which the salary payments (net of tax and NI) of the claimant and Miss Watt were made.

18. Pointshift's major overhead was the payment of salaries.

19. The claimant received a salary of £3,500 net per month net. The payment of that salary was made from the Pointshift bank account. The tax and national insurance which was due on the salary payment was paid for from the respondent's bank account.

20. The claimant received payment of his salary, on or around the 20th of each month, however on occasions salary was split over two payments, and it was not always paid on the 20th.

21. On a reasonably regular basis, the claimant requested funds from the respondents to pay overheads, which were made available by the respondents. Pointshift's biggest overhead was salary, and funds from the respondents could be used to pay salaries for the claimant and Ms Watt.

22. The claimant's wage slips administered by Vincent Clemas, the respondent's accountants. The 'company name' on the wage slips was New Forrest Communications. The date for payment of salary on the wage slips was the 20th of the month.

23. The claimant worked five days per week.

24. It was not uncommon for cashflow to be an issue. Mr Walker would from time to time provide information to the claimant about his forecasts for income which the respondents were likely to receive.

25. The claimant met with Mr Walker in February 2016 in the respondent's offices in Ringwood England, to discuss matters, including cashflow. The outcome of those discussions was that it was agreed that the claimant would move from his base in Glasgow, to the respondent's offices in Ringwood. As part

of the discussions which took place, Mr Walker agreed that the respondents would meet the expenses incurred by the claimant in moving to England to work.

26. The claimant worked in England from around February 2016, until around the end of June 2016. The expenses he incurred in doing so amounted to £9014.14.

27. On 23 April 2016, Mr Walker emailed the claimant and the other Respondent directors with information about the financial state of the company. He advised that the priority order for the payment of creditors was HMRC (VAT and PAYE); loan(guaranteed); overdraft (guaranteed); Trade Creditors; staff; and shareholders.

28. On 3 May 2016, the claimant emailed Mr Walker indicating he disagreed with this priority list and asking for access to the NFC bank accounts. In that email the claimant stated that Pointshift could no longer commercially continue to support the operational requirements of the Group without the restructuring of payments. He suggested a board meeting to discuss. This email was copied to the other directors of the respondents.

29. The claimant did not receive a response to his email, and on 12 May 2016, he emailed Mr Walker again asking for a response. Mr Walker replied on the same day (Cl 205) providing information about cashflow, and a forecast of money which was due to come into the business. He also provided information about monies which the respondents were forecasted to collect.

30. The claimant received payment of his May salary in the sum of £3,500. This was paid by way of two payments, the first received on 31 May of £2,500 and the second received on 1 June of £1,000.

31. The claimant emailed Mr Walker on 21 May Cl 203) advising he was being chased by a supplier for an overdue payment of £4,000. He advised Mr Walker, there was a real possibility that the supplier would shut the service down, resulting in significant client loss, and he asked if the respondents could

assist in making funds available. He also asked for a copy of the management accounts for the respondent.

32. No payments were made by the respondents to Pointshift, and on 14 June 2016 the claimant emailed Mr Walker again advising that Pointshift had insufficient funds to pay for the current contractor services and unless the respondents transferred funds there was a risk of services being terminated, with an outstanding VAT bill of £4,000. He suggested that Pointshift was trading insolvently.

33. Mr Walker responded to this email on 15 June (CL199) with a projection of funds which were due to come into business by the end of the month. He stated that all the documents were visible or could be requested from the accountant. He indicated that he agreed that they should roll up the Pointshift invoicing and banking into the respondents banking, as it would be easier to manage.

34. On 21 June 2016, the claimant emailed Mr Walker again regarding the payment that was due to the service provider. He asked if the respondents had any cash, and if they could help with the payment for the service provider.

35. Mr Walker replied on 21 June (Cl 225) saying there was no cash at the moment, but expected that to change at any time, he advised that he had budgeted £4,000 for Pointshift, but he would up that to £8,000. He also provided a forecast of money which was due into the respondent's business (Cl 226).

36. There were a series of emails on 21 June 2016 between Monica Watt, and Mr Walker, about payments due to the supplier, and on 21 June 2016, Miss Watt asked Mr Walker, what was '*due out 'from NFC by the end of the month'* (Cl 220). Mr Walker responded that there was no cash at the moment to speak of, but he expected that to change at any time.

37. On 29 June 2016, the claimant emailed Mr Walker asking how much cash was on hand and how much he was expecting the following day and querying if everyone would get paid the following day (Cl 295).

38. Mr Walker replied on the same day providing provided information about cash which was due to the respondents, but nothing more.

39. By 29 June 2016, the claimant had not been paid the wages which were due on or around 20 June 2016. On receipt of this email, the claimant became concerned at what he considered was a lack of transparency in the running of the business, and he was concerned that despite the significant income which was said to be due to the respondents by Mr Walker, even small amounts of money were not being transferred into the Pointshift bank account.

40. On 30 June 2016, the claimant decided that he was going to reduce his hours of work. He wrote to Mr Walker on that date (Cl 299) with a list of complaints about how the business was run, and about monies which he said Mr Walker had taken for salary increases and expenses which the business could not afford. He complained Mr Walker was too involved in the day to day management of all aspects of the business, and that he supported employees whom the claimant considered were a liability to the business. The claimant advised Mr Walker that he had lost confidence in terms of the strategy in the business. The claimant stated; '*since the business cannot afford wage rises with the exception of yourself, I intend to reduce my hours of work significantly. I will move to hours that will give me a pro rata salary of pro rata salary of £6k (see 3 days a week) given the 24-hour systems cover I have to provide. I think it is reasonable and matches my salary to yours.'*

41. The claimant also stated '*I also have, with considerable expense to myself, spent six months in Ringwood and as discussed I was to be compensated for this. I will have a Director's loan placed into PS to account for this in the short term, so it is properly accounted for.'*

42. The claimant indicated that he intended to move back to Glasgow immediately, which he did.

43. Mr Walker responded to this email on the 3rd of July (Cl 297) providing his perspective on the business and suggesting a meeting. With regard to the claimant's proposed reduction in hours he stated that; '…. *as to you changing hours to give yourself a pay rise, since this is based on a misunderstanding of the accounts I'll ignore it. In actual fact I don't think it matters what hours you chose to work so long as the list of things that need sorted out is done.'*

44. The claimant received payment of £2,000 on 1 July 2016 by way of salary, which was due for the month of June, with a further £1,500 being paid on 4 July.

45. On 4 July 2016, the claimant emailed Mr Walker advising he needed £3,000 immediately in order to pay the supplier, and then £5,500 before the end of business on 7 July 2016 for VAT payments (CL225).

46. The claimant e-mailed Mr Walker again on 5th July (CL 231) querying the up to date position in terms of cash and Mr Walker responded on the same date providing a forecast of payments which were due in.

47. On 7 July the claimant entered into a text exchange with Mr. Olliff Cooper, (R 63 to 72) in which he stated among other things that Pointshift could not meet the debts which it was owed and that he might resign as Director from Pointshift, and bankrupt himself Mr. Olliff Cooper was very surprised and concerned to hear that the financial situation was as bad as indicated by the claimant.

48. A telephone calls subsequently took place between the claimant and Mr. Olliff Cooper on or around 8 July in which the claimant again raised concerns about cashflow. In the course of that telephone call the claimant suggested to Mr. Olliff Cooper that there was going to be two companies and asked him which one he wanted to work for. At this time Mr. Olliff Cooper formed the

impression that the claimant was seeking to recruit him out of the respondent's business.

49. On 8 July, the claimant e-mailed Mr. Walker stating; *"until we reach agreement of the following I am withdrawing my labour from the business, as of midday today, I will take a view on emergency work as it arises."* The e-mail went on to list 10 points, which dealt with *inter-alia* with the production of management financial information, sales strategy, the claimant's appointment as a Director of the other group companies, that Pointshift would maintain its own bank account until '*we can determine proper financial control for the business as a whole'*, and that Pointshift would employ an alternative accountancy firm.

50. Mr. Walker responded on the same day asking the claimant to define emergency, and what bits of work he was prepared to handle. He also suggested a meeting to discuss all the options including up to a "demerger".

51. On 18th July the claimant again emailed Mr Walker advising that to bring payments to Pointshift's suppliers up to date, they would need a payment of £8,000 and that they had £300 in their account (CL 253). Mr Walker responded suggesting he tell the supplier that they would make a payment of £3000 and that he would 'lean' on a client for payment.

52. On 20th July there was £ 300 in the Pointshift bank account with more that £13,000 of invoices due to supplies. Ms Watt emailed Mr Walker advising of this and asking if she was going to be paid. No response was received from Mr Walker, but the claimant responded to her advising that unless the respondents transferred funds then she would not be paid.

53. A meeting was arranged between the claimant and Mr Walker to discuss matters. By this time the content of the telephone call between the claimant and Mr Ollif Coper had come to Mr Walker attention, and he began to form suspicions about the claimant's intentions. He refused to discuss anything substantive at the meeting on the basis of his concerns.

54. The claimant was due to be paid the July salary on or around 20th July. By 28th July he had not been paid. There was insufficient money in the Pointshift bank account to pay his salary, and no indication when money would be transferred from respondents.

55. The claimant decided to resign with notice, and he wrote to Mr. Walker on 28th July in the following terms;

> "*I had hoped that you would in some way respond to my questions regarding how the business is being run and discuss our options constructively. Since I have contacted you on 8th July again to highlight my areas of major concern you used this schedule meeting update me of some undisclosed legal matter you were pursuing.*
>
> *As I can see no way forward I tender notice of my resignation as an employee of New Forest Communications as Head of Operations in Glasgow with 3 months' notice in accordance with the notice period in my contract of employment. I intend to continue my role as Director of the company. I will of course fully support the business in all respects until I leave. As always I can be contacted on my mobile".*

56. Mr Walker wrote to the claimant on 4th August stating: - *"I write to confirm receipt of your notice of resignation sent by e-mail on 28th July 2016. In accordance with the terms of your employment contract your last day of employment will be 28th October 2016.*" (page 325).

57. The claimant took £7,500 from Pointshift's bank account on the 4th July 2016, which he marked in the account as a loan. He used these funds to partially reimburse the expenses which he had incurred in relocating to England. As Mr. Walker had no visibility on the Pointshift bank account, he did not know the claimant had taken £7500 from the bank account at this time.

58. On 2nd August 2016 the claimant set up a company called Tartan Logic which, although it did not trade as of that day, subsequently provided IT software services. He also set up another company by the name of Chartroom Ltd which provides sailing instruction.

59. The claimant was paid July's salary of £3,500 on the 3rd of August.

60. Mr. Walker asked Mr. Jonathan Olliff Cooper to become involved in the handover from the claimant. As part of this handover the claimant was asked to provide access to the bank account for Pointshift, however he did not do so.

61. The claimant was also asked to provide the administrative login and user name and password details for all servers and the source code to upload the FTP server. Mr. Olliff Cooper e-mailed the claimant on the 19th of August (R17)) asking for this information. He did not receive the information and he emailed the claimant again asking for it on 23rd August (Cl 331). Mr Walker also e-mailed the claimant on 23rd August asking to ensure that Mr. Olliff Cooper had everything which he required.

62. The claimant responded on 23rd August (R20) stating: - *"As a Director of New Forest Communications and the current Head of Operations until 28th October, I had been advised not to release information you have requested at this time, for the following reasons."* The claimant thereafter listed a number of reasons, which included that the respondents had refused to indemnify him in the business against any actions, that the respondents refused to provide him with access to information relating to the new environment specifically Hosting Agreements and SLA, to enable him to ascertain if the proposed service meets the client's existing contractual requirements, and he had no information as to the suitability of the personnel involved in the process. He also cited as a reason for not providing the information, that it had been reported to him there had been an unauthorised attempt to become the primary contact for the UK fast solution by Mr Jonathan Olliff Cooper, which could have resulted in the claimant being locked out of the system. The claimant indicated that the systems were running normally, and the contract enabled them to continue in this environment was not due for renewal until next year, and the respondent's decision to move to a new environment was unwarranted. The claimant stated that if the potential liabilities mentioned could be removed he was sure he that he could progress

the handover successfully. The claimant stated that he was continuing to carry out day to day tasks, customer developments and 24-hour support of systems until notified of a change in these circumstances.

63. The claimant was due to be paid salary on or around 20th August. This salary was not paid as there were insufficient funds in the Pointshift account to meet the salary payment.

64. The claimant e-mailed Mr Walker on 7 September (Cl 337) advising that he was due a salary of £3,500 on 20th August but had not been received; he advised that there were insufficient funds in Pointshift's account to pay salaries and suppliers, and no response had been received from previous e-mails advising of monies due. The claimant queried if the respondents intended to pay the part of his salary which was paid by the respondents. He indicated that Pointshift was dependent on continuing finance being made available by the respondents as a parent company and that the respondents had provided such support, but this had now ceased. The claimant advised that unless the respondents were willing to continue to provide such support, as a Director of Pointshift as the claimant would consider placing Pointshift into some form of insolvency process. The claimant queried if the respondents intended to continue to provide financial support, and he advised that whilst his full salary had not been received he intended to provide emergency cover only. He asked for a response within 5 days.

65. The claimant was not paid on the 20th of September and he then decided to resign. He e-mailed Mr Walker (C 341) tendering his resignation with immediate effect. This e-mail stated *"I was due a salary payment of £3,500 on 20th September 2016 but it was not received. On 7th September I e-mailed you to query that and I asked for a response and payment within 5 days. I have not received any further payment or a response following my e-mail on 7th September 2016 addressing any of the issues raised in my e-mail. In the circumstances I consider that you are in a material breach of contract and I regard myself as having been constructively and unfairly dismissed with immediate effect. My employment has therefore been terminated and I would*

be grateful to receive a copy of my P45 as soon as possible. This does not, of course affect position my as a statutory director or shareholder.

66. After the claimant's resignation on 20th September, the respondents became increasingly concerned about the failure to handover technical information which was extremely important to the running of the Pointshift business.

67. The claimant did not provide all the handover details which were required of him from Mr Olliff Cooper on technical issues, which resulted in the respondents having to employ independent external contractors to resolve the difficulties which this occasioned. The respondents did not obtain access to the Pointshift bank account until December 2016.

68. On 7th October, the claimant contacted one of the Pointshift's suppliers, Mblox, and instructed them not to share any technical or billing information with the respondents (R73).

69. On 14th October 2016 the respondents wrote to the claimant (CL353) purporting to suspend him pending disciplinary investigations. The letter set out 9 allegations in the following terms: -

1 *You deliberately left work requests unfulfilled. It is alleged that you did this in order to intentionally give poor service and cause customer complaints. It is averred that you may have ignored work requests deliberately in order to sabotage the Company and/or Pointshift;*

2 *You deleted work tickets from the Pointshift system. It is alleged that you did this intentionally and with a view to causing business disruption to Pointshift and/or the Company;*

3 *You shared false and misleading information with an employee over SMS. It is averred that you did this in order to cause panic amongst other employees and that you acted intentionally in order to disrupt the business of Pointshift and/or the Company. The type of information that you shared, apart from being false, would have also been*

confidential and it was not appropriate for you to disclose this to Mr Cooper;

4 *On 8 July 2016 you made inappropriate threats to withdraw your labour from the business;*

5 *You have failed to provide a smooth and timely handover. In particular, it is alleged that you have failed to provide access to Pointshift bank accounts;*

6 *You, in collision with another employee, have set up two limited companies and created a website in competition with the Company and/or Pointshift;*

7 *On 7 October 2016 you contacted one of Pointshift's suppliers, Mblox, and instructed them not to share any information with the Company. It is alleged that you were trying to cut off the Company from its suppliers;*

8 *That you have deliberately withheld Pointshift bank accounts from Matthew Walker in order to cause disruption to both businesses; and,*

9 *You knowingly or negligently allowed the use of an illegitimate license key in relation to SQL servers.*

70. The claimant was asked to attend a disciplinary hearing. As he was no longer employed the claimant declined to do so.

71. A disciplinary investigation was conducted by an independent HR consultancy engaged by the respondents. This agency produced a disciplinary investigation report (R document 24/25) which dealt with each of the allegations. A disciplinary hearing was convened on 16th October 2016, to which the claimant was invited. The claimant failed to attend the hearing, but the hearing was conducted in his absence, by a Nick Dyoss, who was a Non-Executive Director of the respondents. Mr Dyoss found that each of the allegations was well founded, and that the claimant was guilty of gross misconduct, and that dismissal was the appropriate penalty.

72. Mr Dyoss wrote to the claimant on the 27th October advising him that his employment with New Forest Communications was terminated by reason of his gross misconduct (R26). The claimant did not respond to this.

73. On 17th October 2016 Miscolo Support systems wrote to the claimant at Pointshift advising that they no longer require Pointshift to provide monthly SMAS services as of the 14th November 2016. Miscolo was Pointshift's biggest client generating income of around £20,000 a month.

74. The claimant gave this letter to the respondents in December, by which time Tartan Logic were providing IT services to Miscolo. The switch of IP from the Pointshift servers to the Tartan Logic servers occurred on 11th November 2016.

75. These services provided to Miscolo are billed through Charthouse Limited. It began billing Miscolo in December 2016. The billing to Miscolo is in the region of around £17,000 a month, split into £2,000 for consultancy services, and £15,000 for other services rendered. The claimant has chosen to draw no income in the period from 20th September to date, from either Tartan Logic or Chartroom other than £3,412.15, drawn from Chartroom, from work done as a sailing instructor. The claimant took a loan of £30, 000 which he invested in one of the businesses.

76. **Expenses.** The claimant incurred expenses in relocating to England of £9,014.14 He submitted a document detailing the expenses which he had incurred on relocation to England to Pointshift, or at some point after the 20th June 2016. This was signed by Ms Watt as an approving Director of the business. The claimant apportioned £7,500 which he had taken from the Pointshift bank account in July and which he had identified in the Pointshift accounts as a loan, towards these expenses.

77. The company Handbook which was issued to the claimant provides at page 81, under the heading: **Business Travel** "*You will be reimbursed for any expenditure necessarily incurred in order to do your job when working away from your normal place of work. Public Transport and accommodation costs*

will be reimbursed at actual cost – appropriate receipts must accompany all claims."

78. The respondents refused to sanction payment of the claimant's expenses on the basis that they were told by their accountants that they were lodged too late and out with the scope of the normal accountancy rules. A Board meeting was called by the respondents in August 2017 after the claimant's employment came to an end when the respondent's Board refused to sanction payment of the claimant's expenses.

79. **Holiday pay.** On the 11th August 2016 the respondent's Office Manager wrote to the claimant with details of the holidays which he had taken (CL335). In that e-mail she stated that the claimant's contract provided he was entitled to 20 days leave per year, and that his entitlement commenced on 1st December.

80. The Office Manager provided a list of dates where it was said that the claimant had been on holiday and stated that he was 7.5 days over his entitlement. Those dates included the 1, 2, 3, 6, 7 and 8 June, and the 1, 11, 12, 13, 14, 15, 18 19, 20, 21 and 22 July. The claimant replied on 6 August stating that he had not had time to fully check this e-mail, but that he had been marked as being on holiday on June dates, when he had actually been working in Glasgow, and he asked for the position to be updated accordingly. The claimant had been working in Glasgow on those dates.

81. The dates marked as holiday from the 7 July were dates upon which the claimant was not working, as part of his reduction in the number of hours which he proposed to work. The claimant had 8.5 days leave which had accrued but not been taken on the termination of hos employment.

Note on Evidence

82. A good deal of the evidence in this case was not in dispute, and it appeared to the Tribunal that the what really was in issue was how the parties interpreted the events. Having said that it appeared to the Tribunal that there may well be disputes between these parties which fall out with the jurisdiction

of this Tribunal, and the Tribunal did not consider it relevant to make findings other than those which are in point in the issues which it has to determine, within the confines of the Employment Tribunal claim. For example, it was not necessary for the Tribunal to make findings as any to the implications of the parties conduct in terms of the Shareholder Agreement or whether there was a breach of that Agreement, even although this may be a matter which is live between the parties.

83. The Tribunal accepted a good deal of the claimant's evidence as being credible and reliable. In particular, it accepted his evidence that he was due to be paid salary of £3,500 net per month on or around 20th of each month, and this was not paid on time for the month of June and July, and that it was not paid at all in the months of August and September.

84. The respondent's position was that all sums due to the claimant had been paid, however it appeared to the Tribunal that this position was predicated was on the basis that the loan which the claimant had taken from Pointshift was taken into account. The fact that the claimant took a Directors loan, or took funds to reimburse expenses due to him, is however irrelevant to the assessment of whether or not wages had been paid.

85. The Tribunal also was prepared to accept the claimant's evidence that he was concerned about cashflow issues and that there were insufficient funds in the Pointshift bank account to pay the claimants salary on the 20/28th July and in August/September. It appeared to be common ground with Mr Walker that given the size of the company, cashflow was from time to time an issue and Mr Walker explained that he spent some time forecasting revenue in order to deal with this.

86. It did not appear to the Tribunal that there was much between Mr Walker and the claimant's evidence as to the degree of control which Mr Walker exercised over the work performed by the claimant. Both Mr Walker and the claimant gave evidence to the effect that the claimant performed his role fairly autonomously within Pointshift in terms of the day to day work which he did, but that Mr Walker was involved in determining what order projects were

performed in and it was Mr Walker's evidence was that he considered the claimant was ultimately answerable to him.

87. The Tribunal also accepted the claimants evidence to the effect that a significant motivation for his resignation in July, and his subsequent resignation without notice in September, was his not being paid on time and then not being paid. The Tribunal had no doubt that there were other factors in pay as far as the Clamant was concerned, connected to his dispute with Mr Walker as to how the company should be run, however what underpinned his concern was the lack of cash flow and how this impacted on the financial viability of the business and ultimately a concern that he would not be paid his salary.

88. **Ms Monica Watt.** The Tribunal formed the impression that Ms Watt in so far as her evidence was relevant, was generally credible and reliable. Her evidence was confined to the fact that she had revised a draft contract, that Pointshift had cash flow issues and at one point could not pay her wages; that she felt Mr Walker had a degree of control over her work, and that the claimant had told her that Mr Walker had sanctioned his expenses, which she then signed off. She also gave an opinion on the allegations made against the claimant post dismissal which she said she thought were not accurate, however it did not appear to the Tribunal that this was relevant to the issues it had to determine.

The respondent's evidence

Mr Olliff Cooper

89. **Mr Olliff Cooper's** evidence was largely about to the effect of the claimant's failure to provide technical information and the severe impact this had upon the respondent's business. He also spoke to the telephone conversation which took place between himself and the claimant, at some point in July 2016. It was Mr Cooper's evidence that he formed the impression that the claimant was trying to recruit him.

90. The Tribunal formed the view that Mr Cooper's was credible and did not seek to mislead, and the Tribunal had no doubt this was the impression that Mr Olliff Cooper formed. That however is not the same as concluding that the claimant had made an offer of employment to Mr Olliff Cooper. Mr Olliff Cooper accepted that the claimant had not mentioned another company by name, and on balance the Tribunal was satisfied that it was unlikely that the claimant had made a specific offer of alternative employment to Mr Olliff Cooper in the course of that telephone call.

91. **Mr Walker.** The Tribunal formed the impression that the bulk of Mr Walker's evidence was credible and reliable. There were some aspects of his evidence in which he was evasive, particular answering questions about of the draft contract of employment. He accepted however that he was unclear as to the claimant's employment position, and the Tribunal did not draw too adverse an inference as to his credibility and reliability from his lack of clarity on the contractual documentation.

Submissions

Claimant's Submissions

92. Mr Turnbull presented written submissions which he supplemented with oral submissions.

93. He invited the Tribunal to find of the claimant and his witness credible and reliable in contrast to the respondent's witnesses, and he took the tribunal to passages of the claimant's evidence which had not been challenged cross examination by Mr Walker

94. Mr Turnbull invited the Tribunal to make findings in fact, and he produced a draft of what he submitted with the key findings in fact. That included at the claimant was an employee of the respondents, that there had been a failure to pay his salary and that he had resigned in response to that, and that the reason the claimant did not engage in the disciplinary procedure was because he had resigned.

95. Mr Turnbull submitted that the Tribunal should find that the respondents did not take any action against the claimant when he temporarily withdrew his labour but continued to treat him as an employee. He submitted there was nothing in the claimant's contract of employment to prevent setting up Tartan Logic on 2nd August, and he did this because he was not being paid by the respondents. Mr Turnbull submitted the tribunal should find that that Miscolo moved its custom from the respondents to Tartan Logic, because of poor service by the respondents.

96. In relation to issue of jurisdiction Mr Turnbull referred the Tribunal to the case of *Ministry of Defence HQ Defence Dental Service v Kettle UKEAT/0308/06* and guidelines set out in that case. Those were;

97. Did the parties intend the documents to be the exclusive record of the terms of that agreement?

98. If the Tribunal finds (as a matter of fact) that this was the parties intention, it will generally be restricted to the terms of the contractual documentation in determining whether the individual was an employee.

99. If, however, the Tribunal finds (as a matter of fact) that it was not the parties intention that the documents should be an exclusive record of their agreement, it may look at other relevant material (including all exchanges and conduct) to determine employment status.

100. Mr Turnbull also referred to the cases of *Real Time Civil Engineering Ltd v Callaghan (2005) UKEAT/0516/05 and Protecatacoat Firthglow Ltd v Szilagyi (2009) IRLR 365,* and *Autoclenz Ltd v Belcher and Others (2011) IRLR 820* in support of the proposition that it is only appropriate to look outside the four corners of the contract where a contractual term has been varied or is a sham.

101. Mr Turnbull submitted that the agreement between the parties was that the claimant was an employee of the respondent, and that the contract produced by the claimant reflected the parties intention. He pointed to the fact that the claimant's witnesses were not cross-examined on the issue of employment status.

102. Mr Turnbull took the Tribunal to the various aspects of the evidence which he submitted support the conclusion that the claimant was an employee of the respondents.

103. Mr Turnbull then went on to deal with the construct of unfair dismissal claim and referred to the test in the well-known case of *Western Excavating v Sharp (1978) IRLR 27,* and submitted that the claimant satisfied all aspects of that test.

104. The claimant was unable to pay himself from the Pointshift bank account on 20 July 2016 because there were insufficient funds in that account and the respondent was not going to adhere to its obligation to pay the claimants wages going forward.

105. The respondents had made a number of undertakings and promises to the claimant. They were saying they had money, but ultimately it never materialised.

106. The issue of the loan is a red herring. The claimant was given leniency to administer the Point shift bank account by the respondents. In taking payment of his expenses he was doing what he thought he was authorised to do. The key point was that the claimant was entitled to both his expenses, and his wages, and this could not be achieved from the funds available in the Pointshift bank account. The fact that the claimant took money in payment of his expenses did not mean that failure to pay wages was not a repudiatory breach of contract.

107. Mr Turnbull submitted that the claimant resigned in response to the breach. He accepted that the claimant had other issues with the respondent, including a rocky relationship between the claimant and Mr Walker, but the real reason why the claimant resigned because was because he had not been paid on time and it was likely he was not going to be paid in the future.

108. In relation to the breach of contract claim it had been agreed that the claimant would be reimbursed his relocation expenses, and the fact that his expenses

were challenged by the accountants after the claimant had resigned was irrelevant.

109. Mr Turnbull submitted that having regard to Section **98 (4)** of the ER A, it could not be said that dismissal was fair. There was no legitimate reason for the breach.

110. Mr Turnbull submitted that the subsequent disciplinary proceedings in October were irrelevant. An employee can resign and claim that he was constructively dismissed even though he himself was also in fundamental breach of his contract of employment at the time of his resignation (*Atkinson v Community Gateway Association (2014) IRLR 834.*

111. On the issue of remedy Mr Turnbull referred the tribunal to the schedule of loss produced in the claimant's bundle. He submitted that the only income which the claimant has received has been from his work with the Navy and he has received no income from the companies which he set up.

112. Mr Turnbull submitted the claimant had mitigated his losses in compliance with Section **123 (4)** of the ER A. In *Aon Training Ltd and another v Dore (2005) IRLR 891 (CA)* the Court of Appeal endorsed the fact that compensation for loss of earnings on dismissal may still be recoverable when a claimant offers to set up their own business rather than seek employment elsewhere.

113. Mr Turnbull reminded the Tribunal that the standard to be imposed on a claimant should not be overly stringent, and the burden of proof is on the respondent. It is not enough for the respondent to show that there were other reasonable steps that the claimant could have taken but did not take. The respondent must show that the claimant acted unreasonably in not taking them. This distinction reflects the fact that there is usually more than one reasonable course of action open to the claimant (Wilding *v British Telecommunications Plc (2002) IRLR 524).*

114. Mr Turnbull referred to the guidance given by Mr Justice Langstaff, in the case of *Cooper Contracting Limited v Lindsay UKEAT/01854/15* as to the key

principles which the tribunal should take into account when considering the issue of mitigation of loss. Those were;

115. It is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate and the burden of proof is on the wrongdoer (*Tandem Bars Ltd Pilloni UKEAT/005/12).*

116. What has to be proved is that the claimant acted unreasonably; they do not have to show that what they did was reasonably *(Waterlow and Sons Ltd v Banquo de Portugal (1932) UKHL1 and Wilding and Ministry of Defence v Mutton (1996) ICR 590.)*

117. There is a difference between acting reasonably is not acting unreasonably.

118. What is unreasonable is a matter of fact and the claimant's views and which is one of the circumstances that the Tribunal should take into account when determining whether the claimant's actions have been reasonable. However, it is the Tribunal's assessment of reasonableness, not the claimants, that counts.

119. The Tribunal should not apply too demanding a standard on the claimant is, who is a victim of wrong. The claimant is not to be put on trial as if his losses were there his fault, when the central cause is the act of respondents as a wrongdoer (*Waterlow; Fyfe V Scientific Furnishings Ltd (1989) ICR 648* and *Wilding).*

120. Mr Turnbull submitted the respondents had failed to discharge the burden on the basis of the evidence. It could not be said to be unreasonable for the claimant not to have drawn any income from a business which he had borrowed money to set up. The respondents had not led any evidence to support this position.

121. Mr Turnbull submitted there should be no *Polkey* deduction on the basis that the reason for subjecting the claimant to the accusations which led to his purported dismissal were all because he had resigned; these would not have been raised had he not been dismissed. Mr Turnbull submitted the

disciplinary proceedings were carried out in attempt by the respondents to classify the claimant as a Bad Leaver under the Shareholder Agreement.

122. Separately Mr Turnbull argued that the Tribunal is not in a position to apply a *Polkey* deduction because it cannot speculate as to what would have happened had the claimant been an employee and participated in the disciplinary proceedings.

123. Mr Turnbull submitted that there should be no deduction for contributory fault. The claimant's conduct could not be culpable or blameworthy. The claimant's conduct was all because of the respondent's breach of contract and anticipatory breach of contract. Even when he threatened to withdraw his labour, it was because of his concerns about payment. The claimant could not be expected to work, and had no had no obligation to work, when he wasn't going to be paid for it. Certainly, he had no obligation to work once the respondents had committed a repudiatory breach of contract which had been accepted on 28 July 2016. It did not matter what the claimant's motives were after the breach and acceptance of the breach. It did not matter what consequences were thereafter.

124. Further, Mr Turnbull submitted that the timelines clearly show that had the claimant not resigned the respondents would not have taken any action against him. None of the allegations which were dealt with were raised with the claimant during his employment. The claimant cannot be said to have contributed to his dismissal because it simply would not have happened had he been paid and not resigned.

125. Mr Turnbull submitted that the Tribunal had heard uncontested evidence in relation to the unlawful deduction of wages and holiday pay elements of the claim and should find for the claimant accordingly.

Respondents Submissions

126. Mr Walker for the respondents submitted that the claimant wore three hats. He was an employee, shareholder, and Director.

127. Mr Walker submitted that the fact that the claimant took a loan from the Pointshift bank account in July was very important. His doing this meant he was unable to pay his own salary. The claimant was the only person who could take a loan the bank account, and it was highly relevant that it was marked as a loan, and not as payment of expenses.

128. Mr Walker referred to the timing of the claimant's loan from the bank account and speculated as to what was in his mind that time. He submitted the claimant attempted to recruit Mr Olliff Cooper, and he set up a company in competition to the respondents as early as August.

129. Mr Walker also pointed to the fact that the claimant subsequently took over the work for Miscolo. He rejected any notion that the reason for this was a bad service, as the claimant had been dealing with them while at Pointshift. Mr Walker submitted that the claimant knew what he was going to do in July, and he used his position as a director and employee to cover his actions.

130. In relation to the unfair dismissal claim Mr Walker submitted that payment was made every month, but on different dates, this was standard operating procedure. The claimant had not objected to this before, the fact that he did so in July showed what was in his mind. Mr Walker referred to the fact that the claimant subsequently refused to hand over bank details for Pointshift and had obstructed the respondents attempts to obtain critical client information. This had proved very costly to the respondents.

131. Mr Walker also referred to the fact that the claimant had use the Pointshift bank account to pay for accountancy services for his new company, which he clearly was not authorised to do.

132. Mr Walker submitted that the claimant deliberately lodged his ET claim at a point when the respondents could not access the Pointshift bank account and therefore could not properly respond to it. All the sums which were due to the claimant had been paid.

133. In light of the claimant's conduct in deliberately refusing to hand over critical information the respondents were entitled to categorise him as a Bad Leaver, whether as an employee, Director, or shareholder

Consideration

The identity of the Respondent

134. There is a preliminary issue as to the Tribunal's jurisdiction to consider the claim against the respondents. The point is taken in the amended ET3, to the effect that the claimant was employed by Pointshift, and not by the respondents. The claimant is a Director of Pointshift, and a Shareholder with the respondents. The question for the Tribunal is whether he was employed by the respondents under a contract of employment.

135. There is no single factor which will determine if the claimant is an employee of the respondents, and the Tribunal approached the question of whether the claimant was employed by the respondents by examining a range of relevant factors which included – did the claimant agree to work in return for remuneration? Did he agree to be subjected to a sufficient degree of control for a relationship to be one of master and servant? Were the provisions of the contract consistent with it being a contract of service?

136. The Tribunal's starting point for this exercise was the exchange of draft contracts between the parties. Albeit no contract was signed, the respondents forwarded the claimant a draft contract of employment in which the respondents were designed as the employer, and the claimant as employee. The proposed draft went so far as to state that the claimant's employment with Pointshift counted as part of his continuous employment with the respondents. This term was inserted by the respondents. The claimant revised the draft and returned it to the respondents. There was no suggestion that there was any objection taken to the proposed revivals by the respondents, and the Tribunal was satisfied that the revised draft (Cl 463) set out the terms which the parties intended to contract with each other, albeit no contract was signed.

137. The Tribunal took into account Mr Walker's evidence that it did not matter to him who the contract of employment was with, in that New Forest owned Pointshift. That may be correct, but it does not take from the fact that the proposed contractual documentation bore to be between the respondents and the claimant, and this indicated the parties' intention at the time. Although the contract of employment was not signed, the fact that there was an exchange of documents which set out the terms on which the parties intended to contract with each other, identifying the respondents as the employer and the claimant as the employee, was a factor to which the Tribunal attached significant weight in assessing the nature of the relationship between the parties.

138. The Tribunal also takes into account that the claimant was provided with an Employee Handbook issued by the respondents, which is consistent with there being a contract of employment between the claimant and the respondent. This however is not a decisive factor, as it was not suggested that the Handbook formed part of the claimant's terms and conditions of employment.

139. The Tribunal also examined the degree of control to which the claimant was subjected to. The Tribunal was satisfied that in terms of his day to day work, the claimant worked more or less autonomously, but it was also persuaded that he was subject to control by the respondents to the extent that Mr Walker had control over the order in which the claimant performed his work. Further Mr Walker said that he considered the claimant was answerable to him. This supported the conclusion that the claimant was subject to a degree of control by the respondents, which had not been present prior to the acquisition of Pointshift by the respondents, even if in the subcontractor/ main contractor type of relationship which had previously existed, the respondents had dictated tasks to Pointshift. This change was indicative of a change in the employment relationship which the claimant was party to.

140. The Tribunal considered if there was a mutuality of obligations between the claimant and respondents? It was satisfied that the claimant did agree to

provide his own work and skill in return for remuneration. There was evidence that he regularly received payment of £3,500 net a month. The question was who had the obligation to pay the claimant? There was no dispute that the claimant's salary net of tax and national insurance was paid from the Pointshift bank account. The unusual feature in this case is that the claimant had sole control and access to that bank account. The fact that this is the case is inconsistent with the claimant being an employee of the respondents.

141. Against that, there was evidence that the respondents transferred money to Pointshift. The claimant gave evidence-in-chief to the effect that Pointshift on occasion ran out of cash, and that he had to ask the respondents to transfer money to Pointshift. The claimant's evidence was that it was not uncommon for him to ask the respondents for around £5,000 to £10,000 per month, and this cash was made available to Pointshift; there was no challenge to this evidence in cross-examination, and the Tribunal was satisfied that the respondents did transfer cash to Pointshift on a reasonably regular basis. It was also satisfied and that given the evidence that Pointshift's biggest overhead was salary, this cash was from time to time used to pay the claimant and Ms Watt's salary. There is support for this in the emails to which the Tribunal was taken, particularly from Ms Watt querying if her salary will be paid.

142. The fact that the respondents made funds available to Pointshift, which funds could be used to pay the claimant's salary, and the fact that that they paid tax and national insurance contributions on the claimant's salary was indicative of their being under an obligation to pay the claimant's salary.

143. The Tribunal was also satisfied that the claimant was under an obligation to perform work in exchange for pay. The Tribunal is supported in this conclusion in that when the claimant declared that he was going to reduce his working hours, Mr Walker responded to the effect that he would choose to ignore it, but he went on to say that it didn't matter as long as the work was done. This is indicative of there being an obligation on the claimant to do work.

144. The Tribunal had regard to the terms of the Shareholder's Agreement. The Tribunal did not attach too much weight to this, given that the Shareholder's Agreement was not relevant to the issue of employment status, however it defines "Bad Leaver", as an employee or member of the Group, the Group being defined as the company (the respondents and Track 360). There was no suggestion that the claimant was an employee of Track 360, and therefore it was an adminicle of evidence in support of an employment relationship between the parties. Another adminicle of evidence is the issue of pay slips identifying the employer as New Forrest, and the fact that the claimant's P45 identified them as the employer.

145. The Tribunal also took into account the correspondence between the parties, at the point when the claimant resigned. Firstly, the claimant tendered his resignation from his employment to the respondents, and the respondents accepted this. Secondly, the claimant gave three months' notice which reflected the terms of the notice provisions in the draft contract, and again, the respondents accepted this. These are elements which are consistent with the existence of the contract of employment between the claimant and respondent.

146. Similarly, the fact that the respondents conducted a disciplinary procedure (albeit this was done after the claimant's employment had in fact come to an end), and purported to dismiss him from their employment on the grounds of gross misconduct, was indicative of the existence of an employment relationship, in that it indicated they considered they had the ability to terminate the claimant's employment.

147. There were some elements which were inconsistent with the existence of an employment relationship. In particular, the fact that the claimant had exclusive access to the Pointshift bank account, and he was paid from the Pointshift bank account, was inconsistent with the existence of an employment relationship between the claimant and respondents. That however has to be viewed alongside the fact that the respondents topped up the Pointshift bank account from time to time that in order to meet Pointshift's

financial commitments, which included salary payments, and that they paid the tax and national insurance element of the claimant's salary.

148. The fact that the claimant was also able to draw £7,500 from the Pointshift bank account, and to mark that as a loan, is inconsistent with the notion that he was an employee, however that has to be considered in the context of the claimant also being a Director of Pointshift.

149. The Tribunal considered all the elements present in this case and evaluated the overall effect of those elements. Having done so it was satisfied that despite some factors which were inconsistent with the existence of an employment relationship between the claimant and the respondents, there was mutuality of obligations between the parties, and that the respondents exercised a degree of control over the claimant consistent with an employment relationship, and that the other factors referred to above consistent with the existence of an employment relationship, taken together were sufficient to establish that there was a contract of employment between the claimant the respondents, and that the Tribunal had jurisdiction to consider the claim.

Unfair Dismissal

150. This is a claim of unfair dismissal under Section **95(1)(c)** of the Employment Rights Act 1996 (ERA) which provides;

151. (1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to sub section (2) …, only if) –*

> *"(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.*

Section **97** states: -

(1) *Subject to the following provisions of this section, in this Part "the effective date of termination" –*

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date in which the notice expires."

Dismissal under Section **94(1)(c)** is often referred to as a "constructive dismissal" and is used to describe circumstances where an employee has resigned either with or without notice, in circumstances in which he is entitled to do so, without notice, by reason of his employer's conduct.

An employee will only be entitled to terminate his contract without notice if the employer is in a repudiatory breach of that contract.

The leading authority in this point *is Western Excavating (ECC) Ltd v Sharp [1978] ICR 22, Ca*, referred to by Mr Turnbull, in which it was said that *"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged without further performance. If he does, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

In order to succeed in his claim for constructive dismissal the claimant must establish firstly that there was a fundamental breach of contract on the part of the respondents, secondly, that that breach caused him to resign, and thirdly, that he did not delay too long before resigning thus affirming the contract and losing the right to claim.

152. The contract term which is said to have been breached in this case, is the term that the claimant will receive payment of wages of £3,500 on or around the 20th of each month. The claimant was paid his May salary by way of a payment of £2,500 on 31st May, and a payment of £1,000 on 6th June. June's salary fell due on or around the 20th of June, however the claimant received no payment in June, but instead, received two payments in July one on 1st July of £2,000, and one on 4th July of £1,500, in respect of June's wages.

153. The payment for July fell due on or around 20th July, but the claimant received no salary payment until 3rd August.

154. The obligation on an employer to pay salary is fundamental, and a failure to meet that obligation amounts to a fundamental repudiatory breach of contract. Albeit the respondents had from time to time in the past not paid the claimant's wages on the 20th of the month, considering the terms of draft contract the Tribunal was satisfied that it was a term of the contract of employment that payment of salary was to be made on or around the 20th of the month. Mr Walker evidence was that the draft contract represented the terms under which the respondents engaged employees, and the claimant's evidence was that he was due to be paid on the 20th of the month, albeit there was sometimes slippage on this. The fact that the due date for payment of wages was on or around the 20th is also supported by the claimant's wage slips (CL 283/4) which identify the payment date as the 20th.

155. By 28th July when the claimant first resigned there was therefore a failure to pay wages on time. The Tribunal considered if the lateness in payment by the 28th of July amounted to a fundamental breach of contract. In doing so the Tribunal take into account the extent of the delay which is in the order of 8 days. The claimant had experienced nonpayment of the full amount (or any amount) of his wages on the 20th of the month in the past. Mr Walker submitted it was standard operating procedure to receive payment of salary in this way because of cash flow issues.

156. That may be the case, and albeit the claimant's wages were paid on 3rd of August, by the 28th July he had received no reassurance that payment would be made. This was despite the claimant advising Mr Walker that Pointshift had £300 in their account and owed £8000 to suppliers, and that Pointshift needed a transfer of funds. In response to that the claimant was told nothing more concrete that that Mr Walker would 'lean' on a client This was not a case where it was suggested that that there was a technical issue or mistake which had led to nonpayment. Payment of wages is a fundamental term and the Tribunal was satisfied that failure to pay the claimant's wages by the 28th

amounted to a fundamental breach of the contractual term that wages would be paid on or around the 20th of the month, in circumstances where there had no reassurance that money would be made available to pay salary or indication when that might happen.

157. By the time the claimant tendered his resignation with immediate effect on the 20th September, the respondents had failed to pay both August and September's salary. The Tribunal was in no doubt that failure to pay salary for a period of two months was a breach of the fundamental contractual term to pay salary.

158. The Tribunal then had to consider whether the claimant had resigned in response to those breaches of contract.

159. The Tribunal was satisfied that it was likely that there were other issues which weighed with the claimant about how the company was managed, but that his resignation in July was in part due to the fact that he had not been paid on time. In reaching this conclusion, the Tribunal takes into account that when his wages when not paid on or around the 20th July it was apparent from the correspondence that the claimant was becoming increasingly concerned about the lack of funds from the respondents, and Pointshift's ability to continue to trade. It was also apparent from the terms of his e-mail to Ms Watt on 20th July (Cl 319) that lack of funding from the respondents impacted on payment of wages, in that the claimant wrote to Ms Watt advising that unless there was a transfer of funds to the Pointshift from the respondents, then she would not be paid in time and that he could not obtain any assurance from Mr Walker on this issue. This all supported the conclusion that not being paid on time was a significant factor for the claimant and was likely to be a trigger for his resignation. The fact that the claimant had issues with other actions taken by the respondents did not vitiate his acceptance of their repudiation of the contract.

160. The Tribunal was satisfied that the claimant's resignation in September was due to the fact that he had not been paid at all for the months of August and September.

161. In reaching these conclusions the Tribunal had regard to the respondent's submission to the effect that the claimant manufactured the position whereby wages could not be paid, by taking a loan from the Pointshift bank account of £7,500 on 4rd July. Mr Walker referred to the claimant e-mails on 8th July advising that he still requires £7,000 which did not include salaries (R5).

162. On balance, the Tribunal was satisfied that the £7,500 which the claimant took out of the Pointshift bank account on 4th July, and marked as a loan, was used by him to discharge expenses which had been incurred by him for his relocation to the respondent's offices in England. While the funds being marked as a loan may have implications in terms of the company accounts, the claimant had written to Mr Walker advising he intended to take money out of the Pointshift bank account in order to reimburse his expenses.

163. The Tribunal was satisfied, that there was an agreement between the claimant and Mr Walker to the effect that the respondents would reimburse the claimant's relocation expenses. There was no challenge to the claimant's evidence on this point, and nor was there any challenge to the amount of the expenses claimed, and the Tribunal was satisfied that the claimant had incurred the expenses claimed of £9,914.14 and that he had taken £7,500 from the Pointshift bank account as partial reimbursement of those expenses. While the fact that the claimant was able to do this, pointed away from the existence of an employment relationship between the claimant and the respondents, it was not sufficient to allow the Tribunal to conclude that the respondents were not the claimant's employer.

164. In circumstances where the claimant took money from the Pointshift bank account for reimbursement of sums which were owed to him, the Tribunal on balance was unable to reach a conclusion that he deliberately manufactured a situation whereby payment of wages could not be made.

165. The Tribunal was therefore satisfied that there had been a fundamental breach of the claimant's contract of employment firstly, by virtue of the respondent's failure to pay wages due timeously in July, and that in response to that breach the claimant resigned giving 3 months' notice, as he was

entitled to do. Section **95(1) (c**) of the ERA makes provision for termination with notice.

166. The Tribunal was also satisfied and that there was a further breach of the contract during the currency of the notice period, by virtue of the respondent's failure to pay wages due in August and September. The Tribunal was satisfied by its very nature that the failure to pay wages was a fundamental breach of contract and in that the claimant resigned with immediate effect in response to that breach.

167. Having reached that conclusion, the Tribunal was satisfied that the claimant was constructively and unfairly dismissed and went on to consider the issue of a remedy.

Remedy

168. Under Section **118** of the ERA where the Tribunal makes an award of compensation for unfair dismissal the award shall consist of a basic award, and a compensatory award.

169. The basic award is calculated under **Section 119** of the ERA and is calculated with reference to the claimant's age, length of service. The length of service is assessed by reckoning full years of employment; and wages are assessed on the basis of one and a half weeks' pay for each year of employment in which the employee was not below the age of 41 years, and one week's pay for each year's employment in which he was not below the age of 21 years. For the purpose of assessing the basic award gross weekly salary is capped at £498 per week.

170. Section **122** provides for reductions in the basic award and provides;

> **122(2**) "*where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly'.*

171. For the reasons given above, the Tribunal was satisfied that the draft contract which was exchanged between the parties represent the terms under which it was intended by the parties the claimant would be employed. That included that the claimant's employment with Pointshift would be regarded as continuous service. The effect of this is that the claimant's basic award is assessed on 13 years employment. The basic award is calculated therefore at 17.5 x £498 = **£8,352.50.**

172. The compensatory award is calculated with the reference to Section **123** of the ERA.

173. Section **123** provides: -

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

(2) *The loss referred to in subsection (1) shall be taken to include –*

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and,

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for dismissal.

……

(4) *In ascertaining the loss referred to in subsection (1) the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*

……..

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

Section **124** of the ERA provides for limits of the compensatory award and the effect of this is that the compensatory award is limited to a maximum of the lower of £83,682, or 52 multiplied by a week's pay of the employee.

174. The Tribunal approached the assessment of the compensatory award by firstly assessing the loss sustained by the claimant, and then considering whether there should be any reduction to that under Section **123** of the ERA.

175. The claimant's evidence was that his gross salary was £58,600; there was no challenge to that and the Tribunal was prepared to proceed on the basis of that figure. The maximum compensatory award to which the claimant would therefore be entitled is £58,600.

176. The Tribunal then considered whether there should be any adjustment to that figure, and firstly considered if there should be any deduction of any sums by way of mitigation or to reflect the employee's failure to take steps to mitigate his loss -(Section **123(4)** of the ERA); secondly, to consider whether there should be any deduction on the grounds that it was just and equitable (section **123(1)** of ERA), including reductions in accordance with the principles in *Polkey v A E Dayton Services Ltd* and reductions for the employee's contributory fault (Section **123(6**) of the ERA), and lastly, the application of the statutory cap – (Section **124** of ERA).

177. **Mitigation.** The claimant's evidence, which was reflected in Mr Turnbull's in submission, was that the only income which he has received since the termination of his employment in the 12 month period from September 2016, is income of £3,412.15 derived from his "Navy work", as a sailing instructor, through a company by the name of Charthouse Ltd, which he set up to perform work as a sailing instructor.

178. The claimant's evidence on this matter was challenged in cross-examination by Mr Walker. The claimant accepted that Tartan Logic was providing IT services to Mblox. Under cross exanimation he accepted that Mblox had been the biggest single customer of Pointshift at least in terms of the turnover, if not overall. He accepted that the turnover from Mblox to Pointshift amounted to around £20,000 per month. He gave evidence under cross examination (albeit reluctantly- asking twice if he had to answer) to the effect that revenue of around £17,000 per month is derived from services provided to Mblox by Tartan Logic, which is billed through Charthouse Ltd (£2,000 a month for consultancy services and £15,000 a month for other services).

179. The claimant's duty to mitigate his loss has been followed if it can be said that he has acted as a reasonable person would do if he had no hope of seeking compensation from his employer.

180. The onus of showing a failure to mitigate lies with the respondents, and the Tribunal is under no duty to consider the question of mitigation unless it is raised, and some evidence adduced.

181. In considering the issue of mitigation the Tribunal should firstly identify what steps the claimant should have taken to mitigate his loss, then consider the date upon which such steps would have produced an alternative income, and thereafter reduce the amount of compensation by the amount of income that would have been earned.

182. The Tribunal was satisfied that mitigation had been raised by Mr Walker. He questioned the claimant on income which he said he had received, and which the claimant in evidence in chief said was confined to a sum of £3,412.15 derived from "Navy work'. Mr Walker's line of questioning effectively put to the claimant that it was unreasonable of him to suggest that he had not been able to draw any income from the work his companies performed, other than the £3,412.15 for Navy work. Mr Walker took evidence from the claimant about the revenue stream which one of the claimant's companies enjoys for IT services provided by another of the claimant's companies.

183. The Tribunal was satisfied the claimant had acted reasonably in order to mitigate his loss in that he had gone into business on his own account. He is entitled to do that, and he was using his skills, to set up business on his own account.

184. The Tribunal took into account that the claimant's views and wishes under the circumstances and had regard to them in determining whether the claimant's actions in confining his income to £3,412.15 for work as a sailing instructor was reasonable. The Tribunal should not apply a too demanding standard on the claimant, however applying the objective test of reasonableness, it was not reasonable for the claimant to draw no income whatsoever for work which he performed in the IT sector when he has been carrying out work for the company which had been previously Pointshift's major client, billing this at a rate of around £17,000 per month, even allowing for his desire to build up equity in a business he taken a loan to invest in. In order to mitigate his loss, the claimant should have drawn some income from his business of performing IT work.

185. The Tribunal then considered when it would have had been reasonable for the claimant to have drawn some income from his new business venture providing IT services (whether this was billed via Tartan Logic or Charthouse Ltd). In doing the Tribunal had regard to the claimant's evidence that he started to bill for these services around November/ December. There was evidence that Mblox terminated their contract with Pointshift in October and began using Tartan Logic in November. Applying a broad-brush approach, the Tribunal was prepared to speculate that the claimant should have been in a position to draw income from around December 2016.

186. Given the level of income which the claimant's business was deriving from Mblox, the Tribunal was prepared to speculate that had he acted reasonably, even taking into account his loan of £30,000 and his desire to build up equity in the business, he would have derived income which was equivalent to that which he had been earning with the respondents prior to his dismissal. The Tribunal was therefore satisfied that it appropriate to reduce the amount of

compensation to reflect that from December 2016, had the claimant taken reasonable steps to mitigate his loss, he would have been earning what he had been earning with the respondents. The effect of this, is to reduce the compensatory award to 2 months' salary (net) of £7,000.

187. The Tribunal then went on to consider whether there should be any reduction from the compensatory award, under Section **123(1)** based on justice and equity, which included reductions in accordance with the principles to be derived from *Polkey v A E Dayton Services Ltd*. The principle to be derived from *Polkey* is whether compensation should be reduced on the grounds that even if the dismissal was unfair then compensation should be limited on the grounds that the employer would have fairly dismissed the claimant at a later date.

188. It appeared to the Tribunal that the respondent's argument centered firstly on the claimant's behaviour in failing to hand over highly relevant important information during the handover process. Indeed, the respondents purported to discipline, and dismiss the claimant for this and other issues, on 28th October. Such a dismissal was clearly irrelevant, as the claimant's employment had come to an end by virtue of his immediate resignation on 20th September.

189. The difficulty with the respondent's argument that compensation should be limited on account of the claimant's behaviour post his resignation on 28th July, is that by that stage the claimant had acted on the respondent's repudiatory breach and had terminated the contract of employment with notice. Therefore, while the claimant failure to give access to bank accounts, or client information might well be criticised, this was not conduct on the part of the claimant which could be relevantly taken into account in assessing whether but for the dismissal, the claimant would have been dismissed in any event. These were matters which arose as a result of the dismissal. The claimant had already brought the contract to an end, and the matters for which he was b disciplined and upon which the respondents now rely, occurred after

the claimant had accepted the respondents repudiatory breach of contract, and brought the contract to an end.

190. The Tribunal also considered whether compensation should be reduced on the basis that the claimant would have been dismissed or was likely to have been dismissed in any event for conduct prior to his initial resignation on the 28th July. That conduct amounted to his reduction of hours, and a telephone conversation and text exchanges which he had with Mr Jonathan Olliff Cooper. In relation to the reduction in hours, the Tribunal was satisfied on the basis of the e-mail exchange that it was unlikely that this conduct would have resulted in dismissal. Mr Walker knew the claimant had reduced his hours, and his response to this was to the effect that he would ignore it, and even if the claimant did reduce his hours, the important thing was that he performed the necessary work. This was not indicative of the respondents viewing this conduct as conduct which was likely to lead to the claimant's dismissal.

191. The respondents would have been entitled to treat the claimant's decision to unilaterally reduce his hours as a repudiation of his contract of employment but elected not to do this on this occasion.

192. The Tribunal also considered the content of the text exchange, and the telephone call between the claimant and Mr Jonathan Olliff Cooper. The Tribunal was satisfied that the claimant was generally concerned about the financial position of Pointshift, and that he communicated this to Mr Olliff Cooper. For the reasons given above it was not persuaded that he directly attempted to recruit Mr Olliff Cooper. Furthermore, the Tribunal was satisfied that Mr Walker was aware of this on 22 July but again did not act on it, and in the circumstances the Tribunal was not satisfied that there should be any reduction of the compensatory award on the basis that it was likely had the claimant not resigned that he would have been fairly dismissed in any event.

193. The Tribunal also considered whether there should be any deduction in contributory conduct. In order to make such a reduction, the Tribunal has to be satisfied that misconduct on the part of the claimant which contributed to

his dismissal. The Tribunal has dealt with the respondent's argument that the claimant manufactured the circumstances so that he would not be paid above. The Tribunal did not find any conduct on the part of the claimant which caused or contributed to his dismissal and made no reduction on this basis. In considering the issue of contributory conduct, the Tribunal is only able to have regard to conduct prior to the claimants resignation on the 28th of July, as by that date the claimant brought the contact to an end, albeit with notice.

194. There is no need for the Tribunal to apply the statutory cap.

195. The Tribunal shall make a total monetary award as follows;

Basic Award	£8,382.50
Compensatory award (2x £3,500)	£7,000.00
Loss of Statutory rights	£300.00
Total	**£15,682.50**

Unauthorised Deduction of wages

196. In terms of Section **13** of the ERA an employee has the right not to suffer an unauthorised deduction of wages. Section **13** provides as follows: -

> "(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 of consent to the making of the deduction"*

197. It is not suggested in this case that the claimant consented to the respondents making a deduction from wages.

198. The Tribunal considered whether the claimant was entitled to recover wages, in circumstances where he had reduced his working hours. On balance the Tribunal was satisfied that he was. In reaching its conclusion, again the Tribunal takes into account when the claimant indicated his intention to reduce his hours of work, this potential repudiation of his contract, (his breach of contract) remained unaccepted by the respondents. He was told that it did not matter as long as he did the work. There was no indication given to him that the respondents intended to withhold this salary, or part of it for that reason.

199. In the circumstances the Tribunal was satisfied that the claimant was entitled to paid wages up until 20th September. The claimant was last paid on the 3rd of August, that payment being in respect of July's wages. He was therefore due wages for the months of August and September of £3,500 per month, being a total of **£7,000** which is the award the Tribunal will make.

Breach of Contract

200. The claimant's claim of breach of contract is in relation to the reimbursement of relocation expenses for the period in which he worked in England. For the reasons given above the Tribunal was satisfied that the claimant and Mr Walker had agreed that the claimant would be reimbursed for relocation of expenses. There was no challenge to the amount of expenses claimed by the claimant, and the respondent's position was that these had been claimed too late and had been refused by the company's accountant.

201. The respondent's internal accountancy procedures however did not vitiate the with contractual obligation created by Mr Walker's agreement with the claimant that the respondents would reimburse his relocation expenses. The Tribunal was satisfied that the claimant had incurred the relocation expenses authorised by Ms Watt in the sum of £9,014.14 (there was no challenge to this), and he had taken £7,500 from the Pointshift bank account and applied that to those expenses, leaving a balance due to him of **£1,514.14.** which is the sum the Tribunal will award.

Holiday Pay

202. On the basis that the Tribunal was satisfied that the draft agreement reflected the terms under which parties agreed the claimant was employed, the Tribunal was satisfied that the claimant was due 20 days annual leave, plus public holidays. The claimant gave uncontested evidence to the effect that he was entitled to 11 days public holiday, which brings his total holiday entitlement to 31 days per year.

203. The respondent's position was that the claimant had been paid everything that he was due. The Tribunal had regard to an e-mail which the claimant received from the Office Manager on 11th August 2016 (page 335 CL), in which she stated that the claimant had taken 7.5 days over his entitlement. The claimant's responded to that e-mail on 6 September that she was in error, and that he had not been on holiday on 6 days in June, when he was working in Glasgow. He subsequently gave evidence that dates which had been marked as holiday in July, were dates where he had unilaterally reduced his working hours. The claimant's evidence on this point was not challenged, and nor was his evidence to the effect that he was due eight and a half days holiday. The Tribunal did not understand it to be in dispute that the claimant's daily earnings were £161.55, and therefore it made an award in respect of leave accrued but not taken at the conclusion of the contract of **£1,373.17.**

Employment Judge: Laura Doherty
Date of Judgment: 09 October 2018
Entered in register: 11 October 2018
and copied to parties